

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 2007

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1734

Cir. Ct. No. 2004CV242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ROBERT L. PERZYNSKI,

PLAINTIFF-APPELLANT,

V.

**ST. MICHAEL'S HOSPITAL OF STEVENS POINT, INC., ABC
INSURANCE COMPANY, RICE MEDICAL CENTER, S.C., DEF
INSURANCE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,**

DEFENDANTS,

**ROY J. DUNLAP, II, M.D. AND BLUE CROSS AND BLUE SHIELD
UNITED OF WISCONSIN,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Portage County:
JON M. COUNSELL, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Robert Perzynski appeals from a judgment dismissing his medical negligence complaint against physician Roy Dunlap and others. We affirm.

¶2 The circuit court dismissed the claim on summary judgment. In doing so, the court noted that Dunlap had conceded performing more surgery on Perzynski's uvula and palate area than had been authorized, but that Dunlap was nonetheless entitled to summary judgment on two grounds. One of those grounds was that Perzynski had failed to produce an expert to prove the cause of his damages. The court stated that on the current record a jury could only speculate as to whether the altered procedure, even if negligent, was the cause of any damage: "In other words, there is nothing in the record to say that his difficulties were equal, greater or less than those he would have had with the original procedure."

¶3 On appeal, Perzynski does not dispute that, at trial, it is ultimately his burden to prove causation of damages. Nor does he dispute that if an expert opinion is required to do so, and he fails to produce an expert at the summary judgment stage, his claim is properly dismissed. Instead, he argues that an expert was not required, based on the existing record.

¶4 Perzynski's argument on this point appears to contain three possible parts. First, he argues that an expert is not necessary because it is within the general experience of a jury to evaluate whether unauthorized changes were made to his body as a result of the unauthorized procedure. The implication or assumption here appears to be that the fact of unauthorized change, *by itself*, is a compensable form of damage. Perzynski cites no authority for that proposition, and we are aware of none. We therefore reject it. As far as we can see, if the unauthorized changes caused no undesirable change in function or appearance that

was perceivable by the patient or others, and caused the patient no pain, then no damages have been caused, even if negligence occurred in the form of a violation of the standard of care.

¶5 Perzynski further argues that in this case the doctor “admitted that Mr. Perzynski experienced more pain to his palate than if the requested surgery had been performed.” The problem with this argument is its focus on pain “to his palate.” To be a proper measure of damages, the focus would be on total pain to the patient as a whole, and not to any specific body part.

¶6 The key question, then, is whether there is any evidence in the summary judgment record that could support the inference that the performed procedure caused some increment of total patient pain above what would have been expected from the authorized procedure. As to that question, Perzynski makes no argument and describes no evidence in his favor. The only evidence he mentions that addresses this point is the testimony of the doctor, who admitted only that “it’s possible” there was more overall patient pain, but said he did not consider it “a significant factor,” because both are painful procedures. This testimony is too vague and indefinite to prove that Perzynski suffered compensable damages in the form of pain.

¶7 Finally, Perzynski suggests in the fact section of the brief, but not in the argument, that he suffers from new symptoms since the unauthorized procedure. However, even if we assume this is true, the questions of whether these symptoms are caused by the new procedure and, if so, whether they are caused by the unauthorized portion of that procedure, are beyond the knowledge of jurors and would require expert testimony in his favor, which Perzynski has not offered.

¶8 Because this ground was a sufficient basis to dismiss the complaint, we need not address Perzynski's argument about the other ground on which the court based its dismissal.

By the Court.—Judgment affirmed.

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

