COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 99-0056

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

CATHY R. YAHNKE, BRUCE E. YAHNKE, MELISSA YAHNKE, AND BRUCE YAHNKE, JR.,

PLAINTIFFS-APPELLANTS,

THE CONNECTICUT INDEMNITY COMPANY,

PLAINTIFF-CO-APPELLANT,

V.

LARRY V. CARSON, M.D., JOVAN L. DJOKOVIC, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., MERCY HOSPITAL OF JANESVILLE, WISCONSIN DEVELOPMENT FOUNDATION, INC., OHIC INSURANCE COMPANY, AND PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed in part and reversed in part.*

Before Dykman, P.J., Eich and Roggensack, JJ.

ROGGENSACK, J. Cathy and Bruce Yahnke, together with their children, Melissa and Bruce Yahnke, Jr., appeal from the circuit court's granting of summary judgment to Dr. Larry Carson, Dr. Jovan Djokovic, and Mercy Hospital of Janesville (collectively "Defendants"). The circuit court dismissed the negligence claims against the Defendants because in their depositions, the Yahnkes' experts did not state that the Defendants breached the standard of care owed to Cathy Yahnke. The circuit court also ruled that *res ipsa loquitur* did not support the Yahnkes' claims because the Yahnkes' experts provided a full and complete explanation of the event which caused the injury. However, we conclude that the affidavits submitted by one of the Yahnkes' experts created a material issue of fact about whether Carson breached the standard of care required of a surgeon. Therefore, granting Carson's motion for summary judgment was error, and we reverse that part of the judgment. However, we affirm the circuit court's dismissal of the Yahnkes' claims against Djokovic and Mercy Hospital because the Yahnkes failed to provide expert testimony that Djokovic and Mercy Hospital breached the standards of care that applied to them. Additionally, the Yahnkes may not rely on the doctrine of *res ipsa loquitur* to avoid summary judgment dismissing their claims because they have provided too much direct evidence of the cause of Yahnke's injury. Accordingly, we affirm the circuit court in part and reverse it in part.

BACKGROUND

Cathy Yahnke had carpel tunnel surgery performed on her hand at Mercy Hospital. Dr. Carson performed the surgery and Dr. Djokovic was the anesthesiologist. After the surgery, Yahnke developed Volkman's Contracture, a debilitating condition in her right arm and hand. Yahnke sued Carson, Djokovic and Mercy Hospital for malpractice.

Yahnke named two experts for trial: Dr. Safwan Jaradeh, a neurologist, and Dr. Hami Matloub, a surgeon. With respect to the services provided by Djokovic, both experts admitted in their depositions that they were not trained in anesthesiology and could not critique the anesthesia services provided by Djokovic. Additionally, neither expert offered any opinions that the conduct of the Mercy Hospital employees fell below the standard of care required of them. Finally, neither expert criticized Carson's care or treatment of Yahnke, when asked about it during their depositions.

Carson, Djokovic, and Mercy Hospital each filed motions for summary judgment on the grounds that the Yahnkes lacked expert testimony showing that the Defendants' care was negligent. The Yahnkes opposed all three motions, and submitted affidavits by Jaradeh and Matloub. Those affidavits stated that the Volkman's Contracture was caused by nerve injury sustained as a result of the surgery. Further, both affidavits stated that the most likely cause of this injury was inadequate blood flow to Yahnke's arm. It was asserted that the reduced blood flow was caused by excessive pressure applied to her upper arm. Both affidavits suggested that this pressure was probably caused by a tourniquet; Jaradeh also suggested it might have been caused by a tightly inflated blood pressure cuff. Finally, Matloub's affidavit stated that the development of Volkman's Contracture was not a risk expected with carpel tunnel surgery when the surgery is performed within the standard of care required of surgeons and anesthesiologists.

The circuit court dismissed the Yahnkes' claims against Djokovic and Mercy Hospital because the experts admitted in their depositions that they were not competent to testify to the standard of care for anesthesiologists, did not mention the hospital employees at all, and the experts' subsequent affidavits did

not change that. With respect to Carson, the circuit court noted that Matloub's affidavit stated Carson had breached the standard of care required of him. However, this statement conflicted with Matloub's earlier deposition. The circuit court cited a federal case, ***Zimbauer v. Milwaukee Orthopaedic Group Ltd.***, 920 F. Supp. 959 (E.D. Wis. 1996), in which that court disregarded a subsequent affidavit because it conflicted with an earlier deposition. The circuit court then held that although it was not disregarding the affidavit completely, it gave the affidavit "no credibility" and attached "no weight to it." Relying on Matloub's earlier deposition which stated that he was not critical of Carson's care or treatment, the circuit court granted Carson's motion for summary judgment.

As an alternative argument opposing all three motions for summary judgment, the Yahnkes argued that they were entitled to an inference of negligence for all the Defendants under the theory of *res ipsa loquitur*. They further claimed that expert testimony is not always necessary to prove medical malpractice, when relying on *res ipsa loquitur*. The circuit court concluded that the Yahnkes failed to satisfy the necessary elements of *res ipsa loquitur*; and therefore, they were not entitled to the inference of negligence. The Yahnkes appeal.

DISCUSSION

Standard of Review.

A grant or denial of summary judgment is an issue of law which we review *de novo*, applying the same methodology as the circuit court. *See* ***State v. Michael J.W.***, 210 Wis.2d 132, 139, 565 N.W.2d 179, 183 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.

See ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997), *review denied*, 215 Wis.2d 425, 576 N.W.2d 281 (1997). If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. *See* ***id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. *See* ***id.*** at 233, 568 N.W.2d at 34.

While the existence of negligence is a mixed question of law and fact which is generally left to the jury, *see* ***Morgan v. Pennsylvania General Insurance Co.***, 87 Wis.2d 723, 732, 275 N.W.2d 660, 665 (1979), when an essential element of the claim cannot be proved, under any view of the evidence, summary judgment is appropriate. *See* ***Smith***, 212 Wis.2d at 233, 568 N.W.2d at 34. Further, whether the conditions for *res ipsa loquitur* are met is a legal issue, which we determine *de novo*. *See* ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 17, 496 N.W.2d 226, 228 (Ct. App. 1993).

Conflict Between the Depositions and Affidavits.

The circuit court was faced with the affidavits of the Yahnkes' experts, which directly contradicted these same experts' depositions taken earlier in the litigation. The affidavits were completed after the depositions of Matlaub and Jaradeh. Although the circuit court stated that it considered the affidavits, it cited with approval a federal district court case in which that court disregarded the affidavits completely by applying a federal rule concerning subsequently prepared affidavits.

Under the Federal Rules of Civil Procedure, a district court should grant a motion for summary judgment if the pleadings, depositions, admissions, answers to interrogatories, and affidavits show there is no genuine issue of material fact. *See* FED. R. CIV. P. 56(c). Generally, a court is not allowed to decide issues of credibility in ruling on a motion for summary judgment. *See, e.g.,* ***Pomplun v. Rockwell Int'l Corp.***, 203 Wis.2d 303, 306-07, 552 N.W.2d 632, 633 (Ct. App. 1996). This creates a special problem when a party opposing a motion for summary judgment submits an affidavit that conflicts with a previous deposition. The federal courts have adopted a rule that in these circumstances, the court may disregard the affidavit and grant the motion for summary judgment despite the conflict. *See* ***Bank of Ill. v. Allied Signal Safety Restraint Sys.***, 75 F.3d 1162 (7th Cir. 1996); ***Franks v. Nimmo***, 796 F.2d 1230 (10th Cir. 1986). Thus, in the federal courts, a party may not, without explanation, create a genuine issue of fact precluding summary judgment by submitting an affidavit that conflicts with previous sworn testimony. This rule has been expanded to include non-party affidavits, as well. *See* ***Adelman-Tremblay v. Jewel Cos.***, 859 F.2d 517, 521 (7th Cir. 1988).

