

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-355

MARCH TERM, 2007

Braylyn Ovitt	}	APPEALED FROM:
v.	}	Chittenden Superior Court
Richard White, M.D. & Fletcher Allen Health Care, Inc.	}	DOCKET NO. S0116-05 CnC
		Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Plaintiff Braylyn Ovitt appeals from the trial court’s order granting summary judgment to defendants in this medical malpractice action. He argues that summary judgment was inappropriately granted because there is a material fact in dispute, and the court failed to give him the benefit of all reasonable doubts and inferences. We reverse and remand.

In April 2003, plaintiff had two pilar cysts removed from his scalp by Dr. Richard White. Dr. White did not suture the incisions but apparently applied direct pressure to obtain hemostasis—the arrest of bleeding. Nevertheless, bleeding from one of the wounds required suturing at the emergency room. In February 2005, plaintiff sued Dr. White and Fletcher Allen Health Care, Inc., alleging that Dr. White breached his duty to properly close the surgical area, and that plaintiff suffered unnecessary emotional trauma and incurred additional medical expenses as a result.

In May 2006, after discovery, defendants moved for summary judgment, and the trial court granted their request. The court found it undisputed that when plaintiff left Dr. White’s office, hemostasis was or appeared to have been achieved, and it concluded that plaintiff failed to produce sufficient evidence to show that Dr. White deviated from the accepted standard of care, a necessary element of his professional negligence claim. See 12 V.S.A. § 1908. The court explained that plaintiff’s own expert witness, Dr. Don Holshuh, testified that he was aware of other colleagues who used the “minimal excision enucleation technique” employed by Dr. White without using a suture for closure. The expert also stated that a medical professional need not suture a pilar cyst wound every time. Moreover, the court explained, Dr. Holshuh did not testify that Dr. White’s treatment of plaintiff deviated from the standard of reasonable care. The court rejected plaintiff’s assertion that there was a genuine dispute over whether hemostasis was actually obtained, finding that plaintiff’s expert contradicted this assertion in his deposition. The court thus concluded that plaintiff failed to put forth facts sufficient to support a claim for professional medical negligence. This appeal followed.

Plaintiff first argues that the court erred in concluding that his expert did not testify to the standard of care. According to plaintiff, the court should have reasonably inferred from his expert’s testimony that the standard of care required suturing for adequate and appropriate hemostasis. He also asserts that there is a genuine dispute as to whether adequate hemostasis was obtained. As support for this assertion, plaintiff points to the trial court’s statement that hemostasis “was or appeared to have been achieved,” as well as his own deposition testimony that the wound did not stop bleeding from the time that he left Dr. White’s office until he had the wound sutured at the emergency room. Plaintiff also cites testimony from his expert that “even though hemostasis seemed to be obtained by Dr. White before he left the office, it really

hadn't been or [the wound] wouldn't have bled.”

We review a grant of summary judgment using the same standard as the trial court. Richart v. Jackson, 171 Vt. 94, 97 (2000). Summary judgment is appropriate when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Id.; V.R.C.P. 56(c). The moving party bears the burden of proving that he is entitled to summary judgment, and the opposing party is entitled to all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. Price v. Leland, 149 Vt. 518, 521 (1988). We conclude that a material fact remains in dispute, and thus, summary judgment was inappropriately granted to defendants.

To establish his claim against defendants, plaintiff needed to prove: (1) the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances; (2) that the defendant failed to exercise this degree of care; and (3) that as a proximate cause of the failure to exercise this degree of care, plaintiff suffered injuries that would not otherwise have been incurred. 12 V.S.A. § 1908.

In this case, plaintiff alleged that Dr. White had a duty to properly close the surgical area in his scalp, and that he breached this duty. According to plaintiff, to comply with the standard of care, Dr. White needed to obtain adequate hemostasis. While plaintiff argued that hemostasis should have been achieved by suturing, his secondary argument was always that Dr. White had to achieve hemostasis by the same method and failed to do so. This argument assumes that the standard of care requires that adequate hemostasis be obtained before a patient is discharged. Thus, notwithstanding the fact that plaintiff's own expert acknowledged that suturing is not always required to obtain hemostasis after the removal of pilar cysts, the question remains whether Dr. White actually obtained hemostasis in this case, even if he used an acceptable method. Plaintiff testified that his wound was visibly bleeding when he left Dr. White's office. He stated that he would dab the wound with gauze when he felt the blood pooling, that he was constantly patting the wound dry, and that the blood did not stop pooling from the time he left Dr. White's office until the time he went to the emergency room two hours later. This evidence was sufficient to create a genuine dispute of fact as to whether hemostasis was actually obtained when plaintiff left Dr. White's office. See Provost v. Fletcher Allen Health Care, Inc., 2005 VT 115, ¶ 12, ___ Vt. ___, 890 A.2d 97 (mem.) (while plaintiff must ordinarily provide expert testimony to meet his burden of proof in medical malpractice action under 12 V.S.A. § 1908, an exception exists “where the alleged violation of the standard of care is so apparent that it can be understood by a layperson without the aid of medical experts”). Because a material fact remains in dispute, the trial court erred in granting summary judgment to defendants.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice