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SUPREME COURT OF WISCONSIN
Appeal No. 2020AP876

Kelly Brellenthin and Joseph Brellenthin,

Plaintiffs-Appellants,

v.

Dr. Gregory Goblirsch,
Western Wisconsin Medical Associates, S.C.,
d/b/a Vibrant Health Family Clinics,
Allina Health Services, and
MMIC Group,

Defendants-Respondents,

and

BlueCross BlueShield of Minnesota,

Subrogated Party.

PETITION FOR REVIEW

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INTRODUCTION

Kelly Brellenthin and Joseph Brellenthin, Plaintiffs-Appellants, hereby petition the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. §808.10 and Wis. Stat. §809.62 to review the decision of the Court of Appeals, District III, filed on May 25, 2021, in Kelly Brellenthin and Joseph Brellenthin, Plaintiffs-Appellants, v. Dr. Gregory Goblirsch, Western Wisconsin Medical Associates, S.C., d/b/a Vibrant Health Family Clinics, Allina Health Services, and MMIC Group, Defendants-Respondents, and BlueCross BlueShield of Minnesota, Subrogated Party, Appeal No. 2020AP876.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue presented for review is:

When expert testimony is typically required to establish the nature of an injury (a "physical injurious change") and its causal relationship to Defendants' conduct and where a *prima facie* case for summary judgment must be made based upon "evidentiary facts *admissible in evidence* or other proof," did the Circuit Court and the Court of Appeals err, as a matter of law, in holding that Defendants' submission of medical records alone satisfied the establishment of the predicate to summary judgment?

The Circuit Court decided the issue as follows: No.

The Court of Appeals decided the issue as follows: No.

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

Petitioner relies upon Wis. Stat. §809.62 (1) (r) (c) (3).

At issue is the standard necessary to make a *prima facie* case for summary judgment when elements of the showing require expert testimony. The Court should grant review because the issue presented requires uniform clarification of the necessary elements of *prima facie* showing for summary judgment.

STATEMENT OF THE CASE

I. Nature of the Case.

Kelly Brellenthin and her husband, Joseph Brellenthin, commenced a medical malpractice action against Defendants on November 2, 2018. The Brellenthins alleged that the Defendants were negligent in the prescription of high doses of corticosteroids and that this negligence caused Plaintiff Kelly Brellenthin to suffer avascular necrosis (AVN) of her hips bilaterally and vestibular dysfunction resulting in migraine headaches. Joseph Brellenthin asserted a claim for loss of consortium.

Defendants answered asserting, *inter alia*, that the Brellenthins' claims were time barred by Wis. Stat. §893.55 (1) (m) (a) on the grounds that their cause of action accrued more than three years prior to November 2, 2018.

II. Procedural Status.

Defendants moved for summary judgment on the ground that the action was barred by the statute of limitations and submitted initial and reply briefs with affidavits and medical records in support of their motions. Plaintiffs submitted a brief in opposition to the motion with an affidavit and medical records contending, *inter alia*, that the motion should be denied because, in the absence of a proffer of

any expert testimony, Defendants failed to meet their burden, to establish ***through admissible evidence*** that an injury (physical injurious change) had occurred at a particular point in time and that it was caused by the alleged negligence of the Defendants.

The Circuit Court, the Honorable Thomas W. Clark, heard oral argument at the Pierce County Courthouse on February 13, 2020. See transcript of arguments (P. App-27-62). Judge Clark rendered an oral ruling on March 18, 2020, granting Defendants' Motion for Summary Judgment and filed an Order for Dismissal on March 19, 2020. (P. App-64-77).

On April 7, 2020, Judge Clark signed and filed the Findings of Fact, Conclusions of Law, and Order for Dismissal. (P. App-15-26).

On May 7, 2020, Plaintiffs-Petitioners timely filed their Notice of Appeal from the Circuit Court's Order for Dismissal.

The Court of Appeals filed its decision affirming the grant of summary judgment on May 25, 2021. (P. App-1-13).

Plaintiffs-Petitioners now seek review of this Court for the reasons set forth in their statement of criteria for review, *supra*.

The detailed factual background of the case are set out by the Court of Appeals at ¶¶ 2-13 (pp. 2-6). The Court of Appeals made reference to the medical records offered by Defendants as establishing the sufficiency of the evidence of the nature of the physical injurious changes, their relationship to the administration of the corticosteroids, and the dates upon which such changes occurred.

In summary, the Court of Appeals concluded that the various diagnoses, the causes therefore, and the dates of occurrence contained within the medical records, constituted sufficient admissible evidence to make a *prima facie* case for summary judgment.

ARGUMENT

I. The Supreme Court should grant review in order to establish a uniform rule clarifying the quantum of proof necessary to make a *prima facie* case for summary judgment.

Plaintiffs-Petitioners contend that, under Wis. Stat. §809.62 (1) (r) (c) (3), a decision by the Supreme Court will help clarify the issue of the sufficiency of evidence in order to make out a *prima facie* case for summary judgment.

The Brellenthins argue that, in matters of medical causation, expert testimony is required. The Court of Appeals observed that the Brellenthins' objection to the medical records on the grounds of "hearsay" was misplaced as, pursuant to statute, medical records are admissible as an exception to the hearsay rule citing Wis. Stat. §968.03 (6) (m). (Court of Appeals Opinion, ¶ 22, Fn. 3; P. App. 10). The Brellenthins' objection was not to the medical records, *per se*, but the causal opinions contained therein. Admissibility of medical records as an exception to the hearsay rule does not address the issue of whether the expression of opinions in these records constitute sufficient admissible evidence.

The Brellenthins have contended throughout this proceeding that, in the three step methodology utilized in analyzing motions for summary judgment,[1] the first step, that is the statement of a *prima facie* case, must be established through evidentiary facts, admissible in evidence. The opinions contained in the records required the testimony of a qualified expert in order to be admissible.

The Court of Appeals observed that the Brellenthins conflated the need for expert testimony at trial with the need for expert testimony on summary judgment "...where Goblirsch was only required to establish a *prima facie* case." (Court of Appeals Opinion, ¶ 22; P. App. 10). The Court of Appeals noted that Goblirsch was not required to submit the same proof that he would have been required at trial, but only to make a *prima facie* case. Respectfully, the Brellenthins disagree.

The Brellenthins contend that, because "evidentiary facts" must be "admissible in evidence," the same standard of whether such evidence is admissible applies at every stage of the proceeding. While the making of a *prima facie* case requires a lesser quantum of proof overall than at trial, it does not eliminate the need for its predicate elements to comply with evidentiary rules of admissibility. The mere statement of a fact in a written record does not mean that it would be admissible in evidence simply because the record, or portions of it, would be admissible for other reasons.

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[1] *Tews v. NHI, LLC*, 2010 WI 137, ¶ 4, 330 Wis.2d 389, 793 N.W.2d 680; *Estate of Generich v. OHIC, Inc. Co.*, 2009 WI 67, ¶ 10, 318 Wis.2d 553, 769 N.W.2d 481.

The issue of whether the opinions contained in the medical records were admissible in evidence was raised throughout the entire proceeding from the argument of the motion below through the briefs to the Court of Appeals.

DISCUSSION

I. Standard of Review.

The standard on review of an appeal from a grant of summary judgment pursuant to Wis. Stat. §802.08 is whether the Circuit Court correctly applied the methodology established by the Wisconsin Supreme Court for all Courts, Circuit and Appellate.

