

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2344

Cir. Ct. No. 2009CV3527

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**DONALD MARTIN, BOBBIE JO MARTIN, J. M. (A MINOR) AND B. M.
(A MINOR),**

PLAINTIFFS-APPELLANTS,

V.

**MIDWEST MEDICAL INSURANCE COMPANY, DR. THOMAS STAUSS,
ADVANCED PAIN MANAGEMENT AND WISCONSIN INJURED PATIENTS
AND FAMILIES COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Donald Martin, Bobbie Jo Martin, and two minors appeal a judgment dismissing their claims against Dr. Thomas Stauss, the

Advanced Pain Management (APM) practice that he was part of, and their insurers. We affirm.

¶2 The Martins first argue that we should change the jury's answer to verdict question number four. That question asked: "If a reasonable person, placed in Donald Martin's position, had been informed of this necessary information, would that person have elected to undergo" the procedure Martin underwent. The jury answered "yes," meaning it found that a reasonable person would still have undergone the procedure, even after "this necessary information" was provided.

¶3 The Martins argue that the defendants failed to meet their burden on this question. The parties agree that the defendants had the burden of proof to obtain a "yes" answer on this question.

¶4 Part of the Martins' argument is that the defendants had a burden to prove what the "necessary information" was that Martin should have been informed of. This argument fails because it disregards the context of this jury question. The phrase "this necessary information" can only refer back to the information that was the subject of the *prior* verdict question: "Did Dr. Thomas Stauss fail to disclose *information* about the ... procedure *necessary* for Donald Martin to make an informed decision to elect to undergo the procedure?" (Emphases added.) The jury answered "yes" to that question. In the context of the current case, the jury could have answered that way only if there was specific information that the Martins proved was not provided. That is so because the jury could not determine whether the information was "necessary" without knowing what specific information was missing. Accordingly, no additional proof was

required, from any party, regarding the reference in the next question to “necessary information.”

¶5 The Martins also argue that the defendants failed to present any credible evidence to show what a reasonable person in Donald Martin’s position would have done. In response, the defendants argue that the jury’s answer to this question was supported mainly by the evidence of the pain and other symptoms that Martin was seeking relief from, and by the failure of other attempted remedies. They argue that even if a reasonable person in Martin’s situation had been told that the doctor would not stimulate the nerves before ablating them, and why he would not, that the person would still have the procedure.

¶6 The Martins reply that evidence of Martin’s medical condition is not relevant to whether a reasonable person would have had the procedure “after being given false information about a safety measure for the procedure.” They assert that “the relevant inquiry is whether a reasonable patient would have acted differently after being given false information.”

¶7 The Martins’ argument repeatedly misstates the relevant question. This jury question did not ask whether a reasonable person would have proceeded when given *false* information. It asked whether a reasonable person would have proceeded if given *correct* information. The purpose of the question is to establish causation. If receipt of the correct information would not have changed a reasonable patient’s decision to have the procedure, then the defendant doctor’s failure to provide that correct information (as established in question three) did not cause any harm to the patient, because the same ultimate medical outcome would still have occurred: the patient would have had the procedure and suffered the injuries now claimed.

¶8 Once this jury question is understood correctly, the relevance of the patient's previous medical condition is obvious: the greater the patient's distress and dysfunction, the more likely the patient is to have the procedure even when given the additional necessary information. The question requires the jury to weigh the urgency of a reasonable patient's desire for the treatment against whatever deterring effect the additional necessary information might have. Here, there was sufficient evidence on both sides of that equation to provide sufficient support for a determination that a reasonable patient in Martin's condition would still have the treatment, even if the patient knew there would not be stimulation of the nerves before ablation.

¶9 The Martins also make several evidentiary arguments. The first is that the circuit court erred by denying their request to use an animation that shows performance of the ablation procedure, including use of the nerve stimulation procedure that did not occur in Martin's case. The Martins' brief fails to tell us where in the record such a decision occurred, and does not set forth the circuit court's reasons for this discretionary decision. We could properly reject the argument on this basis alone. However, we address the merits.

¶10 On appeal, the Martins argue that the animation is relevant to showing that nerve stimulation is part of the standard of care. However, the animation, by itself, cannot be admissible evidence of the standard of care, because the animation is not an expert. It is not apparent how the animation could be evidence of the standard of care unless it was created or adopted by a person who qualifies as an expert. Here, the Martins attempt to attribute the animation to the APM practice and the defendant doctor, because it appeared on the practice's website at some point after Martin's procedure.

¶11 To the extent the Martins attribute the animation to the practice, this argument fails because the practice itself is not an expert, but is instead a business organization in which decisions on some topics, such as marketing, may be made by persons other than medical experts. The Martins do not point us to any information showing who produced this animation or who decided to use it on the practice's website.

¶12 To the extent the Martins attribute the animation as representing the opinion of the defendant doctor personally, this argument fails because the doctor testified during an offer of proof that he did not know the animation was on the website. Therefore, its presence there cannot constitute an adoption of the animation by the doctor.

¶13 The Martins next argue that the circuit court erred by denying them a spoliation instruction in relation to the fact that there were 48 needles placed, but only 32 pictures are in the file, and on their claim that the late date on a procedure note shows that the note was altered. The Martins again fail to explain where in the record any rulings on these issues occurred, or what the circuit court's reasoning was. Furthermore, they cite no law regarding spoliation other than an unpublished opinion, and they make no meaningful effort to apply the relevant legal standards to the facts of the case. We conclude the arguments are not sufficiently developed to require a response. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶14 Finally, the Martins argue that the circuit court erred by not allowing them to present on rebuttal the deposition testimony of the APM records manager. The Martins argue that this evidence would have supported their theory that the

doctor's procedure note was not dictated until several months after the procedure, and was, therefore, unreliable or altered.

¶15 We conclude that any error here, assuming error, would have been harmless, because the Martins fail to explain what the ultimate significance of an unreliable or altered procedure note would be to the issues that were contested in this case. We understand the Martins' theory of the case to be that the doctor was negligent because he did not perform nerve stimulation before ablation, and then placed the needles in improper locations. However, the doctor apparently did not dispute at trial that he did not perform nerve stimulation. And, as to the needle locations, the Martins do not explain how a delay or alteration in the procedure note could have related to this theory.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

