

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 13, 2005**

Cornelia G. Clark  
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. 2004AP2137**

**Cir. Ct. No. 2002CV359**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JAMES B. CLARK AND JOYCE E. CLARK,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**WISCONSIN PATIENTS COMPENSATION FUND, WILLIAM  
M. CLAYBAUGH, MD AND ROGER A. PELLMANN, MD,**

**DEFENDANTS-RESPONDENTS,**

**ST. JOSEPH'S COMMUNITY HOSPITAL OF WEST BEND,  
INC., OHIC INSURANCE COMPANY, PHYSICIANS  
INSURANCE COMPANY OF WI, INC., AND TOMMY  
THOMPSON, SECRETARY OF THE DEPARTMENT OF HEALTH  
& HUMAN SERVICES,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Washington  
County: PATRICK J. FARAGHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. James and Joyce Clark appeal from the dismissal of their medical malpractice claims against Drs. William Claybaugh and Roger Pellmann. The circuit court granted summary judgment dismissing the action because the Clarks failed to present any expert opinion evidence on causation. We affirm the judgment.

¶2 In November 1999, James complained to his primary physician of back pain. James had a long history of back problems, including the insertion of Harrington rods for a fractured back in 1979. Spine and chest x-rays were taken. At a December 2, 1999 consultation with orthopedic surgeon Dr. Thomas Flatley, Dr. Flatley indicated that the Harrington rods were not the source of James's back pain.

¶3 Due to continued pulmonary problems and back pain, a chest x-ray was taken on December 15, 1999. Dr. Pellmann, a radiologist, interpreted the x-ray noting "some significant compression deformities in the mid thoracic spine." James sought emergency room treatment on December 24, 1999, due to chest pain, shortness of breath and weakness. A chest x-ray was ordered. Dr. Claybaugh, a radiologist, interpreted the x-ray noting "[c]hronic wedge deformity of mid thoracic." The emergency room physician prescribed pain medication and sent James home with an order to see his own doctor if the symptoms did not improve.

¶4 On December 28, 1999, James saw his primary physician because of severe back pain and inability to ambulate. A CAT scan was done and it revealed an infectious and destructive process in his thoracic spine at the T7-T8 level. On December 30, 1999, Dr. Flatley performed surgery on James's back.

¶5 James was rendered a paraplegic. The Clarks's action alleges that radiologists Pellmann and Claybaugh failed to identify and report from the x-rays the obliteration of the T7-T8 disc space, and that had the reports been made, the infectious condition in his back would have been timely diagnosed prior to the onset of paraparesis. In opposition to the motion for summary judgment, the Clarks offered the affidavit of Dr. Flatley stating: "It is my opinion, to a reasonable degree of medical certainty that if Mr. Clark's problem at T7-T8 had been diagnosed prior to the onset of his severe symptoms on December 28, 1999, those symptoms and his paraparesis would likely have been avoided." Dr. Flatley's deposition testimony demonstrated that his opinion was confined to recognizing that had the problem been diagnosed prior to the onset of the paraparesis, it is likely paraparesis would have been prevented.<sup>1</sup> The Clarks also offered the deposition testimony of a retained expert witness, Dr. Paul Molina. Dr. Molina opined that Dr. Pellmann's and Dr. Claybaugh's reading of x-rays did not meet the standard of care because the obliteration of the disc space and absence of vertebral body endplates were not reported. The circuit court concluded that the opinions of Drs. Flatley and Molina did not establish or permit an inference that the negligence of the radiologists was the cause of James's paraplegia. Summary judgment dismissing the action was granted.

¶6 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromhecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the

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<sup>1</sup> Dr. Flatley specifically indicated that he had no opinion to a reasonable degree of medical certainty whether Dr. Pellmann's or Dr. Claybaugh's involvement was a cause one way or the other of James's outcome.

well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.*; WIS. STAT. § 802.08(2) (2003-04).<sup>2</sup>

Causation in Wisconsin exists where the defendant's negligence was a substantial factor in producing the plaintiff's harm. Substantial factor "denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense."  
....

A plaintiff in a negligence action carries a twofold burden of proving causation. First, the plaintiff has the burden of producing evidence, satisfactory to the judge, from which a jury could reasonably find a causal nexus between the negligent act and the resulting injury. If the plaintiff fails to meet this burden, the plaintiff has failed to establish a prima facie issue of causation and the defendant is entitled to a directed verdict.

*Fischer v. Ganju*, 168 Wis. 2d 834, 857, 485 N.W.2d 10 (1992) (citations omitted).

¶7 The question here is whether the Clarks established a prima facie issue of causation. We agree with the circuit court that the Clarks failed to produce evidence of a causal nexus between the radiologists' negligence in reading the x-rays and James's paraplegia. Dr. Flatley opined that if the diagnosis were made before the onset of paraparesis, paraplegia would have been avoided. Dr. Molina's testimony merely established that negligence occurred. Neither

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

expert offered an opinion that if the radiologists had properly read the x-rays and reported the abnormality, the correct diagnosis would have been timely made.

¶8 The Clarks argue that the opinions of Drs. Flatley and Molina are sufficient to allow a jury to “connect the dots” in finding a causal connection so that expert opinion on cause is not required. We cannot agree in light of evidence that there could have been several possible explanations for the obliteration of the disc space and absence of vertebral body endplates, particularly in a patient with James’s history of back pain. Dr. Molina explained that the obliteration of disc space could be due to a destructive process, a degenerative process, a compression fracture, or a tumor. Dr. Molina suggested that if the x-rays had been interpreted properly, the treating physician would have been prompted to do further investigation and follow-up. Dr. Molina stated that he had no knowledge of how the treatment would have changed had the x-rays been interpreted correctly.

¶9 It is not enough to establish that the x-rays were taken and interpreted before the onset of severe symptoms. This is not simply a failure-to-diagnose case because the radiologists were not required to make a diagnosis and recommend treatment. A timely diagnosis was required before Dr. Flatley’s opinion that paraparesis would have been avoided comes into play. There is simply no evidence from which the jury could conclude that follow-up prompted by a correct interpretation of the x-rays would have involved additional tests that would have timely diagnosed the infectious process.<sup>3</sup> It is not a matter within the

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<sup>3</sup> In their reply brief the Clarks argue that the causal chain is completed by evidence that ten days later, when presented with cause for further investigation, the treating doctors reacted and referred James for surgery. This is nothing but speculation that the same course of action would have been taken ten days earlier.

common knowledge of laymen and expert testimony is needed to show that the timely and proper diagnosis would have occurred. *See Christianson v. Downs*, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979).

¶10 The Clarks argue that the circuit court’s decision is in conflict with the holding in *Burnett v. Alt*, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999), that an expert cannot be compelled to give expert testimony that requires additional preparation. They claim the circuit court could not rely on Dr. Flatley’s inability to render an opinion on causation because as a treating physician, Dr. Flatley could not be required to undertake additional preparation necessary to give an expert opinion on causation.<sup>4</sup> The circuit court’s comment that Dr. Flatley had no opinion as to causation does not violate *Alt*. The circuit court was not requiring Dr. Flatley to give expert opinion evidence on causation but just observing that he had not done so. Moreover, the Clarks’s reliance on *Alt* does not relieve them of the obligation to produce evidence of a causal nexus. They failed to do that and summary judgment of dismissal was proper.

*By the Court.*—Judgment affirmed.

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

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<sup>4</sup> They further cite *Glenn v. Plante*, 2004 WI 24, ¶2, 269 Wis. 2d 575, 676 N.W.2d 413: “[*Burnett v. Alt*, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999)] does not apply to observations made by a person’s treating physician regarding the care and treatment provided to the patient, but rather applies to expert testimony from such a physician as to the standard of care and treatment provided by another physician.”

