**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 1, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2009AP1097** **Cir. Ct. No. 2007CV789**

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

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**KATHIE JECKELL,**

**PLAINTIFF-APPELLANT,**

**V.**

**ELIZABETH BURNSIDE, M.D.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Kathie Jeckell appeals a summary judgment decision dismissing her medical malpractice action against Dr. Elizabeth Burnside. We affirm for the reasons discussed below.

## BACKGROUND

¶2 Based on abnormalities identified in a mammogram, Jeckell had biopsy samples taken from two spots in her right breast. Each spot was marked with a metallic clip. The sample taken from a "10 o'clock" location turned out to be benign, but the sample from an "11 o'clock" location was malignant. Dr. David Mahvi recommended that Jeckell undergo a lumpectomy to remove the malignant growth.

¶3 Burnside, a radiologist, was to perform an ultrasound-guided radiologic wire localization to mark the malignant tissue in preparation for the lumpectomy to be performed by Mahvi. On the morning of the procedure, Burnside discovered that she did not have all of Jeckell's relevant medical records, including those of the biopsy that had identified the malignant growth. Burnside took Jeckell off of the operating table while she tracked down the missing records from another clinic.

¶4 Later that day, after reviewing multiple images from Jeckell's file, Burnside used ultrasound to place a wire in Jeckell's breast marking, or "localizing," an abnormality in what she believed was the location where the biopsy had identified the malignancy. Burnside then performed a mammogram to compare the location of her marker with the other films. Burnside found the post-localization mammogram to be "somewhat equivocal" and "a little bit confusing," so she called Mahvi to discuss whether he wished to go ahead and remove the abnormality she had marked or have additional imaging like an MRI done. Mahvi proceeded to perform the lumpectomy.

¶5 After examination showed that the tissue Mahvi removed was benign, Jeckell underwent several more tests which revealed that the malignant

growth remained in her body. More than three months after the initial procedure, Jeckell had to have a second lumpectomy to remove the malignant growth, causing her additional pain, suffering, and monetary damages.

¶6 Jeckell filed suit, alleging that Burnside had failed to use the degree of care and skill that a reasonable doctor would exercise in similar circumstances to ensure that the wire used in the localization procedure was placed in the area of the breast where the malignant tissue was located.[1] Jeckell named Dr. Richard Steliga as an expert witness. Steliga had performed an independent medical examination of Jeckell's files and concluded that Mahvi was not negligent because a breast surgeon is dependent upon the placement by the radiologist of the wire and clip to determine what tissue to remove. With respect to Burnside, Steliga testified in a deposition that he was not qualified to testify as to the care and treatment she provided because Steliga was a surgeon, not a radiologist.

¶7 Dr. Richard Ellis, who met the expert witness qualifications established by the American College of Radiology and the Society of Breast Imaging, performed an independent medical examination for the defense. Ellis determined that Burnside had in fact localized a different lesion than the one that had been identified in a prior biopsy as cancerous, apparently the one in the 10 o'clock rather than the 11 o'clock position. However, Ellis attributed this mistake to the complexity of the case, including such factors as the density of the patient's breast, the multiple lesions in the breast that had been identified by three separate radiologists, and inherent difficulties correlating the findings from the

[1] The suit also named Mahvi and U.W. Hospitals & Clinics, but they were subsequently dismissed from the action and are not parties to the present appeal.

available mammography and ultrasound images from multiple sources. Ellis concluded that Burnside had demonstrated the level of care, skill, and judgment that a reasonable radiologist would have afforded by tracking down missing reports and images from another clinic on the morning of the procedure, by using standard procedure under ultrasound guidance to localize what she believed to be the lesion of interest, by obtaining an additional post-localization image, and by reporting her concerns to the surgeon prior to the lumpectomy.

¶8 Burnside moved for summary judgment on the ground that Jeckell did not have any qualified expert witness who would testify that Burnside had failed to meet the applicable standard of care for the medical procedure she had performed. The circuit court granted the motion, and Jeckell appeals.

## STANDARD OF REVIEW

¶9 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). The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

## DISCUSSION

¶10 A claim for medical malpractice, like any claim for negligence, requires four elements: (1) a breach (2) of a duty owed (3) that results (4) in an

injury or damages. ***Paul v. Skemp***, 2001 WI 42, ¶17, 242 Wis. 2d 507, 625 N.W.2d 860. It is well established that expert testimony is required to prove a medical malpractice case in this state, unless the situation is one where the common knowledge of laypersons would afford a basis for finding negligence. ***Christianson v. Downs***, 90 Wis. 2d 332, 338-39, 279 N.W.2d 918 (1979). The rationale for requiring expert testimony in medical malpractice cases is that a doctor is not required to always provide a correct diagnosis or positive outcome, but merely to conform to the accepted degree of skill, care, and judgment required by a reasonable physician. *See* ***Francois v. Mokrohisky***, 67 Wis. 2d 196, 201-02, 226 N.W.2d 470 (1975). Cited examples of situations in which a layperson could be able to determine that the standard of care had been violated without expert testimony include the removal of the wrong body part despite a correct preoperative diagnosis or leaving a surgical instrument in the patient. ***Christianson***, 90 Wis. 2d at 338-39; ***Francois***, 67 Wis. 2d at 204. Such situations may also fall within the realm of *res ipsa loquitur*.

¶11 *Res ipsa loquitur* is a doctrine of circumstantial evidence that permits, but does not require, an inference of negligence to be drawn by the jury. ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993). "The doctrine applies where there is insufficient proof available to explain an injury-causing event, yet the physical causes of the accident are of the kind which ordinarily do not exist in the absence of negligence." ***Id.***

¶12 *Res ipsa loquitur* can be invoked in a medical malpractice action when: (1) either a layperson can determine as a matter of common knowledge or an expert testifies that the result does not ordinarily occur in the absence of negligence; (2) the agent or instrumentality that caused the harm was within the

defendant's exclusive control; and (3) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but is not so substantial as to provide a full and complete explanation for the event. ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992); *see also* ***Richards v. Mendivil***, 200 Wis. 2d 665, 674, 548 N.W.2d 85 (Ct. App. 1996).

¶13 Jeckell argues that the circuit court erred in granting summary judgment in this case because: (1) the court should have allowed Jeckell to develop her evidence at trial before determining whether a *res ipsa loquitur* instruction was warranted; and (2) Burnside failed to meet her burden of showing that whatever mechanisms or events caused Burnside's error, they were outside the ordinary experience and common knowledge of the jury. We reject both contentions.

¶14 First, as we have explained above, the purpose of the *res ipsa loquitur* doctrine is to allow the jury to draw a circumstantial inference about the causation of an injury when there is no direct evidence available. Here, however, the summary judgment materials suggest that Jeckell would have been able to present direct evidence of the causation of her injury. Specifically, Jeckell could have provided testimony and records from more than one source that the reason she suffered her claimed injury of needing to have a second lumpectomy was that Burnside had localized or marked for removal what turned out to be a benign lesion, rather than the lesion that had previously been determined by biopsy to be malignant. Thus, the principal issue for trial in this case would not have been what happened—*i.e.*, that Burnside failed to localize the malignant growth—but rather whether she exercised the degree of skill, care, and judgment required of a reasonable radiologist while performing the procedure. Since the summary judgment materials disclosed no apparent need for a circumstantial inference to

establish the basic chain of events leading to the claimed injury, we are not persuaded that the court needed to await the development of evidence at trial before determining that the *res ipsa loquitur* doctrine would not apply to this case.

¶15 Moreover, even if further development of the evidence at trial would have revealed some gap in the chain of causation requiring a circumstantial inference, that would not negate the need for a threshold determination as to whether expert testimony would be required to establish the requisite standard of care. Whether expert opinion is required on a certain issue is a question of law. ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 862, 541 N.W.2d 803 (Ct. App. 1995). That means it would have been up to the circuit court to decide whether the first element of the *res ipsa loquitur* instruction should be framed for the jury in terms of what a layperson could determine as common knowledge or in terms of what an expert had testified about. We conclude, therefore, that it was procedurally appropriate for the circuit court to determine on summary judgment whether Jeckell would be able to establish her medical malpractice claim without expert testimony, either by direct evidence or by circumstantial evidence pursuant to a *res ipsa loquitur* instruction.

¶16 The next question is whether the circuit court correctly determined as a matter of law, based on the summary judgment materials before it, that Jeckell would need expert testimony to prevail on her case. We conclude that the circuit court correctly concluded that expert testimony was necessary.

¶17 Few laypersons, other than those who have themselves undergone the procedure, would even know what an "ultrasound-guided radiologic wire localization" is, much less know how one should be performed. Certainly, a layperson would have no basis for evaluating how various types of imaging films

should be interpreted or reconciled in order to identify the area of interest, how difficult it would be to actually position a wire in conformance with such images, or what other factors might impede a successful procedure.

¶18 Here, Burnside's summary judgment materials included an expert opinion explaining why this was a particularly complex case and concluding that Burnside had met the standard of care, as well as Jeckell's own deposition testimony acknowledging that she had been advised that one of the risks of the procedure was that it might fail to localize the mass it was aiming at. We conclude that the materials Burnside submitted satisfied her burden of showing that expert testimony would be required to determine whether Burnside had met the requisite standard of care in performing the localization procedure at issue.

¶19 Finally, Jeckell argues that it was possible that she could have obtained a favorable expert opinion at trial through the cross-examination of Burnside. It is true that a professional defendant in a malpractice action may be questioned about whether his or her own conduct met the applicable standard of care. *See* ***Carney-Hayes v. Northwest Wisconsin Home Care, Inc.***, 2005 WI 118, ¶¶38-42, 284 Wis. 2d 56, 699 N.W.2d 524 (reaffirming ***Shurpit v. Brah***, 30 Wis. 2d 388, 399-400, 141 N.W.2d 266 (1966)). Here, however, Jeckell points to no deposition testimony or other summary judgment materials that would suggest an opinion favorable to Jeckell's position was forthcoming. In sum, because an expert opinion was needed to establish the alleged negligence, and because Jeckell failed to name any expert who would provide her with the required opinion, the circuit court properly granted summary judgment in Burnside's favor.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).