ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
DISTRICT COURT NO. 99-C-02029
SUPREME COURT NO. 20010065

Steven Jaskoviak,

Plaintiff/Apellant,

vs.

Daniel Gruver, M.D., and
Medcenter One Health Systems,

Defendants/Appellees.

20010065

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE BRUCE B. HASKELL

BRIEF OF DEFENDANT/APPELLEE DANIEL GRUVER, M.D.

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STATEMENT OF THE ISSUES

1. Whether a judgment dismissing an action without prejudice is appealable when the statute of limitations has run?

2. Was the claim of lack of informed consent properly before the trial court when an amended complaint had never been served and filed by the plaintiff?

3. Were the claims of lack of medical negligence and lack of informed consent properly dismissed by summary judgment by the trial court based on the evidence before the court?

4. Was the motion for reconsideration providing Dr. Bell's opinion after judgment had been entered properly considered and denied by the trial court?

STATEMENT OF THE CASE

This is an appeal from summary judgment dismissing Steven Jaskoviak's ("Jaskoviak") medical malpractice claim without prejudice and from an order of the trial court denying his motion for reconsideration of the judgment of dismissal. The trial court's original Order Granting Motions for Dismissal and Summary Judgment was dated December 27, 2000. The Judgment was entered on January 9, 2001. Notice of Entry of Judgment of Dismissal was served by mail on January 11, 2001. Following a motion for reconsideration filed by Jaskoviak on January 12, 2001, the trial court denied the motion by Order dated February 5, 2001. Notice of Entry of Order was served on February 7, 2001. Jaskoviak's Notice of Appeal was filed on March 12, 2001.

The substance of Jaskoviak's claim was that on or about February 21, 1997 he presented himself at Medcenter One for varicose vein surgery to be performed by Dr. Gruver. Complaint at ¶ III; Appendix [App.], p. 5. Jaskoviak alleged that Dr. Gruver was negligent in his care and treatment in the surgical procedure involving the removal of varicose veins. Complaint at ¶ IV; App., p. 6. He further alleged that Medcenter One was negligent in employing and permitting an unqualified physician to practice medicine. Complaint at ¶ V; App., p. 6. Finally, Jaskoviak asserted that as a result of the negligence of Dr. Gruver and Medcenter One that he has undergone extensive pain and suffering, including but not limited to, continuous pain and weakness in his legs; has incurred serious discoloration and scarring of his legs; incurred medical expense; and will incur further complications which may require additional surgery. Complaint at ¶ VI; App., p. 6. Jaskoviak initially made no claim of lack of informed consent, the subject of this appeal.

Both Dr. Gruver and Medcenter One denied the allegations contained in Jaskoviak's complaint. *See* the Separate Answer of Daniel Gruver, M.D., and Demand for Jury Trial dated June 9, 1998. App., p. 8.

On July 28, 1999 Dr. Gruver filed a Motion to Dismiss or, in the Alternative for Summary Judgment. Medcenter One did likewise on July 30, 1999. The motions were based on the fact that Jaskoviak had failed to provide an admissible expert opinion in compliance with N.D.C.C. § 28-01-46. In the alternative, the motion of Dr. Gruver was for summary judgment for failure of Jaskoviak to establish a prima facie case of medical malpractice. Jaskoviaks's answers to the interrogatories of both Dr. Gruver and Medcenter One identified Martin L. Bell, M.D of Phoenix, Arizona as his expert medical witness, but stated that Dr. Bell's report would be provided when it was available. *See* Plaintiff's Answers to Defendant Daniel Gruver, M.D.'s Interrogatories to Jaskoviak's(Set One) (Answers to Interrogatories 36 b and 39 d), Appellee's Appendix at 1; and Plaintiff's Answers to Medcenter One's Interrogatories to Plaintiff, Set No. 1 (Answers to Interrogatories No. 44, 45, 46, 47, 48, and 49), Appellee's Appendix at 4.

On August 13, 1999 Jaskoviak filed Plaintiff's Motion, Brief and Affidavit of Robert V. Bolinske for an Extension of Time to Respond to Defendant Medcenter One Health Systems' Motion to Dismiss. Neither Dr. Gruver, nor Medcenter One had an objection to the motion.

On August 27, 1999 Jaskoviak filed Plaintiff's Motion, Brief and Affidavit of Robert V. Bolinske for an Extension of Time to Respond to Defendants' Motions to Dismiss and/or for Summary Judgment. The motion requested another thirty day extension to respond. Again, there was no objection to the motion by Dr. Gruver or Medcenter One.

On September 30, 1999 Jaskoviak requested an additional forty-five day extension to respond by filing Plaintiff's Motion, Brief and Affidavit of Robert V. Bolinske for an Extension of Time to Respond to Defendants' Motions to Dismiss and/or For Summary Judgment. One more time Dr. Gruver and Medcenter One did not object.

On September 30, 1999 Jaskoviak also filed Plaintiff's Combined (1) Notice of Motion, (2) 3.2 Motion to Amend Complaint, and (3) Brief in Support of Motion to amend his complaint to allege a claim of lack of informed consent.

On October 13, 1999 Dr. Gruver responded requesting that the motion to amend either be denied or, if granted, that summary judgment be granted dismissing Jakoviak's claim. Medcenter One opposed the motion to amend to include a claim of lack of informed consent against Medcenter One on the basis that it had no duty as a hospital to provide Jaskoviak with informed consent.

On October 21, 1999 the trial court entered an Order Amending Order allowing an amendment of the complaint to include a claim of lack of informed consent against Dr. Gruver, but not against Medcenter One on the basis that a hospital does not owe a duty to a patient to secure informed consent. An amended complaint has never been served or filed by Jaskoviak.

On November 12, 1999 Jaskoviak filed Plaintiff's Motion, Brief and Affidavit of Robert V. Bolinske for an Extension of Time to Respond to Defendants' Motions to Dismiss and/or for Summary Judgment requesting an additional ninety days to respond to the pending motions to dismiss. The purpose of the motion was to take the deposition of Dr. Wayne Swenson relating to his office visits with Jaskoviak and to attempt to locate two medical records related to the two medical visits. Dr.

Swenson's deposition was taken on November 3, 2000. Dr. Gruver responded by asking either that the motion be denied or that the time be limited to forty five days.

A scheduling conference was held in Bismarck, North Dakota on October 5, 2000. When it was determined that an order from the court had not been provided to any of the counsel for the parties the trial court entered an Order directing that Jaskoviak file his responses to the Motion to Dismiss and Motion for Summary Judgment within 60 days of October 5, 2000. Jaskoviak filed Plaintiff's Response to Defendants' Motion to Dismiss, Etc. on November 30, 2000. Dr. Bell's opinion was still not provided. The response, however, contained: 1) an Affidavit of Jaskoviak dated September 30, 1999, App., p. 11; 2) a Supplemental Affidavit of Jaskoviak dated November 30, 2000, App., p. 20; 3) pages 29-32 of the transcript of Deposition of Wayne Swenson; 4) an Order Denying Motion for Summary Judgment in the case of Violet K. Marshall and Todd Marshall v. Daniel Gruver, M.D. in Case No. 08-99-C-1809, venued in the County of Burleigh, District Court, South Central Judicial District; 5) an Order Denying Renewed Motion for Summary Judgment in the Marshall case; 6) an Affidavit of Steven K. Hamar, M.D. App., p.32; 7) an article from the Bismarck Tribune; and 8) another article from the Bismarck Tribune.

On December 6, 2000 Dr. Gruver served and filed his Reply Brief of Daniel Gruver, M.D., to Plaintiff's Response to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment. On December 11, 2000 Medcenter One filed its Reply of Medcenter One Health Systems to Plaintiff's Response to Defenant's Motion to Dismiss.

On December 27, 2000 the trial court signed its Order Granting Motions for Dismissal and Summary Judgment. App., p. 24. Notice of Entry of Judgment of Dismissal was served on January 11, 2001.

On January 12, 2001 Jaskoviak served and filed his Plaintiff's Brief in Support of Motion for Reconsideration. The only new exhibit added was the Medical Opinion of Martin L. Bell, M.D., J.D., dated January 12, 2001. App., p. 34.

On January 22, 2001 Dr. Gruver served and filed his Response of Daniel Gruver, M.D. to Plaintiff's Motion for Reconsideration. Medcenter One served and filed its Response of Medcenter One Health Systems to Plaintiff's Motion for Reconsideration on January 25, 2001. Jaskoviak served and filed his Reply to Defendant Gruver's Response on January 25, 2001. The only new information was the Second Supplemental Affidavit of Steven Jaskoviak dated January 25, 2001. App., p. 32.

On February 5, 2001 the trial court signed an Order denying the Plaintiff's Motion for Reconsideration. App., 35. Notice of Entry of that Order was made on February 7, 2001. Jaskoviak filed his Notice of Appeal on March 12, 2001. App., p. 37.

ARGUMENT

1. Whether a judgment dismissing an action without prejudice is appealable when the statute of limitations has run?

A case dismissed without prejudice is generally not appealable to the Supreme Court of North Dakota. *Kouba v. Febco, Inc.*, 543 N.W.2d 245, 248 (N.D. 1996) (citing *Community Homes of Bismarck v. Clooten*, 508 N.W.2d 364, 365 (N.D. 1993) (because a party is not barred from bringing a subsequent action on the matter)). This Court has recently stated; however, that in certain situations, "a trial court's dismissal without prejudice has the practical effect of terminating the litigation.... and is therefore final in the sense that it terminates the controversy...." *Triple Quest v. Cleveland Gear Co., Inc.*, 2001 ND 101, ¶8. A controversy is appealable if it is, in

effect, a dismissal with prejudice. *Id.* at ¶11. Other jurisdictions agree and allow for an appeal if a case is dismissed without prejudice and the statute of limitations would prevent the refiling of a new action. *See B.C. Investment Company v. Throm*, 650 P.2d 1333, 1335 (Colo. App. 1982) (stating that a dismissal of a complaint without prejudice is generally not a final and appealable order but would be considered final and appealable if circumstances indicate a case "cannot be saved"); *see also Wyler /Pebble Creek Ranch v. Colorado Board of Assessment*, 883 P.2d 597, 599 (Colo. App. 1994) (stating that a dismissal without prejudice is a final and appealable order if the statute of limitations has run and the case may not be refiled because it is time barred).

The statute of limitations regarding medical malpractice is found in N.D.C.C. § 28-01-18(3). "The following actions must be commenced within two years after the claim for relief has accrued: ... (3) An action for the recovery of damages resulting from malpractice...." The statute of limitations began to run when Jaskoviak knew or should have known about the injury, cause, and defendant's negligence. *Wall v. Lewis*, 393 N.W.2d 758 (N.D. 1983).

Jaskoviak commenced this medical malpractice action against Daniel Gruver, M.D. ("Dr. Gruver") and Medcenter One Health Systems ("Medcenter One") on May 4, 1998. At the very latest the statute of limitations commenced on May 4, 1998, more than three years ago. The statute of limitations for medical malpractice is two years. N.D.C.C. § 28-01-18. Since Jaskoviak would be time barred from bringing another action the trial court's dismissal without prejudice should be a final and appealable order under the rationale of *Triple Quest*, 2001 ND 101¶8 and *Throm*, 650 P.2d at 1335.

Commercial Equity Corp. v. Majestic Savings and Loan, 620 P.2d 56, (Colo. App. 1980) is another Colorado Court of Appeals case that decided that a dismissal without prejudice is a final and appealable order since the statute of limitations in the case was not tolled during the pendency of the case. In so doing, the court cited the North Dakota case of *Walrod v. Nelson*, 210 N.W. 525 (N.D. 1926) which addressed the tolling of the statute of limitations. In *Walrod*, a party asked the court to toll the statute of limitations because the adverse party had another case pending against him and since he had to tend to that litigation. The court rejected the argument because both actions concerned the same parties and the pending action should not have kept the party from pursuing the present action. In *Commercial Equity*, a party initiated an injunctive action against the adverse party and later commenced a separate action. The party argued that the pending action should have tolled the statute of limitations in the separate action. The Colorado court rejected that argument citing *Walrod*. The Colorado court stated that a case dismissed without prejudice is a final and appealable order if the statute of limitations has run.

If Jaskoviak's appeal is dismissed because it is an improper appeal of a nonappealable order Jaskoviak would have to start his law suit all over again. Since N.D.C.C. § 28-01-18(3) includes no applicable exception allowing for the tolling of the statute of limitations any new action commenced by Jaskoviak would most likely be dismissed. Further, North Dakota has not enacted a "savings statute" and has not yet adopted the doctrine of equitable tolling, *Reid v. Cuprum SA, de C.U.*, 2000 ND 18, ¶ 13, 611 N.W.2d 187, 190. If adopted and applied to this case, the doctrine of equitable tolling would require Jaskoviak to prove three things: 1) timely notice, 2) lack of prejudice to the defendant, and (3) reasonable and good-faith conduct on his own part. *Id.* at ¶ 10. Neither would it seem that equitable estoppel is an appropriate remedy for Jaskoviak. *See Burr v. Trinity Med. Ctr.*, 492 N.W.2d 904 (N.D. 1992).

Therefore, under the circumstances present in this case the judgment dismissing Jaskoviak's complaint without prejudice should be appealable.

2. Was the claim of lack of informed consent properly before the trial court when an amended complaint had never been served and filed by Jaskoviak?

Rule 15(a), N.D.R.Civ.P., states in relevant part that "...a party's pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." A trial court has sound discretion to allow an amendment to a pleading and the decision will not be disturbed on appeal unless there was an abuse of discretion. *J.R. Watkins Co. v. Vangen*, 116 N.W.2d 641, 646 (N.D. 1962).

On September 30, 1999, some sixteen months after serving his complaint, Jaskoviak filed a Motion to Amend the Complaint to allege a claim of lack of informed consent. While it is apparent that Jaskoviak was attempting to circumvent the effective expert opinion requirements of N.D.C.C. § 28-01-46, the trial court was apprised of this argument in Dr. Gruver's Response to Jaskoviak's Motion to Amend from October 13, 1999. The discretion to allow the amendment lies with the trial court and absent any prejudice to the defendant because of the lateness of the amendment, the trial court can allow the complaint to be amended. *See Johnson v. Mineral Estate, Inc.*, 371 N.W.2d 136, 141 (N.D. 1985) (stating that where defendant had time to respond and in the absence of evidence of prejudice, the trial court did not abuse it's discretion to allow the amendment two years after the suit began).

The Supreme Court will not reverse the trial court's decision to allow the amendment absent abuse of discretion. *Messiha v. State*, 1998 ND 149, ¶7, 583 N.W.2d 385, 387. A trial court abuses its discretion when it acts in an arbitrary, unconscionable or unreasonable manner. *Id.* In *Messiha*, the trial court denied the

amendment to the pleadings because the plaintiff took over two and one-half years to bring the amendment and the evidence did not support the plaintiff's other claims. *Id.* at ¶8.

A lack of informed consent claim generally requires expert opinion in order to prove the claim. *See Winkjer v. Herr*, 277 N.W.2d 579, 588 (N.D. 1979) (stating that expert testimony is generally necessary to identify the risks of treatment, their gravity, likelihood of occurrence, and reasonable alternatives); *see also Jaskoviak v. Gruver*, Burleigh County 99-C-2029 at 7 (December 2000) (Bruce Haskell, J., District Court, South Central Judicial District) (stating that expert testimony was required to prove the claim of lack of informed consent). Since Jaskoviak had no evidence to support his claim of lack of informed consent and decided to add the amendment a considerable period of time after the suit was filed, the trial judge abused his discretion to allow it in the first place. *Messiha*, 1998 ND 149, ¶8.

What is procedurally interesting, however, is that Jaskoviak has never served a copy of the amended complaint. Rule 15(a) provides for an answer to an amended pleading and therefore certainly contemplates actual service of the amended complaint. ("A party shall plead in response to an amended pleading ... within 10 days after service of the amended pleading, ..."). The trial court noted that Jaskoviak never filed an amended complaint, thus the court did not know the exact language of his claim regarding lack of informed consent. App., pp. 26 and 29. An amended complaint, like any other pleading, must contain a short and plain statement of the claim showing the pleader is entitled to relief. N.D.R.Civ.P. 8 (a). Not only was the trial court put at a disadvantage because of the lack of an amended complaint, so also are Dr. Gruver and this Court placed at a disadvantage in trying to guess at the exact

nature of Jaskoviak's complaint re informed consent. On that basis alone, the appeal should be dismissed.

3. Were the claims of medical negligence and lack of informed consent properly dismissed by summary judgment by the trial court based on the evidence before the court?

The sequence of events or chronology of the case set forth in the Statement of the Case, including the late submission of Dr. Bell's affidavit by a motion for reconsideration [Rule 60 motion], is crucial to a complete understanding of the trial court's decision in this case. It is critical to understand and keep in mind what evidence was properly before the court on the motion for summary judgment and at what time the evidence was presented to the court.

