COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2011AP1795 **Cir. Ct. No. 2008CV729**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BRITTANY J. VASQUEZ, A MINOR, BY DAVID P. LOWE, HER GUARDIAN AD LITEM, ANGELICA MARTINEZ AND FELIPE VASQUEZ,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

INJURED PATIENTS AND FAMILIES COMPENSATION FUND, BELLIN MEMORIAL HOSPITAL, INC. AND BELLIN HEALTH SYSTEMS, INC.,

DEFENDANTS-RESPONDENTS,

MHA INSURANCE COMPANY AND INTERNATIONAL TRANSLATORS,

DEFENDANTS.

APPEAL from judgments of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 VERGERONT, J. This appeal arises out of a medical malpractice action. Angelica Martinez, Felipe Vasquez, and their daughter, Brittany Vasquez,[1] (collectively, "the Vasquezes") sued Bellin Memorial Hospital, Inc. and Bellin Health Systems, Inc. (collectively, "Bellin").[2] They claim that the nurses who cared for Angelica during her labor and delivery were negligent, which caused Brittany to suffer permanent neurologic injury after Angelica's uterus ruptured during labor and which caused Angelica's and Felipe's resulting loss of society and companionship with Brittany. A jury determined that Bellin was not negligent, and the circuit court entered judgment on the verdict.

¶2 The Vasquezes contend on appeal that they are entitled to a new trial because of circuit court error in rulings on evidence and jury instructions and because of insufficient evidence to support the verdict. For the reasons we explain below, we disagree and affirm the judgments.

[1] This action was brought by a guardian ad litem on behalf of Brittany, a minor.

[2] In addition to Bellin Memorial Hospital, Inc. and Bellin Health Systems, Inc., the Vasquezes also named as defendants the following: Bellin's insurer, MHA Insurance Company; Angelica's obstetrician Dr. Clark Stevens, his employer OB-GYN Associates of Green Bay, and their insurer, Physicians Insurance Company of Wisconsin, Inc.; and the Injured Patients and Families Compensation Fund. As we note in this opinion, Dr. Stevens, his employer, and their insurer were dismissed prior to trial. The Fund remained a party during trial and joined all of Bellin's arguments and objections at trial. Separate judgments were entered in favor of Bellin and the Fund. On appeal the Fund and Bellin have submitted a joint brief. Accordingly, we refer to Bellin and the Fund collectively as "Bellin."

BACKGROUND

¶3 The following facts were developed at trial. On April 19, 2005, Angelica was admitted to Bellin Memorial Hospital for delivery of her second child. Angelica's first child had been delivered by caesarian section. For this second delivery, Angelica and her obstetrician, Dr. Clark Stevens, decided to try a vaginal birth, a procedure referred to as "vaginal birth after caesarian section" or "VBAC."

¶4 At 7:00 a.m. the next morning, two nurses, Melinda Wydeven and Candice Bilotto, were assigned to monitor Angelica. An electronic fetal heart rate monitor was used to record the fetus's heart rate and Angelica's contractions. Throughout trial, the parties presented conflicting expert testimony regarding what the fetal heart rate monitor indicated and the actions the nurses should have taken based upon the fetal heart rate monitor readings. Additional facts related to this testimony and the events that transpired throughout the morning are discussed later in our opinion.

¶5 When Dr. Stevens made his mid-day rounds, he noticed that the fetus's heart rate was low and irregular. He ordered an immediate caesarian section, but he also decided to try a vaginal delivery in order to expedite delivery. Using forceps, Dr. Stevens delivered Angelica's baby, Brittany, at 12:01 p.m. After the delivery, Dr. Stevens did a pelvic examination, determined that Angelica's uterus had ruptured, and performed an emergency hysterectomy on Angelica.

