COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2809 **Cir. Ct. No. 2010CV666**

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

JUDITH M. SATORIUS AND GORDON SATORIUS,

PLAINTIFFS-APPELLANTS,

V.

PROASSURANCE WISCONSIN INSURANCE COMPANY, LUTHER HOSPITAL - MAYO HEALTH SYSTEM, MIDELFORT CLINIC, LTD. - MAYO HEALTH SYSTEM AND CECIL L. BERLIE, JR., M.D.,

DEFENDANTS-RESPONDENTS,

GROUP HEALTH COOPERATIVE OF EAU CLAIRE,

SUBROGATED DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Judith and Gordon Satorius appeal an order dismissing their negligence claims against Proassurance Wisconsin Insurance Company, Luther Hospital – Mayo Health System, Midelfort Clinic, Ltd. – Mayo Health System, and Cecil Berlie, Jr., M.D. (collectively, "Luther Hospital"), and a judgment ordering the Satoriuses to pay Proassurance $2,882.29 in statutory taxable costs. The Satoriuses argue the circuit court erred by concluding they were required, but failed, to establish the applicable standard of care through expert testimony. We affirm.

BACKGROUND

¶2 Judith Satorius underwent a routine cataract surgery on her left eye on July 24, 2007. Berlie performed the surgery, which required an incision in Judith's cornea, removal of fragmented cataract pieces, and replacement of the eye lens. Hydration is the process of closing and securing the wound using a sterile fluid. It is performed using a syringe fitted with a cannula, a hollow-tip tube that resembles a needle. During hydration, the cannula separated from the syringe and shot into Judith's eye. Berlie repaired the injury and scheduled several follow-up visits to track Judith's progress.

¶3 The Satoriuses commenced the present action in 2010. Their complaint alleged a single count of negligence "for using the wrong instrument in this procedure." Berlie used what is known as a tension, or slip, syringe during the surgery. His preference is for a Luer-Lok syringe, which has interlocking threads that hold the cannula in place. The tension syringe is not threaded and the cannula is held in place only by friction.

¶4 The court entered a scheduling order requiring the Satoriuses to name experts by January 2011. Six doctors, excluding Berlie, were named as

expert witnesses. However, by late June, Luther Hospital's counsel noted in a filing that none of the Satoriuses' experts had offered any testimony supporting their negligence claim.

¶5 On May 24, 2011, the Satoriuses filed a motion to supplement their expert witness list with Lee Sapetta, Ph.D., a mechanical engineer, who would "offer testimony regarding pressure produced by the syringe and cannula used in the surgery." The motion was granted over Luther Hospital's relevancy objection.[1]

¶6 Later in 2011, Luther Hospital filed a motion for summary judgment. The motion was supported by an affidavit from defense counsel stating that one of the Satoriuses' medical experts had withdrawn as a witness and three others intended to assert their ***Alt*** privilege against providing testimony concerning the standard of care.[2] A fifth medical expert would not respond to the Satoriuses' attempts to contact him, and the sixth explicitly declined to offer standard-of-care opinions at deposition. Thus, Luther Hospital asserted that the Satoriuses had failed to offer necessary expert testimony to establish that Luther Hospital's conduct fell below the standard of care. Luther Hospital submitted an affidavit from its own expert, Stephen Sauer, M.D., who opined that cannula ejection can occur without negligence and that Luther Hospital did not violate the standard of care in any respect.

[1] According to Luther Hospital, there was no need for an engineer to testify regarding the pressures in the syringe because it was undisputed that the pressure was sufficient for the cannula to eject.

[2] *See* ***Burnett v. Alt***, 224 Wis. 2d 72, 86, 589 N.W.2d 21 (1999) (witness has a legal privilege to refuse to provide expert testimony).

¶7 The circuit court granted Luther Hospital's summary judgment motion. It determined that expert medical testimony as to deviation from the applicable standard of care was necessary, but had not been offered by the Satoriuses. The court also rejected the Satoriuses' request for a *res ipsa loquitur* instruction and concluded the lack of testimony concerning the standard of care would require the jury to speculate as to negligence.

DISCUSSION

¶8 We review a grant of summary judgment de novo. *See* ***Emjay Inv. Co. v. Village of Germantown***, 2011 WI 31, ¶24, 333 Wis. 2d 252, 797 N.W.2d 844. We apply the same standards as the circuit court. ***Id.*** Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[3]

¶9 The Satoriuses argue expert testimony is not necessary to establish the standard of care in this case. In their view, determining negligence in this case does not require special knowledge, skill, or experience. They also assert Luther Hospital's negligence is "apparent and undisputed," though we note the latter claim is not literally true as Luther Hospital vigorously disputes the Satoriuses' negligence allegation.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶10 "Unless the situation is one where the common knowledge of laymen affords a basis for finding negligence, expert medical testimony is required to establish the degree of care and skill required of a physician." ***Christianson v. Downs***, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979). Without such testimony, the jury generally has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required. ***Froh v. Milwaukee Med. Clinic, S.C.***, 85 Wis. 2d 308, 317, 270 N.W.2d 83 (Ct. App. 1978).

¶11 Medical cases in which the jury is permitted to find negligence based on its own knowledge are rare. *See* ***Albert v. Waelti***, 133 Wis. 2d 142, 145, 394 N.W.2d 752 (Ct. App. 1986). Generally, no expert testimony is required when a *res ipsa loquitur* instruction is appropriate, which permits the jury to "fill in the blanks" by drawing an inference of negligence from the happening of an event that does not ordinarily occur in the absence of negligence. *See* ***Kasbaum v. Lucia***, 127 Wis. 2d 15, 21 n.3, 377 N.W.2d 183 (Ct. App. 1985); *see also* ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993) (describing *res ipsa* doctrine). "For example, laymen may be able to conclude that there was negligence, without expert testimony, where a sponge or surgical instrument was left in an incision or where the wrong organ or other body part was removed in surgery." ***Christianson***, 90 Wis. 2d at 338-39 (citing ***Francois v. Mokrohisky***, 67 Wis. 2d 196, 204, 226 N.W.2d 470 (1979); ***Burnside v. Evangelical Deaconess Hosp.***, 46 Wis. 2d 519, 523, 175 N.W.2d 230 (1970)).

¶12 We conclude expert testimony was required in this case. In all but the most extreme circumstances, a medical professional's decision to use one medical instrument over another for a surgical procedure is not a lay matter. In choosing such instruments, a medical professional must use "special learning,

study, or experience." *See* ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). The average juror simply does not have the requisite knowledge, unaided by expert testimony, to conclude that the use of one surgical instrument versus another constitutes negligence. Instead, the standard of care must be established by reference to the care given in similar circumstances by medical professionals in the area. *See* ***id.*** at 149-50.

¶13 The Satoriuses cite two cases purportedly holding that expert testimony is not required in a case such as this. Beyond the fact that neither case involves medical malpractice, both actually support our conclusion.

¶14 In ***Olfe v. Gordon***, 93 Wis. 2d 173, 180, 286 N.W.2d 573 (1980), a legal malpractice action, our supreme court iterated that expert testimony is generally required in medical malpractice actions to establish the applicable standard of care and the defendant's departure from it. The exceptions are where the defendant's responsibility is not at issue, the negligence of the defendant is "apparent and undisputed," and "the record discloses obvious and explicit carelessness …." ***Id.*** at 182 (citation omitted). Here, Luther Hospital vigorously contests liability, and the use of a tension syringe does not constitute obvious and explicit carelessness. *See* ***Christianson***, 90 Wis. 2d at 338-39 (citing examples of obvious negligence).

¶15 In ***Racine County v. Oracular Milwaukee, Inc.***, 2009 WI App 58, ¶38, 317 Wis. 2d 790, 767 N.W.2d 280, *aff'd on other grounds*, 2010 WI 25, 323 Wis. 2d 682, 781 N.W.2d 88, we held that no expert testimony was required in a simple breach of contract action. The critical issues were whether Oracular provided competent training and whether the contract was performed in a timely manner, matters that are "simple and obvious to the average juror." ***Id.*** On

review, our supreme court observed that no expert was necessary because the action was one for breach of contract, not negligence. ***Id.***, ¶29. Nonetheless, this court repeated the general rule that expert testimony is generally required in professional negligence actions. ***Id.***, ¶41.

¶16 The Satoriuses have produced no evidence regarding the applicable standard of care, nor have they established that Berlie's use of a tension syringe was a deviation from it. None of the Satoriuses' submissions establish a prevailing professional norm requiring the use of a Luer-Lok syringe. Thus, nothing in the record supports the Satoriuses' claim that Berlie's use of a tension syringe represented actionable negligence.

¶17 To the contrary, the only record evidence establishes that Berlie did not deviate from the applicable standard of care. Luther Hospital submitted an affidavit from Stephen Sauer, M.D., a board-certified ophthalmologist with a specialty in medical and surgical management of eye diseases. Sauer averred that cannula ejection can occur without any negligence on the part of the health care provider:

> 2. I am familiar with the phenomenon of unintended cannula ejection during ophthalmologic procedures. It is a rare but known occurrence which can occur without any health care provider deviating from accepted standards of care or being negligent in any manner.
>
> 3. I am familiar with peer reviewed published literature which compares [Luer-Lok] syringes with tension syringes. Both have been known to fail during procedures. It is not a violation of the standard of care for tension syringes to be used during the hydration of the paracentesis site as apparently occurred during the cataract procedure at issue in this case. While [Luer-Lok] syringes have a lower rate of unintended cannula ejection, tension syringes remain in common use and are considered safe.

Sauer concluded that, as long as Berlie confirmed the syringe was functional, he was not negligent. He also concluded the surgical technician was not negligent, as she had provided Berlie "with a device known within the industry to be safe and which is in wide use."

¶18 The Satoriuses argue that, if expert testimony is required, they have satisfied their burden by submitting an affidavit from Sapetta, the mechanical engineer. Sapetta averred that the "capacity of a cannula to be ejected" is a "mechanical engineering consideration." Sapetta concluded that, based on his testing, the cannula would not have ejected from a Luer-Lok syringe.[4]

¶19 It appears the Satoriuses misapprehend the nature of this case. The uncontradicted evidence does not establish, as they argue, that "this is a mechanical case." This is a negligence action against a doctor and business entities that provide medical services. As such, the Satoriuses must supply some evidence that "'the defendant failed to [provide], not the highest degree of care, but merely the reasonable care and skill usually possessed by physicians of the same school.'" ***Hoven v. Kelble***, 79 Wis. 2d 444, 456, 256 N.W.2d 379 (1977) (quoting ***Francois***, 67 Wis. 2d at 202). At deposition, even Sapetta conceded that a tension syringe is an acceptable device to use for the procedure at issue.

¶20 In essence, the Satoriuses contend they have placed Luther Hospital's negligence at issue by submitting evidence that a Luer-Lok syringe is

[4] Sapetta also averred that, if seated correctly, the cannula would not have ejected from the tension syringe if the syringe was used properly. However, the Satoriuses do not claim Berlie was negligent for failing to properly seat the cannula or operate the tension syringe. The complaint reflects that their only claim is that Berlie used "the wrong instrument in this procedure." When later asked in an interrogatory to identify every act they believed constitutes negligence, the Satoriuses responded only that "[t]he wrong syringe was used in the procedure."

less prone to failure than a tension syringe. To accept this argument would be to remove Luther Hospital's conduct from the negligence realm and elevate it to a form of strict liability.

¶21 Our supreme court rejected a strict theory of liability in the medical services context in ***Hoven***. There, the plaintiff argued that he would be entitled to recovery if he could show "that a hypothetical virtually perfectly informed doctor, working in a perfectly equipped hospital, could have avoided the untoward result, … notwithstanding that the defendant exercised reasonable care in all respects." ***Id.*** at 460. The court determined that adopting this theory of liability "would set the standard of performance for the entire medical profession at the zenith of that profession's achievement, a level at which by definition virtually no one could perform all the time." ***Id.***

¶22 Even if arguably sounding in negligence, the Satoriuses' claim does not pass muster. At the very least, such a claim would require some evidence that the applicable standard of care in the medical community is to use the safest equipment available. The Satoriuses have supplied no evidence that this is the standard. Further, such a claim treads dangerously close to the line drawn in ***Hoven***. Under the plaintiff's rejected theory there, "[t]hat which might possibly have been done would be required, or liability would result, and inevitably, the matter would be judged with the acuity of vision which hindsight provides." ***Id.***

¶23 The Satoriuses next argue that a purported admission Berlie made shortly after the surgery is sufficient to bring their case before a jury. According to Judith, Berlie approached her family in the recovery area and said something like, "I have … made sure that this won't happen again. It was a mistake in the type of cannula that was used." Gordon Satorius recalled Berlie being "very

concerned, very apologetic," though he did not recall Berlie saying precisely what had occurred. The Satoriuses contend these purported admissions create "an inference favorable to the plaintiffs."

¶24 This argument goes hand-in-hand with the suggestion in the Satoriuses' brief that Luther Hospital should be held liable because of Berlie's stated preference for Luer-Lok syringes. At deposition, Berlie stated he used Luer-Lok syringes all the time. Luther Hospital does not contest that Berlie identified Luer-Lok syringes on a "pick sheet" describing his preferred instruments.

¶25 Neither Berlie's purported admission nor his stated preference for Luer-Lok syringes is sufficient to establish a prima facie case of negligence. That a physician prefers one type of instrument does not mean that he or she is negligent for using another. Again, the standard of care must be established by reference to the care given in similar circumstances by medical professionals in the area. ***Cramer***, 45 Wis. 2d at 150. The only evidence of record is that tension syringes are considered safe and are widely used.

¶26 The Satoriuses' final argument is that expert testimony is not required because an alleged failure to adequately train or supervise staff is within the layperson's ken. However, we need not linger on this argument. The Satoriuses have not stated a claim for negligent training or supervision. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987) (first task on summary judgment is to determine whether plaintiffs have stated a claim for relief). The complaint does not include any facts supporting an allegation that Luther Hospital failed to adequately and properly train their respective coworkers or employees. *See* ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 260, 580

N.W.2d 233 (1998). In an interrogatory in which they were asked to identify the factual basis for their negligence claim, the Satoriuses responded only that "[t]he wrong syringe was used in the procedure."

By the Court.—Judgment and order affirmed.

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