Summary judgment is a procedure for the prompt disposition of a controversy if no dispute exists as to the material facts or the inferences to be drawn from undisputed facts, or if resolving actual disputes would not alter the results. Further, this Court reviews the evidence in light most favorable to a party opposing summary Judgment. *Schanilec v. Grand Forks Clinic, Ltd.* 1999 ND 165, ¶ 8, 599 N.W.2d 253, 254-55. While the party seeking summary judgment has the burden to demonstrate that there is no genuine issue of material fact, a party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported conclusory allegations, but must present competent admissible evidence to establish a genuine issue of material fact. *Id* at ¶9. "Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and in which that party will bear the burden of proof at trial. Matter of *Estate of Stanton*, 472 N.W.2d 741, 746 (N.D. 1991)" *Id.*

A. The Claim of Medical Negligence Was Properly Dismissed

The Order Granting Motions For Dismissal and Summary Judgment first addressed and granted Dr. Gruver's motion for summary judgment on the negligence or medical malpractice claim. App., pp. 24-31. The trial court first determined that § 28-01-46 applied to the claim against Dr. Gruver that he was negligent in the care and treatment of Jaskoviak in the surgical procedure involving the removal of varicose veins. App., pp. 26-8. As the court observed in its order Dr. Bell had not yet provided an affidavit. Further, the affidavit of Dr. Hamar was insufficient because it failed to establish his field of expertise and because it did not contain a summary of the bases for his opinion. *Id.* The court viewed Dr. Hamar's affidavit as "nothing but conclusory statements that do not comply with the statutory requirements." *Id.* Most important of all the court determined that Dr. Hamar's affidavit did not mention the procedure or results of the procedure at all, but was rather solely addressed allegations re: informed consent. *Id.* The court then ruled that because Jaskoviak had failed to comply with § 28-01-46 the medical negligence claim set forth in paragraph IV of the Complaint was dismissed without prejudice. *Id.* It appears from the Brief of Plaintiff/Appellant Steven Jaskoviak that he does not take issue with this ruling of the court, but rather is only challenging on appeal the sufficiency of the trial court's ruling on the issue of informed consent.

B. The Claim of Lack of Informed Consent Was Properly Dismissed by Summary Judgment

As pointed out by the trial court Jaskoviak never filed an amended complaint, thus the court did not know the exact language of his claim regarding lack of informed consent. App., pp. 26 and 29. For the reasons cited above in section two that alone should result in dismissal of this appeal and an affirmance of the order of the trial court dismissing Jaskoviak's complaint.

As the trial court set forth, N.D.C.C. § 28-01-46 does not apply to a claim of "failure to obtain [ ] Jaskoviak's informed consent." Appendix at p. 29. Therefore dismissal on that ground alone was not appropriate. *Id.* However, even if lack of informed consent is Jaskoviak's only theory and § 28-01-46 does not apply, Jaskoviak is still required to provide expert opinion to support his claim. *See Winkjer*, 277 N.W.2d at 588 (stating that expert testimony is generally necessary to identify the risks of treatment, their gravity, likelihood of occurrence, and reasonable alternatives) (citing *Cornfeldt v. Tongen*, 262 N.W.2d 684, 702 (Minn. 1977) (*Cornfeldt I*). "The necessity for expert testimony is particularly so when such information is outside the common knowledge of laymen." *Id.*

Jaskoviak states that the scarring he experienced from the surgery at issue is an "obvious occurrence" and as a result, he is not required to provide an expert opinion. *Jaskoviak's Supreme Court Brief at 14.* However, this argument only addresses the § 28-01-46 issue of "obvious occurrence". It does not address the motion for summary judgment issue that he is required to establish a prima facie of medial malpractice by expert testimony. Further, he never raised this issue in the trial court and he should not be able to raise it now for the first time on appeal. *Carlson v. Farmers Ins. Group Companies Farmers Ins. Exch.*, 492 N.W.2d 579, 581 (N.D. 1992).

In North Dakota, "[e]xpert opinion is essential to successfully maintain a malpractice action and...without such expert opinion the action is subject to a summary judgment of dismissal," regardless of any statute's requirements. *See Fortier v. Traynor*, 330 N.W.2d 513,517 (N.D. 1983) (stating that North Dakota case law requires expert opinion in medical malpractice cases independent of any statutory requirements). To maintain a lack of informed consent claim Jaskoviak must also

establish the elements of causation and injury. *Buzzell v. Libi*, 340 N.W.2d 36, 40 (N.D. 1983). In a North Dakota medical malpractice case, NDJI-Civil, C-14.00 (1994) provides:

Medical Negligence
(Elements)

To establish a claim for negligence, [Plaintiff] must prove by the greater weight of the evidence:

1) The standard of care applicable to [Defendant] at the time of the incident in question;

2) Failure to meet that standard by [Defendant];

3) [Plaintiff] was damaged;

4) The failure to meet that standard of care proximately caused [the Jaskoviak's] damages.

[Evidence as to the standard of care, the failure to meet that standard of care, and proximate cause must be established by expert testimony.]

* * * * *

Larsen v. Zarrett, 498 NW2d 191, 192, (ND 1993)
Winkjer v. Herr, 277 NW2d 579 (ND 1979)

NOTE: The last paragraph of the above instruction should not be used when error is obvious that expert medical testimony is not necessary. *Winkjer,* 277 NW2d at 585; N.D.C.C 28-01-46.

For a claim of lack of informed consent NDJI-Civil C-14.20 (1994), Physician's Duty to Disclose (Informed Consent) states:

"A physician has a duty to disclose to the patient the available treatment alternatives [including no treatment] and the material and known risks potentially involved in each alternative. A duty to disclose can arise only if the physician knew or should have known of the risk to be disclosed. A physician has no duty to disclose all possible risks and dangers of the proposed treatment but only those that are significant in terms of their seriousness and likelihood of occurrence.

* * * * *

Kershaw v. Reichert, 445 NW2d 16, 17 (ND 1989)
Buzzell v. Libi, 340 NW2d 36 (ND 1983)
Winkjer v. Herr, 277 NW2d 579 (ND 1979)

NOTE: Expert testimony is generally necessary to identify the risks of treatment, their gravity, likelihood of occurrence, and reasonable alternatives. Expert testimony is particularly necessary when such information is outside the common knowledge of the general public. *See Winkjer,* 277 NW2d at 588.

There is nothing that Jaskoviak has presented to support his belief that this is a case where a physician's expert testimony regarding the risks of treatment, their gravity, the likelihood of occurrence, and reasonable alternatives is not required. This is certainly one of those cases when such information is outside the common knowledge of the general public. Thus, Jaskoviak's argument that an expert opinion is not necessary in a lack of informed consent case is not correct.

Although Jaskoviak belatedly in December 2000 provided an opinion by Dr. Hamar, the opinion in the form of Dr. Hamar's affidavit still falls far short of an opinion required to support a claim for lack of informed consent in North Dakota. A review of the above cited North Dakota jury instructions makes it clear that something more than Dr. Hamar's affidavit is required to survive summary judgment.

In Minnesota, the elements of negligent nondisclosure are similar to the elements required for a lack of informed consent claim in North Dakota, with the

addition that a plaintiff is required to prove that the physician's duty to disclose risks or alternative treatments may be established by showing that a reasonable person in what the doctor knows or should have known to be the Jaskoviak's position would likely attach significance to that risk or alternative treatment in deciding whether to consent to the treatment. *Reinhardt v. Colton*, 337 N.W.2d 88, 95-96 (Minn. 1983). *Cornfeldt I* (also relied on by North Dakota in *Winkjer*) requires expert testimony in negligent nondisclosure cases to establish that a risk exists and that it is accepted medical practice to know of that risk. 262 N.W.2d at 702. *Cornfeldt II* requires that a Plaintiff must prove by expert testimony that it is more probable than not that the undisclosed risk did materialize in harm. *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640-41(Minn. 1980) (*Cornfeldt II*).

It is clear that expert testimony is required to support Jaskoviak's claim. However, the only evidence that had been presented by Jaskoviak is a "mere allegation of negligence" because the affidavits of Jaskoviak and Dr. Hamar do not meet the requirements of North Dakota case law. *Fortier*, 330 N.W.2d at 517.

(A) Dr. Hamar's Affidavit

In the present case, Jaskoviak initially offered one expert opinion, from Dr. Hamar, before the claim of lack of informed consent was dismissed on Motion for Summary Judgment. Dr. Hamar's expert opinion lists the alternative treatments, the duty of a physician to inform (standard of care) and states that he would tell a patient of the alternatives and the risks of each. Dr. Hamar does not indicate how his opinion specifically applies to Jaskoviak's care by Dr. Gruver in February 1997. Dr. Hamar does not state that Dr. Gruver's performance was the proximate cause of any complications or harm that Jaskoviak might have experienced. *See Cornfeldt*, 295

N.W.2d at 640-41 (stating that a plaintiff must prove by expert testimony that it is more probable than not that the undisclosed risk did materialize in harm).

In the trial court's opinion, Dr. Hamar was required to, but did not identify, the risks of treatment, their gravity, or the likelihood of their occurrence. App., p.30. Specifically the trial court stated:

> The Note to North Dakota Civil Pattern Jury Instruction C-14.20 states: "Expert testimony is generally necessary to identify the risks of treatment, their gravity, the likelihood of occurrence, and reasonable alternatives." Dr. Hamar's affidavit sets our reasonable alternatives, but does not establish any of the other requirements. Nor does any other evidence presented by the plaintiff do so. Further, the plaintiff has provided no evidence establishing the general elements of medical negligence, those being the standard of care applicable, the defenant's failure to meet the standard of care caused the plaintiff's alleged damages.
>
> Because no evidence presented to the Court sustains the plaintiff's claims regarding lack of informed consent, those claims are DISMISSED without prejudice.

As first addressed by the trial court Dr. Hamar's affidavit contains no basis for his qualifications nor does it contain a basis for the foundation for his generic opinion about what he might do in a general sense versus what the standard of care was for Dr. Gruver to provide informed consent to Jaskoviak in February 1997or whether Dr. Gruver breached that standard. Certainly there is nothing in the record or in Dr. Hamar's affidavit that establishes that Dr. Hamar reviewed the medical records in this case to determine what advice Dr. Gruver provided to Jaskoviak and whether the advice or alternatives were appropriate advice or alternatives for Jaskoviak (versus generic type advice or alternatives for a hypothetical patient). Dr. Hamar's opinion is highly speculative and conclusory as it relates to the claim of lack of informed consent in this case and does not address the question of whether a reasonable person in (what the physician knew or should have known was) Jaskoviak's position would

likely attach significance to the consequences of the undisclosed risk. *Reinhardt*, 337 N.W.2d at 96.

Other courts have considered the issue of whether the expert testimony has to address the same or similar circumstances as present in the litigated case. In *DiFilippo v Preston* 173 A.2d 333, 339 (Del. 1961, Sup), the court affirmed a judgment for the defendant physician, who had performed a thyroidectomy on a patient who suffered a resultant injury causing loss of voice. The court stated that whether or not a physician or surgeon is under a duty to warn a patient of the possibility of a specific adverse result of a proposed treatment depends upon the circumstances of the particular case, and on the general practice with respect to such cases followed by the medical profession in the locality, and that the custom of the medical profession to warn must be established by expert medical testimony [emphasis added]. The significance of *DiFilipo* is that it sets forth the standard that the proposed treatment depends upon the circumstances of the particular case. That is, the standard is not judged by some generic statement such as Dr. Hamar's statement without relevance to the particular circumstances related to Jaskoviak.

