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DISTRICT IV

January 24, 2025

To:

Hon. Paul S. Curran
Circuit Court Judge
Electronic Notice

Anthony Russomanno
Electronic Notice

Alecia Pellegrini-Kast
Clerk of Circuit Court
Juneau County Justice Center
Electronic Notice

JaTavious Webster 617038
New Lisbon Correctional Inst.
P.O. Box 2000
New Lisbon, WI 53950-2000

You are hereby notified that the Court has entered the following opinion and order:

2023AP1520

JaTavious Webster v. Christopher Rauch (L.C. # 2022CV68)

Before Kloppenburg, P.J., Blanchard, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

JaTavious Webster, pro se, appeals a circuit court order granting summary judgment to Christopher Rauch in Webster's dental malpractice lawsuit against Rauch. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).¹ We affirm because Webster does not establish that he proffered any admissible expert opinion relating to the standard of care, as was required to avoid summary judgment in Rauch's favor.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In his suit against Rauch, Webster alleged that he suffered an injury as a result of Rauch's negligence during a dental procedure. More specifically, Webster alleged that he suffered an injury to his "left lingual nerve" as a result of Rauch's negligence in administering a numbing agent before Webster received three fillings in his teeth. It is undisputed that the numbing procedure Rauch used was an "inferior alveolar nerve block" or "IAN block."

Rauch moved for summary judgment on the ground that Webster failed to identify any expert witness who could testify to the standard of care or provide an opinion that Rauch failed to meet that standard. Additionally, Rauch offered an expert opinion from another dentist in support of Rauch's use of the IAN block. The circuit court granted Rauch's motion for summary judgment and dismissed Webster's action.

We review a grant of summary judgment de novo, applying the same standards as the circuit court. *Schauer v. Baker*, 2004 WI App 41, ¶4, 270 Wis. 2d 714, 678 N.W.2d 258. Summary judgment is appropriate when "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. § 802.08(2).

To prevail in a medical malpractice action, "the plaintiff must establish the standard of care, show that the defendant failed to conform to the standard of care, and prove that the defendant's failure to conform to the standard of care caused the plaintiff's injury."² *Carney-*

² There is no dispute that the relevant legal standards for medical malpractice apply to Webster's action for dental malpractice.

Hayes v. Northwest Wis. Home Care, Inc., 2005 WI 118, ¶37, 284 Wis. 2d 56, 699 N.W.2d 524. Expert testimony relating to the standard of care is required, except when a layperson’s common knowledge would be sufficient to determine negligence. *Christianson v. Downs*, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979). For instance, expert testimony may be unnecessary to determine negligence “where a sponge or surgical instrument was left in an incision or where the wrong organ or other body part was removed in surgery.” *Id.* at 339.

Given this general requirement for expert testimony, the plaintiff in a medical malpractice action must, as a general rule, proffer an expert opinion to avoid summary judgment in favor of the defendant. See *Kasbaum v. Lucia*, 127 Wis. 2d 15, 18-20, 22-23, 377 N.W.2d 183 (Ct. App. 1985) (concluding that summary judgment in favor of defendants was appropriate when the plaintiff offered no expert testimony); see also *Kinnick v. Schierl, Inc.*, 197 Wis. 2d 855, 862, 541 N.W.2d 803 (Ct. App. 1995) (“Because appellants lack the necessary expert testimony, we conclude that no factual issues remain to be tried, and [the respondent] is entitled to summary judgment”).

Here, the use of IAN blocks in dental procedures is not a matter within a layperson’s common knowledge, and therefore, the general requirement for expert opinion applies. Webster contends that he submitted three forms of evidence that satisfy this requirement: (1) a journal article addressing the use of IAN blocks; (2) a written statement from an individual with knowledge of dental procedures who worked for dental practices; and (3) Rauch’s responses to requests for admissions.

Rauch contends that none of this proffered evidence satisfies the requirement for an expert opinion addressing the relevant standard of care. We agree with Rauch.

As to the journal article addressing IAN blocks, Webster argues that the article is admissible under the hearsay exception for learned treatises set forth in WIS. STAT. § 908.03(18). However, Webster does not show that he satisfied the requirements for this hearsay exception. The exception applies only if “the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement ... is recognized in the writer’s profession or calling as an expert in the subject.” Sec. 908.03(18). Here, Webster argues that the circuit court should have taken judicial notice of the article, but he does not point to any basis on which the court could have found that the article’s author “is recognized in the writer’s profession or calling as an expert in the subject.” *See* § 908.03(18). Moreover, Webster provides no legal support for his contention that a learned treatise may generally take the place of required expert testimony, or that its use was appropriate here.

As to the statement of the witness who worked for dental practices, Webster does not establish that the witness is qualified to offer expert opinions on the relevant standard of care. According to her statement, the witness was employed by two dental practices, earned \$13 per hour, and had “personal awareness and knowledge of” tooth anatomy and dental procedures, including IAN blocks. Although the statement may show that the witness has some specialized knowledge beyond the knowledge of the average layperson, it does not establish that she has the education, training, or experience to offer opinions on the standard of care for IAN blocks.³

³ Although the witness’s job title is not expressly identified in her statement, Webster asserts that her statement shows that she has worked as a dental assistant. Even if we accept this assertion as true, Webster has not demonstrated that the witness is qualified to provide expert testimony addressing the standard of care for IAN blocks.

As to Rauch's responses to requests for admissions, Webster does not show that the admissions address the standard of care or Rauch's alleged failure to meet that standard. Webster relies on two admissions. The first admission is that Rauch was not certified by a state board to administer anesthetics. However, Webster provides no basis to conclude that certification beyond a dental license was required. As Rauch points out, the relevant statutes require dental hygienists to obtain a certification to administer local anesthesia, and the statutes do not contain a similar requirement for dentists. *Compare* WIS. STAT. § 447.04(1) *with* WIS. STAT. §§ 447.04(2)(c)1. and 447.06(2)(e)2. Rauch's second admission was that he used up to two cartridges of numbing agent. However, nothing in this admission addresses what amount of numbing agent, used in this context, would be inconsistent with the standard of care.

In sum, because Webster failed to proffer any admissible expert opinion relating to the standard of care, the circuit court properly granted summary judgment to Rauch.⁴

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

⁴ To the extent that Webster may be raising other arguments that we have not expressly addressed, we reject them as plainly lacking in merit or insufficiently developed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (discussing the requirements for developed legal arguments). Although we make some allowances for deficiencies in a pro se litigant's briefing, "[o]ur obligation does not extend to creating an issue and making an argument for the litigant." *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998). "We cannot serve as both advocate and judge." *Id.*

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals