COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1705 **Cir. Ct. No. 2011CV117**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

TINA RUPERT,

PLAINTIFF-APPELLANT,

V.

JAMES TANDIAS, MD, TWIN CITY ORTHOPAEDIC, S.C. AND PROASSURANCE WISCONSIN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Tina Rupert appeals an order dismissing her medical negligence action. Rupert argues the trial court erroneously applied the

Daubert standard when determining whether her medical expert established the standard of care.[1] We reject Rupert's argument and affirm.

BACKGROUND

¶2 Orthopedic surgeon James Tandias performed a bunionectomy on Rupert's right foot. Rupert reported pain following the procedure and ultimately had a different surgeon fuse her toe joint. She reported continued pain after the fusion surgery and never returned to work as a certified nursing assistant.

¶3 Rupert sued Tandias, Twin City Orthopaedic, S.C., and ProAssurance Wisconsin Insurance Company (collectively, Tandias), alleging Tandias negligently performed the bunionectomy. During trial, Tandias unsuccessfully moved for a directed verdict, arguing there was insufficient evidence because Rupert's medical expert failed to articulate the standard of care. The jury was ultimately unable to render a verdict, and a mistrial was declared.

¶4 Tandias filed a renewed motion for a directed verdict, which the court granted. The motion relied on the ***Daubert*** standard for admissibility of expert testimony. In the dismissal order, the court explained: "plaintiff's expert failed to testify at the trial of this matter that Dr. Tandias violated a standard of care that plaintiff's expert could define. As a result, Ms. Rupert did not present sufficient expert testimony to maintain her claim …." Rupert now appeals.

[1] *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

DISCUSSION

¶5 Rupert argues the circuit court erroneously determined that her expert, Dr. Kendall Wagner, failed to establish the standard of care. Specifically, Rupert contends the ***Daubert*** standard, set forth in WIS. STAT. § 907.02(1), does not apply to standard of care testimony in medical malpractice actions.[2] Application of a statute to a given set of facts presents a question of law subject to de novo review. ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273. The standard of review for a motion for directed verdict is whether, considering all credible evidence and reasonable inferences therefrom, in a light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party. ***Warren v. American Family Mut. Ins. Co.***, 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984).[3]

¶6 Tandias's response brief asserts:

> Rupert effectively agrees that if the ***Daubert*** standard applies to Dr. Wagner's testimony, then his testimony failed to establish a definable standard of care, and she had no qualified expert testimony to support her claim. Further, Ms. Rupert did not object to a ***Daubert*** standard for Dr. Wagner's opinions during the motions after verdict [and] made no argument that it does not apply in medical negligence cases.

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

[3] We observe that Rupert's brief fails to conform to the rules of appellate procedure. For example, visual exhibits are embedded without record citation; the argument lacks record citations; and case citations lack punctuation, pinpoint references, and/or proper identification of the court. *See* WIS. STAT. RULE 809.19(1)(d)-(e).

Rupert filed no reply brief. Accordingly, she is deemed to have conceded Tandias's assertions. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶7 Because Rupert failed to argue in the circuit court that the ***Daubert*** standard was inapplicable, she has forfeited her right to do so on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Rupert does not argue that her proffered standard-of-care testimony satisfied the ***Daubert*** standard. Without such testimony, Rupert lacked sufficient evidence to prove her medical negligence claim. *See* ***Froh v. Milwaukee Med. Clinic, S.C.***, 85 Wis. 2d 208, 317, 270 N.W.2d 83 (Ct. App. 1978). Accordingly, her appeal fails.

¶8 Moreover, we conclude the ***Daubert*** standard, set forth in WIS. STAT. § 907.02(1), applies to medical standard-of-care testimony. Quite simply, the statute does not set forth any exceptions to its application to expert testimony.[4] The statute's meaning is plain.[5]

[4] WISCONSIN STAT. § 907.02(1) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

[5] Furthermore, even if the ***Daubert*** standard was inapplicable, we would affirm because Rupert's expert, Wagner, did not clearly articulate any standard of care. While Wagner opined generally that Tandias removed too much bone during the procedure, the question remains: excessive compared to what?

¶9 Additionally, the text of WIS. STAT. § 907.02(1), although arranged differently, mirrors that in the federal version of the ***Daubert*** standard. *See* FED. R. EVID. 702. Rupert argues the standard should not apply to standard-of-care testimony because "***Daubert*** was spawned in the Federal Court system in the context of cases which turned upon highly technical scientific testimony." However, in ***Kumho Tire Company, Ltd. v. Carmichael***, 526 U.S. 137, 141 (1999), the Supreme Court explained that ***Daubert*** applied not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" or other "specialized" knowledge. The Court observed that the test of reliability is flexible, and the law grants a trial court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. *See* ***id.*** at 142, 152.

¶10 Finally, we observe that Tandias discusses numerous federal district and appellate court cases in support of his argument that the ***Daubert*** standard should apply to medical negligence cases. We need not address these cases other than to note that, by failing to file a reply brief, Rupert concedes Tandias's argument. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.