COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2062 **Cir. Ct. No. 2005CV434**

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

DUANE WEINKE BY HIS PERSONAL REPRESENTATIVE AND ILLEEN WEINKE INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE FOR THE ESTATE OF DUANE WEINKE,

PLAINTIFFS-APPELLANTS,

HUMANA INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

THOMAS FREEMAN, M.D., MICHAEL PERLMUTTER, M.D., JOHN LENT, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC. AND THE MEDICAL PROTECTIVE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Duane Weinke's estate appeals from the summary judgment dismissing the action against the defendant physicians. The estate strenuously argues that decisions here regarding administration of prophylactic antibiotics with a lung biopsy present informed consent and standard of care issues not appropriate for resolution by summary judgment. It also contends that the testimony of its sole expert, a family practitioner, regarding the need for prophylactic antibiotics, goes to weight and credibility, not admissibility. We affirm the exclusion of the expert's testimony as a proper exercise of the trial court's discretion and the resultant grant of summary judgment.

¶2 The undisputed facts are these: Sixty-nine-year-old Weinke had a medical history significant for knee and hip replacements, congestive heart failure, atrial fibrillation, hypertension, inflammatory bowel disease, chronic renal disease and severe rheumatoid arthritis for which he took immunosuppressive medication and steroids. Due to this history, Weinke allegedly had been advised to take prophylactic antiobiotics with all medical and dental procedures.

¶3 In May 2003, Weinke was admitted to St. Agnes Hospital in Fond du Lac with a suspected infiltrative process of his lungs. His internist, Dr. John Lent, requested a consult from pulmonologist Dr. Michael Perlmutter. Dr. Perlmutter and surgeon Dr. Thomas Freeman concurred that an open lung biopsy was indicated.

¶4 Weinke signed a consent for a "[r]ight chest thoracoscopy and possible mini-thoracotomy with open lung biopsy." The consent form stated that Dr. Freeman had fully explained the procedures to him, that Weinke understood "the nature and consequences, the benefits, the special risks involved, the

possibility of complications and the available alternatives," and that no guarantee was made as to the results. Also, Weinke certified by his signature "that I have all of the information about the procedure that I want." In addition, Dr. Freeman's consultation note stated that the "[i]ndications and risks were explained to the patient, understood, and accepted."

¶5 Dr. Freeman performed an open lung biopsy on May 6, 2003. None of the three doctors prescribed antibiotics. Weinke's widow testified at deposition that she did not tell Dr. Perlmutter and did not recall if her husband told him or Dr. Freeman that they wanted pre-biopsy antibiotics given. Discharged on May 10, Weinke saw one or the other of the three doctors on seven different occasions for shortness of breath, dizziness, wound drainage and blurred vision. On May 28, Weinke complained of severe knee pain. Dr. Lent referred him to orthopedist Dr. John Welsch who immediately readmitted him to St. Agnes with probable sepsis of his prosthetic knee. Dr. Welsch's consultation report remarked on Weinke's "numerous medical problems, mostly originating from his severe rheumatoid arthritis and compromised cardiorespiratory system." Weinke's condition steadily worsened and he was transferred to the University of Wisconsin Hospital, where he died on July 11, 2003.

¶6 The St. Agnes Hosptal discharge summary Dr. Lent authored listed fourteen discharge diagnoses. Listed first numerically was "Septic arthritis, left knee arthroplasty …. Probable portal of entry, right lung surgical biopsy site." The UW Hospital discharge summary following Weinke's death listed nine final diagnoses. Listed first numerically was "Multi-organ failure secondary to sepsis/soluble immune response suppressor." The autopsy report listed the cause of death as "sepsis with septic emboli causing abscesses in multiple organs and severe systemic amyloidosis all contributing to multi-organ failure." It opined that

the likely cause of the sepsis was staphylococcus that had colonized in Weinke's left knee, and the likely cause of the amyloidosis was his rheumatoid arthritis. It termed the amyloidosis "a very impressive finding" which, while not the ultimate cause of Weinke's death, "likely had a large contribution" to it.

¶7 The estate commenced this action alleging medical negligence and failure to obtain informed consent, both related to the fact that, despite Weinke's artificial joints and immunosuppressant medication, prophylactic antibiotics were not ordered before or after the lung biopsy. The defendants deposed the estate's sole expert, family practitioner Dr. Finley Webster Brown, Jr. According to Dr. Brown's affidavit, his years of training and practice qualify him to offer opinions in this case because the issues involve "fundamental medical knowledge which applies to all physicians whether they are generalists or specialists." He testified at deposition that administration of prophylactic antibiotics has "nothing to do with pulmonology, general surgery, or cardiology … [but] with simple basic bread-and-butter general medicine which all doctors need to know." On that basis, Dr. Brown asserted that the defendant doctors negligently failed to give Weinke prophylactic antibiotics despite being aware that he was immunocompromised; that failure directly caused Weinke's death; and they failed to advise Weinke of the risks and benefits of doing the lung biopsy without antibiotics or of having the procedure done elsewhere.

