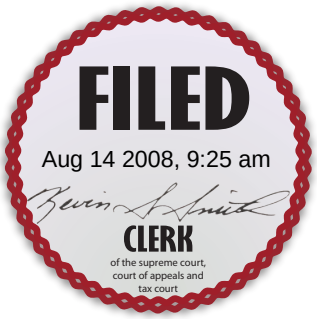

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IN THE
COURT OF APPEALS OF INDIANA

LORI CALDWELL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A05-0712-CV-744
	)	
ADOLPHUS A. ANEKWE, M.D.,	)	
BENJAMIN ANIGBO, M.D., and	)	
BROADWAY MEDICAL	)	
CORPORATION, P.C.,	)	
	)	
Appellees.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias-Schneider, Judge
Cause No. 45D01-0212-CT-297

August 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Lori Caldwell appeals the trial court's entry of summary judgment in favor of Adolphus A. Anekwe, M.D., Benjamin Anigbo, M.D., and Broadway Medical Corporation, P.C. (collectively, the "Defendants").

We affirm.

ISSUE

Whether the trial court erred in granting summary judgment to the Defendants.

FACTS

In June of 2000, Caldwell sustained a laceration to her lower-left leg. Her wound became infected and later led to an infection of the bone. From July of 2000 through August of 2000, she sought treatment from the Defendants. The Defendants admitted her to the hospital and prescribed the antibiotics Gentamicin and Vancomycin, to be administered intravenously. The hospital discharged Caldwell on July 24, 2000, and she continued treatment with Gentamicin and Vancomycin, provided at home through a home health-care facility.

In late August of 2000, Caldwell started suffering from dizziness. Subsequently, she was diagnosed with ototoxicity, which is damage to the "organs or nerves involved in hearing or balance[.]" Merriam-Webster Medical Dictionary at http://www.intelihealth.com (July 22, 2008).

On December 16, 2002, Caldwell initiated a medical malpractice action against the Defendants by filing a proposed complaint with the Indiana Department of Insurance. Upon review of the evidence, the medical review panel unanimously determined that the

evidence did not support the conclusion that the Defendants failed to meet the appropriate standard of care.

Subsequently, Caldwell filed her complaint with the Lake Superior Court on August 12, 2005. She alleged that "the medical care and/or treatment rendered by Defendants failed to comply with the applicable standards of care" and that as "a proximate result of Defendants' negligence, [Caldwell] sustained damages and will continue to sustain damages that include, without limitation: temporary and permanent physical injuries, including drug-induced inner ear damage; physical pain and suffering; mental pain and anguish; pecuniary loss[;] . . . and loss of enjoyment of life." (App. 32). Caldwell's husband, John Bailey, asserted a claim for loss of consortium.

On December 2, 2005, the Defendants filed a motion for summary judgment. The Defendants asserted that there was no genuine issue of material fact as Caldwell "failed to identify any expert witness to establish that the [D]efendants deviated from the standard of care." (App. 34).

On March 3, 2006, Caldwell filed a motion in opposition to the Defendants' motion for summary judgment. She designated as evidence the affidavit of Dr. Barry Gustin, who opined that the treatment provided to her by the Defendants fell below the applicable standards of care in prescribing to Caldwell "IV Gentamicin plus Vancomycin for thirty-five (35) days . . . despite the fact that other, equally effective antibiotic treatments—without a risk of ototoxicity—were also available." (App. 42). Dr. Gustin further opined that "similarly situated physicians exercising reasonable care and skill and acting under the same or similar circumstances would have informed a patient like Lori

Caldwell of the risks of IV Gentamicin plus Vancomycin treatment and the available alternatives." *Id.* In light of Dr. Gustin's affidavit, the Defendants withdrew their motion for summary judgment as "[t]he affidavit of Dr. Gustin ma[de] moot the issue presented by the [D]efendants[']' summary judgment motion." (App. 44).

Subsequently, the Defendants sought to take Dr. Gustin's deposition. Caldwell, however, informed the Defendants that she "d[id] not intend to call Dr. Gustin to testify regarding the standard of care." (App. 57). According to Caldwell, she intended to call the members of the medical review panel as well as an "independent expert witness physician . . . not yet retained . . . ." (App. 57). She agreed to disclose the name of her expert witness "no later than March 30, 2006." (App. 57).

Caldwell scheduled a deposition of Dr. David Dollens, one of the medical review panel members, for January 17, 2007. She, however, cancelled that deposition. She also cancelled a second deposition—scheduled for January 31, 2007—of Dr. Dollens. Rather, she took a tape-recorded statement from Dr. Dollens on January 30, 2007.

On February 21, 2007, the Defendants filed a renewed motion for summary judgment and memorandum of law in support thereof. The Defendants asserted that they were entitled to judgment as Caldwell had "persistently failed to identify any expert witness to establish that the [D]efendants deviated from the standard of care." (App. 15).

Caldwell filed her opposition to the Defendants' renewed motion for summary judgment on or about April 30, 2007. She asserted that "a genuine issue of material fact exists as to the standard of care, specifically the issue of informed consent, with regard to the Defendants' treatment" of Caldwell. (App. 77). She designated as evidence the

transcript of Dr. Dollens' tape-recorded statement, which reads, in pertinent part, as follows:

> [Q] . . . And I understand that you are of the opinion that prescribing [Vancomycin and Gentamicin] w[as] within the standard of care.
>
> [A] Correct.
>
> * * *
>
> [A] That is my opinion that Vancomycin and Gentamicin was within the standard of care.
>
> * * *
>
> [Q] With a patient like Lori Caldwell presenting as she did at that time, does a physician have a duty to inform a patient like that of the risks of ototoxicity associated with a combination of Vancomycin and Gentamicin?
>
> [A] . . . I think that a physician has a duty to inform patients of major toxicities and common toxicities and I would say yes, I would . . . have told her of the potential toxicity, yes.
>
> [Q] Did the panel form an opinion . . . as to whether the Vancomycin and Gentamicin caused the ototoxicity that [Caldwell] developed ultimately?
>
> [A] I don't believe we formed that opinion.

(App. 115-16). Dr. Dollens signed the transcript, affirming under the penalties of perjury that the representations contained therein were true.

Caldwell also designated her affidavit as evidence. She averred that "with regard to the Defendants' course of treatment of IV Gentamicin plus Vancomycin, [she] was never warned by [the] Defendants in any way of the risks of ototoxicity accompanying such treatment" and "[t]hat had [she] been told of the risks involved and the equally

effective alternative treatments available, [she] would not have submitted to the IV Gentamicin plus Vancomycin treatment." (App. 122-23).

The Defendants filed their reply in support of their renewed motion for summary judgment and an amended designation of evidence on August 7, 2007. The Defendants designated as evidence a "Product Education Form" for Gentamicin, which was provided to Caldwell by a registered nurse, and which Caldwell signed on July 24, 2000. The Product Education Form provided, in part, as follows:

> POSSIBLE SIDE EFFECTS
> CHECK WITH YOUR DOCTOR AS SOON AS POSSIBLE if you experience . . . dizziness or lightheadedness . . . .

(App. 150). The Defendants also designated as evidence an information sheet for Vancomycin, which also was provided to Caldwell by a registered nurse, and which Caldwell also signed on July 24, 2000. This sheet provided, in part, as follows:

> SIDE EFFECTS:
> This medication may cause . . . dizziness. . . . Symptoms of an allergic reaction include . . . dizziness.

(App. 152).

The Defendants designated as evidence two forms, titled "Patient Skills Checklist for the Pharmacy Only Patient," which Caldwell signed on July 24, 2000, indicating that she understood the potential side effects of her therapy with Gentamicin and Vancomycin. (App. 154; 156). These forms also indicated that Caldwell understood the purpose of being treated with Gentamicin and Vancomycin.

The Defendants also designated as evidence the deposition of Caldwell, taken June 25, 2007. She testified that she remembered signing the "Product Education Form" for

Gentamicin and "probably" read the document. (App. 212). Regarding the information sheet for Vancomycin, she testified that she did "[n]ot really" remember signing it but was "sure [she] looked at it" prior to signing it. (App. 212).

Additionally, the Defendants designated as evidence Dr. Dollens' deposition, taken on July 18, 2007. During that deposition, Dr. Dollens testified as follows:

> Q. . . .[C]ould you please identify this document?
>
> * * *
>
> A. Yes. That is a copy of the opinion I rendered. It says, "The Opinion of the Panel is that the evidence submitted does not support the conclusions that the [Defendants] failed to meet the appropriate standard of care as charged in the complaint." And yes, that's what I signed and what I stand by.
>
> * * *
>
> Q. Does that opinion include that the [D]efendants complied with the standard of care in the prescription of [Gentamicin and Vancomycin]? Does that include that they complied with the standard of care in prescribing those medications?
>
> A. Yes.
>
> Q. Does it also include that the [D]efendants complied with the standard of care as to informed consent?
>
> A. Yes.
>
> * * *
>
> Q. Dr. Dollens, is it still your opinion that the [D]efendants complied with the standard of care in their treatment of Lori Caldwell?
>
> A. Yes.
>
> Q. Is it still your opinion that Lori Caldwell gave informed consent for the use of [G]entamicin and [V]ancomycin?

