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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1458**

Carla Paul,
Appellant,

vs.

Charles E. Crutchfield, III M.D., et al.,
Respondents.

**Filed April 13, 2010
Affirmed
Worke, Judge**

Dakota County District Court
File No. 19HA-CV-09-1333

Dean M. Salita, Brabbit & Salita, P.A., Minneapolis, Minnesota (for appellant)

Angela M. Nelson, Lynn M. Schmidt Walters, Brock P. Alton, Gislason & Hunter LLP,
Minneapolis, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins,
Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondents, arguing that her battery claim was improperly dismissed as a medical-malpractice claim. We affirm.

DECISION

When reviewing a grant of summary judgment, we determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). But “there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue”; “the party resisting summary judgment must do more than rest on mere averments.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Appellant Carla Paul sued respondents Charles E. Crutchfield, III M.D. and Crutchfield Dermatology for battery, medical negligence, and intentional infliction of emotional distress (IIED), stemming from an elective cosmetic procedure. Specifically,

appellant asserted that respondent-physician injected Restylane in an incorrect area above her lip, causing scarring and discoloration. Appellant failed to serve the requisite expert affidavits for a medical-malpractice claim under Minn. Stat. § 145.682 (2008), and respondents moved for summary judgment. Appellant voluntarily dismissed the medical-malpractice claim, but opposed respondents' summary-judgment motion on the other claims. The district court concluded that appellant's battery claim was indistinguishable from her medical-malpractice claim, noting that the location of an injection within an inch of where appellant consented "is clearly a question of professional judgment and one of a technical nature. The procedure falls within [appellant's] informed consent and is not battery, but more appropriately a medical negligence claim, for which [appellant] failed to provide an expert affidavit." The court dismissed appellant's battery and IIED claims, but she only challenges the dismissal of the battery claim.

"[O]rdinarily, a malpractice action without supporting expert testimony is frivolous per se." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990). But a claim for battery can exist within a medical context which would not require expert affidavits. *Kohoutek v. Hafner*, 383 N.W.2d 295, 299 (Minn. 1986). A claim for medical battery exists when a physician engages in "touching of a substantially different nature and character from that to which the patient consented." *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995).

Appellant principally contends that the district court erred because the actual location of the injection was a substantial departure from the location to which she consented, and thus did not require supporting expert affidavits. Appellant asserts that

our interpretation of a “substantial departure” should be narrowed in cases involving an elective procedure, arguing that even the most acute mistake overrides a patient’s consent in this particular field of medicine. However, appellant presents no legal authority to support this argument, and failed to produce *any* evidence at summary judgment to sustain her claim. Appellant relied solely on mere averments and thus failed to adequately resist summary judgment. Accordingly, the district court did not err in determining that appellant’s claim involved a question of professional judgment and was truly a medical-malpractice claim requiring expert affidavits, which appellant failed to provide.

Affirmed.