COURT OF APPEALS
DECISION
DATED AND RELEASED

October 8, 1996

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

NOTICE

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

No. 95-2234

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

Hector R. Figueroa, Jr.,

Plaintiff-Appellant,

v.

Medical Group of West Allis and Douglas Wendland, M.D.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Hector R. Figueroa, Jr., *pro se*, appeals from a judgment dismissing his medical malpractice claim against Dr. Douglas Wendland and the Medical Group of West Allis. The trial court dismissed Figueroa's claim on summary judgment due to his failure to name medical experts. Although it is difficult to discern Figueroa's arguments from his briefs, he seems to contend: (1) the trial court improperly granted summary judgment

to the defendants because the doctrine of res ipsa loquitur obviates the need for expert testimony; (2) the defendants are allegedly guilty of violating several criminal statutes; and, (3) summary judgment denied him the right to a jury trial. We reject his arguments and affirm.

Figueroa was treated by Dr. Wendland for a back injury between July 26 and October 21, 1991. Figueroa subsequently filed a medical malpractice suit against Dr. Wendland and the Medical Group of West Allis, alleging that Dr. Wendland failed to properly diagnose the severity of his injury.[1] Figueroa, however, failed to name a medical expert to support his allegation and the trial court dismissed his complaint on summary judgment.

Section 802.08, STATS., governs summary judgment. Summary judgment methodology has been recited in many cases, *see* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 289-292, 507 N.W.2d 136, 139-140 (Ct. App. 1993), and need not be repeated here. We review the trial court's decision *de novo*. *See* ***id.*** at 289, 507 N.W.2d at 139.

Figueroa first argues that the trial court improperly granted summary judgment to the defendants because the doctrine of res ipsa loquitur obviates the need for expert testimony. We disagree.

"Testimony from medical experts is essential to establish a cause of action for medical malpractice." ***Kasbuam v. Lucia***, 127 Wis.2d 15, 20, 377 N.W.2d 183, 185 (Ct. App. 1985); *see also* ***Christianson v. Downs***, 90 Wis.2d 332, 338, 279 N.W.2d 918, 921 (1979); ***Albert v. Waelti***, 133 Wis.2d 142, 145, 394 N.W.2d 752, 754 (Ct. App. 1986). The reason is clear:

> In order to hold a physician liable, the burden is upon the plaintiff to show that the physician failed in the requisite degree of care and skill. That degree of care and skill

[1] Figueroa also sued Heritage Mutual Insurance Company, alleging claims of "racketeering, bribery, conspiracy and black-listing." Those claims were also dismissed on summary judgment and are not at issue on appeal.

> can only be proved by the testimony of experts. Without such testimony, the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him.

Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 317, 270 N.W.2d 83, 87 (1978). Additionally, the ultimate burden of demonstrating that there is sufficient evidence to go to trial at all is on the party that has the burden of proof on that issue that is the object of the motion. ***Hunzinger***, 179 Wis.2d at 290, 507 N.W.2d at 139.

Here, the only medical experts Figueroa identified were treating physicians who Figueroa admitted would not testify that Dr. Wendland was negligent. Therefore, the trial court correctly concluded that Figueroa failed to offer any evidentiary support for his negligence claim. Res ipsa loquitur is not applicable in this case because that doctrine only applies where a layperson would be able to determine as a matter of common knowledge that the result would not have ordinarily occurred but for negligent conduct. ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 17, 496 N.W.2d 226, 228 (Ct. App. 1993). Because it is not within the common knowledge of laypersons whether Figueroa's present physical condition would not have occurred but for the alleged negligence of Dr. Wendland, the doctrine of res ipsa loquitur is inapplicable. Thus, summary judgment was appropriate.

Second, Figueroa appears to be suggesting that the defendants are guilty of violating various sections of the criminal code, including §§ 940.23 (reckless injury), 941.30 (recklessly endangering safety), 939.25 (criminal negligence), and 939.32 (attempt), STATS. Section 968.02(1), STATS., however, states that a criminal complaint "shall be issued only by a district attorney of the county where the crime is alleged to have been committed." Section 968.02(3) further provides that a circuit court judge can issue a criminal complaint if the district attorney "refuses or is unavailable to issue a complaint." There is no evidence in the record that the requirements of § 968.02 were met and, therefore, we reject this argument as well.

Additionally, even if we were to construe (as did the trial court) Figueroa's claims of criminal violations as claims for punitive damages, we also reject his argument. Figueroa has no claim for punitive damages because punitive damages are not recoverable unless the plaintiff is entitled to compensatory damages. ***Estate of Wells***, 174 Wis.2d 503, 515, 497 N.W.2d 779, 784 (Ct. App. 1993), *aff'd on other grounds*, 183 Wis.2d 667, 515 N.W.2d 705 (1994).

Finally, Figueroa argues that the trial court's grant of summary judgment to the defendants improperly denied him the right to a jury trial. The right to a jury trial, however, is a limited one, extending to issues of fact. *See* ***Jennings v. Safeguard Ins. Co.***, 13 Wis.2d 427, 431, 109 N.W.2d 90, 92 (1960) (parties entitled to a jury trial on all issues of fact). When a party opposed to a summary judgment motion fails to establish that genuine issues of material fact are in dispute, only matters of law are presented. ***Bolen v. Bolen***, 39 Wis.2d 91, 93, 158 N.W.2d 316, 317 (1967). Matters of law are for the trial court to determine, without violating the province of the jury. ***Hoan v. Journal Co.***, 238 Wis. 311, 329-330, 298 N.W. 228, 237, *cert. denied*, 314 U.S. 683 (1941). No disputed issues of material fact were supported by an evidentiary basis as required by § 802.08, STATS. Therefore, the trial court did not improperly deny Figueroa a jury trial; the trial court correctly granted summary judgment to the defendants.

By the Court. – Judgment affirmed.

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