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

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 15 2001

STATE OF NORTH DAKOTA

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

BRIEF OF PLAINTIFF/APPELLANT
STEVEN JASKOVIK

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ISSUES PRESENTED FOR REVIEW

- I. Did the trial court err in granting defendant Gruver's Motion for Summary Judgment?
- II. Did the trial court err in denying plaintiff Jaskoviak's Motion for Reconsideration?
- III. Is this case appealable to the North Dakota Supreme Court?

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This is a medical malpractice action in which plaintiff Steven Jaskoviak alleges that the defendant Dr. Daniel Gruver committed medical negligence in performing a vein stripping surgical procedure on him without first obtaining his informed consent.

The claim was initially brought also against Medcenter One Health Systems, but that action has been dismissed and is not a part of this appeal. Initially, also, plaintiff Jaskoviak alleged causes of action in addition to his lack of informed consent claim, but those issues have been abandoned and are not a part of this appeal.

The sole issue, then, is whether the trial court erroneously granted defendant Gruver's Motion for Summary Judgment on plaintiff Jaskoviak's lack of informed consent cause of action.

Defendant Gruver's Motion for Summary Judgment came on for determination before the Honorable Bruce B. Haskell. Judge Haskell granted defendant Gruver's Motion for Summary Judgment by his Order dated December 27, 2000, wherein plaintiff Jaskoviak's action was dismissed without prejudice. (App. 24).

Plaintiff Jaskoviak thereafter brought a Motion for Reconsideration, but that motion was denied without discussion by Judge Haskell in his Order dated February 5, 2001. (App. 35).

This appeal followed.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT GRUVER'S MOTION FOR SUMMARY JUDGMENT.

The specific factual background of this case is set forth in (1) the Affidavit of Steven Jaskoviak dated September 30, 1999 (App. 11) and (2) the Supplemental Affidavit of Steven

Jaskoviak dated November 30, 2000. (App. 20). Those affidavits are hereinafter set forth in full.

I, Steven Jaskoviak, being duly sworn hereby state:

I am the plaintiff in the above-captioned matter.

Early in 1996 I went to Q & R Clinic to talk to somebody about a drug that I heard about called Phen Phen. I was referred to Dr. Gruver. He prescribed the drug to me. After about 7 days on the drug, I noticed the Phen Phen made me very irritable at home and work. I then quit.

After seeing a documentary on television about liposuction, I wanted to investigate further about this process and how it could help me lose a few pounds, or even if it was feasible for me to pursue this option. When I called Medcenter One, I was referred to Medcenter One resident plastic surgeon Dr. Daniel Gruver and made an appointment to see him. I told them that I saw him earlier in the year. He asked me why I quit the Phen Phen and I told him what the problem was. He then inspected my tummy area. He had his nurse escort me into a separate room where there was a special computer and camera combination set up. I was told to undress down to my shorts so that the nurses could take pictures of my abdomen area. At that time, Dr. Gruver noticed my varicose veins. He told me he could take care of those if I wanted. I told him that I had Dr. Swenson look at them not too long ago and he said they were okay.

After the nurses took the pictures they needed to compile the information, Dr. Gruver came into the room and counselled the nurse

operating the computer how to adjust the picture so that I would have a pretty good idea how much of my tummy area would be reduced by doing to the tummy tuck. He informed me that if I did this operation, he would use liposuction to eliminate small pools around the incision area. He then took me into a separate room to watch a movie on liposuction, tummy tuck and vein stripping while he compiled other information and also while he checked with Blue Cross if the operation was covered. After the movie ended, a nurse escorted me into his private office. He told me that Blue Cross considered a tummy tuck and liposuction to be cosmetic surgery and was not covered under my policy. Because Blue Cross would not cover the tummy tuck and liposuction, Dr. Gruver told me that he would discount the \$4200 fee to \$3000. I said half jokingly \$2500. He shook his head and said "OK".

He then told me that Blue Cross would pay for the varicose veins and he would do the operation at the same time as the tummy tuck and liposuction. Concerned, I told him that Dr. Swenson told me my varicose veins were okay. He then tested the veins with a machine that looked like a microphone attached to a speaker then told me they were perforated and needed to be taken out because my blood was not returning properly to my heart.

I then made an appointment for surgery for mid-November. A family crisis came up and I had to cancel my surgery. I called again in December and rescheduled my surgery. I always believed that the Blue Cross deductible must be met January 1 to January 1. Concerned, I asked Dr. Gruver to schedule the operation before year

end. He told me that I needn't worry, but I did need to do it before March 1 or I would have to pay the 1997 deductible. I wanted to schedule it for February 7 and he told me he couldn't do it then, so I said February 21 and he agreed. At that time I also told him that I couldn't afford the tummy tuck and he said "No problem we'll do that later."

On February 21, 1997, I had the operation done. During the night, I tried to get up to go to the rest room with the help of a nurse. As I stood up I started bleeding profusely from the back of my legs. They sounded the buzzer and four other nurses came running in. I fell faint back on the bed. One of the nurses I heard said he lost 5 milliliters of blood and that she was going to call Dr. Gruver right away. She came back in about 15 minutes later and made sure the bleeding stopped and everything was going smoothly. She told the other nurses to watch me. I was set to go home that morning but because of that incident, I had to stay another night for observation.

Dr. Gruver came in later the next day and looked me over. He explained to me the bleeding came from him not using stitches on some incisions. Also at that time he told me that he was leaving Medcenter One and going to Panama. This was the first that I had heard of this. When he was coming back from Panama, he was going to start a private practice. He wanted to do the tummy tuck when he got back. With all the pain I was in, I told him that is the last thing on my mind now. The Medcenter One nurse told me that

Dr. Gruver's nurse was going to call me with an appointment then discharge me.

My first appointment was within a very short time after being discharged. He checked my incisions, wrapped my legs and sent me home.

At my second appointment, Dr. Gruver asked me if it was okay if he could bring in a student to watch him. I said it was okay. He checked my stitches on my ankles and told me that everything looked good.

He told me to make another appointment before he leaves to Panama. He then told me that he wants to do that tummy tuck and to keep in contact so that he can do it after he returns from Panama. I went out to the counter and made my next appointment.

I waited over an hour at my third appointment. When he came into the office he did not even acknowledge I was there, let alone apologizing for making me wait for over an hour. He then made me wait another 15 minutes. I went to the desk and told the nurse this was absurd. I should be given the decency for at least a phone call telling me that Dr. Gruver couldn't make his appointments. I'm a working man also. The nurse told me that Dr. Gruver was going to be gone so I needed to make an appointment with his replacement. I should be getting a call in a couple of days from Dr. Gruver's replacement. That call has yet to come.

My next conversation with Medcenter One was in the form of a billing for \$1250 for services from the hospital. I received an Explanation of Benefits from my insurance company that said "Your

responsibility \$0.00". I thought this matter was finished when I received the bill from Medcenter One. Dr. Gruver never explained this to me. He told me there would be no charge to me because my insurance will pick up all the charges. The Explanation of Benefits corresponds this. Dr. Gruver never ever talked to me about other expenses.

Not very long before I talked to Dr. Gruver, I called Dr. Swenson at Q & R Clinic after being told by a co-worker that he would be the right person to talk to about some varicose veins that I had on the back of my legs. My legs didn't hurt at all. I was perfectly normal and did perfectly normal things. I played golf, I ski every winter, I'm always working in my yard, I occasionally install carpet, I work on remodeling my basement, I work on restoring my old collector cars. I have a very busy life-style and like to do everything myself. I personally thought the veins were a little unsightly but I could have lived with them.

Dr. Swenson met with me at Q & R Clinic and he inspected my legs. He said that he felt all I needed was to start wearing special leg socks but to be on the safe side he wanted to inject my feet with a dye so that radiology could take x-rays of my legs to see if there was a problem that he couldn't see. After the x-rays were performed, he met with me and told me that there was no leakage. He again suggested that I wear special leg socks. The circulation is very good. He told me that he could take my money and fix the damaged areas, but it would be unnecessary. Just wear the socks.

