COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1998

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. 97-0121

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

IRENE M. ORAVECZ AND STEVE ORAVECZ,

PLAINTIFFS-APPELLANTS,

V.

THE MEDICAL PROTECTIVE CO., BREAST DIAGNOSTIC CLINIC, S.C., JOHN R. MILBRATH, M.D., WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN, R. HINSON, M.D., WISCONSIN PATIENTS COMPENSATION FUND, A.O. SMITH CORPORATION AND COMPCARE HEALTH SERVICES INSURANCE CORP.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed and cause remanded.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Irene M. Oravecz and her husband, Steve Oravecz, appeal from the trial court's grant of summary judgment in favor of Dr. John R. Milbrath and Dr. R. Hinson, and their respective employers and medical malpractice insurers. The Oraveczes assert that they submitted evidence sufficient to establish that the negligence of each doctor causally contributed to the injuries and resultant losses they suffered, and that the trial court therefore erred in granting summary judgment. We reverse and remand.

I. BACKGROUND

The Oraveczes' complaint alleged that Dr. Milbrath and Dr. Hinson negligently failed to diagnose Mrs. Oravecz's breast cancer in September of 1990 and September of 1991, respectively, causing a delay in the commencement of her treatment until December of 1992. After deposing the Oraveczes' expert medical witnesses, both doctors moved for summary judgment. The motions were heard on June 13, 1996. In their summary judgment briefs and at the summary judgment hearing, the doctors argued that the Oraveczes had failed to produce any evidence that, at the time of the acts of alleged malpractice, Mrs. Oravecz would not have had to undergo the same treatment that she ultimately received in January of 1993, a modified radical mastectomy of her right breast; that the Oraveczes had failed to produce evidence that Mrs. Oravecz's life expectancy had decreased as a result of the doctors' alleged malpractice; and that the Oraveczes had therefore failed to produce evidence that the alleged malpractice caused any injury or loss.

The trial court agreed with the doctors and granted the motions for summary judgment, but stated, "I will entertain a motion for reconsideration if you can get one of those doctors to say definitively, that her outcome would have been different in terms of the loss of the breast, that's got to be specifically addressed,

and also the prognosis on her life expectancy." The trial court further stated, "I'm granting you an extension of time to file in forty-five days. Once you file it, it has to meet the requirements I have just set forth, and if it doesn't, I'll make a decision whether or not to set it on for hearing."[1]

On July 26, 1996, the Oraveczes filed a motion for reconsideration, supported by the affidavit of Dr. Alonzo P. Walker. The trial court held a hearing on the motion for reconsideration on September 9, 1996. After reviewing Dr. Walker's affidavit, the trial court found that Dr. Walker's affidavit with respect to Mrs. Oravecz's life expectancy was not credible, and again determined that the Oraveczes had failed to produce evidence that the doctors' alleged negligence caused any injury or loss. The judgment dismissing the Oraveczes' action was entered on October 29, 1996. The Oraveczes appeal from that judgment.[2]

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[1] Section 802.08(4), STATS., provides:

> WHEN AFFIDAVITS UNAVAILABLE. Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Dr. Milbrath and Dr. Hinson argue that the evidence presented at the motion for reconsideration should not be considered in determining the propriety of the trial court's grant of summary judgment. The trial court, however, specifically granted the Oraveczes an extension of time to afford them the opportunity to present further evidence in opposition to the motion for summary judgment. The trial court's actions were consistent with § 802.08(4), and, thus, the evidence provided with the motion for reconsideration was properly considered by the trial court, and is proper for consideration by this court, in determining whether summary judgment was appropriate.

[2] The doctors argue that the Oraveczes did not appeal from the denial of their motion for reconsideration, and that the appellate record, therefore, does not include the affidavit that was provided with the motion for reconsideration. The judgment from which the Oraveczes appeal, however, was entered after the denial of their motion for reconsideration, and thus includes that motion and its supporting papers. *See* § 809.10(4), STATS. ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the (continued)

II. DISCUSSION

We review the trial court's grant of summary judgment *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "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 judgment as a matter of law." Summary judgment should be granted only where the moving party shows the right to judgment with such clarity as to leave no room for controversy. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. *See* ***id.***, 97 Wis.2d at 338–339, 294 N.W.2d at 477.

A moving party can properly meet the burden of establishing that summary judgment is appropriate by demonstrating that there are no facts of record that support an element on which the opposing party has the burden of proof. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 291, 507 N.W.2d 136, 140 (Ct. App. 1993). To defeat the motion for summary judgment, the party asserting the claim must then "'make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Id.***, 179 Wis.2d at 291–292, 507 N.W.2d at 140 (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)).

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appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.").

"'The elements in a cause of action for negligence are: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.'" ***Id.***, 179 Wis.2d at 293, 507 N.W.2d at 140 (quoted source omitted).

We conclude that the trial court erred in weighing the credibility of Dr. Walker's affidavit in deciding whether summary judgment was appropriate, and that the evidence submitted was sufficient to establish that the doctors' alleged negligence caused an injury and loss to the Oraveczes. We therefore reverse the trial court's grant of summary judgment, and remand for further proceedings.

As noted, the trial court rejected Dr. Walker's affidavit because it found that the affidavit was not credible. On a motion for summary judgment, however, the trial court is not to make credibility determinations, *see* ***Pomplun v. Rockwell Int'l Corp.***, 203 Wis.2d 303, 306–307, 552 N.W.2d 632, 633 (Ct. App. 1996), but must view the evidence in the light most favorable to the party opposing summary judgment, *see* ***Delmore v. American Family Mut. Ins. Co.***, 118 Wis.2d 510, 512, 348 N.W.2d 151, 153 (1984).

Dr. Walker's affidavit alleged, in relevant part:

> 5. I have reviewed the September 23 and 24, 1990 mammograms taken by Dr. Milbrath. In the films of the right breast, there is a suggestion that a mass may be present in the outer quadrant, and there appears to be an area of somewhat distorted glandular tissue which does not appear in the films of the left breast. The repeat films of the right breast taken on the second day show a distinct mass with a slight distortion of the glandular tissue.
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> 6. Mrs. Oravecz's cancer was in the upper quadrant of the right breast, in the same general area of the mass and distortion I identified in the Dr. Milbrath 1990 films. From the readings of the films of September, 1990, it is my opinion to a reasonable medical probability that Mrs.

Oravecz probably had cancer at that time in the areas that I identified on the films. This is where the cancer was ultimately found.

7. With the cancer in only one site in 1990, Mrs. Oravecz would have been amenable to conservative treatment, meaning removal of the localized cancer known as a lumpectomy, without need to remove the entire breast.

8. Based on my review of the 1989 and 1990 mammograms alone, it is my opinion to a reasonable medical probability that cancer of the right breast should have been suspected by the radiologist reading those films in 1990. Diagnosis at that time would have permitted treatment by lumpectomy rather than a modified radical mastectomy. The failure on the part of the radiologist to make the proper interpretation of the mass as suspicious for breast cancer from those films was a violation of the standard of care usually exercised by radiologists reading of mammograms. The failure to diagnose breast cancer from the 1989 and the 1990 films was a substantial factor in denying conservative treatment to Mrs. Oravecz which would have been available to her had the diagnosis been properly made.

9. In the Dr.'s McWey/Hinson September 1991 mammograms of Mrs. Oravecz there appears to be an area of distorted tissue that has coalesced in comparison to the 1990 films. The suggested mass in the outer quadrant is now larger in size and becoming more distinct and well outlined. In the 1991 films I estimate the area of abnormality and the size of the mass at 2 ½ centimeters. In the inner quadrant the mass is 1 ½ by 1 centimeters in size. It appears there is one lesion. In my opinion to reasonable medical probability the radiologist examining the mammographic 1991 films, particularly in comparing the prior films, should have recognized the appearance of a mass as highly suspicious for breast cancer and taken prompt steps for its treatment before it enlarged and infiltrated the entire breast. The failure to diagnose the breast cancer in 1991 was a departure from the standard of care usually exercised by radiologists reading mammograms. The failure of the radiologist to identify the masses suspicious for the breast cancer in 1991 was a substantial factor in denying to Mrs. Oravecz proper prompt treatment of the cancer to preclude its subsequent growth and diffusion throughout the right breast.

….

11. In my opinion to a reasonable medical probability by December, 1992, the disease in Mrs.

> Oravecz's right breast had diffused throughout the right breast, and she was no longer a candidate for conservative surgical therapy by way of lumpectomy. In January, 1993 I surgically removed the entire right breast together with 31 lymph nodes…. By that time the cancer in the breast had grown to greater than 5 centimeters in size.
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> 12. In summary, in my opinion to a reasonable medical probability the failure to indicate the mass as suspicious for breast cancer by Dr. Milbrath in his September, 1990, mammograms of the right breast was a departure from the standard of care, skill and judgment usually exercised by radiologists reading mammograms for cancer diagnostic purposes. That failure was a substantial factor in denying to Mrs. Oravecz conservative treatment by way of lumpectomy in the right breast following the reading of the mammograms. It was also a substantial factor in permitting the cancer to grow from its minimal size of about 1 centimeter in September, 1990, to over 5 centimeters in size in December, 1992.
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> 13. In summary, it is my opinion to a reasonable medical probability that the failure to indicate the masses as suspicious for breast cancer by Dr. Hinson in his September, 1991, mammograms of the right breast was a departure from the standard of care, skill and judgment usually exercised by radiologists reading mammograms for cancer diagnostic purposes. That failure was a substantial factor in denying to Mrs. Oravecz prompt surgical treatment to remove the cancer before it enlarged from about 2 centimeters in September, 1991, to about 5 centimeters in December, 1992, with infiltration into the entire right breast.
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> 14. Early detection of cancer, particularly breast cancer, is important to its prompt treatment to preserve life expectancy. The life expectancy of Mrs. Oravecz determined by 5 year survival rate was reduced to 85% when early detection and treatment of the cancer were denied to her. The failure to make the diagnosis of cancer by the said radiologists reading the 1990 and 1991 mammograms is a substantial factor in the reduction of Mrs. Oravecz's life expectancy.

The Oraveczes had also presented the following expert medical testimony:

> Breast cancers that are small and can be demonstrated to be small at a particular point in time – I mean small means less than one centimeter in size or less than two centimeters in size. Those are two particular benchmarks that people use in estimating prognosis – have a better prognosis from the

> date of diagnosis than those tumors which are more than two centimeters in size which, again, has a better prognosis than those tumors which are more than five centimeters in size.
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> ….
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> And when I say better, a lesion less than a centimeter probably has a ten-year survival of 90-plus percent. A lesion less than two centimeters but not greater than two probably has a ten-year survival of approximately 80-plus percent.
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> Lesions between two to five centimeters are between 70 and 75 percent. Lesions greater than five centimeters are very variable but the span ranges between 60 and 70 percent ….

These factual allegations are sufficient to sustain a finding that the doctors' alleged negligence caused an injury and loss to the Oraveczes, and to thereby defeat the doctors' motions for summary judgment. The Oraveczes produced evidence that, at the time of Dr. Milbrath's alleged negligence, Mrs. Oravecz could have been treated with a lumpectomy rather than a modified radical mastectomy. They also produced evidence that Mrs. Oravecz's prognosis worsened as her cancer grew, and that the negligence of each of the doctors contributed to the growth of her lesion and the resultant decrease in her life expectancy. Dr. Walker averred under oath that Mrs. Oravecz's lesion was about one centimeter in size at the time of Dr. Milbrath's alleged negligence, that it was about two centimeters in size at the time of Dr. Hinson's alleged negligence, and that as a result of the negligence of each of the doctors, the lesion continued to grow to over five centimeters before its removal. Another expert opined that lesions greater than five centimeters have a lower ten-year survival rate than lesions that are about one or two centimeters in size. Because this expert opinion is sufficient to establish that the alleged negligence of each of the doctors caused an injury that resulted in a loss to the Oraveczes, the trial court erred in granting summary judgment to the doctors.

By the Court.—Judgment reversed and cause remanded.

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