A. Yes.

Q. Are those opinions that you hold within a reasonable degree of medical certainty?

A. Yes.

Q. And do you still not have an opinion, sir, regarding causation, in other words, whether the [V]ancomycin or [G]entamicin therapy caused Lori Caldwell any injuries?

A. I don't know. They could have, but I don't know that for a fact.

* * *

A. I cannot say that the drugs caused her injury with a degree of medical certainty.

Q. In your expert opinion, Doctor, did the patient have enough information to provide informed consent in this case?

A. Yes.

Q. The information provided to her was enough to comply with the standard of care; isn't that correct?

A. That's correct, in my opinion.

(App. 159-165).

Caldwell filed her response to the Defendant's reply on October 10, 2007. Also on October 10, 2007, the trial court held a hearing on the Defendants' renewed motion for summary judgment. During the hearing, the trial court granted the Defendants' oral motion to strike Caldwell's response to the Defendant's reply. Caldwell reiterated that she was "only alleging that there was no informed consent here" and was making "no claim for the breach of the standard of care in this case . . . ." (App. 238).

On November 19, 2007, the trial court entered its order, finding as follows:

> 1. [Caldwell] has failed to come forward with expert medical testimony rebutting the Medical Review Panel's unanimous opinion that the [D]efendants did not deviate from the applicable standard of care.
>
> 2. On the issue of informed consent, [Caldwell]'s expert and Medical Review Panel member, Dr. David Dollens, stated that the panel found that the [D]efendants provided adequate informed consent to [Caldwell].
>
> 3. [Caldwell] stated that she did not remember discussing the possible risks and side effects of the antibiotic drugs administered to her. However, [Caldwell]'s signature appears on forms stating she was informed of the possible side effects.
>
> 4. There exist no genuine issues of material fact and the [D]efendants are entitled to summary judgment as a matter of law.

(App. 12). Accordingly, the trial court entered judgment in favor of the Defendants.

DECISION

Caldwell asserts that the trial court erred in granting the Defendants summary judgment on her claim of lack of informed consent. Specifically, she contends that the trial court "overlooked designated evidence . . . that the IV drug regime administered carried a risk of ototoxicity that a reasonable physician should have informed Ms. Caldwell of and that had she been told of the risks (and the equally effective alternative treatments available) she would not have submitted to the same." Caldwell's Br. at 5. Thus, Caldwell argues that the Defendants failed to explain the side effects of the prescribed medication, which deprived her of the opportunity to give informed consent to the administration of the medications.

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law.

Landmark Health Care Assocs., L.P. v. Bradbury, 671 N.E.2d 113, 116 (Ind. 1996). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Ind. T.R. 56(C); *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167, 169 (Ind. 1996), *abrogated on other grounds*, 804 N.E.2d 736 (Ind. 2004). For summary judgment purposes, a fact is "material" if it bears on ultimate resolution of relevant issues. *Kreighbaum v. First Nat'l Bank & Trust*, 776 N.E.2d 413, 419 (Ind. Ct. App. 2002). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991).

All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). However, once the movant has carried his initial burden of going forward under Trial Rule 56(C), the nonmovant must come forward with sufficient evidence demonstrating the existence of genuine factual issues, which should be resolved at trial. *Otto v. Park Garden Assocs.*, 612 N.E.2d 135, 138 (Ind. Ct. App. 1993), *trans. denied*. If the nonmovant fails to meet her burden, and the law is with the movant, summary judgment should be granted. *Id*.

A failure to advise of side effects falls within the scope of the Indiana Malpractice Act. *See Dove by Dove v. Ruff*, 558 N.E.2d 836, 840 (Ind. Ct. Appt. 1990). In a medical malpractice action based upon negligence, the plaintiff must establish: 1) a duty on the

part of the defendant in relation to the plaintiff; 2) the defendant's failure to conform to the requisite standard of care required by the relationship; and 3) an injury to the plaintiff resulting from that failure. *Hamilton v. Ashton*, 846 N.E.2d 309, 315 (Ind. Ct. App. 2006) (citations omitted), *aff'd on reh'g*, 850 N.E.2d 466 (Ind. Ct. App. 2006), *trans. denied*. "A unanimous opinion of the medical review panel finding that the physician did not breach the applicable standard of care is ordinarily sufficient to negate the existence of a genuine issue of material fact, entitling the physician to summary judgment." *Syfu v. Quinn*, 826 N.E.2d 699, 704 (Ind. Ct. App. 2005).

