DA 18-0295

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 195N

ANDREW DEMONEY,

Plaintiff and Appellant,

v.

RAYMOND A. KAUFMAN, M.D.,

Defendant and Appellee.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause No. DV-15-413
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Wade J. Dahood, Jeffrey W. Dahood, Knight & Dahood, Anaconda, Montana

For Appellee:

J. Daniel Hoven, Carlo J. Canty, Browning, Kaleczyc, Berry & Hoven, Helena, Montana

Submitted on Briefs: June 26, 2019

Decided: August 13, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Plaintiff and Appellant Andrew DeMoney (DeMoney) appeals following a jury trial in the Second Judicial District Court, Butte-Silver Bow County, which returned a verdict in favor of the Defendant and Appellee, Dr. Raymond A. Kaufman, M.D. (Dr. Kaufman). We affirm.

¶3 On June 7, 2013, Dr. Kaufman performed a sinus surgery and tonsillectomy on DeMoney at St. James Hospital in Butte. Dr. Kaufman successfully completed the sinus procedure before beginning the tonsillectomy. During the tonsillectomy, DeMoney started bleeding uncontrollably. After initially attempting to stop the bleeding using pressure, Dr. Kaufman ultimately performed a ligation on DeMoney's external carotid artery to stop the bleeding. After the surgery, DeMoney suffered an embolic stroke. DeMoney was taken to Missoula to recover after the stroke and has since suffered from speech and other health problems.

¶4 In December 2015, DeMoney filed the instant lawsuit against Dr. Kaufman, alleging that Dr. Kaufman caused DeMoney's injuries through negligence in performing the tonsillectomy. Before trial, DeMoney filed a motion for summary judgment on the issue of liability and a motion in limine to disclose Dr. Kaufman's insurance to the jury. The

District Court denied both motions. The matter proceeded to a jury trial from April 9-13, 2018. At the close of evidence, Dr. Kaufman moved for a directed verdict regarding the issue of informed consent. The District Court granted Dr. Kaufman's motion for a directed verdict on that issue, and DeMoney then withdrew his proposed jury instructions regarding informed consent. The jury later returned a unanimous verdict finding that Dr. Kaufman was not negligent.

¶5 DeMoney now appeals three decisions of the District Court: (1) the denial of DeMoney's motion for summary judgment; (2) the refusal to give DeMoney's proposed jury instructions regarding informed consent; and (3) the denial of DeMoney's motion in limine regarding Dr. Kaufman's insurance.

¶6 We review summary judgment orders de novo, performing the same M. R. Civ. P. 56 analysis as the district court. *Ray v. Connell*, 2016 MT 95, ¶ 9, 383 Mont. 221, 371 P.3d 391. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Hughes v. Lynch*, 2007 MT 177, ¶ 8, 338 Mont. 214, 164 P.3d 913.

¶7 DeMoney moved for summary judgment regarding liability before trial, arguing that Dr. Kaufman had not contested that he was medically negligent in performing the tonsillectomy. Dr. Kaufman responded that DeMoney's argument was incorrect, and that he had argued—and presented expert testimony demonstrating—that he had met the standard of care required in performing the surgery. The District Court ruled that genuine issues of material fact existed and denied DeMoney's motion for summary judgment.

¶8 "It is well settled Montana law that the plaintiff in a medical malpractice action must establish the following elements: (1) the applicable standard of care, (2) the defendant departed from that standard of care, and (3) the departure proximately caused plaintiff's injury." *Estate of Willson v. Addison*, 2011 MT 179, ¶ 17, 361 Mont. 269, 258 P.3d 410 (citation omitted). Expert testimony is required to establish these elements. *Labair v. Carey*, 2012 MT 312, ¶ 29, 367 Mont. 453, 291 P.3d 1160 (citing *Estate of Willson*, ¶ 17).

¶9 Because expert testimony is required to establish negligence in medical malpractice cases, summary judgment is rarely proper. In this case, each party presented expert testimony regarding the standard of care. Dr. Kaufman's expert, Dr. Michael Olds, testified at his deposition that Dr. Kaufman met the standard of care required in performing the tonsillectomy. Dr. Derek Mittledeier and Dr. Lawrence Clarke, DeMoney's experts, testified at their depositions that Dr. Kaufman did not meet the required standard of care. Presented with these differing expert medical opinions regarding the standard of care, the District Court properly found that genuine issues of material fact precluded summary judgment and correctly denied DeMoney's motion for summary judgment regarding liability.

¶10 We review a district court's M. R. Civ. P. 50 decision granting judgment as a matter of law de novo. *Wagner v. MSE Tech. Applications, Inc.*, 2016 MT 215, ¶ 15, 384 Mont. 436, 383 P.3d 727. "A district court should grant judgment as a matter of law only where there is a complete lack of any evidence which would justify submitting an issue to the jury, considering all evidence and any legitimate inferences that might be drawn from it in

a light most favorable to the opposing party." *Wagner*, ¶ 15 (citing *Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 2004 MT 297, ¶ 18, 323 Mont. 387, 101 P.3d 742).

