COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP403 **Cir. Ct. No. 2003CV6612**

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

JONATHAN SNAPP,

PLAINTIFF-APPELLANT,

V.

JESSIE JEAN-CLAUDE, M.D.,

DEFENDANT-RESPONDENT,

MANUEL A. RIVERA, M.D., JAMES KNAVEL, M.D., RAJ D. RAO, M.D., AURORA LAKELAND MEDICAL CENTER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Jonathan Snapp appeals from the judgment entered against Snapp and in favor of Dr. Jessie Jean-Claude. Snapp contends that the trial court erred in granting Dr. Jean-Claude's motion for summary judgment because material issues of fact have been raised as to whether Dr. Jean-Claude acted negligently in treating Snapp following a motorcycle accident, by failing to explore the posterior tibial artery or in using the reversed saphenous vein from the injured extremity as graft; and in failing to get Snapp to the operating room sooner. Because Snapp has failed to produce expert testimony to show that Dr. Jean-Claude's treatment was negligent and that her treatment caused Snapp's injuries, we conclude that the trial court did not err in granting Dr. Jean-Claude's motion for summary judgment and affirm.

I. BACKGROUND.

¶2 On April 15, 2000, Snapp was in a motorcycle accident in which he sustained severe leg injuries. Snapp was first taken to Aurora Lakeland Medical Center, and then transferred to Froedert Hospital and Medical Center (Froedert). At Froedert, Snapp underwent several surgeries, including a vein graft, which was unsuccessful. Among the doctors who treated Snapp at Froedert was Dr. Jean-Claude, whose specialty is vascular surgery. Snapp was left with permanent injuries to his right leg.

¶3 On August 11, 2003, Snapp filed a medical malpractice action alleging that Dr. Jean-Claude and other health care providers involved in Snapp's treatment were negligent in their treatment and that the negligence caused "injuries resulting in damage." Many of the parties were dismissed early on in the proceedings; Dr. Jean-Claude was not among them.

¶4 Snapp hired one expert witness, Dr. Peter Ihle, a retired orthopedic surgeon. Dr. Ihle issued a report regarding his opinions about Dr. Jean-Claude's treatment of Snapp in which Dr. Ihle explained that Dr. Jean-Claude had been negligent: (1) in failing to get Snapp to the operating room and doing compartment fasciotomies immediately; (2) in not exploring the posterior tibial artery after there were very significant signs of decreased vascularity; and (3) in performing the initial posterior tibial bypass by using the reversed saphenous vein taken from the injured extremity as a graft. Dr. Ihle was subsequently deposed. During the deposition, Dr. Ihle repeated that, in his opinion, Dr. Jean-Claude's treatment had been negligent, but admitted that he, as an orthopedic surgeon, is not an expert in vascular surgery, does not know the standard of care for vascular surgery, and is unable to offer an expert opinion as to whether Dr. Jean-Claude's care had fallen below that standard or whether her care was a cause of Snapp's injuries.

¶5 Dr. Jean-Claude filed a motion for summary judgment, arguing that Snapp had failed to produce expert testimony to show that her care was negligent and that the alleged negligence was a cause of Snapp's injuries. On January 5, 2005, the trial court granted Dr. Jean-Claude's motion for summary judgment dismissing Snapp's complaint, and on January 26, 2005, judgment was entered in favor of Dr. Jean-Claude. Snapp now appeals.

II. ANALYSIS.

¶6 Snapp contends the trial court erred in granting Dr. Jean-Claude's motion for summary judgment because there are disputed issues of material fact involving whether Dr. Jean-Claude was negligent in causing Snapp's permanent injuries.

¶7 The review of a decision to grant summary judgment is a question of law that we consider *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We utilize the same methodology as that applied by the circuit court. ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 110, 595 N.W.2d 392 (1999). "The purpose of summary judgment is to determine whether a controversy can be resolved without a trial." ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶28, 236 Wis. 2d 435, 613 N.W.2d 142. If "there is no genuine issue as to any material fact," summary judgment "shall be rendered" and "the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). We will reverse a summary judgment if a review of the record reveals disputed material facts or if there are undisputed material facts from which reasonable alternative inferences may be drawn. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). All facts and reasonable inferences are viewed in the light most favorable to the non-moving party. ***Kraemer Bros., Inc. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

¶8 "Medical malpractice arises when a physician fails to exercise that degree of care and skill usually employed by the average practitioner under similar circumstances." ***Ande v. Rock***, 2002 WI App 136, ¶10, 256 Wis. 2d 365, 647 N.W.2d 265. In a medical malpractice claim, like in any negligence claim, the plaintiff must establish "(1) a breach of (2) a duty owed (3) that results in (4) an injury or injuries, or damages[,]" in short, "a negligent act or omission that causes an injury." ***Paul v. Skemp***, 2001 WI 42, ¶17, 242 Wis. 2d 507, 625 N.W.2d 860. "The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result." ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978).

¶9 To establish a cause of action for medical malpractice, where, as here, the medical issues "beyond the common knowledge or experience of jurors," testimony from medical experts is essential. ***Ollman v. Wisconsin Health Care Liability Ins. Plan***, 178 Wis. 2d 648, 667, 505 N.W.2d 399 (Ct. App. 1993); *see* ***Christianson v. Downs***, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979); ***Froh v. Milwaukee Med. Clinic, S.C.***, 85 Wis. 2d 308, 317, 270 N.W.2d 83 (Ct. App. 1978). Thus, if the plaintiff is unable to produce an expert who can establish the requisite causal connection between the alleged negligence and the injuries sustained, summary judgment may be proper, ***Dean Med. Ctr., S.C. v. Frye***, 149 Wis. 2d 727, 734, 439 N.W.2d 633 (Ct. App. 1989), unless, as in a *res ipsa loquitur* case, "where a layman is able to say as a matter of common knowledge that the consequences of the professional treatment are not those which ordinarily result if due care is exercised," ***Fehrman v. Smirl***, 20 Wis. 2d 1, 21, 121 N.W.2d 255 (1963).

> If the only issue is one on which expert testimony must be produced at trial, whether the party having the burden to produce such testimony can do so is itself a fact. It is immaterial that the ultimate issue will be resolved on the basis of expert opinion evidence. When determining whether a trial must be had, the court need only decide whether the party bearing the burden of producing admissible opinion evidence has made a prima facie showing that it can do so.

Dean Med. Ctr., 149 Wis. 2d at 734-35. WISCONSIN STAT. § 907.02 (2003-04)[1] governs expert testimony in Wisconsin:

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id.

¶10 Snapp contends that material issues of fact have been raised as to whether Dr. Jean-Claude acted negligently in failing to explore the posterior tibial artery or in using the reversed saphenous vein from the injured extremity as a graft, and in failing to get Snapp to the operating room sooner.

¶11 Snapp's main argument alleges that the trial court erroneously discounted the allegations that Dr. Jean-Claude was negligent because it refused to give any weight to Dr. Ihle's report in the face of what it saw as conflicting testimony in his deposition, and instead relied solely on the deposition. Snapp claims that "[t]his error was predicated on Dr. Ihle's answer in his deposition that he could not give an opinion to the standard of care 'for a reasonable vascular surgeon' because he was an orthopedic surgeon." Snapp argues that the fact "[t]hat Dr. Ihle feels he cannot testify as an expert vascular surgeon, however, does not mean that he is unqualified to render an expert opinion on procedures performed by vascular surgeons," and maintains that "there is significant overlap between the areas of orthopedic and vascular surgery and that he has sufficient knowledge of vein grafts and other areas of vascular medicine to render the opinion he expresses in his report." Snapp further claims that although the trial court acknowledged that a doctor from one specialty may be eligible to testify regarding the negligence of a doctor practicing another specialty, the trial court "put undue emphasis on the form of Dr. Ihle's responses to questions about his qualifications to testify to Dr. Jean-Claude's alleged deviation from the standard of

care of a vascular surgeon." Snapp blames the "aggressive questioning by Dr. Jean-Claude's attorney" which "elicited a number of responses from Dr. Ihle that suggested that he was not qualified to testify...." We are not persuaded.

¶12 Dr. Ihle's report expressed the opinion that Dr. Jean-Claude's treatment of Snapp was negligent. Specifically, Dr. Ihle gave three reasons for why he felt Dr. Jean-Claude had been negligent in her treatment of Snapp: (1) "negligent in [not] getting Mr. Snapp to the operating room and doing compartment fasciotomies immediately"; (2) "negligent in not exploring the posterior tibial artery after there were very significant signs of decreased vascularity"; and (3) "negligent in the initial posterior tibial bypass in using the reversed saphenous vein as a graft that was taken from the injured extremity in close approximation to the fracture…."

¶13 At his deposition, Dr. Ihle testified that he is a retired orthopedic surgeon, and that when he was actively practicing, his practice was limited to that of an orthopedic surgeon, and he is not board certified as a general surgeon or a vascular surgeon. Dr. Ihle testified that he has not performed the vein bypass surgery in question, or been the primary surgeon determining where to harvest a vein for a bypass procedure of the lower extremity since 1968 during his residency. When asked, "You don't hold yourself out as an expert in the performance of vascular bypass surgery, correct?," Dr. Ihle answered, "No, not at all." Similarly, when asked, "So you don't hold yourself out as an expert to determine what would be an appropriate area to harvest a vein from for a bypass procedure of the lower extremity, correct?," Dr. Ihle's answer was, "That's correct." Dr. Ihle also testified that he did not know the appropriate standard of care for a vascular surgeon in the selection of veins, or whether a reasonable vascular surgeon would have selected the vein from the area Dr. Jean-Claude did:

Q You do not know what the standard of care is for a vascular surgeon in selection of – selections of vein material, correct?

A Specifically, for that specialty, no.

Q And you yourself, since 1972, have not personally harvest[ed] saphenous veins for any type of vascular procedure, correct?

A That's correct.

Q You do not, on a routine basis, familiarize yourself with the literature regarding vascular surgical procedures, correct?

A That's correct.

Q You do not know whether a reasonable vascular surgeon would have selected the vein from the area Dr. Jean-Claude did, correct?

A I guess that would be correct.

….

Q You – in this case, you can't say one way or another whether it was a deviation for a vascular surgeon not to [sic] explore the popliteal vessel, correct?

A No, I can't.

Q Then, the last area of concern that I saw raised in your reports regarded the selection of the saphenous vein?

A Yeah.

Q And we've already discussed that. As an orthopedic surgeon, you can't render expert opinion testimony as to what a reasonable vascular surgeon would have done in that regard, true?

A That's true.

¶14 Dr. Ihle also admitted that although he has an opinion about Dr. Jean-Claude's treatment of Snapp, this opinion does not qualify as an expert opinion.

> Q So you may have an opinion but it wouldn't qualify as an expert opinion in that area, correct?
>
> A That's correct.
>
> Q And, in fact, you have signed an expert witness affirmation that indicates that you will provide evidence or testify only in matters in which you have relevant clinical experience, true?
>
> A That's correct.
>
> Q And you do not have relevant current clinical experience in deciding what portion of the saphenous vein should be used for a posterior tibial artery bypass, correct?
>
> A That's correct.
>
> ….
>
> Q Although you indicate that you would have explored the popliteal artery, you're not in a position as an orthopedic surgeon to tell the jury that you have an expert opinion [that] the standard of care for the reasonable vascular surgeon required such exploration, true?
>
> A That – that's correct.

¶15 Dr. Ihle thus never said what the standard of care of a vascular surgeon was, and indeed admitted that he did not know what that standard was. Dr. Ihle also, on multiple occasions, conceded that although he did have an opinion about Dr. Jean-Claude's treatment of Snapp, he was unable to give an opinion of whether that care deviated from the standard of care of a reasonable vascular surgeon, and that the reason for this inability to do so was that he was an orthopedic surgeon, not a vascular surgeon.

¶16 We agree with both Snapp and the trial court that, to be eligible to testify as to the possible negligence of a particular doctor, an expert need not necessarily practice in the same specialty as the doctor whose care he or she is

testifying about. *See* ***Morrill v. Komasinski***, 256 Wis. 417, 421-22, 41 N.W.2d 620 (1950); ***Kerkman v. Hintz***, 138 Wis. 2d 131, 149, 406 N.W.2d 156 (Ct. App. 1987), *aff'd in part, rev'd in part by* 142 Wis. 2d 404, 418 N.W.2d 795 (1988). However, we also agree with Dr. Jean-Claude that Snapp incorrectly construes this to mean that Dr. Ihle qualifies as an expert witness merely because there is overlap between the areas of orthopedic and vascular surgery. Admittedly, the apparent overlap between the two areas suggests that it is conceivable that Dr. Ihle could have qualified as an expert, however, his own admissions that he was unfamiliar with the appropriate standard of care disqualified him. As the trial court correctly stated, Dr. Ihle cannot first maintain in a report that Dr. Jean-Claude was negligent, and then admit that because he is an orthopedic surgeon he is unable to say what a reasonable vascular surgeon should have done. The trial court noted:

> This is not the issue, whether he can give an opinion as a vascular surgeon. The question is, can he give an opinion criticizing a vascular surgeon. I agree with you a hundred percent, just because someone is an orthopedic surgeon doesn't mean they can't offer an opinion criticizing a vascular surgeon. I agree with you. You don't have to be, necessarily have to be a specialist in the same medical field as the doctor you are criticizing. I don't buy that argument and don't really know if defendants are making that argument. But if they were and you believe they were, I agree with you that you don't have to be a vascular surgeon to criticize a vascular surgeon.
>
> But if you are offering an expert witness, I don't care what his background is, as long as he's got a background to offer an opinion in the area he is offering, I agree with you that on the face of it, Dr. Ihle should be able to give an opinion criticizing Dr. Jean-Claude as a vascular surgeon. I don't have a problem with that. But he cannot then say, look, I'm an orthopedic surgeon, so I can't really say what a vascular surgeon would do. But I'm still saying Dr. Jean-Claude did something wrong.
>
> He can do that if that is what he says. What he says is, you can't say what, one way or another, whether it was a deviation for a vascular surgeon not to explore the popliteal

> vessel. Correct? Correct. No, I can't. So, he is saying he can't do it. Where is he saying he can? Where is he saying that Dr. Jean-Claude did anything wrong here?

¶17 Contrary to what Snapp tries to argue, the trial court did not err in ignoring Dr. Ihle's report. Rather, the trial court correctly concluded that the report had to be ignored because Dr. Ihle was unable to show that he qualified as an expert witness. Dr. Ihle's deposition answers plainly demonstrate that he did not have the necessary "knowledge, skill, experience, training, or education" necessary to testify in this case. WIS. STAT. § 907.02. We therefore cannot agree with Snapp that this acknowledgment would place an "undue emphasis" on Dr. Ihle's deposition answers. One can only speculate as to the reasons why Snapp presented only one expert witness and why that single expert witness was an orthopedic surgeon. Moreover, effective representation through intense questioning on the part of opposing counsel is hardly a reason to doubt the testimony given by Dr. Ihle. Because Dr. Ihle's deposition reveals that he does not qualify as an expert witness, his report does not provide the expert testimony necessary to overcome summary judgment.[2] *See* ***Frye***, 149 Wis. 2d at 734-35.

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[2] Snapp attempts to make a separate argument out of Dr. Ihle's opinion expressed in his report that Dr. Jean-Claude failed to get Snapp to the operating room soon enough. Snapp claims that the trial court erroneously relied on the following deposition testimony by Dr. Ihle in finding that Snapp had failed to present any evidence that Dr. Jean-Claude negligently caused a delay in Snapp's treatment:

> Q And based upon all of the information you have, would you agree that Dr. Jean-Claude did not delay her assessment of Mr. Snapp in the holding area?
>
> A Yes, I would agree with that.
>
> Q So in terms of Dr. Jean-Claude's surgical intervention for the fasciotomy, she acted in a timely manner based upon her notification of this patient, true?

(continued)

¶18 Snapp also attacks the fact that the testimony given by Dr. Ihle was obtained during a deposition. He asserts that "the deposition was a discovery deposition designed to elicit impeachment evidence for trial. Defendants, not Plaintiff, controlled the form of the questions asked of Dr. Ihle and, unlike at trial, Dr. Ihle did not have the opportunity to be 'rehabilitated' as a witness or to explain his answers." We are not convinced. The mere fact that the testimony was taken as part of a deposition, which took place in a setting other than a courtroom, changes nothing. A sworn statement by a witness is viewed the same regardless of the setting in which it was given. Even so, there were plenty of opportunities to rehabilitate; there were no trick questions; and Snapp could have submitted an affidavit from Dr. Ihle following the deposition in an attempt to support his

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A Yes, that's true.

While Snapp concedes that this testimony does provide a basis for summary judgment, he maintains that the trial court mistakenly viewed it in isolation, and tries to discount it by relying on Dr. Cassandra Voss's testimony, that as far as she could remember, while she was in the emergency room, members of the vascular surgery team, including Dr. Jean-Claude, arrived. Snapp argues that "Dr. Ihle's statement in his deposition that Dr. Jean-Claude was not negligent in delaying Snapp's surgery was based on the belief that Dr. Jean-Claude did not arrive on the scene until Snapp was in the holding room," to which Snapp was transferred from the emergency room. It appears as though Snapp is arguing that, had Dr. Ihle been aware of Dr. Voss's testimony, he might not have testified that he felt Dr. Jean-Claude's treatment of Snapp was timely. Snapp's argument is without merit. Snapp still relies on testimony by Dr. Ihle, the same expert witness who is not qualified to testify in this case. *See* ***Dean Medical Center, S.C. v. Frye***, 149 Wis. 2d 727, 734-35, 439 N.W.2d 633 (Ct. App. 1989).

contention.[3] *But see* ***Yahnke v. Carson***, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102.[4]

¶19 Moreover, even if Dr. Ihle would have qualified as an expert witness in this case, and he would have testified that a jury could find Dr. Jean-Claude's treatment to be below the standard of care, Snapp would still be required to show causation. *See* ***Skemp***, 242 Wis. 2d 507, ¶17. Snapp submits that "[i]t is implicit throughout Dr. Ihle's report and transcript that there is a causal link between

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[3] In his reply, in an attempt to further diminish the importance of the inconsistencies between Dr. Ihle's deposition and report and to emphasize the content of the report, Snapp also maintains that the admissions obtained during the deposition "should not be used as a basis for summary judgment where a *prima facie* case against Dr. Jean-Claude has already been established by the opinions expressed in Dr. Ihle's report." Snapp is mistaken. He has not established a *prima facie* case against Dr. Jean-Claude because Snapp has failed to provide a qualified expert witness to testify that Dr. Jean-Claude's care was negligent. *See* ***Frye***, 149 Wis. 2d at 734-35. Dr. Ihle does not qualify as an expert, and Dr. Ihle's report therefore does not establish a *prima facie* case against Dr. Jean-Claude.

[4] In ***Yahnke v. Carson***, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 12, the Wisconsin Supreme Court adopted the so-called "sham affidavit" rule, which generally precludes the creation of genuine issues of fact on summary judgment by the submission of an affidavit that directly contradicts earlier deposition testimony. The court, however, explained its holding as follows:

> [F]or purposes of evaluating motions for summary judgment pursuant to WIS. STAT. § 802.08, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.

Id., ¶21.

Snapp's injuries and Dr. Jean-Claude's alleged negligence," and that the trial court "commented erroneously that Dr. Ihle did not issue an opinion that Dr. Jean-Claude's negligence caused any injuries to Snapp." In granting Dr. Jean-Claude's motion, the trial court noted:

> And all of that, Mr. [attorney for Snapp] leaves one other problem. Even if there was somehow from that [a way], one could weave some kind of opinion and I don't see one, there is no opinion as, that anything that she did or did not do caused injuries to Mr. Snapp.
>
> So, we have a causation problem.

¶20 We disagree with Snapp's assertion that it is implicit in Dr. Ihle's report that Dr. Jean-Claude's alleged malpractice caused Snapp's injuries. Even if Dr. Jean-Claude's treatment of Snapp fell below the standard of care, which Snapp has not come close to showing, Dr. Ihle's report does not state that Dr. Jean-Claude's care was a substantial factor that contributed to Snapp's permanent injuries. *See* ***id.***; ***Merco Distrib. Corp.***, 84 Wis. 2d at 458. Even more importantly, there is absolutely no deposition testimony that supports causation, since during the deposition Dr. Ihle admitted that he does not know the standard of care for vascular surgery, and is unable to offer an expert opinion as to whether Dr. Jean-Claude's care had fallen below that standard. *See* ***Skemp***, 242 Wis. 2d 507, ¶17. While in reviewing a summary judgment motion, this court draws every inference in favor of the non-moving party, ***Kraemer Bros.***, 89 Wis. 2d at 567, we are able to draw inferences only to the extent the record allows us to do so. Dr. Ihle's testimony does not assert or suggest that Dr. Jean-Claude's treatment of Snapp was a substantial factor that contributed to Snapp's injuries. Statements like "it is implicit throughout Dr. Ihle's transcript," without more, is not sufficient to overcome summary judgment. *See* ***Merco Distrib. Corp.***, 84 Wis. 2d at 458.

¶21 Snapp has not produced the expert testimony necessary to show that Dr. Jean-Claude's treatment was negligent and that that treatment caused his injuries. Drawing every inference in favor of Snapp, we find no material issues of fact, and therefore affirm the trial court's grant of summary judgment to Dr. Jean-Claude. *See* WIS. STAT. § 802.08(2).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.