The reasoning behind the federal rule seems to be that a deposition is more reliable than an affidavit because an attorney usually prepares the affidavit, while a deposition is the deponent's own words. *See* ***Russell v. Acme-Evans Co.***, 51 F.3d 64, 67 (7th Cir. 1995). Additionally, one of the purposes behind summary judgment, which is to weed out claims that lack factual support, is thwarted if a party can raise an issue of fact by submitting an affidavit which contradicts a deposition taken earlier. *See* ***Perma Research & Dev. Co. v. Singer Co.***, 410 F.2d 572, 578 (2d Cir. 1969). However, the federal courts usually do not limit the

receipt of subsequent affidavits when they are based on a reasonable explanation, such as newly discovered evidence. *See* ***id.***

Carson urges us to apply the federal rule and to disregard Matloub's affidavit. However, Wisconsin has not yet adopted the federal rule. We were presented with the issue in ***Wolski v. Wilson***, 174 Wis.2d 533, 497 N.W.2d 794 (Ct. App. 1993). There, we examined the plain language of § 802.08(2), STATS.,[1] and the supreme court's directive in ***Wright v. Hasley***, 86 Wis.2d 572, 578, 273 N.W.2d 319, 322 (1979), both of which prohibit granting summary judgment if an affidavit is submitted which creates a material issue of fact. And, although we recognized the existence of the federal rule, we concluded that "[a]s an error-correcting court, our task is to apply the statutes and rules of law as they presently exist. Any changes in state summary judgment methodology must either come from the legislature or supreme court, and not this court." ***Wolski***, 174 Wis.2d at 541, 497 N.W.2d at 797. Additionally, the supreme court, citing ***Wolski*** with approval, agreed that it was "the proper forum for determining the issue of whether a party can submit an affidavit that is inconsistent with prior deposition testimony in response to a motion for summary judgment." ***Morris v. Juneau County***, 219 Wis.2d 543, 563, 579 N.W.2d 690, 698 (1998).[2] Because we are

[1] Section 802.08(2), STATS., states in relevant part:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[2] Although the issue arose in ***Morris v. Juneau County***, 219 Wis.2d 543, 563, 579 N.W.2d 690, 698 (1998), the supreme court decided the case on other grounds; and therefore, it did not determine whether a party could create a material issue of fact by submitting an affidavit that conflicted with a previous sworn deposition.

bound by our previous decisions[3] and because of the supreme court's recognition that it is the proper forum for establishing a rule similar to that used in federal courts, we cannot disregard the affidavits offered by Yahnkes' experts.

Medical Negligence.

Wisconsin law holds that a physician is liable in an action for medical negligence if he or she fails to exercise that degree of care and skill which is exercised by the average practitioner in the class to which he or she belongs, acting in the same or similar circumstances. *See* ***Shier v. Freedman***, 58 Wis.2d 269, 283-84, 206 N.W.2d 166, 174 (1973). Further, a plaintiff must demonstrate that there is a causal connection between the physician's negligence and the plaintiff's injury. *See* ***Fischer v. Ganju***, 168 Wis.2d 834, 857, 485 N.W.2d 10, 19 (1992); ***Ehlinger v. Sipes***, 148 Wis.2d 260, 264-65, 434 N.W.2d 825, 827-28 (1988).

Generally,[4] medical negligence cannot be established without expert testimony. *See* ***Froh v. Milwaukee Med. Clinic***, 85 Wis.2d 308, 317, 270 N.W.2d 83, 87 (Ct. App. 1978). Without expert testimony, the jury in a medical malpractice case has no standard by which to determine whether a defendant failed to exercise the degree of care and skill required. *See* ***id.***

[3] See ***Cook v. Cook***, 208 Wis.2d 166, 560 N.W.2d 246 (1997), in which the supreme court held that the court of appeals is bound by its previous decisions and may not overrule, modify or withdraw language from its prior published decisions. *See* ***id.*** at 189-90, 560 N.W.2d at 255-56.

[4] *Cf.* ***Lecander v. Billmeyer***, 171 Wis.2d 593, 601-02, 492 N.W.2d 167, 170-71 (Ct. App. 1992).

1. Dr. Carson

Matloub stated in his affidavit that Volkman's Contracture is not a risk associated with carpel tunnel surgery where the surgery is performed within the standard of care of surgeons and anesthesiologists. As a surgeon himself, Matloub is competent to testify to the standard of care of surgeons in the field. His affidavit states in relevant part:

> A. That it is most probable that Cathy Yahnke's condition of ill being with respect to her right upper extremity are symptoms, complications sequelae of a medical condition known as Volkman's Contracture;
>
> B. That such Volkman's Contracture was the result of a combined ischemic and nerve injury to her right upper extremity; …
>
> D. It is my professional medical opinion as an expert in the field of hand surgery and as Cathy's treating physician, that Cathy Yahnke most probably has a condition known as Volkman's Contracture, an ischemic condition caused by prolonged lack of blood flow and/or excessive compression injury as from a tourniquet ….
>
> E. It is also my opinion that the development of … Volkman's Contracture is not a risk expected with surgical procedures for the release of impingement of a nerve known as carpal tunnel release, where the surgery and associated care is performed within the standard of care of surgeons and anesthesiologists; and
>
> F. It is my opinion that the development of Volkman's Contracture is a development that will not ordinarily occur if the surgeon would have exercised that degree of care and skill which surgeons usually exercise.

Therefore, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, *see* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980), Matloub's affidavit is sufficient to raise a factual issue about whether Carson's care of Yahnke fell below the requisite standard of

care. It also is sufficient to raise a factual issue about the causal connection necessary to prevail in a medical malpractice claim. Accordingly, we reverse the circuit court's grant of summary judgment for the Yahnkes' claim against Carson.

2. Dr. Djokovic and Mercy Hospital

Djokovic and Mercy Hospital argue that even if the court considers Matloub's affidavit, the circuit court's granting of their summary judgment motions was proper because the Yahnkes failed to present any expert testimony demonstrating that their treatment fell below the requisite standard of care. The Yahnkes contend that Matloub's affidavit, which stated that Volkman's Contracture is not a risk associated with carpel tunnel surgery where the surgery is performed within the standard of care of surgeons and anesthesiologists, is sufficient to establish that Djokovic and Mercy Hospital fell below the requisite standard of care. We disagree.

First, the Yahnkes provided no expert testimony that raises a material issue of fact about whether Mercy Hospital's employees failed to exercise the proper degree of care or that their acts caused Yahnke's injuries. Matloub's affidavit does not even mention Mercy Hospital or its employees. Therefore, without expert testimony, the Yahnkes' claim of medical negligence against Mercy Hospital fails as a matter of law.

Similarly, the Yahnkes' medical malpractice claim against Djokovic must also fail. Although Matloub stated in his affidavit that Volkman's Contracture is not a risk to be expected with carpel tunnel surgery where the surgery is performed within the standard of care of anesthesiologists, Matloub admitted in his deposition that he was not anesthesiologist nor had he ever been trained in anesthesiology. Further, when asked whether he was qualified to

critique the anesthesia services provided to Yahnke, Matloub unequivocally answered no. The affidavit's later conclusory remarks do not repair Matloub's lack of competency to testify to the standard of care that was required of an anesthesiologist.

Because the Yahnkes have failed to provide expert testimony that Djokovic or Mercy Hospital did not exercise due care in treating Yahnke, we affirm the circuit court's grant of summary judgment dismissing the medical negligence claims against these two defendants.

***Res Ipsa Loquitur*.**

The Yahnkes argue that they are entitled to an inference of negligence for their claims against Djokovic and Mercy Hospital under the doctrine of *res ipsa loquitur*. Further, they argue that under *res ipsa loquitur*, lack of expert testimony is not fatal to a medical malpractice claim. The circuit court determined that the Yahnkes could not rely on *res ipsa loquitur* because the affidavits submitted by the Yahnkes' experts provided "too much proof" and presented a full and complete explanation of the events which caused the injury. Because we also conclude that Yahnkes provided a full and complete explanation of those events, we agree with the circuit court that *res ipsa loquitur* is not applicable to their claims.

We stated in ***Lecander v. Billmeyer***, 171 Wis.2d 593, 601-02, 492 N.W.2d 167, 170-71 (Ct. App. 1992), that *res ipsa loquitur* may be applied when

> (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which has occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the

> causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

All three elements must be met before the doctrine may be applied to a particular set of facts. If a plaintiff fails to meet one element, then the doctrine fails as a matter of law and summary judgment is appropriate.

