COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2847

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

FETHIYE F. UYGUR,

PLAINTIFF-APPELLANT,

LIBERTY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

SMITH & NEPHEW DYONICS, INC., A FOREIGN CORPORATION, AND REPUBLIC INSURANCE COMPANY, A FOREIGN CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Fethiye F. Uygur appeals from a judgment dismissing her claims that Smith & Nephew Dyonics, Inc. (hereinafter S&N) defectively designed, manufactured, and provided inadequate warnings about the instruments used in endoscopic carpal tunnel release surgery performed on her. The dispositive issues are whether under the doctrine of issue preclusion Uygur was entitled to partial summary judgment and whether the expert opinion offered by Uygur precluded summary judgment in favor of S&N. We affirm the judgment of dismissal.

¶2 In November 1991, Dr. James Shapiro performed endoscopic carpal tunnel release surgery on Uygur's right wrist. Shapiro performed the surgery using instruments manufactured by S&N and marketed as the ECTRA System. The instruments had been developed to facilitate a surgical technique developed by Dr. James Chow. The ECTRA System included instructions describing the Chow technique and a warning that surgeons should obtain training before utilizing the system and that only a qualified surgeon should use the system. Seminars were held to train surgeons on the Chow technique. Shapiro had attended one such seminar before performing Uygur's surgery. Uygur's ulnar nerve was severed during the surgery and she developed reflex sympathetic dystrophy and is unable to work.[1] She commenced this action against S&N alleging negligence and strict liability for the failure to warn.

¶3 In October 1996, Uygur moved for partial summary judgment on liability on the ground that S&N was precluded from litigating whether the

[1] In the action against him, Shapiro admitted that he had modified the Chow technique by moving the incision away from the thumb and toward the ulnar nerve. Uygur's medical malpractice suit against Shapiro was unsuccessful.

ECTRA System was defective and unreasonably dangerous, and whether S&N had breached its duty to warn. She argued that those issues had been determined against S&N in ***Violette v. Smith & Nephew Dyonics, Inc.***, 62 F.3d 8 (1st Cir. 1995). The circuit court denied her motion and she renews her claim on appeal.

¶4 Offensive issue preclusion occurs when the plaintiff seeks to foreclose a defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. *See* ***Mayonia M.M. v. Keith M.***, 202 Wis. 2d 460, 468, 551 N.W.2d 31 (Ct. App. 1996). The critical inquiry "is whether actually applying issue preclusion to the litigant comports with principles of fundamental fairness." ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 225, 594 N.W.2d 370 (1999). This is generally a determination within the circuit court's discretion. *See* ***id.***

> Courts may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the action: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T. v. Crozier, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993).

¶5 ***Violette*** involved surgery performed in the summer of 1991 according to the ECTRA system. *See* ***Violette***, 62 F.3d at 10. As in Uygur's surgery, Violette's ulnar nerve was severed. *See* ***id.*** Violette's complaint against

S&N alleged negligence in the failure to warn, design defects, and breach of warranty. *See* ***id.*** S&N's attempt to overturn the jury's verdict was rejected based on the State of Maine's application of the danger/utility test to claims of design defects. *See* ***id.*** at 12.

¶6 The trial court concluded that it was fundamentally unfair to apply issue preclusion based on the ***Violette*** case. This is the critical inquiry here and the trial court properly exercised its discretion in relying on fundamental fairness. There was no showing that issues of law litigated in ***Violette*** were the same as those raised here. Although the basic facts of the surgery and the use of S&N instruments are the same in both cases, there is no assurance that the doctors received the exact same instruction or warnings. Moreover, the appellate decision in ***Violette*** was based on the danger/utility test. In considering the two approaches to evaluate design defects, the first being the consumer-contemplation test and the second the danger-utility test, Wisconsin has opted for the consumer-contemplation test. *See* ***Estate of Schilling v. Blount, Inc.***, 152 Wis. 2d 608, 616, 449 N.W.2d 56 (Ct. App. 1989). That test requires a case-by-case analysis of whether a product is defective and unreasonably dangerous. *See* ***id.*** Given Wisconsin's recognition of the need to make a case-by-case analysis of product liability claims, one case in the State of Maine is an insufficient basis to bar S&N from litigating the case in Wisconsin under applicable Wisconsin law. [2]

¶7 S&N's motion for summary judgment rested on the concept that the ECTRA system was comprised of two components: the surgical instruments

[2] *Cf.* ***Goodson v. McDonough Power Equip., Inc.***, 443 N.E.2d 978, 987 (Ohio 1983) (it is not prudent for a single jury, sitting in review of certain limited facts, to enter a verdict which would establish safety standard for a given product for the entire country).

(S&N's product) and the Chow technique and it was the Chow technique and not the instruments which was inherently unreasonably dangerous.[3] The trial court concluded that it was the surgical procedure and not the product that was defective. As Uygur recognizes, the issue turns on whether her expert, Dr. Morton Kasdan,[4] provided a sufficient opinion that it was the instrumentality, and not merely the surgical technique, that was defective and dangerous. Uygur argues that the trial court resolved this critical question against her based on an impermissible assessment of Kasdan's credibility or the weight to be given his opinion, a function only for the jury. *See* ***Pomplun v. Rockwell Int'l Corp.***, 203 Wis. 2d 303, 306-07, 552 N.W.2d 632 (1996).

¶8 We review decisions on summary judgment de novo, applying the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** at 496-97. Summary judgment is appropriate where "a party moving

[3] S&N filed a trial brief that raised the question of whether the Chow technique is a product for which it may be held strictly liable. The trial court indicated that the brief would be considered as a motion to dismiss and Uygur was given an opportunity to respond. Upon hearing the matter further, the trial court likened the motion to one for summary judgment. Not until the reply brief does Uygur specifically argue that it was error for the trial court to convert the motion to a motion for summary judgment. We will not, as a general rule, 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 (Ct. App. 1989). Even though the time for filing a motion for summary judgment had passed, it was within the trial court's discretion to permit the motion. Indeed, as the court noted, the legal question needed to be resolved before trial in order to frame jury instructions. We see no error with the somewhat unusual procedural posture.

[4] Kasdan was also the expert who testified in ***Violette v. Smith & Nephew Dyonics, Inc.***, 62 F.3d 8 (1st Cir. 1995).

for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof, but cannot submit specific evidentiary material proving the negative." ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993).

¶9 Kasdan opined that the ECTRA System instrumentation is defectively designed for its intended use of being pushed through the hand blindly and permitting the cutting process without complete visualization of the carpal ligament. Kasdan acknowledged that he is not critical of the way the ECTRA tools are constructed. It is the application of the device in the human body that he finds objectionable. When Kasdan's opinion is stripped of the conclusory language of "defective design," it amounts to nothing more than a distaste for endoscopic carpal tunnel surgery, regardless of what instrumentation is used to perform it. Since Uygur's expert testimony only impugned the surgical procedure, her claim that S&N manufactured a defective product fails.

¶10 Uygur's failure-to-warn claim also fails because it is dependent on the instrumentality being defective, a burden she has not sustained. We need not address the remaining claims regarding the admissibility of medical device reports and the trial court's denial of Uygur's motion to dismiss Liberty Mutual Insurance Company, a potential subrogated insurer.

By the Court.—Judgment affirmed.

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