

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2660

Cir. Ct. No. 2005CV3443

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BARBARA E. CONNOLLY,

PLAINTIFF-APPELLANT,

V.

**JOSEPH S. FOK, M.D., ALEX Y. WEI, M.D., UW HOSPITAL &
CLINICS & AUTHORITY AND INJURED PATIENTS & FAMILIES
COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Barbara Connolly appeals a summary judgment order that dismissed her action for medical malpractice, lack of informed consent,

and related claims against Dr. Joseph Fok, Dr. Alex Wei, UW Hospital & Clinics & Authority, and the Injured Patients & Families Compensation Fund. We affirm for the reasons discussed below.

BACKGROUND

¶2 According to Connolly's affidavit, Connolly's primary care physician referred her to Dr. Fok, an ob/gyn specialist, after discovering a non-symptomatic 2 cm cyst in her left ovary. Dr. Fok told Connolly at her first visit that he would need to remove her left ovary to check for ovarian cancer and remove her right ovary to prevent future problems.¹ Connolly expressed reluctance to have her right ovary removed since there was nothing wrong with it. Dr. Fok responded that ovaries in menopausal women are useless. Connolly then specifically asked whether ovaries produce any hormones, and Dr. Fok answered "no," which persuaded her to agree to the surgery. Contrary to notations made in her file, Connolly contends that Dr. Fok did not discuss the alternatives to surgery with Connolly and did not inform her that she would need to be on hormone replacement therapy for the rest of her life.

¶3 Dr. Fok informed Connolly that he would perform the surgery, called a bilateral salpingo-oophorectomy. However, resident Dr. Wei actually performed the surgery under Dr. Fok's supervision. The consent form Connolly signed stated that the surgery would be performed by "Dr. Fok, his/her associates, designees or others deemed appropriate," but did not mention Dr. Wei by name.

¹ The respondents set forth a very different version of events, but we accept Connolly's version for the purposes of summary judgment analysis. See *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

Connelly claims that Dr. Fok had falsified her medical records, recording symptoms that she did not in fact have or report, in order to provide a practice opportunity for Dr. Wei. She also maintains that Dr. Wei himself never discussed the risks or alternatives to surgery with her.

¶4 Connelly claimed the removal of her ovaries violated the standard of care and she averred in her affidavit that she became “seriously ill” as a result of the surgery and/or the subsequent hormone therapy. She described her list of complaints in an answer to an interrogatory as follows:

Pain (almost constant) at right side of my umbilicus, uterine pain, nausea, especially with exertion, sides hurt, weakness, dizziness, feel as if I cannot catch my breath and get short of breath often, legs are cold, stomach is hard and protruding, buttocks are cold and have decreased sensation, thighs hurt, taste, smell is impaired, can't feel skin well, nose and earlobes have no elasticity in them, unable to tolerate heat/cold, when I lay down, my body falls to the side it is laying on, head, arms and legs feel heavy, pain in right knee, and other bone/joint pain, joints feel loose as if they are sliding in the sockets, my body looks very old. I fall easily, walk unsteadily, bump into doorways often. With Hormone Replacement Therapy, I have pain at the left side of my head—this pain first occurred on the Saturday after the surgery, when I experienced tremendous pain and had a seizure at that same time.

Connelly also provided excerpts from textbooks and other medical literature to support an assertion that postmenopausal ovaries still produce hormones, and that the general standard of care would be to observe ovarian cysts of less than five centimeters, rather than to surgically remove the ovaries. Connelly did not, however, provide any expert opinion linking the symptoms she claimed to be suffering after the surgery to taking hormone therapy or to the surgery itself. The trial court dismissed Connelly's claims on summary judgment based on this lack of expert opinion.

STANDARD OF REVIEW

¶5 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). A party is entitled to summary judgment if there are no genuine issues of material facts and that party is entitled to judgment as a matter of law. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751.

DISCUSSION

¶6 As a threshold matter, we note that Connelly's arguments on appeal are not organized according to the elements of her separate causes of action, and that many of her arguments are not sufficiently developed. In addition, most if not all of the points Connelly attempts to make on her lack of informed consent claims seem to be based upon an outdated theory that surgery performed without informed consent constitutes an assault and battery. Although that used to be the prevailing common law model of liability for unauthorized medical treatments, and may still be used in some states, the Wisconsin Supreme Court explicitly held some years ago that Wisconsin would follow the negligence model of informed consent rather than the assault and battery model. *Trogun v. Fruchtman*, 58 Wis. 2d 569, 596-600, 207 N.W.2d 297 (1973). The modern doctrine has been codified under WIS. STAT. § 448.30 (2005-06),² which sets forth in general terms what type of information a doctor should provide to a patient.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 Accordingly, under current Wisconsin law, an informed consent claim is now treated as a subset of medical malpractice actions under negligence theory, the elements of which are:

(1) the patient was not informed of the risks in the proposed treatment or procedure of which a reasonable person in the patient's position would wish to be made aware; (2) a reasonable person in the patient's position presented with such information would not have chosen to submit to the treatment or procedure; and (3) the failure to disclose such information was a cause of the patient's injuries.

Hannemann v. Boyson, 2005 WI 94, ¶50, 282 Wis. 2d 664, 698 N.W.2d 714. Therefore, to the extent that Connolly advances arguments that rely on an assault and battery model of liability or otherwise fail to make coherent claims under current law, we reject those arguments without a point-by-point analysis. *See generally State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments which are undeveloped or unsupported by references to relevant legal authority). Instead, we will limit our discussion to identifiable claims that could be reasonably construed to arise out of Connolly's complaint and summary judgment materials.

¶8 Connolly's complaint could reasonably assert claims that: (1) Dr. Wei failed to obtain her informed consent for the surgery because he was the treating physician and he did not *personally* inform her of any risks or alternatives to the surgery; (2) Dr. Fok failed to obtain her informed consent to the surgery because he did not tell her that: (a) waiting to see if the cyst resolved on its own would be a reasonable alternative to surgery; (b) postmenopausal ovaries still produce hormones and removal of both ovaries would require hormone replacement therapy; and (c) Dr. Wei would actually be performing the surgery; (3) regardless of what they told her, both doctors committed medical malpractice

by performing a medically unjustified procedure on her healthy ovary; (4) Dr. Fok falsified her medical records to justify the surgery; and (5) the Hospital was negligent in its supervision of both doctors.

¶9 With regard to the first claim, Connolly does not cite any authority for the proposition that, where there is more than one treating physician involved in a surgery, each one must obtain separate informed consent for the procedure, and we are aware of none. To the contrary, we see no reason why each member of a surgical team should be required to provide duplicate information to the patient. We are satisfied that the informed consent doctrine has been fulfilled if the patient has been provided all of the relevant information by at least one of the treating physicians. Therefore, we conclude that Connolly's submissions are not sufficient to establish a separate claim against Dr. Wei based on the fact that he did not personally speak to her before the surgery. Rather, any informed consent claim against Dr. Wei, as one of the treating physicians, is dependent upon the sufficiency of the information which Dr. Fok provided to Connolly.

¶10 We turn, then, to consideration of the information that Connolly alleges Dr. Fok failed to give her. We agree with Connolly that it is for a jury to decide what risks or alternatives a reasonable person would expect to be informed about, and that no expert opinion is required to establish the materiality of a particular risk or alternative to a patient's decision to undergo treatment. *Trogun*, 58 Wis. 2d at 604. That does not mean, however, that expert opinion may not be required to establish what the known risks or alternative to a particular procedure are in the first instance. *Id.* at 603 (citing *Wilkinson v. Vesey*, 295 A.2d 676, 688 (R.I. 1972)). Whether expert opinion is required on a certain question is a question of law. *See, e.g., Kinnick v. Schierl*, 197 Wis. 2d 855, 862, 541 N.W.2d 803 (Ct. App. 1995). We agree with the trial court that expert

opinion would be required to establish the validity of Connolly's assertions that ovarian cysts may sometimes resolve themselves without treatment and that the removal of ovaries necessitates hormone replacement therapy. Therefore, such expert testimony would be necessary before the jury could consider whether a reasonable person would expect to be given that information.

¶11 We are not persuaded that an expert opinion is required before a jury can evaluate whether a reasonable person would expect to be told which doctor would be performing the surgery. However, we conclude that an expert opinion is required on the question whether having the surgery performed by a different doctor than Connolly expected was what caused the injuries that she claimed resulted from the surgery. That is, notwithstanding her complaints about the resident's lack of experience, Connolly has not alleged that Dr. Wei performed the surgery any differently than any other doctor would have done. Since Connolly did not offer any such expert opinion in her summary judgment materials, the trial court properly dismissed all of her informed consent claims.

¶12 Substantially the same analysis applies to Connolly's claims that both doctors committed medical malpractice by performing a medically unnecessary procedure on her. Unlike informed consent cases, expert opinion is always needed to establish the standard of care in typical medical malpractice cases. *Carney-Hayes v. Northwest Wis. Home Care, Inc.*, 2005 WI 118, ¶37, 284 Wis. 2d 56, 699 N.W.2d 524. Likewise, we agree with the trial court that expert opinion is required to show causation between the surgery and the list of injuries Connolly claimed to have suffered as a result. We further agree that Connolly lacked a sufficient foundation to admit medical texts regarding the risks of surgery without expert testimony to explain which information actually applied to her. We

therefore conclude the trial court properly dismissed Connolly's medical malpractice claims against both doctors.

¶13 Next, we conclude that Connolly has failed to sufficiently develop an argument that she has a separate claim based on her assertion that Dr. Fok falsified her medical records. She avers that the records do not accurately reflect what she told Dr. Fok and what he told her. However, she does not state that her decision to go forward with the surgery was based on anything that the doctor placed in her file. Her exchanges with Dr. Fok might have been relevant to her informed consent claims, but we have already concluded that these claims were properly dismissed because of the lack of expert testimony.

¶14 Finally, because Connolly's summary judgment materials are insufficient to establish medical malpractice and lack of informed consent claims against the doctors, her additional claim that the Hospital negligently supervised the doctors also fails.

By the Court.—Order affirmed.

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