The Court of Appeals of Tennessee has stated that a patient's testimony that a plastic surgeon made oral representations and assurances regarding the extent of scarring from surgery to treat the patient's enlarged breast condition failed to establish a prima facie claim against a surgeon for lack of informed consent, in the absence of expert testimony establishing what a reasonable medical practitioner of same or similar communities under same or similar circumstances would have disclosed to a patient about attendant risks incident to the surgery, and that plastic surgeon departed from the norm. T.C.A. § 29-26-118. *Harris v. Buckspan*, 984 S.W.2d 944 (Tenn. Ct. App. 1998), appeal denied, (Feb. 1, 1999). [Emphasis added].

Generally, a physician is required to disclose only such risks that reasonable practitioner of like training would have disclosed in the same or similar circumstances; under this standard, expert testimony is required to establish what a reasonable practitioner would disclose in such circumstances. *Weber v. McCoy*, 950 P.2d 548 (Wyo. 1997). [Emphasis added].

Since expert opinion is essential to maintain a malpractice action and the trial court determined that it was not provided in Dr. Hamar's affidavit, summary judgment was appropriate in the present case.

(B) Dr. Wayne Swenson's Opinion

The one opinion left out of the Jaskoviak's brief on appeal is that of his own treating physician Dr. Wayne Swenson of Bismarck, North Dakota whose deposition was taken by his own attorney. Although Jaskoviak noticed and took the deposition of Dr. Wayne Swenson it is clear that Dr. Swenson did provide an opinion regarding Dr. Gruver meeting the applicable standard of care. On page 32 of Dr. Wayne Swenson's deposition, Dr. Swenson stated specifically:

> "THE WITNESS: As far as I'm concerned, Dr. Gruver is an excellent surgeon, competent to perform the procedure and if, in his opinion, he said he was to do it, I would not disagree with that because there are different opinions every time you turn around in this business."

Appellee's Appendix, p. 14. Dr. Wayne Swenson deposition page 32, lines 5-10.

Similarly, on page 24 of Dr. Gruver's deposition Dr. Swenson stated:

> "Q. What was your opinion - - what is your opinion, after reviewing this report, as to whether Mr. Jaskoviak needed it?

A. I may have done the surgery on it, I don't know. See, if I told him I didn't think so, it had to be based on a lot of factors but another surgeon might say I can go ahead and do this and do a good job and he's well within his competency.

If I can interject, Dr. Gruver is a conscientious surgeon and he was well within his competency to perform the surgery, he did a varicose vein surgery on a patient."

Appellee's Appendix, p. 12, Dr. Wayne Swenson deposition page 24, lines 9-20.

Dr. Hamar in no way contradicts this expert testimony supportive of Dr. Gruver. In fact, Dr. Hamar does not address the issue and is therefore, fatally defective.

It is clear that Dr. Swenson believes that Dr. Gruver is an excellent surgeon and that if Dr. Gruver recommended surgery, Dr. Swenson would not disagree with that recommendation. Dr. Swenson and other surgeons might disagree, but that does not make the recommendation to have varicose vein surgery negligent nor does it fall below the standard of care for surgeons such as Dr. Gruver to recommend such surgery. In fact, there is no opinion to that effect in this entire case or in any of the materials provided by Jaskoviak. Thus again, this is simply a case of lack of informed consent.

The significance of Dr. Swenson's testimony is that it places the whole issue of informed consent in context. Physicians may disagree about a recommended course of action in a particular case. That does not inescapably lead to a determination that one of the two was negligent or committed medical malpractice. This is important because the only claim left, lack of informed consent, was still the subject of summary judgment of dismissal by the court. It is interesting to note also that Dr. Swenson does not necessarily provide the same information as provided in Dr. Hamar's Affidavit.

Specifically Dr. Swenson stated in response to a question in his deposition as to what information he provides to a patient as follows:

> "Q. Do you explain to the patient each of these three and give them a choice of what they want to do based upon your input?
>
> A. I usually give the opinion of what I think is right without going into the other details, as a generalization, but if they ask the question, I certainly answer them."
>
> Appellee's Appendix, p. 15, Dr. Wayne Swenson deposition page 34, lines 8-14.

The general case law regarding medical negligence cases in North Dakota requires expert testimony to prove the elements of a claim of medical negligence.

This case was commenced against Dr. Gruver on May 4, 1998. More than two (2) years and seven (7) months later, Jaskoviak has still yet to provide an admissible expert opinion to survive a Motion for Summary Judgment. Without going into all the arguments that have been considered by the Court several times in this case already, informed consent does in fact require a medical expert opinion. Essentially, every medical malpractice case requires expert medical testimony to establish the standard of care, the failure to meet that standard of care and proximate cause. NDJI-Civil C-14.00(1994) Medical Negligence (Elements). That is also true in this case of informed consent.

There is no genuine issue of material fact regarding the elements of a claim for medical negligence. Jaskoviak has failed to meet the standards for surviving a motion for summary judgment and his complaint was properly dismissed by summary judgment.

4. Was the motion for reconsideration providing Dr. Bell's opinion after judgment had been entered properly considered and denied by the trial court?

Jaskoviaks's answers to the interrogatories of both Dr. Gruver and Medcenter One identified Martin L. Bell, M.D of Phoenix, Arizona as his expert medical witness, but stated that Dr. Bell's report would be provided when it was available. *See* Plaintiff's Answers to Defendant Daniel Gruver, M.D.'s Interrogatories to Jaskoviak's(Set One) (Answers to Interrogatories 36 b and 39 d) Appellees Appendix, p. 1 and Plaintiff's Answers to Medcenter One's Interrogatories to Plaintiff, Set No. 1 (Answers to Interrogatories No. 44, 45, 46, 47, 48, and 49). Appellees Appendix, p.4 served December 17, 1998. Dr. Bell's opinion was not provided, despite all the motions pending before and considered by the court, until January 12, 2001, more than two years later.

(A) The Motion for Reconsideration

The trial court filed a Judgment dismissing Jaskoviak's claims on January 9, 2001. Notice of Entry of Judgment was served on January 11, 2001. Dr. Bell's expert opinion was included with Plaintiff's Motion for Reconsideration on January 12, 2001. Dr. Bell's expert opinion should not be considered part of this litigation because it was provided only after the judgment was entered. The motion for reconsideration was properly denied.

A motion to reconsider may be treated as a Rule 60(b), N.D.R. Civ.P. motion. *Filler v. Bragg*, 1997 ND 24, ¶6, 559 N.W.2d 225, 227-28. Rule 60(b) states that a court may relieve a party from a final judgment or order for certain specified reasons. A decision on a Rule 60(b) motion will not be reversed absent an abuse of discretion.

If a party makes a decision to submit certain evidence at a stage in the proceeding, that party cannot later claim exceptional circumstances in trying to get relief from a judgment. *Follman v. Upper Valley Special Educ. Unit*, 2000 ND 72, ¶11, 609 N.W.2d 90, __ (citing *Hefty v. Aldrich*, 220 N.W.2d 840, 847 (N.D. 1974)). "A Rule 60(b) motion is not to be used to relieve a party from free, calculated, and deliberate choices." *Id.* (quoting *Industrial Comm'n of North Dakota v. Wolf*, 1999 ND App 2, ¶6, 588 N.W.2d 590). Indeed, Jaskoviak has no claim of exceptional circumstances. *Follman* at ¶10.

Jaskoviak's motion to reconsider may not have been properly before the trial court in the first place. It has been argued that a "motion to reconsider" is not specifically authorized by the North Dakota Rules of Civil Procedure. *Mahoney v. Mahoney*, 516 N.W.2d 656, 660 (N.D. App. 1994). The court, even though it decided the case without reaching the issue, stated that even if a motion to reconsider is not specifically authorized, the trial court should rule on it to assist the parties in determining matters of finality for purposes of an appeal. *Id.*

In the present case, even if a motion to reconsider is not authorized under the Rules of Civil Procedure, the trial court was correct in considering and then denying the motion because the ruling would give the litigants, the court, society and all concerned a finality of judgment in the matter. *Follman at* ¶10 (stating that the principle of finality of judgment serves a purpose for all concerned); *see also Mahoney*, 516 N.W.2d at 660 (stating that even if motion to reconsider is not authorized by the rules, the trial court should rule on the motion to provide finality to the parties).

Follman had appealed a trial court order denying his motion to reconsider its grant of a summary judgment motion dismissing his claim. This Court held that the

trial court did not abuse its discretion in denying the motion for reconsideration. *Follman* at ¶1. In his appeal Follman asserted that his motion for reconsideration was a motion under N.D.R.Civ.P. 60(b)(vi). Id. at ¶¶ 8-9. This Court first set forth the traditional standard that a "trial court's decision on a Rule 60 (b) motion for relief is within the trial court's sound discretion and will not be overturned absent an abuse of discretion." *Id.* at ¶ 10 [citation omitted]. This Court then discussed that the principle of finality serves a most useful purpose for all concerned, that the moving party bears the burden of establishing sufficient grounds for disturbing the finality of a decree, and that relief should be granted only in exceptional circumstances. Jaskoviak has failed to bear the burden of establishing sufficient grounds for Rule 60(b) relief. No such exceptional circumstances exist in this case.

A decision to submit only certain evidence at a stage in the proceedings, such as occurred in the case of Jaskoviak's Motion for Reconsideration, cannot constitute exceptional circumstances justifying relief from a judgment. *Id.* at ¶ 10 [citation omitted]. Rule 60(b) is not designed to relieve a party from "free, calculated, and deliberate choices", from "misjudgment or careless failure to evaluate", and a "party remains under a duty to take legal steps to protect his own interests." *Id.* at ¶ 11 [citations omitted]. Because Jaskoviak was not entitled to relief under Rule 60(b) his motion for reconsideration was properly denied by the trial court.

Neither did Jaskoviak make a prior request pursuant to N.D.R.Civ.Pro. 56(f) for additional time to submit affidavits such as that of Dr. Bell. The incomplete state of Jaskoviak's discovery provides no basis to reverse the summary judgment. *Hummell v. Mid Dakota Clinic*, P.C., 526 N.W.2d 704, 708 (N.D. 1995).

(B) Dr. Martin Bell's Opinion Submitted January 12, 2001

The North Dakota Supreme Court has not addressed in depth the issues of informed consent as they relate to the sufficiency of expert testimony required to establish a claim of lack of informed consent or negligent nondisclosure as it is called in Minnesota. Neither has the court addressed the issues of the materiality of the risks or feasibility of the alternatives required in a case of lack of informed consent and whether these requirements are related to the specific plaintiff involved in a case or just general requirements on a hypothetical basis. Other courts in other states have addressed these issues and it is helpful to review some of the issues raised in those cases.

For examples as to how other courts have addressed some of these issues, see the following cases: *Reinhardt v. Colton*, 337 N.W.2d 88 (Minn. 1983); *Harris v. Buckspan*, 984 S.W.2d 944 (Tenn. Ct.App. 1998); *DiFilippo, Supra*; *Weber v. McCoy*, 950 P.2d 548 (Wyo. 1997); and, *Getchell v. Mansfield*, 489 P.2d 953 (Or. 1971).

