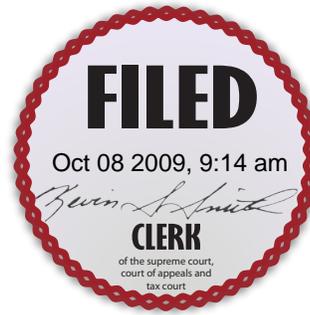


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOUGLASS S. HALE, M.D., )

Appellant-Respondent, )

vs. )

No. 49A02-0902-CV-191

MELISSA PHELPS )

Appellee-Petitioner. )

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APPEAL FROM THE MARION SUPERIOR COURT

The Honorable S. K. Reid, Judge  
The Honorable John F. Hanley, Judge  
Cause No. 49D14-0803-CT-12313

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**October 8, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Douglass Hale, M.D., brings this interlocutory appeal challenging the trial court's denial of his motion for summary judgment on Melissa Phelps's complaint for medical malpractice. Hale presents two issues for review, which we consolidate and restate as: Did the trial court properly deny Dr. Hale's motion for summary judgment?

We reverse and remand.

On January 22, 2002, Dr. Hale performed a total abdominal hysterectomy with bilateral salpingo-oophorectomy, Burch retropubic urethropexy, abdominal sacral colopopexy, abdominal paravaginal defect repair, and an abdominal vaginal rectocele repair on Phelps after she presented to him complaining of pelvic floor pain and urinary incontinence. Following the surgery, Phelps suffered from chronic pelvic floor pain that affects her pelvic floor, her hips, and her lower back down to her legs. She has spasms in her pelvic floor that require her to lie down until the spasms subside. Phelps maintains that she is not able to work and is permanently and totally disabled.

On January 22, 2004, Phelps filed her proposed complaint with the Indiana Department of Insurance alleging that Dr. Hale "failed to properly disclose the risks associated with the surgery so that she could make an informed consent to the operation" and that Dr. Hale "negligently performed an unnecessary operation . . . which failed to correct the pain and other problems which existed prior to surgery." *Appellant's Appendix* at 98. On December 20, 2007, a medical review panel (MRP) reviewed Phelps's claims against Dr. Hale and rendered its expert opinion on the matter on December 28, 2007. Specifically, the MRP unanimously found that "the evidence [submitted by the parties] does not support the

conclusion that [Dr. Hale] failed to meet the applicable standard of care as charged in the complaint.” *Id.* at 100.

On March 18, 2008, Phelps filed a civil complaint in the Marion Superior Court that mirrored in all pertinent respects the proposed complaint she filed against Dr. Hale with the Department of Insurance. Phelps made the same allegations that were reviewed by the MRP, including her allegations that Dr. Hale was negligent in failing to properly disclose the risks associated with the surgery so that Phelps could make an informed consent and that Dr. Hale negligently performed an unnecessary operation and thereby failed to correct the pain and other problems that existed prior to surgery. Dr. Hale filed his answer to the complaint on March 31, 2008. Dr. Hale filed a motion for summary judgment on April 9, 2008, designating in support thereof the unanimous opinion of the MRP that the evidence did not support the conclusion that Dr. Hale deviated from the applicable standard of care in his treatment of Phelps. After requesting and being granted five extensions of time to respond to Dr. Hale’s motion for summary judgment, Phelps filed her response in opposition to summary judgment on November 10, 2008. In support thereof, Phelps designated paragraph 3 of her complaint and her answers to questions 12 and 14 of the first set of interrogatories from Dr. Hale.

The trial court held a hearing on Dr. Hale’s motion for summary judgment on December 5, 2008. On December 15, 2008, the trial court issued a written order denying Dr. Hale’s motion for summary judgment. At Hale’s request, the trial court certified its ruling

for interlocutory appeal, and this court subsequently accepted jurisdiction of the appeal pursuant to Ind. Appellate Rule 14(B).

On appeal, Dr. Hale argues that the trial court erred in denying his motion for summary judgment. Our standard of review for a summary judgment order is well settled. Summary judgment is appropriate if the “designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Ind. Trial Rule 56(C). The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Huntington v. Riggs*, 862 N.E.2d 1263 (Ind. Ct. App. 2007), *trans. denied*. If the moving party meets these two requirements, the burden shifts to the non-movant to set forth specifically designated facts showing that there is a genuine issue of material fact for trial. *Id.* “A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.” *Id.* at 1266.

“On appeal, we are bound by the same standard as the trial court, and we consider only those matters which were designated at the summary judgment stage.” *Id.* We do not reweigh the evidence, and we will liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Huntington v. Riggs*, 862 N.E.2d 1263.

Our Supreme Court has made clear that medical malpractice cases are the same as negligence cases in terms of the elements the plaintiff must prove. That is, to succeed on a

medical malpractice claim, a plaintiff must show: (1) defendant owed a duty to plaintiff; (2) breach of that duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty. *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000). "This jurisdiction has long recognized a physician's duty to disclose to [his] patient material facts relevant to the patient's decision about treatment." *Id.* at 1217 (citing *Boruff v. Jesseph*, 576 N.E.2d 1297 (Ind. Ct. App. 1991)). Generally, this duty is implicated in cases involving informed consent or fraudulent concealment. *Bader v. Johnson*, 732 N.E.2d 1212. The underlying principle is that in order to make an informed decision about their health, the patient must have the relevant facts. *Id.* If the physician has possession of those facts, the physician has a duty to disclose them. *Id.* "Th[is] duty arises from the relationship between the doctor and patient, and is imposed as a matter of law as are most legal duties." *Id.* at 1217 (quoting *Culbertson v. Mernitz*, 602 N.E.2d 98, 101 (Ind. 1992)).

Physicians, however, are not held to a duty of perfect care. *Syfu v. Quinn*, 826 N.E.2d 699 (Ind. Ct. App. 2005). "Instead, the doctor must exercise the degree of skill and care ordinarily possessed and exercised by a reasonably skillful and careful practitioner under the same or similar circumstances." *Id.* at 703. To establish the standard of care and to show a breach of that standard, a plaintiff must generally present expert testimony. *Syfu v. Quinn*, 826 N.E.2d 699. In some situations, however, a physician's negligent act or omission is so obvious that expert testimony is not required. *Id.* Such situations are those fitting within the "common knowledge" or *res ipsa loquitur* exception. *Id.* "Application of this exception is

limited to those situations in which the physician's conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach of the applicable standard of care." *Id.* at 703.

Dr. Hale argues that he was entitled to summary judgment because Phelps failed to designate expert testimony to refute the unanimous expert opinion of the MRP that there was no evidence that he deviated from the applicable standard of care in any respect. In response, Phelps argues:

Although [Dr. Hale] might be entitled to a summary judgment on paragraph 4 of the complaint [alleging that Dr. Hale negligently performed an unnecessary operation] pursuant to the medical review panel decision, the defendant is not entitled to a summary judgment on the issue of informed consent under paragraph 3 of the complaint since informed consent is a genuine issue of fact which is not subject to expert opinion in this case.

*Appellee's Brief* at 3. Phelps essentially concedes that summary judgment is appropriate on her claim that Dr. Hale negligently performed an unnecessary operation, providing no further discussion or argument of the issue other than that quoted above. Moreover, we conclude that summary judgment is in fact appropriate on this issue because, other than her own factual allegations, Phelps failed to designate an expert opinion refuting the unanimous expert opinion of the MRP. *See Oelling v. Rao*, 585 N.E.2d 273 (Ind. Ct. App. 1991) (noting that a unanimous opinion of the medical review panel favorable to the party moving for summary judgment was prima facie evidence that the controversy lacked a material factual issue). Whether Dr. Hale negligently performed any one of the medical procedures he performed on Phelps and/or whether such procedures were unnecessary are not matters within a laymen's common knowledge. Phelps was therefore required to designate expert

opinion in opposition to the unanimous expert opinion of the MRP, which served as the basis for Dr. Hale's motion for summary judgment. By failing to designate any expert evidence, Phelps failed to meet her burden of establishing a genuine issue of material fact. We therefore conclude that the trial court erred in denying Dr. Hale's motion for summary judgment in this regard.

We turn now to whether Phelps was required to present expert opinion on the issue of whether Dr. Hale failed to properly disclose the risks associated with the surgery so that Phelps could make an informed consent to the operation. Phelps's specific claim is that Dr. Hale failed to inform her that there was a risk that she could suffer chronic pain and be totally disabled after he performed the specified procedures. In her response to Dr. Hale's interrogatories, Phelps asserts that she "never would have had the operation" had she been so informed. *Appellant's Appendix* at 44.

As noted above, to establish the standard of care and to show a breach of that standard, a plaintiff must generally present expert testimony. *Syfu v. Quinn*, 826 N.E.2d 699. In informed consent cases, where professional judgment and knowledge is required to determine what a reasonably prudent physician should tell a patient in order to obtain the patient's informed consent, expert testimony is required to determine what the physician should tell the patient. *See Bowman v. Beghin*, 713 N.E.2d 913 (Ind. Ct. App. 1999). While our courts have held that expert testimony is generally required on the issue of informed consent, our courts have created an exception, holding that expert testimony is not required when the fact-finder can understand that the physician's conduct fell below the applicable

standard of care without technical input from an expert witness. *See id.* For example, in *Culbertson v. Mernitz*, 602 N.E.2d 98, our Supreme Court held that the plaintiffs were required to present expert medical testimony to refute the unanimous opinion of the medical review panel as to what a reasonably prudent physician would have discussed concerning the risks of the proposed surgery. In another case, *Bowman v. Beghin*, 713 N.E.2d 913, this court concluded that expert testimony was not required in medical malpractice action where the physician did not perform a procedure that the patient consented to.

Here, Phelps's specific allegation was that Dr. Hale failed to disclose that she could suffer chronic pain and be totally disabled following the operation. The only evidence Phelps designated in support of her claim and in opposition to the MRP's unanimous expert opinion was her factual allegation that Dr. Hale did not disclose to her the risks set forth in her complaint. Even accepting as true Phelps's allegation that Dr. Hale did not disclose such risks, which Dr. Hale agrees we must do, we conclude that Phelps has not met her burden of establishing a genuine issue of material fact. Whether Dr. Hale should have informed Phelps of such risks as part of the standard of care is a matter for expert input. It was therefore incumbent upon Phelps to come forward with expert evidence that controverts the unanimous expert opinion of the MRP. *See Oelling v. Rao*, 585 N.E.2d 273. Phelps designated no such evidence. Dr. Hale was thus entitled to summary judgment on the issue of informed consent. We therefore reverse the trial court's denial Dr. Hale's motion for summary judgment and remand with instructions that the trial court enter summary judgment in favor of Dr. Hale.

Judgment reversed and remanded.

BAKER, C.J., and RILEY, J., concur.