Dr. Hamar of St. Alexius Hospital told me he was surprised that Dr. Gruver nor Medcenter One had not ever started or suggested starting some kind of therapy for my legs. Dr. Hamar told me to get in contact with the Human Performance Center and see if they can help. Also, he told me that the waist high restrictive Jobst socks that Dr. Gruver gave me to wear were unnecessary. I told him that I had to stop wearing them because they fell down around my knees and cut off even more circulation to my lower legs. Dr Hamar prescribed knee high socks to wear. Dr. Hamar also told me that I would no doubt need more corrective surgery to take care of a few veins that are appearing in my lower leg.

At no time before the operation did Dr. Gruver tell me anything about what was going to happen. He never explained to me that I'll be scarred for life like Dr. Hamar told me. He never told me that I would need to wear corrective Jobst socks for the rest of my life. He never told me that I would lose all my strength and not be able to do the things that I did before. After he took my money he disappeared into oblivion never to talk to me again. When my cut opened up and I lost the blood in the hospital, I overheard the head nurse tell the others that she called Dr. Gruver and he'd be in in the morning and to watch the patient (me) closely. In the morning Dr. Gruver and the nurses felt it was serious enough to keep me in for an extra day. All Dr. Gruver asked was how I felt. He never ever talked to me about therapy. I felt I needed therapy both physical and mental to help me handle my future.

Dr. Gruver came to Wilhelm Inc. about 6 months after my operation to buy a car for his daughter. Do you know that even then he didn't ask me how my legs were? He did ask me to come and see him about liposuction and a tummy tuck though. I was very blunt with him when I told him I'm having a problem getting over the leg operation. He didn't care. He came back and said, "Well, when you're ready for your tummy tuck look me up" and he walked out of my office.

I initially went to Dr. Gruver for suggestions about liposuction and he ended up tearing my whole life apart. I have to learn to do everything different now. I'm more conscientious about the way I walk and even look. Every time I wear shorts, I feel people are staring at my legs.

I had developed a small spot on my lower right leg (a little bigger than a dime but smaller than a quarter) and wanted to talk to a surgeon.

I had no regular doctor so Leonard Hetland, a co-worker, recommended Dr. Swenson to me.

I made an appointment and went to Q & R to meet with Dr. Swenson.

After visually examining my legs, Dr. Swenson told me that without a procedure that would inject dye into my veins, he couldn't make a proper evaluation. He then called a different office and told me to go to the x-ray area where they will do the procedure. The appointment was set up for either the next day or very close.

I showed up for the appointment and undressed. Then they put me on the table and put a pad under my legs. I told them I was needle shy and the doctor told me I would only feel a warm sensation. When they injected the dye I fainted. When I came to, the nurse was putting a warm towel on my forehead and the procedure was finished.

I was then instructed to go to Dr. Swenson's office. I went there and after waiting a long time in the waiting room, they called me in.

In the office Dr. Swenson put two x-rays in a lighted area and explained to me there was no leakage. He recommended I get socks to help the varicose veins. I specifically remember that he told me "I could take your money and remove a couple of veins, but you don't need an operation. It can be improved with the socks." I joked with him saying, "Heck, I fainted during this dye process. What do you think it would be like if I let you cut on me."

He told his nurse to give me a pair of socks and she did.

Further affiant sayeth not.

In his Supplemental Affidavit dated November 30, 2000, plaintiff Jaskoviak stated the following:

I, Steven Jaskoviak, being duly sworn hereby state:

I am the plaintiff in the above-captioned matter.

In my Affidavit dated September 30, 1999, I described the circumstances surrounding the vein stripping surgery performed by Dr. Gruver which gave rise to this lawsuit.

In supplementation of that Affidavit, at no time prior to the vein stripping surgery did Dr. Gruver explain to me any options or alternative treatments, or give me any information with which to decide between the various alternative treatments available. Frankly, he seemed very intent on doing the surgery and seemed overly concerned with the money he would receive. As a matter of fact, he even negotiated with me as to the cost of a "tummy tuck" operation, reducing the price from \$4200 to \$3000 when he determined that Blue Cross Blue Shield would not cover that procedure and then agreed to reduce the price further to \$2500 when I jokingly offered him that amount. The vein stripping procedure was supposed to be entirely covered by Blue Cross Blue Shield according to Dr. Gruver but I later learned that that was not accurate in that I was billed an additional \$1250.

Further affiant sayeth not.

In addition, plaintiff Jaskoviak submitted the Affidavit of Dr. Steven Hamar in opposition to the Motion. (App. 22). Dr. Hamar stated as follows:

I, Steven K. Hamar, being duly sworn hereby state:

1. I am a physician licensed to practice medicine in the state of North Dakota.
2. I am employed by the Mid Dakota Clinic, Bismarck, North Dakota.
3. I have seen Steven Jaskoviak on several occasions. It is my opinion that prior to surgery Mr. Jaskoviak should be or have been informed of the options and/or alternative treatments for

varicose veins. These include (1) to inject them with a sclerosing solution (2) to remove them by the stripping operation or (3) to treat them with pressure elastic stockings.

4. It is my further opinion that a physician has a duty to inform the patient as to the nature of the procedure to be performed, the purpose it will serve, the alternatives involved and the dangers and risks of serious complications inherent in the procedure. The risks and benefits of each alternative procedure must also be explained.

5. Before performing the vein stripping procedure performed on Mr. Jaskoviak, had I been his physician, I would have informed him of each of the alternative treatment procedures available and would have specifically advised him of the risks and benefits of each. If this was not done it would, in my opinion, constitute medical negligence in that Mr. Jaskoviak was not provided with sufficient information to give his informed consent to the surgical procedure performed by Dr. Gruver.

Further affiant sayeth not.

In Wasem vs. Laskowski, 274 NW2d 219 (ND 1979) the North Dakota Supreme Court approved the following (partial) instruction relating to Informed Consent:

"A doctor must obtain the consent of a patient before treating him or subjecting him to medical tests. The patient's consent, however, to be effective, must be knowledgeable; that is, it must constitute an informed consent. The average patient's ignorance of medical science creates a duty in his doctor to explain the proposed procedure in terms and in a manner that the patient can reasonably comprehend. The doctor must give

the patient information as to the nature of the procedure, the purpose it will serve, the alternatives involved, and the dangers and risks of serious complications inherent in the procedure." (274 NW2d at 226, instruction quoted in part.)

In Greenwood vs. Paracelsus Health Care, 2001 ND 28, 622 NW2d 195 (ND 2001), the North Dakota Supreme Court stated:

In order to establish a prima facie medical malpractice case, the plaintiff must present evidence establishing the applicable standard of care, a violation of that standard, and a causal relationship between the violation and the harm complained of. 2001 ND 28 at Paragraph 10; 622 NW2d at 199.

In the instant case we submit that Dr. Hamar's Affidavit established the applicable standard of care. Dr. Hamar stated that, prior to plaintiff Jaskoviak's varicose vein surgery, he should have been informed of the options and/or alternative treatments for varicose veins and that "a physician has a duty to inform the patient as to the nature of the procedure to be performed, the purpose it will serve, the alternatives involved and the dangers and risks of serious complications inherent in the procedure. The risks and benefits of each alternative procedure must also be explained." Dr. Hamar went on to say that Mr. Jaskoviak should have been informed "of each of the alternative treatment procedures available" and "the risks and benefits of each. If this was not done it would, in my opinion, constitute medical negligence---".

Further, it is clear from plaintiff Jascoviak's Supplemental Affidavit that "at no time prior to the vein stripping surgery did Dr. Gruver explain to me any options or alternative treatments, or

give me any information with which to decide between the various alternative treatments available." Plaintiff Jaskoviak's Affidavits, then, establish a violation of the standard of care enunciated by Dr. Hamar.

Dr. Hamar's Affidavit also establishes a violation of the applicable standard of care in that he states that, if Mr. Jaskoviak was not advised of the alternative treatment procedures and the risks and benefits of each "it would, in my opinion, constitute medical negligence in that Mr. Jaskoviak was not provided with sufficient information to give his informed consent to the surgical procedure performed by Dr. Gruver."

Finally, plaintiff Jaskoviak's original Affidavit establishes a causal relationship between the violation and the harm complained of. Mr. Jaskoviak's Affidavit describes in very specific detail the problems caused to him by Dr. Gruver's surgery. Not the least of plaintiff Jaskoviak's problems is that he is now "scarred for life" as a result of the varicose vein surgery. (Affidavit of Steven Jaskoviak, App. 11). Further, plaintiff Jaskoviak in that same Affidavit describes the pain, discomfort and embarrassment caused by the surgery.

NDCC Section 28-01-46 provides that, in certain instances, an expert opinion is not required to maintain an action for medical negligence. Thus, that section provides in relevant part as follows:

"Expert opinion required to maintain an action based upon alleged medical negligence except in obvious cases.---This section does not apply to alleged lack of informed consent,

unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence." (Emphasis added.)

Here, then, even though an expert is not required to maintain an action for lack of informed consent, plaintiff Jaskoviak provided that expert opinion in the form of Dr. Hamar's Affidavit.

Further, a part of the "harm complained of" by plaintiff Jaskoviak is the scarring injury caused to him as a result of the surgery. Certainly Mr. Jaskoviak can testify that the scarring resulted directly from and was caused by the surgery. The scarring is an "obvious occurrence" which was caused by the surgery and, consequently, no expert opinion is required to establish causation of the scarring.

Therefore, plaintiff Jaskoviak submitted sufficient evidence to establish a prima facie medical malpractice action. He established through Dr. Hamar the applicable standard of care, he established through his own testimony and the testimony of Dr. Hamar a violation of that standard, and, finally, through his own Affidavit he also established a causal relationship between the violation of the standard and the harm he incurred.

On a motion for summary judgment, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought. Dunseith Sand & Gravel Co. v. Albrecht, 379 N.W.2d 803 (N.D. 1986). The party opposing a motion for summary judgment must receive the benefit of all favorable inferences which can be reasonably drawn from the evidence. Production Credit Ass'n

v. Klein, 385 N.W.2d 485 (N.D. 1986). In reviewing a summary judgment, the supreme court views the evidence in the light most favorable to the opposing party, and then determines whether the trial court properly granted summary judgment as a matter of law. Ertelt v. EMCASCO Ins. Co., 486 N.W.2d 233 (N.D. 1992). The court must accept the truth of the evidence presented by the non-moving party and the truth of all reasonable inferences from that evidence. Greenwood, supra. Finally, questions of law are fully reviewable. Miller v. Kloeckner, 1999 ND 190, 600 N.W.2d 881.

In that plaintiff Jaskoviak submitted evidence on all elements necessary to establish a prima facie medical malpractice action, it is respectfully submitted that the trial court erred in granting defendant Gruver's Motion for Summary Judgment.

**III. THE TRIAL COURT ERRED IN DENYING PLAINTIFF
JASKOVIK'S MOTION FOR RECONSIDERATION.**

In granting defendant Gruver's Motion for Summary Judgment, Judge Haskell concluded as follows:

"The Note to North Dakota Civil Pattern Jury Instruction C-14.20 state: "expert testimony is generally necessary to identify the risks of treatment, their gravity, the likelihood of an occurrence, and reasonable alternatives."

Dr. Hamar's Affidavit sets out 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 defendant's failure to meet the standard of care, and that the defendant's failure to meet the standard of care caused the plaintiff's alleged damages."

(Order dated December 27, 2000, App. 24).

As discussed above, we submit that the requirements for a prima facie medical malpractice case, as established by the North Dakota Supreme Court, were met by plaintiff Jaskoviak, and that Judge Haskell was in error to conclude otherwise.