¶8 Dr. Brown also testified, however, that he never had done a lung biopsy and, because he is not a surgeon, had no opinion whether the biopsy procedure itself was done properly. Further, he testified he does not know which antibiotic to use, the dose, the duration, or how long in advance of such a procedure it should be prescribed, and would ask a surgical or infectious disease colleague to find out. Finally, while Dr. Brown gave Weinke a ninety-five percent

chance that prophylactic antibiotics would have averted the post-biopsy infection, he said his opinion "requires pure conjecture" about which he "think[s] there is statistical data, but I don't know what it is."

¶9 Dr. Perlmutter moved for summary judgment and to exclude Dr. Brown's testimony on grounds that Dr. Brown was unqualified to render an opinion on the defendant doctors' standard of care; Drs. Lent and Freeman joined the motions. Drs. Lent and Perlmutter argued that the informed consent claim failed against them as a matter of law because they did not perform the biopsy. Dr. Freeman contended that failing to prescribe prophylactic antibiotics does not form the basis for an informed consent claim because antibiotic administration is part of the surgical procedure to which Weinke consented and therefore is an issue of medical negligence. The defendant doctors also contended that the estate failed to produce expert testimony sufficient to establish negligence or to causally tie it to the damages claimed. After hearing arguments, the trial court granted the motions, dismissing the estate's claims. The estate appeals.

¶10 On review of a grant of summary judgment, we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-317, 401 N.W.2d 816 (1987). Although our review is de novo, we value the trial court's decision. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).[1] We first examine the pleadings to determine whether they state a claim for relief. ***Green Spring Farms***, 136 Wis. 2d at 315. If they do and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** "In evaluating

[1] We commend Judge Nuss for his thorough, well-articulated oral ruling.

the evidence, we draw all reasonable inferences from the evidence in the light most favorable to the non-moving party." ***Pum v. Wisconsin Physician Serv. Ins. Corp.***, 2007 WI App 10, ¶6, 298 Wis. 2d 497, 727 N.W.2d 346. Summary judgment 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 a judgment as a matter of law." WIS. STAT. RULE 802.08(2) (2005-06).[2]

Informed Consent

¶11 The estate first contends the defendant doctors failed to inform Weinke about the risks and benefits of prophylactic antibiotic treatment associated with a lung biopsy, including going elsewhere for it.[3] The estate contends this cause of action was wrongly dismissed on summary judgment because informed consent issues are reasonable person, not standard of care, questions which only a jury can decide.

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

[3] The latter aspect of the claim arises from a deposition statement of pulmonologist Dr. Perlmutter that transbronchial lung biopsies, while less invasive, have a poorer record of providing a definitive diagnosis at St. Agnes because fewer are performed there than at a tertiary hospital such as UW Hospital. The estate offers no argument or evidence about the accuracy of transbronchial lung biopsies versus open biopsies generally or at UW Hospital, that Weinke declined the closed biopsy due to a belief that the former was less accurate, or that he would have considered a tertiary setting for the procedure. We therefore address it no further. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶12 Wisconsin's informed consent law, codified in WIS. STAT. § 448.30,[4] obligates a treating physician to inform the patient about the risks and benefits of the proposed treatment or procedure and the availability, risks and benefits of alternate, viable treatments. Dr. Freeman performed Weinke's lung biopsy. The informed consent claim against Drs. Lent and Perlmutter thus fails as a matter of law because neither was the treating physician in regard to the lung biopsy. Accordingly, neither had a duty under the informed consent statute. *See* ***Montalvo v. Borkovec***, 2002 WI App 147, ¶¶9-10, 256 Wis. 2d 472, 647 N.W.2d 413.

¶13 The claim also fails against Dr. Freeman as a matter of law. The informed consent law recognizes and protects a person's right to consent to or to refuse a proposed medical treatment or procedure. *See* ***Scaria v. St. Paul Fire &***

[4] WISCONSIN STAT. § 448.30 provides:

> Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
>
> **(1)** Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
>
> **(2)** Detailed technical information that in all probability a patient would not understand.
>
> **(3)** Risks apparent or known to the patient.
>
> **(4)** Extremely remote possibilities that might falsely or detrimentally alarm the patient.
>
> **(5)** Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
>
> **(6)** Information in cases where the patient is incapable of consenting.

Marine Ins. Co., 68 Wis. 2d 1, 12, 227 N.W.2d 647 (1975). The touchstone of the informed consent test is "what the reasonable person in the position of the patient would want to know." ***Schreiber v. Physicians Ins. Co.***, 223 Wis. 2d 417, 427, 588 N.W.2d 26 (1999) (citation omitted).

¶14 The estate asserts that giving prophylactic antibiotics in association with the lung biopsy therefore presents an issue of informed consent because it is information Weinke would have wanted. We agree with the trial court, however, that it is "uncontroverted that Mr. Weinke knew of his replacement joints and the whole issue of prophylactic antibiotics." Indeed, the estate's attorney avers in an affidavit that "Mr. Weinke had been told that antibiotics were needed with all medical and dental procedures," and Mrs. Weinke testified that her husband had insisted on antibiotics with prior dental procedures. In addition, the estate asserts that "Mr. Weinke asked for antibiotics in the hospital and at at least one or more post discharge visits." Likewise, Dr. Brown testified that one of the three defendant doctors "needed to be sure that … somebody took care of Mr. Weinke and responded to his and his family's request for pre-operative antibiotics …."[5] A physician need not discuss risks that are apparent or known to the patient. ***Scaria***, 68 Wis. 2d at 13; *see also* WIS. STAT. § 448.30(3). Accordingly, Dr. Freeman had no duty under the informed consent law to explain to Weinke risks of which he already was aware.

¶15 Dr. Freeman further argues that the lung biopsy was the procedure and whether or not to give prophylactic antibiotics simply was part and parcel of

[5] The estate's assertion is without citation to the record and Dr. Brown does not explain the source of his understanding. Our search of the record does not verify that such requests were made. The estate, however, clearly believes Weinke already appreciated the risk.

that procedure, along with anesthetic agents and surgical equipment. It was not a discrete procedure that needed to be separately addressed. We agree.[6] Dr. Freeman explained the two alternatives, thoracoscopy and open lung biopsy. By his signature on the consent form, Weinke acknowledged that he understood the procedure's risks, benefits, possibility of complications and available alternatives, and certified that he had all the information he desired. We agree with the trial court that a claim that any of the three doctors breached a duty of informed consent is "raw speculation and conjecture, unsupported factually in any form or fashion." Summary judgment was properly granted as to informed consent.

Medical Negligence

¶16 The estate's second claim is that the defendant doctors' failure to order prophylactic antibiotics in connection with the lung biopsy constituted substandard care and caused Weinke's injuries. The trial court excluded as unqualified the testimony of the estate's sole expert. The estate insists this is a jury question. Without an expert who can establish the requisite causal connection between the alleged negligence and the injuries sustained, however, we conclude that here summary judgment is proper. *See* ***Dean Med. Ctr., S.C. v. Frye***, 149 Wis. 2d 727, 734-35, 439 N.W.2d 633 (Ct. App. 1989).

¶17 A claim for medical malpractice requires proof of (1) a breach of (2) a duty owed (3) that results in (4) injury or damages—in short, a negligent act or omission that causes injury. ***Paul v. Skemp***, 2001 WI 42, ¶17, 242 Wis. 2d 507,

[6] Dr. Freeman does not argue, and we do not here decide, whether prescribing or dispensing medication ever constitutes "treatment" within the meaning of WIS. STAT. § 448.30.

625 N.W.2d 860. The plaintiff must prove both negligent conduct and that the negligent conduct was a substantial factor in causing the injury. ***Ollman v. Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 666, 505 N.W.2d 399 (Ct. App. 1993).

¶18 Medical negligence claims must be supported by expert testimony where the issue involves technical, scientific or medical matters beyond jurors' common knowledge or experience such that they could only speculate as to what inference to draw. ***Id.*** at 667. Whether a witness is qualified to render an expert opinion is a matter within the trial court's discretion. ***Enea v. Linn***, 2002 WI App 185, ¶13, 256 Wis. 2d 714, 650 N.W.2d 315. A witness qualifies as an expert "by knowledge, skill, experience, training, or education," WIS. STAT. RULE 907.02, that is, if "he or she has superior knowledge in the area in which the precise question lies." ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶154, 297 Wis. 2d 70, 727 N.W.2d 857 (citation omitted).

¶19 The defendant doctors moved to exclude Dr. Brown's testimony on grounds that a family practitioner who never has performed a lung biopsy or prescribed prophylactic antibiotics in conjunction with that procedure does not qualify as an expert. The estate responded that Dr. Brown was qualified to testify because antibiotic coverage in immunocompromised patients is basic medicine familiar to all doctors. We agree that an expert need not practice in the same specialty as the doctor about whom testimony is rendered. *See* ***Kerkman v. Hintz***, 138 Wis. 2d 131, 149, 406 N.W.2d 156 (Ct. App. 1987), *aff'd in part, rev'd in part on other grounds*, 142 Wis. 2d 404, 418 N.W.2d 795 (1988). Still, the medical witness must be qualified by "knowledge, skill, experience, training, or education" to give the required opinion. ***Id.***; *see also* WIS. STAT. § 907.02. That is what was lacking here.

¶20 Before ruling, the trial court stated that it had reviewed "every motion, every affidavit, every deposition, every attachment, every medical record, every autopsy," doing so "not once, not twice, but … multiple times." Looking at WIS JI-CIVIL 1023, the trial court stated that the standard a jury would have to apply is whether the doctor failed to use the degree of care, skill and judgment "which reasonable specialists, note, not general practitioners, but reasonable specialists," would exercise given the state of medical knowledge at the time of the procedure in question. The court concluded that the level of care called for in a lung biopsy had to be established by an expert in that area.

¶21 The court then examined Dr. Brown's qualifications and deposition testimony, and referenced the autopsy report listing numerous diagnoses vis-à-vis Dr. Brown's sole focus on prophylactic antibiotics as causal to Weinke's demise. The court addressed the relevance and helpfulness of Dr. Brown's testimony under WIS. STAT. §§907.02, 904.01 and 904.03, and the limited gate-keeping function Wisconsin courts play in determining whether to admit relevant scientific evidence. *See* ***State v. Peters***, 192 Wis. 2d 674, 689-90, 534 N.W.2d 867 (Ct. App. 1995). The court exhaustively examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *See* ***Enea***, 256 Wis. 2d 714, ¶13. Excluding Dr. Brown's testimony represents a proper exercise of the court's discretion. *See* ***id.*** [7]

[7] Assuming arguendo that Dr. Brown, a family practitioner, could offer expert opinions on the standard of care expected of Dr. Lent, an internist, summary judgment still was warranted. Dr. Brown established no duty on Dr. Lent's part to prescribe prophylactic antibiotics in connection with a lung biopsy. Indeed, Dr. Brown opined that it is the physician that performs a procedure who decides whether to prescribe them.

¶22 Even if failing to prescribe prophylactic antibiotics does constitute negligence on the part of Dr. Freeman, the estate simply did not causally link that failure to Weinke's death. The hospital records describe a complex, multi-faceted health history. The autopsy enumerates seven main diagnoses, fourteen subdiagnoses, and reports the "most impressive finding" to be "the markedly severe amyloidosis present in the lungs, heart, liver, spleen, kidneys, and in blood vessels throughout the body" which "likely had a large contribution" to Weinke's death. Yet, as the trial court observed, the estate opted to "put all [its] eggs in that prophylactic antibiotic basket."

¶23 The estate emphasizes that summary judgment yields a harsh result here. True, negligence ordinarily is an issue for the fact-finder and not for summary judgment. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶2, 241 Wis. 2d 804, 623 N.W.2d 751. That is because the court must be able to say that no properly instructed, reasonable jury could find on the facts presented that the alleged tortfeasor failed to exercise ordinary care. But the court here did not determine whether or not the defendant doctors exercised ordinary care. Rather, it determined only that, even where a duty existed, the estate could not establish through its proofs that a breach occurred, or if one did, that it was a substantial cause of Weinke's injury. Expert testimony was essential to prove certain elements of the estate's claim. With only one expert offered, and his testimony excluded, a jury would be left to speculate about technical matters outside their general experience. This constitutes an insufficiency of proof. *See* ***Ollman***, 178 Wis. 2d at 667. Evaluating the evidence and the reasonable inferences most favorably to the estate, we conclude that summary judgment is appropriate because the estate has not presented a triable issue, making a trial unnecessary. *See* ***Kasbaum v. Lucia***, 127 Wis. 2d 15, 24, 377 N.W.2d 183 (Ct. App. 1985).

¶24 As a final matter, we observe that the estate includes in its appendix a copy of the order granting summary judgment but not the transcript of the oral ruling containing the court's reasoning, contrary to what the certification represents. This violates WIS. STAT. RULE 809.19(2)(a) and (b) and warrants a monetary sanction against counsel. *See* ***State v. Bons***, 2007 WI App 124, ¶¶21-24, 301 Wis. 2d 227, 731 N.W.2d 367. In view of counsel's health issues as documented in the record and respondents' considerate inclusion of the transcript in their appendices, we deem a reprimand sufficient. We admonish counsel that future false certifications will result in a fine.

By the Court.—Order affirmed.

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