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DISTRICT II

(Amended November 24, 2014, as to the second paragraph on page 3)

November 19, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2012 Elana Glinberg v. Injured Patients and Families Compensation Fund (L.C. #2013CV27)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Elana Glinberg, her parents Harry and Leticia, and her brothers Isaac and David appeal from judgments granting summary judgment in favor of the defendant medical providers and institutions, their insurers, and the Injured Patients and Families Compensation Fund. The Glinbergs' claims were properly dismissed because the Glinbergs produced no expert on either the standard of care for the negligence claims against the doctors or on the issue of informed consent. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

In November 1999, four-month-old Elana underwent a surgical repair of sagittal suture stenosis, a premature fusion of the midline skull suture. Elana suffered brain damage, allegedly due to being sedated with nitrous oxide despite having a "severe" Vitamin B_{12} deficiency.

In July 2009, Harry, acting pro se, commenced this lawsuit on his and Elana's behalf alleging that neurosurgeon Dr. David Dunn and anesthesiologist Diane Rosner negligently failed to provide proper medical care. The case progressed slowly. The Glinbergs retained and discharged a series of lawyers. Despite extensions, discovery, scheduling order, and expert-naming deadlines came and went. The Glinbergs finally designated three non-physician experts. In July 2012, the Glinbergs amended their complaint, adding Elana's mother and brothers as plaintiffs and Medical College of Wisconsin Affiliated Hospitals, Inc. (MCWAH) as a defendant. A new deadline for naming experts passed without liability experts being retained.

All defendants moved for summary judgment. Harry, again pro se, opposed summary judgment on his and his family's behalf. The day before the hearing on the motions, the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Glinbergs retained new counsel who moved for an enlargement of time to respond to the summary judgment motions and to name witnesses. The circuit court denied the request.

On the summary judgment motions, the court ruled that, as a nonlawyer, Harry could not respond on behalf of his family members. *See* WIS. STAT. § 757.30 (nonlawyers prohibited from practicing law); *see also* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 202-04, 562 N.W.2d 401 (1997) (pro se litigant's filings on others' behalf are to no effect). As Leticia and the children filed no other response, the court dismissed their claims and necessarily dismissed Harry's purely derivative loss of society and companionship claim. *See* ***Tara N. by Kummer v. Economy Fire & Cas. Ins. Co.***, 197 Wis. 2d 77, 89, 540 N.W.2d 26 (Ct. App. 1995).

The court also ruled that the Glinbergs' experts could not speak to the proper standard of care, causally link the doctors' care to Elana's injuries, or show a connection between the Glinbergs' allegations and the damage to Elana. It granted summary judgment to MCWAH, as the only claim against it was vicarious liability for the alleged failure of Drs. Dunn and Rosner to obtain informed consent, which duty lies solely with the doctor. *See* ***Montalvo v. Borkovec***, 2002 WI App 147, ¶14, 256 Wis. 2d 472, 647 N.W.2d 413. Likewise, it granted summary judgment to Children's Hospital because it had no vicarious liability for the two doctors, both non-employees, the Glinbergs offered no proof for its claim that employee nurses falsified chart entries. The court dismissed all claims with prejudice. This appeal followed.

Whether summary judgment was appropriate presents a question of law. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 755, 601 N.W.2d 318 (Ct. App. 1999). We independently apply the summary judgment methodology set forth in WIS. STAT.

§ 802.08(2) to the record de novo. ***Wegner v. Heritage Mut. Ins. Co.***, 173 Wis. 2d 118, 123, 496 N.W.2d 140 (Ct. App. 1992).

The Glinbergs asserted that Dr. Dunn negligently went ahead with Elana's surgery despite the alleged Vitamin B_{12} deficiency and that, given the deficiency, Dr. Rosner negligently used nitrous oxide as an anesthetic. "Unless the situation is one where the common knowledge of laymen affords a basis for finding negligence, expert medical testimony is required to establish the degree of care and skill required of a physician." ***Christianson v. Downs***, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979).

Harry's affidavit opposing summary judgment, which simply recited his disagreement with the facts the defendants supplied, was insufficient to overcome summary judgment. *See* WIS. STAT. § 802.08(3) (the nonmoving party "may not rest upon the mere allegations or denials of the pleadings" but must come forward with evidence supporting those allegations). Further, the Glinbergs designated as experts a pharmacist, a nurse who would testify about Joint Commission standards, and a forensic document examiner.[2] The chosen experts doomed the Glinbergs' negligence cause of action because none of the three could opine as to the standard of care in either of the doctor's specialties, whether it had been breached, or whether the health care providers' alleged conduct caused Elana's subsequent injury. *See* ***Rockweit by Donohue v. Seneca***l, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995) (to establish negligence, must be duty of

[2] The Glinbergs contended that Elana's medical records were altered to conceal substandard care, for example, that certain forms were signed by someone other than the purported signatory, that a "secret" blood transfusion was given, and that the blood used for the transfusion was not properly cross-matched for compatibility.

care on part of defendant; breach of that duty; causal connection between conduct and injury; and resulting actual loss or damage).

The informed consent claim also was properly dismissed. To support the claim, the Glinbergs would have had to establish that (1) they were not told of risks and alternatives; (2) they would have chosen an alternative if they had been adequately informed; and (3) the failure to disclose information was a cause of Elana's injuries. WIS JI—CIVIL 1023.1; *see also* ***Martin by Scoptur v. Richards***, 192 Wis. 2d 156, 182, 531 N.W.2d 70 (1995). None of the Glinbergs' experts could opine as to an informed consent standard of care. Further, while the Glinbergs alleged that the treating physician did not properly sign all consent forms, they did not sufficiently tie that claimed failure either to a lack of consent or to Elana's injury.

Having determined that summary judgment was appropriate, we need not examine the issue of Leticia's and the Glinberg children's failure to respond to summary judgment and the related dismissal of Harry's derivative claim. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (only dispositive issues need be addressed).

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals