

ORIGINAL

20010065

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 17 2001

STATE OF NORTH DAKOTA

Steven Jaskoviak,)
)
Plaintiff/Appellant,)
)
vs.)
)
Daniel Gruver, M.D. and)
Medcenter One Health Systems,)
)
Defendants/Appellees.)

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

REPLY BRIEF OF PLAINTIFF/APPELLANT

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I. PLAINTIFF'S LACK OF INFORMED CONSENT CLAIM
WAS PROPERLY BEFORE THE TRIAL COURT

Defendant Gruver contends that the trial court did not know the exact language of his claim regarding lack of informed consent. That is not accurate. As the court will note plaintiff's motion to amend his complaint stated that the informed consent claim would provide essentially as follows:

That, further defendants Gruver and Medcenter One Health Systems failed to obtain plaintiff Steven Jaskoviak's informed consent for the procedures involved in this action. (Docket Number 34).

Defendant Gruver next claims that the informed consent claim was not properly before the trial court because, while the trial court did grant the motion to amend, an Amended Complaint was never actually served on defendant Gruver. It is correct that the Amended Complaint was never formally served, but that objection was not raised in the trial court. Instead, the parties proceeded to litigate this case exactly as if the Complaint had been amended to include the lack of informed consent claim.

It is well established in North Dakota that issues not raised by the pleadings but tried by the express or implied consent of the parties are treated as if they had been raised in the pleadings. Saakian vs. North Dakota Workers Comp. Bureau, 1998 ND 227, 587 NW2d 166 (1998). And, in Hector vs. Metro Centers, Inc., 498 NW2d 113 (N.D. 1993),

the North Dakota Supreme Court held that even a failure to amend the complaint, much less serve the amended complaint on a third party defendant, did not prevent consideration of a claim and the entry of judgment thereon. In so holding, the Court quoted with approval from Federal Practice and Procedure: Civil 2d, Section 1459 (1990) to the effect that ". . . a formal amendment of plaintiff's complaint is not necessary if the parties actually treat each other in an adverse manner." (498 NW2d at 121).


Finally, North Dakota Rule of Civil Procedure 15(b), dealing with amendments to conform to the evidence, provides in relevant part as follows:

If issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of those issues..."

For the above stated reasons, it is respectfully submitted that the lack of informed consent claim was properly before the trial court. Not only did defendant Gruver fail to raise the subject objection in the trial court which, of course, would have allowed plaintiff the opportunity to easily remedy the alleged defect, defendant Gruver also fully litigated the issue, causing it to be treated in all respects as if it had been raised in the

pleadings.

Dated this 17 day of July, 2001.


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