It should also be kept in mind that a bad result, such as complained of by Jaskoviak, is not in and of itself evidence of negligence. NDJI-Civil C-14.30 (1994) citing the *Winkjer* case. The fact that Jaskoviak has continuing complaints of pain or scarring (both of which should be expected results) does not in and of itself provide anything in aid of his claim in this case.

It should also be kept in mind in looking at the Affidavit of Dr. Bell as well as that of Dr. Hammer that, again, that this is not a case of expert testimony regarding negligent medical treatment by Dr. Gruver. In fact, neither Dr. Hammer nor Dr. Bell have stated that the varicose vein surgery was not appropriate under these particular circumstances involving this particular patient. The best that can be said about their opinions is that they said there may be alternatives in a general sense. Generally in

a lack of informed consent case, expert medical evidence is required of what a reasonable medical practitioner would do "under the same or similar circumstances . . ." *Harris* 984 S.W.2d at 949. *See also Weber v. McCoy Supra.* Testimony regarding the feasibility of the medical alternatives is also required in a case of lack of informed consent. *Getchell v. Mansfield*, 489 P.2d 953, 957-58 (Or. 1971). Similarly in the case of Dr. Bell and Dr. Hammar, neither has stated whether the alternatives they have identified were medically feasible for Jaskoviak in February 1997. The record is silent on that crucial issue. Again, both simply talk in terms of a general hypothetical case and not on the basis of a review of Mr. Jaskoviak's records or review of his complaints at the specific time in 1997 when he was complaining of those problems to Dr. Gruver, not several years later when their opinions were provided. Neither do they state specifically how Dr. Gruver's case allegedly fell below the standard of care.

If the Court considers Dr. Bell's expert opinion despite it's untimeliness, it, too, does not properly address either the standard of care, breach of standard of care or the causation requirement. Dr. Bell outlines the duty or standard of care that a physician owes a patient generally, but does not specifically address the duty owed to this patient. He lists the risks of vein stripping and other alternatives, but does not indicate whether these alternatives were preferable for Jaskoviak and does not state that Dr. Gruver, therefore, breached the standard of care owed to Plaintiff. Dr. Bell's opinion states in a conclusory manner that Dr. Gruver's failure to inform Jaskoviak of possible outcomes may have led to the damage or harm that Jaskoviak experienced. However, "[a] conclusory statement is insufficient to demonstrate that the injury could not have occurred without negligence." *Maguire v. Taylor*, 940 F.2d 375, 377 (8th Cir. 1991). Furthermore, Dr. Bell does not address the question of whether a reasonable person in (what the physician knew or should have known was)

Jaskoviak's position (objective standard) would likely attach significance to the consequences of the undisclosed risk. *Reinhardt*, 337 N.W.2d at 96. Jaskoviak has failed to establish causation because Jaskoviak did not provide expert opinion evidence showing that it was more probable than not that the undisclosed risk materialized in harm. *Reinhardt*, 337 N.W.2d at 96. Since expert opinion is essential to maintain a malpractice action and it was not provided by Dr. Bell, summary judgment was appropriate in the present case. *Fortier*, 330 N.W.2d at 517.

Paragraph two Dr. Bell's opinion discusses alternative treatments to surgery in terms of recommending and performing only the treatment which was reasonably likely to improve Jaskoviak's condition. However, it does not go into detail at all as to what was the appropriate alternative or treatment in Jaskoviak's case. Again, it does not criticize the actual surgery or performance of the surgery by Dr. Gruver. However, simply stating alternatives that would improve a patients condition without saying which alternatives should be chosen or are appropriate falls short of establishing a standard of care required for Dr. Gruver in this case.

Similarly in paragraph four of Dr. Bell's opinion, Dr. Bell states that Dr. Gruver's care and treatment fell below the applicable standard of care, but fails to state exactly or specifically how or why his opinion is that the care and treatment fell below the applicable standard of care.

The new submission of Dr. Bell's medical opinion still falls short of what is required in North Dakota for expert opinion to support a claim of medical malpractice. It first of all is noticeable that the opinion of Dr. Bell is based in part upon pages 1-24 of a deposition allegedly given by Dr. Gruver in a lawsuit against him by Beverly Williams. How this is relevant is beyond comprehension and how it is even remotely to be considered as a basis for an expert medical opinion in this case

is hard to decipher. *See, Kunnanz v. Edge*, 515 N.W.2d 167, 171 (N.D. 1994) (negligence generally cannot be proved by showing the commission of similar prior acts by the same person. Citing NDREvid. 404(b) & 403). In the case before the court it is even less clear the relevance of the deposition testimony cited in a different case than the one now being considered by the Court.

The affidavit of Dr. Bell, submitted two years and seven months after his case was started, simply fails to support the elements of a cause of action for lack of informed consent. Because the Affidavit of Dr. Bell still falls short of supporting a claim of medical negligence against Dr. Gruver his appeal should be denied and the Judgment and Order of the trial court affirmed.

Jaskoviak has provided neither the trial court nor this court with any reason in the record why the expert medical opinion of Dr. Bell could not have been provided earlier than January 12, 2001 after judgment had been entered dismissing his claim without prejudice. Not one of the circumstances allowed by Rule 60 applies to the facts in this case. The order denying the self styled motion for reconsideration was entirely appropriate. The trial court did not abuse its discretion in denying the motion and its considered judgment should not be disturbed on appeal.

CONCLUSION

The claims of medical negligence and lack of informed consent were properly dismissed by summary judgment by the trial court based on the evidence before the court. Further, the motion for reconsideration providing Dr. Bell's opinion after judgment had been entered was properly considered and denied by the trial court. Therefore, the judgment of the district court granting summary judgment dismissing Jaskoviak's complaint and the order denying the motion for reconsideration should, in all respects, be affirmed.

Dated this 14th day of June, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Defendant/Appellee Daniel Gruver, M.D. has been served by first-class mail, postage prepaid, this 14th day of June, 2001, upon:

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