¶11 At the close of evidence, Dr. Kaufman moved for judgment as a matter of law pursuant to M. R. Civ. P. 50 that the informed consent given to DeMoney prior to the surgery was not deficient. The Court reviewed the testimony given in the case and determined that the Plaintiff's expert with regard to the applicable standard of care, Dr. Clarke, did not testify regarding the standard of care for informed consent at trial. *See Griffin v. Moseley*, 2010 MT 132, ¶ 31, 356 Mont. 393, 234 P.3d 869 (citing *Montana Deaconess Hosp. v. Gratton*, 169 Mont. 185, 189-90, 545 P.2d 670, 672-73 (1976)). We have reviewed the transcript and agree with the District Court. Because DeMoney did not present expert testimony regarding the standard of care for informed consent at trial, the District Court correctly granted Dr. Kaufman's M. R. Civ. P. 50 motion for judgment as a matter of law.

¶12 DeMoney appears to argue that, regardless of the M. R. Civ. P. 50 judgment as a matter of law on the informed consent issue, the District Court committed reversible error by not giving DeMoney's proposed jury instructions regarding informed consent. A review of the transcript shows that counsel for DeMoney withdrew his proposed informed consent instructions immediately after the District Court ruled on Dr. Kaufman's M. R. Civ. P. 50 motion for judgment as a matter of law. As such, DeMoney did not preserve this issue for appeal. "We will not review the propriety of jury instructions where a party has failed to preserve these issues for appeal." *Vincent v. BNSF Ry. Co.*, 2010 MT 57, ¶ 22, 355 Mont. 348, 228 P.3d 1123.

¶13 At trial, DeMoney argued that the consent form he signed was deficient and did not meet the required standard of care regarding informed consent. However, in his argument on appeal he does not assert Dr. Kaufman was negligent in obtaining DeMoney's informed consent for the surgery. Instead, he asserts that, even though DeMoney gave his consent for the surgery, that consent did not give Dr. Kaufman the green light to be negligent in doing the surgery—he still had an obligation to perform the surgery in a non-negligent manner. Although DeMoney understood there were risks to the surgery and consented knowing there were risks, Dr. Kaufman was still required to exercise the reasonable skill and experience of a reasonable surgeon performing tonsillectomies. This modified appeal argument is also unavailing as it too was not preserved for appeal.[1] The District Court correctly granted Dr. Kaufman's M. R. Civ. P. 50 motion for judgment as a matter of law regarding informed consent and it is unnecessary to review DeMoney's proposed instructions on the issue as he withdrew them, and the issue was not preserved for appeal.

¶14 We review a district court's denial of a motion in limine for an abuse of discretion. *Patch v. Hillerich & Bradsby Co.*, 2011 MT 175, ¶ 12, 361 Mont. 241, 257 P.3d 383 (citing *Malcolm v. Evenflo Co.*, 2009 MT 285, ¶ 29, 352 Mont. 325, 217 P.3d 514). A district court abuses its discretion when it acts arbitrarily, without conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Patch*, ¶ 12 (citing *Malcolm*, ¶ 29).

[1] It is noted that, although not preserved for appeal, DeMoney was able in closing to fully argue his position that he did not consent to malpractice to the jury for its consideration.

¶15 Before trial, DeMoney filed a motion in limine seeking to disclose Dr. Kaufman's insurance to the jury. M. R. Evid. 411 states:

> Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

¶16 In general, Rule 411 prevents the admission of evidence that a particular party was insured against liability. The plain text of Rule 411 does contain exceptions, however. DeMoney sought to inform the jury about Dr. Kaufman's insurance to combat the sympathy the jury may have towards Dr. Kaufman and their possible reluctance to return a large monetary verdict against a well-respected local doctor.

¶17 "Evidence of insurance generally may not be admitted upon the issue of whether a party acted negligently or otherwise wrongfully." *Eklund v. Wheatland Cty.*, 2009 MT 231, ¶ 29, 351 Mont. 370, 212 P.3d 297. "[D]istrict courts have broad discretion in determining the admissibility of evidence pertaining to liability insurance[.]" *Jenks v. Bertelsen*, 2004 MT 50, ¶ 25, 320 Mont. 139, 86 P.3d 24.

¶18 We cannot find that the District Court abused its discretion by denying DeMoney's motion in limine to disclose insurance. M. R. Evid. 411 generally prevents the disclosure of insurance in a negligence action, such as the one here, and we have long recognized that district courts have broad discretion in determining whether to admit evidence regarding liability insurance. The determination of whether to admit, or not admit, evidence of Dr. Kaufman's liability insurance was well within the discretion of the District Court, and

its determination that the jury should not be informed of Dr. Kaufman's insurance was not an abuse of that discretion.

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶20 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE