

FILED**09-08-2023****CLERK OF WISCONSIN
SUPREME COURT****STATE OF WISCONSIN, SUPREME COURT**

Mary A. Hensley, and
Spriggie N. Hensley, Sr.,
Plaintiffs/Appellants,

-v-

Appeal No. 2022AP000588

Froedtert South, Inc., Froedtert South, Inc. - Somers
Clinic, Froedtert South, Inc. - Kenosha Hospital, Froedtert
South, Inc. - Pleasant Prairie Hospital, MMIC Insurance,
Inc. and Neil Shepler, M.D.,
Defendants-Respondents,
Rebekah Costello, D.O.,
Defendant.

PETITION FOR REVIEW

Submitted and electronically signed this 8th , day of September , 2023 by:

THE PLAINTIFF/APPELLANTS

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PETITION FOR REVIEW

Appellants Mary A. Hensley, (hereinafter "Mary") and Spriggie N. Hensley, Sr., (hereinafter "Spriggie"), hereby petition the Supreme Court of Wisconsin, pursuant to Wis. Stats., s. 808.10 and Wis. Stats., s. 809.62 to review the decision of the Court of Appeals, District 2, in Case No. 2022AP000588, filed on August 9, 2023 R215.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

- 1. Is an indigent litigant barred from raising a medical malpractice claim simply because he or she cannot afford a paid medical expert, and if so, does this deprive the indigent litigant access to the court merely due to his or her poverty?**

- 2. Is a paid medical expert automatically required for all medical malpractice claims even where the alleged malpractice is clear and obvious with credible documentation and expert testimonial evidence offered in support of the claimed malpractice?**

The Court of Appeals decided the issues as follows:

The Court of Appeals relied upon the general proposition that in medical malpractice actions, Wisconsin law requires a paid medical expert to testify as to the standard of care and the defendants' departure from it, (R215: ¶8 pg. 5,6). The Court of Appeals rejected the Hensleys contention that their claims did not require paid expert testimony and held that they could not compel the

defendants to offer opinions as to the standard of care, and that the testimony of "Dr. Jandali," the surgeon who actually performed Mary's life saving surgery, did not qualify as "expert testimony" (R215: ¶12 pg. 7). The Court of Appeals offered no comment regarding Mary and Spriggie's indigent pro se status or their financial inability to afford paid expert testimony.

The reasons the Supreme Court should grant review are:

1. The Court should grant review because the issues described above present a novel question as to whether an indigent litigant should be denied access to the court in matters of medical malpractice because he or she cannot afford the cost of a paid medical expert.

2. The Court should also grant review to revisit the question of whether a paid medical expert is automatically required any time medical malpractice is alleged, even where the alleged malpractice is clear and obvious and can be proven by other credible means of information and evidence.

STATEMENT OF FACTS

1. On 6/22/20, Mary and Spriggie sought medical treatment for Mary at Froedtert South - Somers Clinic, (hereinafter, "Somers Clinic"); Mary was, at the time, unknowingly suffering from appendicitis. (R2: 9, no.13; R46: 5, no.13)

2. During Mary's initial visit to Somers Clinic, Mary presented with a host of symptoms typically associated with appendicitis, including lower abdominal and back pain, distended abdomen, with bloating, nausea and diarrhea, as well as vomiting, constipation and a recurring fever. (R2: 9 no. 14,15, 16; R101: 7, 20, 21, 22, 23, 24, Ex. 20r, Ex. 20f - 20f(i); R132: 790, 791, 793, 794).

3. The care provider at Somers Clinic, Andrea Mattison, P.A., (hereinafter Mattison), did not order a CT scan of Mary's abdomen nor order diagnostic tests or conduct a thorough history or physical examination to determine the cause of Mary's illness. (R2: 9, no. 17, 18, 19, 20; R101: 7, Ex. 20f - 20f(i); R46: 5 no 14).

4. Mattison instead ordered a series of four x-rays which confirmed the distended appearance of Mary's abdomen, suspicious for a small bowel obstruction, (R2: 9 - 10, no. 21; R101: 8, Ex. 20g & 20h), which itself can

require emergency surgery or be indicative of appendicitis. (R101: 8 no. 73, 74, 75, 76; R101: 9 no. 102 - 105, 125-128).

5. Nevertheless, Mattison and the staff at Somers Clinic sent Mary home with instructions to adhere to a "clear liquid diet" and to return to Somers Clinic the next day for a follow-up. (R2: 10 no. 22; R132: 790 – 791; R132: 807).

6. Mary and Spriggie returned to Somers Clinic as directed on 6/23/20, where Mary again presented with symptoms consistent with acute appendicitis. (R2:10, no. 24,25; R132:686, 687). Mattison ordered two additional x-ray images of Mary's abdomen, (R2:10, no. 27; R132: 671, 672, 673, 790, 791), and Mary was again sent home and instructed to adhere to a "bland diet," and to return to Somers Clinic "in about 2 days." (R2:11, no. 29; R101: 22, 23, 24; R132: 686, 687, 755).

7. At no time did the Somers Clinic staff employ diagnostic measures to ascertain the seriousness of Mary's condition or at least attempt to exclude appendicitis as a possible cause of her illness. (R2: 11, no. 28; R101: 7, Ex. 20f - 20f(i)).

8. Following the 6/23/20 visit, Mary's condition continued to worsen and by 6/25/20 Mary was in severe distress, (R66: 33, no. 160; R132: 168, 169), which caused Spriggie to rush Mary to the Kenosha Hospital, Emergency Department, (R2: 13, no. 41, 42; R132; 38, 39, 168, 169), where she was finally diagnosed as suffering from "acute appendicitis" and admitted as a patient, (R2: 13, no. 41, 42, 43, 47, 48, 49, 50; R132: 38, 39, 295, 296, 332, 333, 334, 335, 662, 663).

9. On 6/26/20, at 3:30 a.m., Mary was transported by "Flight For Life" to Pleasant Prairie Hospital for surgery. (R132: 34, 50)

10. Dr. Majed Jandali, M.D., (hereinafter "Jandali"), performed the surgery and initially attempted to remove Mary's appendix by the less invasive means of laparoscopy, but the massive infection had by that time adhered Mary's appendix to the wall of her pelvis. (R2: 15, no. 62, 63; R101: 10, Ex. 20i; R132: 54, 55, 56).

11. As a result, Jandali could only detach and remove Mary's appendix by means of a 19-centimeter incision down the middle of Mary's abdomen. Upon opening Mary's abdominal cavity, Jandali found that Mary's

appendix had indeed perforated and that the infection had spread to such an extent that Jandali's efforts to cut it from its adhesions necessarily destroyed a significant portion of Mary's intestinal tract. Id.

12. The consequence of Mary's undiagnosed appendicitis, the infection, surgery and resultant trauma which Mary endured not only required that her 19-centimeter abdominal incision could not be closed until 7 days later on 7/3/20, but has cost both Mary and Spriggie significant loss and hardship. (R2; 15, no. 66; R101; 22, 23, 24).

STATEMENT OF THE CASE

1. Mary and Spriggie filed a lawsuit, pro se, in the Circuit Court of Kenosha County, the Honorable Judge Kerkman presiding, alleging medical/corporate negligence against Somers Clinic for failure to diagnose and treat Mary's medical condition as appendicitis and for the deliberate alteration of Mary's medical record in an attempt to conceal that failure. (R2; R85)

2. Mary and Spriggie were granted indigent status in this action on (9-07-2021). (R1)

3. Spriggie filed a motion on (10-04-2021) asking the Circuit Court to appoint a medical expert if the Court deemed it necessary to its understanding of the relevant standard of care. (R31) The Circuit Court denied the motion on (04-12-2021). (R173: line 20).

4. On 1-19-22, Spriggie filed a motion for partial summary judgment contending that there is no triable or genuine issue of material fact and requested in the alternative, if the court found summary judgment to be inappropriate, to determine whether the case presented sufficient factual and legal grounds so as to place the issue of negligence within the knowledge and understanding of a lay person, thereby obviating the need to present expert testimony in order to establish the failure to apply the correct standard of care. (R98; R100).

5. Attorney Johnson, counsel for Somers Clinic, filed both a response to Spriggie's motion for partial summary judgment and a motion for summary judgment in opposition. (R115; R130).

6. On 3-25-22, Judge Kerkman granted Attorney Johnson's motion "regarding any claims involving medical negligence" because [Spriggie did not file] a witness list [that includes] a witness who can testify to the standard of care as to the doctors involved in the alleged negligence. (R175: 11, lines 15-20).

7. Judge Kerkman refused to consider Spriggie's claim regarding corporate negligence and granted Johnson's motion regarding the altered medical record, because Johnson said that the records are, in fact, not falsified, and because "[the] other claims have gone away." (R175: 14, lines 10-17).

8. Judge Kerkman then admonished Spriggie for not having counsel: "I recommended that you get an attorney... You said you couldn't afford one....but sometimes you can't afford not to get an attorney." R175: 15, lines 16-21).

9. On (04-08-2022), Mary and Spriggie appealed the decision of the Circuit Court and argued that Judge Kerkman cannot dismiss their claims on summary judgment because they are indigent and financially unable to retain a paid medical expert, particularly when they presented other credible expert testimony in support of their claim, and they argued that Judge Kerkman applied an incorrect standard of law as to the alleged altered/falsified records. (Brief of Appellant, page 22, III)

10. The Court of Appeals affirmed the Circuit Court and held that Mary and Spriggie needed an expert witness for their medical malpractice claims, and that they had failed to provide evidence of intentional falsification or withholding/concealing Mary's medical records. (R215:10, ¶21).

11. The Court of Appeals did not mention Mary and Spriggie's pro se indigent status or their financial inability to retain a paid medical expert.

12. On (8-18-2023), Spriggie filed a motion asking the Court of Appeals to reconsider its decision, which was denied on (8-21-2023). (R216)

13. Mary and Spriggie now petition this Honorable Court to review their case and address the questions as presented.

ARGUMENT

To dismiss an indigent pro se litigant's medical malpractice claims because he or she cannot afford to pay an expert witness is tantamount to denying the litigant access to the court based on poverty. In-fact, it makes no practical sense and is an affront to the concept of law and justice to allow a pro se litigant to proceed with his claims as an indigent only to then dismiss those claims because he or she is indigent.

In the instant case, Mary and Spriggie could not afford an attorney and could not find an attorney willing to take their case against a big corporate hospital on a contingency basis, (R173:3 line 3 thru12); (R174: 24); (R175: 15 line 16). As a result, they were forced to proceed pro se and were granted indigent status. The Circuit Court then chastised Spriggie in open court for not having counsel, (R174: 20 line 17 thru - R174: 22 line14); (R174: 24); (R175: 15 line 16); (R174: 24), and admonished him, repeatedly that he must have a paid expert "testify as to what the standard of care is when you're alleging some sort of medical malpractice." (R173: 5 line 11 thru R173: 6 line 16); (R175:2 line 18); (R175: 4 line 21 thru R175:8 line10). The Circuit Court ultimately dismissed Mary and Spriggie's claims because they were financially unable to secure a paid expert witness. The Court of Appeals affirmed the Circuit Court, with neither Court commenting on the fact of Mary and Spriggie's indigent status or their financial inability.

Clearly, in a case such as this, the Circuit Court had the authority to appoint an expert if it felt it necessary to define the relevant "standard of care," e.g. (FR v. TB, 593 NW 2d 840 - Wis: Court of Appeals 1999, page 653); (Wis. Court of Appeals No. 98-0819, pg. 20, 21, 22); (1945 Wis. L. Review 593: 6), in-fact, Spriggie filed a motion at the outset of this case asking the Court to do so, (R31); (R173: 4 line 20), but was denied with the Court simply stating that it was under no obligation to appoint an expert, (R173: 3 line 13 thru (R173: 4 line 23). The Court of Appeals made no comment as to such an alternative, choosing instead to simply affirm the proposition that an expert is generally required in medical malpractice cases, (R215: ¶8).

Mary and Spriggie submit that this case pertains to a complete lack of care, and as such, is not the usual case of medical malpractice, in that, the neglect was clear and obvious and simply pertains to the Hospital's failure to recognize classic symptoms of appendicitis which would have easily been shown by questioning the named defendants, (R2: 1, 2); (R68: 1) and by presenting the findings of the Wisconsin Medical Board, (R54: 2 thru 8). As a result, Mary and Spriggie believe they would have been able to prove their case without a paid medical expert, (R173: 4 line 4); (R174: 11 line 17), but that if the Court believed it necessary to understand the relevant "standard of care," the Court should have sought to appoint it's own expert, rather than dismissing the case and essentially punishing Mary and Spriggie for being indigent and financially unable to secure a paid expert.

Mary and Spriggie ask, therefore, that this Honorable Court answer the question as to whether, in the case of a litigant's indigent status, the Court is obligated to appoint it's own expert witness, and revisit the question of whether a paid expert is automatically required in all medical malpractice cases, or is such a witness required only where it is necessary to understand the type of malpractice alleged.

CONCLUSION

For the reasons stated above, Mary and Spriggie hereby request that this Honorable Court grant their Petition, respectfully submitted this 8th, day of September, 2023.

Electronically signed September 8th, 2023

BY THE PLAINTIFF/APPELLANTS

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