The supreme court first recognized that a plaintiff could offer too much evidence at trial to render *res ipsa loquitur* inapplicable in ***Knief v. Sargent***, 40 Wis.2d 4, 161 N.W.2d 232 (1968). In ***Knief***, a surgeon who was unsuccessful at removing a plaintiff's kidney stone through an incision in his stomach, removed the stone by forcing it through the wall of the ureter. *See* ***id.*** at 8, 161 N.W.2d at 234. Plaintiff's expert testified that the surgeon failed to exercise the requisite skill and care in deciding to perform the surgery in the first place, and in failing to intubate the ureteral tract during the surgery. *See* ***id.*** at 8-9, 161 N.W.2d at 234.

The supreme court stated:

> While the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant but does not purport to furnish a complete and full explanation of the occurrence does not deprive the plaintiff of the benefit of *res ipsa loquitur*; here, there is more than some evidence. There is direct evidence of specific acts of negligence complained of which furnish a complete and full explanation of what caused the injury to the plaintiff. Either the acts of the defendant were negligent or they were not. There were no other probable causes.

Id. at 9, 161 N.W.2d at 234. The court then concluded that the plaintiff provided too much direct evidence of negligence to be entitled to the *res ipsa loquitur* instruction.

Similarly, in ***Lecander***, 171 Wis.2d at 603, 492 N.W.2d at 171, we held that the plaintiff provided a full and complete explanation of the injury-causing event where his two experts testified that his injury "probably occurred during [a] blind nasal intubation." In ***Lecander***, a nurse had made five attempts to intubate Lecander before surgery. *See* ***id.*** at 597, 492 N.W.2d at 168-69. At some point, the back of Lecander's throat was punctured, causing Lecander to undergo surgery to repair his throat. *See* ***id.*** at 597, 492 N.W.2d at 169. We rejected Lecander's claim that he was entitled to an instruction on *res ipsa loquitur* because we concluded that giving the instruction would have been superfluous. *See* ***id.*** at 603, 492 N.W.2d at 171. We stated *res ipsa loquitur* should not be applied "where the specifics of an event can be completely explained." *See* ***id.*** at 604, 492 N.W.2d at 171.

Similarly, we believe the Yahnkes have offered too much direct evidence of negligence to come within *res ipsa loquitur*. Matloub states in his affidavit, to a reasonable degree of medical probability and certainty, that Yahnke's Volkman's Contracture was caused by a nerve injury and a lack of blood flow to her upper arm. Further, Matloub states that the injury was most likely caused by excessive pressure to her arm, such as from a tourniquet. Similar to the plaintiff in ***Knief***, this testimony is more than some evidence of negligence. "Either the acts of the defendant were negligent or they were not." ***Knief***, 40 Wis.2d at 9, 161 N.W.2d at 234. The affidavit of Matloub has removed all other probable causes and the specifics of the events causing the injury can be completely explained.

Because the Yahnkes have not provided any expert testimony to establish that Djokovic or Mercy Hospital fell below the requisite care, and because they have provided too much direct evidence of negligence to be entitled

to the inference of negligence through the *res ipsa loquitur* doctrine, we conclude that Djokovic and Mercy Hospital were entitled to summary judgment.[5]

CONCLUSION

We conclude that the affidavit submitted by the Yahnkes' expert created a material issue of fact about whether Carson breached the requisite standard of care. Therefore, granting Carson's motion for summary judgment was error, and we reverse that part of the judgment. However, we affirm the circuit court's ruling dismissing the Yahnkes' claims against Djokovic and Mercy Hospital because the Yahnkes failed to provide expert testimony that Djokovic and Mercy Hospital breached the standards of care which applied to them. Additionally, the Yahnkes may not rely on *res ipsa loquitur* to survive summary judgment because they have provided too much direct evidence of the events which caused Yahnke's injury. Accordingly, we affirm the circuit court in part and reverse it in part.

By the Court.—Judgments affirmed in part and reversed in part.

Not recommended for publication in the official reports.

[5] In their reply brief, the Yahnkes argue for the first time that Mercy Hospital is liable under a theory of *respondeat superior*. We do not consider arguments raised for the first time in a reply brief. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989).