II. Requirement of Expert Testimony.

The methodology is set forth as follows:

> If the pleadings demonstrate the existence of a valid claim and the existence of factual issues, the Court examines the moving party's affidavit and other proof for *admissible evidence* to determine whether that party has made a *prima facie* case for summary judgment. If the moving party is the Defendant, he or she must establish a defense that would defeat the Plaintiff's claim. If the moving party has made a *prima facie* case for summary judgment, the Court must analyze the opposing party's evidentiary submissions to determine whether a genuine issue exists as to any material fact or whether reasonable conflicting inferences may be drawn from the undisputed facts thereby necessitating a trial. (Emphasis added).

Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin*, Appendix C, p. C-21 (8th Ed. 2020).

Causation, in particular, in a medical negligence case requires expert testimony because it entails specialized knowledge. *Cramer v. Theda Clark Memorial Hospital*, 45 Wis.2d 147, 150, 172 N.W.2d 427, 428-429 (1969).

Whether expert testimony is necessary in a given situation is a question of law which Appellate Courts decide independently. *Racine County v. Oracular Milwaukee, Inc.*, 210 WI 25, ¶ 24, 323 Wis.2d 682, 781 N.W.2d 88.

The requirement that a *prima facie* case be made by evidentiary facts admissible in evidence is crucial.

The discussion of facts by the Court of Appeals identifies various conditions described in the medical records from which Ms. Brellenthin suffered (*i.e.*, Cushing's Syndrome) which was caused, according to the medical records, by the prescription of the corticosteroids. Some of these conditions are normal side effects of the medication and the records do not make a distinction of which symptoms would result from the drug, as opposed to those due to a medical misadventure. Plaintiffs made no claim for Cushing's Syndrome or several others that are recounted in the statement of facts.

The determinative issue in this case is when the "physical injurious change" due to the Defendants' alleged negligence occurred. This requires expert testimony to establish the nature of that change and specifically when (as to the claims made against the Defendants) it occurred.

In *Preloznik v. City of Madison, supra*, the Court of Appeals stated that, in the methodology to determine the sufficiency of a *prima* facie showing for summary judgment if the complaint states a claim (which it did

in this case) and the pleadings showed the existence of factual issues (which is also true in this case): "...the court examines the moving party's affidavit for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case." *Preloznik*, 113 Wis.2d at 116, 334 N.W.2d at 583.

The Court of Appeals also observed that Kelly Brellenthin underwent a vestibular evaluation at the Mayo Clinic "following an adverse response to steroid treatments initiated in April of 2015." (Court of Appeals Opinion, ¶ 11; P. App. 5). This is not a statement that Kelly Brellenthin's headaches (for which she made a claim) were caused by the conduct of the Defendants at that time.

In fact, a full reading of the findings on the vestibular examination in the medical record reveals that, after a complete detailed work up, all of the findings for vestibular function were normal and the patient was diagnosed with subjective complaints of dizziness, not headaches as a result of the corticosteroids. (R. 18, pp. 61-64). There wasn't an objective finding of vestibular dysfunction, let alone a connection to the migraine headaches at that time.

The Circuit Court and the Court of Appeals relied in good faith on the statements in the medical records, but without a proper foundation and the opportunity to cross-examine, the statements were accepted as admissible evidence.

CONCLUSION

The Brellenthins' petition this Court to clarify the standard for summary judgment and whether the requirement for "admissible evidence" applies in the methodology in such cases. Where "facts" need to be established by expert testimony and there is no such testimony, they do not constitute admissible evidence sufficient to meet the *prima facie* case test.

Respectfully submitted,

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Dated: June 24, 2021. By: _____

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CERTIFICATION

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stat. §809.19 (8) (b) and §809.62 (4) (a) for a petition produced using a proportional serif font. The length of this petition is 2,210 words.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §809.19 (12) (f)

I hereby certify that I have submitted an electronic copy of this Petition for Review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19 (12) (f).

I further certify that this electronic Petition for Review is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Petition for Review filed with the Court and served on all opposing parties.

Respectfully submitted,

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Dated: June 24, 2021. By: _____

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