> Under the doctrine of informed consent, a doctor must disclose the facts and risks of a treatment which a reasonably prudent physician would be expected to disclose under like circumstances and which a reasonable person would want to know. This is separate and apart from the doctor's duty to "exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances."

Hamilton, 846 N.E.2d at 317 (citations omitted).

Regarding informed consent, "the critical issue is whether the patient was subjected to the inherent risks of the proposed treatment without being permitted to intelligently reject or accept that treatment." *Bunch v. Tiwari*, 711 N.E.2d 844, 850 (Ind. Ct. App. 1999). A physician "should simply be called upon to discuss medical facts and recommendations with the patient as a reasonably prudent physician would" and "be required to give the patient sufficient information to enable the patient to reasonably exercise the patient's right of self-decision in a knowledgeable manner." *Culbertson v. Mernitz*, 602 N.E.2d 98, 103 (Ind. 1992).

"[E]xcept in those cases where deviation from the standard of care is a matter commonly known by lay persons, expert medical testimony is necessary to establish whether a physician has or has not complied with the standard of a reasonably prudent physician." *Id.* at 104. Therefore, expert testimony is unnecessary only when "the physician's conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach of the applicable standard of care." *Syfu*, 826 N.E.2d at 703.

In this case, we cannot say that the risk of ototoxicity, due to the administration of Gentamicin and Vancomycin, is a matter commonly known to lay persons. As it is outside the scope of a layperson's knowledge, Caldwell had the burden to submit expert testimony that the alleged failure to disclose the risk of ototoxicity-induced dizziness constituted a failure to comply with appropriate standard of care.

Caldwell submitted her designated evidence—in the form of an affidavit pursuant to Indiana Trial Rule 11—a transcript of Dr. Dollens' tape-recorded statement, wherein Dr. Dollens stated that he "would have told [Caldwell] of the potential toxicity" of Gentamicin and Vancomycin. (App. 116) Dr. Dollens, however, did not state that the Defendants' conduct fell below the proper standard of care. *See Syfu*, 826 N.E.2d at 704 (finding that where expert testimony is presented in the form of an affidavit to rebut the unanimous opinion of the medical review panel, "the affidavit must set forth that the expert is familiar with the proper standard of care under the same or similar circumstances, what that standard of care is, and that the defendant's treatment of the plaintiff fell below that standard of care"). We therefore find that Caldwell failed to

establish a genuine issue of material fact as to whether the Defendants breached the applicable standard of care.

Furthermore, "there must be a causal relationship between the physician's failure to inform and the injury to the plaintiff." *Boston v. GYN, Ltd.*, 785 N.E.2d 1187, 1192 (Ind. Ct. App. 2003). This "causal connection arises only if it is established that, had the revelation been made, consent to treatment would not have been given." *Id.* It is "usually the case that expert opinion is required to establish a causal connection between the acts or omissions of the physician and the injury to the patient." *Bowman v. Beghin*, 713 N.E.2d 913, 917 (Ind. Ct. App. 1999).

Here, we cannot say that Caldwell's affidavit created a genuine issue of material fact. Although Caldwell averred that "had [she] been told of the risks involved and the equally effective alternative treatments available, [she] would not have submitted" (App. 123) to the Defendants' prescribed treatment, she failed to present expert testimony that 1) "equally effective alternative treatments" (App. 123) were available and 2) that there was a causal connection between the Defendants' alleged omission and her injuries. *Cf. Bowman*, 713 N.E.2d at 917 (finding that an expert opinion is not required where a lay person is capable of deciding the truth of the plaintiff's claim that he would not have consented to surgery but for the physician's misrepresentations). We therefore find that Caldwell has failed to establish a genuine issue of material fact as to the cause of her consenting to the prescribed treatment. *Cf. id.* (finding that the plaintiff's affidavit "was sufficient to generate a genuine issue of fact as to the cause of his consenting to surgery").

Finally, the Defendants presented evidence in the form of Caldwell's deposition and signed documents that she was informed that dizziness was a side effect of both Gentamicin and Vancomycin. This evidence contradicted her affidavit that "[she] was never warned by Defendants in any way of the risks of ototoxicity accompanying" her treatment. (App. 122). Her affidavit therefore failed to create a genuine issue of fact regarding whether the Defendants informed her of the side effects of Gentamicin and Vancomycin. *See Cox v. N. Indiana Pub. Serv. Co., Inc.*, 848 N.E.2d 690, 698 (Ind. Ct. App. 2006) (holding that a "non-movant may not create a genuine issue of fact by contradicting his own testimony").

Caldwell failed to demonstrate a genuine issue of material fact regarding informed consent. Accordingly, we find that the trial court properly granted the Defendants' renewed motion for summary judgment.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.