However, in that Judge Haskell disagreed, plaintiff Jaskoviak then moved for reconsideration of Judge Haskell's decision and submitted the additional Affidavit of Dr. Martin L. Bell. (App. 34).

Dr. Bell's Affidavit stated the following:

You have requested an opinion regarding the medical care of your client, Mr. Steve Jaskoviak, by Dr. Daniel Gruver when he performed vein stripping surgery in February, 1997. I am a Board Certified Plastic Surgeon with previous training in General Surgery. I am familiar with the standard of care of a Plastic Surgeon with a General Surgery background who performs vein stripping surgery. I have reviewed the following records and information: letters, notes, and answers to interrogatories by Mr. Jaskoviak, photographs of Mr. Jaskoviak's legs, curriculum vitae of Dr. Gruver, pages 1 through 24 of a deposition given by Dr. Gruver

in a lawsuit against him by Beverly Williams, relevant medical records of Q & R Clinic and of Medcenter one, the deposition of Dr. Mark Swenson, and an affidavit of Dr. Steven Hamar.

Based on the information I have reviewed, it is my opinion that Dr. Gruver had a duty to Mr. Jaskoviak to recommend and perform only that treatment which was reasonably likely to improve his condition, and for which the likelihood of benefit outweighed the risks of harming and making his condition worse. Dr. Gruver also had a duty to inform Mr. Jaskoviak about alternative treatments to surgery, including injection with sclerosing solution, or wearing elastic compression stockings, or both of the above.

The risks of vein stripping surgery include the destruction and elimination of blood vessels and decreased blood flow to affected tissue, resulting in loss of blood supply and weakness, and the scars and disfigurement of the vein stripping procedure itself. These results are 100% likely to occur, in varying degrees of severity, dependant upon the extent of the procedure performed and the characteristics of the individual upon whom they are performed. Additional risks of vein stripping are blood clots, pulmonary embolism and death. Accepting Mr. Jaskoviak's statements in his affidavit dated September 30, 1999, as accurate, and assuming for the purpose of this report that they are true, Mr. Jaskoviak's complaints are causally related to the procedure performed by Dr. Gruver.

Mr. Jaskoviak alleges that Dr. Gruver suggested a vein stripping operation, that Mr. Jaskoviak was misinformed about the seriousness of his condition, that he was not informed of options or alternative treatments, and that his condition was worsened by unnecessary surgery. Assuming Mr. Jaskoviak's allegations to be true and correct, Dr. Gruver's care and treatment fell below the applicable standard of care.

Dated and signed this 12th day of January, 2001, in the County of Maricopa, State of Arizona.

/s/
Martin L. Bell, M.D., J.D.

Clearly, Dr. Bell's Affidavit addresses each of the elements established by the North Dakota Supreme Court to establish a prima facie medical malpractice case. And, Dr. Bell's Affidavit goes further and addresses those additional elements District Judge Haskell found absent. For these reasons, we submit that Judge Haskell erred in denying plaintiff Jaskoviak's Motion for Reconsideration.

IV. APPEALABILITY.


The North Dakota Supreme Court has requested that the parties address the appealability of this case in that plaintiff Jaskoviak's action was dismissed "without prejudice". Plaintiff Jaskoviak's claim arose in 1997. (Affidavit of Steven Jaskoviak, App. 11). The statute of limitations for medical malpractice actions is two years. NDCC Section 28-01-18. Consequently, even though plaintiff Jaskoviak's claim has been dismissed "without prejudice", unless Judge Haskell's decision is reversed, the

statute of limitations will have run and plaintiff Jaskoviak's claim will be forever barred. It is for that reason that this matter is now appealable.

V. CONCLUSION

It is respectfully submitted that the District Court erred in granting defendant Gruver's Motion for Summary Judgment, and in denying plaintiff Jaskoviak's Motion for Reconsideration. For all reasons set forth herein plaintiff respectfully requests that those decisions be reversed and that this matter be remanded to the District Court for further proceedings.

Dated this 14 day of May, 2001.


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