¶6 At birth Brittany was not breathing. She required resuscitation and was transferred to the neonatal intensive care unit at St. Vincent Hospital. Brittany suffered a lack of oxygen resulting in hypoxic-ischemic encephalopathy,

meaning damage to cells in the brain and spinal cord from inadequate oxygen and blood flow. As a result, she has permanent and irreversible brain injury and cerebral palsy, with severe physical and cognitive impairments. At trial there was conflicting testimony on whether her injuries were caused by the uterine rupture during labor or whether her injuries were caused by an unspecified event causing reduced oxygen that occurred nine hours after birth.

¶7 The Vasquezes sued Bellin and Dr. Stevens, as well as their insurer and Dr. Stevens' employer, for the personal injuries sustained by Brittany and for Angelica's and Felipe's derivative claims. The Vasquezes alleged that, through the conduct of Bellin's nurses during the period of labor and delivery, Bellin was negligent and this negligence caused Brittany's personal injuries. They also alleged that Angelica never gave Dr. Stevens her informed consent to the VBAC procedure. Dr. Stevens, his employer, and their insurer were dismissed before trial pursuant to a stipulation between the Vasquezes and the dismissed parties. Thus, the only issues tried to the jury were whether Bellin was negligent, whether Bellin's negligence was a substantial factor in causing Brittany's injuries, and the amount of damages that would compensate Brittany for her injuries and compensate her parents for their loss of Brittany's society and companionship as a result of her injuries.

¶8 The jury found that Bellin was not negligent. As instructed on the special verdict form, because the jury made this finding, it did not answer the questions on the other issues. The Vasquezes moved the court to change the verdict or conduct a new trial. The court denied the motion and entered judgment on the verdict in favor of Bellin.

DISCUSSION

¶9 On appeal the Vasquezes contend they are entitled to a new trial because:

I. The circuit court allowed Bellin to present evidence related to whether Angelica gave her consent to the VBAC procedure.

II. The circuit court refused to give a jury instruction requested by the Vasquezes regarding the use of the evidence on Angelica's consent.

III. The circuit court allowed Bellin to cross-examine Professor Michelle Murray, the Vasquezes' expert, about criticisms she had of certain nursing personnel when the actions she criticized were not alleged to have caused Brittany's injuries.

IV. The circuit court allowed Dr. Michael Ross, Bellin's expert, to testify when, according to the Vasquezes, his causation testimony was irrelevant and he offered previously undisclosed testimony regarding the nursing standard of care.

V. The circuit court allowed Dr. Bruce Bryan, the Vasquezes' expert, to be cross-examined with post-occurrence literature.

VI. There was insufficient evidence to support the verdict.

¶10 We address each of these issues and conclude that the Vasquezes are not entitled to a new trial.

I. Admission of Evidence Related to Angelica's Consent

¶11 As already noted, the Vasquezes initially filed a claim against Dr. Stevens alleging he did not obtain Angelica's informed consent for the VBAC procedure, but they later dismissed him as a party. Before opening statements, the Vasquezes objected to the admission of any evidence related to Angelica's consent to the VBAC on the ground that the evidence was no longer relevant because Dr. Stevens had been dismissed. Bellin responded that evidence that Angelica signed a form consenting to the VBAC and evidence that she testified at her deposition she was never informed of the risks of the VBAC procedure was relevant to the issue of Bellin's negligence for several reasons. The circuit ruled that that evidence would be admitted.

¶12 Specifically, the circuit court concluded that "the defendants [had] a right to present an affirmative defense as to plaintiff – as to mother's state of knowledge or state of awareness regarding the risk." The court also stated that the evidence could be used by the defense to argue that "alternative or superseding causes" in some way affect or are the primary causal agent of Brittany's injuries.

¶13 During trial, Bellin presented evidence that Angelica had signed the consent form and had denied at her deposition that she had been informed of the risks of the VBAC procedure. However, Bellin did not use that evidence as a basis for arguing either of the two theories identified by the circuit court before trial: that the evidence of Angelica's awareness of the risk was an affirmative defense or that Dr. Stevens or someone or something else, not Bellin, was the primary causal agent of Brittany's injuries. Instead, as we read the record, Bellin's primary use of this evidence was to undermine Angelica's credibility. In its ruling

on post-verdict motions, the circuit court's view was that this evidence was properly admitted and used as background information for the jury.

¶14 On appeal the Vasquezes renew their argument that the evidence on Angelica's consent was not relevant for any purpose and, they argue, it was prejudicial. Bellin, in response, asserts that it did not argue an assumption of risk theory and it does not defend admissibility on this ground. Instead, Bellin asserts, the evidence was admissible for several other reasons: it was relevant as a background fact explaining why and how Vasquez decided to proceed with a VBAC; it was an appropriate consideration for damages on the Vasquezes' loss of consortium claim; it was "directly relate[d] to the negligence of Dr. Stevens and causation"; and it was relevant to Angelica's credibility. In reply the Vasquezes disagree that Angelica's knowledge of risks was relevant to the loss of consortium claim and they dispute that during trial Bellin used this evidence to show Dr. Stevens' negligence or to show causation. They also assert that Angelica's credibility had no bearing on the issues of standard of care, causation, and the injuries sustained by Brittany.

¶15 Evidentiary rulings related to relevancy are generally committed to the circuit court's discretion. ***Marquez v. Mercedes-Benz USA, LLC***, 2012 WI 57, ¶115, 341 Wis. 2d 119, 815 N.W.2d 314. We affirm discretionary decisions if the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778 (citation omitted).

¶16 As we have already noted, it appears from our review of the record that the primary purpose for which Bellin used the consent evidence was to

impeach Angelica's credibility. We acknowledge that it was also used as general background information, and the circuit court, as we have noted, approved of this ground in its ruling on post-verdict motions. However, we agree with the Vasquezes that Bellin made a much greater use of this evidence than reasonably necessary for background information, and our review of the record persuades us that the greater use was an attempt to undermine Angelica's credibility. Angelica's credibility was not a ground on which the court ruled the evidence admissible before trial, and the court did not discuss this ground in its ruling on post-verdict motions. Thus, we do not have a decision on this point made by the circuit court in the exercise of its discretion. In addition, Bellin's arguments on the relevance of Angelica's credibility are conclusory and do not adequately explain why her credibility is relevant to the issues tried. For these reasons, we will assume without deciding that the admission of the consent evidence was error and we will proceed to a harmless error analysis.

¶17 Even if a circuit court errs in admitting evidence, we do not reverse and remand for a new trial if the error is harmless, that is, if the error did not "affect[] the substantial rights of the party." ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. When considering whether an error affected the substantial rights of a party, we ask whether there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Id.***, ¶32 (citations omitted). "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Id.*** (citations omitted). Determining whether an error is harmless presents a question of law, which we review de novo. ***State v. Mark***, 2008 WI App 44, ¶15, 308 Wis. 2d 191, 747 N.W.2d 727 (citation omitted).

¶18 As we explain below, we agree with Bellin that any error was harmless. We conclude there is not a reasonable possibility that the consent evidence contributed to the jury's finding that Bellin was not negligent in its care and treatment of Angelica and Brittany.

¶19 The issues presented to the jury were: Bellin's negligence, causation, damages, and the Vasquezes' derivative claims. Most of the evidence focused on the actions or inactions of two of the nurses and whether their conduct complied with the standard of care and caused Brittany's injuries. Nothing in the testimony or argument of counsel suggested that Bellin was not negligent simply because Angelica had given her consent to a VBAC. Indeed, in closing argument Bellin's attorney, as well as the Vasquezes' attorney, told this to the jury. Bellin's attorney told the jury that the evidence relating to Angelica's consent was "an issue of credibility…. Just because somebody agrees [to] informed consent, it doesn't mean things can be done negligently." And, as we explain in the next section, the jury instructions very specifically instructed the jury on standard of care and did not at any point refer to Angelica's consent as relevant to that issue or any other issue. We generally presume juries follow the instructions they are given, and we have no reason to think that did not happen in this case. *See* ***Frayer v. Lovell***, 190 Wis. 2d 794, 812, 529 N.W.2d 236 (Ct. App. 1995) (citation omitted).

II. Proposed Jury Instruction on Angelica's Consent

¶20 After closing argument, the Vasquezes requested the following jury instruction on Angelica's consent:

> You have heard testimony in this case about Angelica Martinez's consent to a VBAC procedure. There is no question in this case about whether Angelica Vasquez gave consent to have the VBAC procedure or whether Dr. Stevens informed her about the risks of the VBAC

> procedure. Duty of care owed by Bellin Memorial Hospital and its nurses to Angelica Martinez and Brittany Vasquez is the same regardless of any discussion between Angelica Martinez and Dr. Stevens about the proposed VBAC procedure.

¶21 The court denied the Vasquezes' request on the ground that the proposed instruction did not offer anything helpful to the jury. The court explained that the way the evidence and the closing arguments were presented to the jury made it clear that the issues before the jury were the standard of care and causation as they relate to Bellin's liability. The court stated that Dr. Stevens has not been "a significant issue" in the case and the court did not want "to make it a more significant issue by providing an instruction." The court expressed its concern that this instruction would "distract from the clear thrust of the closings."

¶22 The Vasquezes contend that the circuit court erroneously exercised its discretion in denying the requested instruction. We disagree and conclude that the circuit court properly exercised its discretion for the following reasons.

¶23 A circuit court has broad discretion to decide whether to give a particular jury instruction. ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. The court "properly exercises its discretion when it fully and fairly informs the jury" of the applicable law. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 787 N.W.2d 187 (citation omitted). We will order a new trial "[o]nly if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of the law …." ***State v. Hemphill***, 2006 WI App 185, ¶8, 296 Wis. 2d 198, 722 N.W.2d 393 (quotation omitted) (alteration and omission in original).

¶24 Other jury instructions given to the jury clearly explained the duty of care owed by the Bellin nurses to Angelica and Brittany. The jury was instructed that "[r]egistered nurses have a duty in providing care to Angelica Martinez and

Brittany Vasquez during labor and delivery to use the degree of care, skill, and judgment which reasonable registered nurses would exercise in the same or similar circumstances, having due regard for the state of learning, education, experience, and knowledge possessed by registered nurses at the time in question." The jury was also instructed that "the degree of care, skill, and judgment which a reasonable registered nurse would exercise" can only be established by expert testimony. This is a correct statement of the law and nothing in these instructions or any others given to the jury suggest that whether Angelica gave her consent to the VBAC procedure would affect the duty of care owed to Angelica or Brittany.

¶25 In addition, the record reasonably supports the court's assessment that the manner in which the evidence and the closing arguments were presented made the requested instruction unnecessary and distracting, and these are appropriate considerations.

III. Cross-Examination of Professor Michelle Murray

¶26 Professor Murray was an expert testifying for the Vasquezes on the nursing standard of care. During her deposition, she identified various actions by the nursing staff that, in her opinion, did not meet the standard of care. However, according to Professor Murray, the only actions or inactions that fell below the standard of care and were causally related to Brittany's injuries were those of nurses Wydeven and Bilotto.

¶27 Prior to trial, Bellin filed a motion in limine seeking to preclude the Vasquezes "from presenting evidence regarding the negligence of any defendant health care provider unless that negligence is supported by expert testimony that establishes causation." It appears the motion was never acted on by the circuit court. However, the Vasquezes contend on appeal, they viewed the motion as

"well-founded" and for this reason on direct examination they elicited Professor Murray's opinions regarding the conduct of only nurses Wydeven and Bilotto, and not the conduct of other nurses that Professor Murray had criticized in her deposition.[3] When Bellin cross-examined Professor Murray and asked her about criticisms she had of the conduct of those other nurses, the Vasquezes objected on the ground of relevancy. The court allowed the testimony on the ground that it went to credibility in that it was relevant to "whether she had any bias or prejudice that may influence the weight that the jury gives to her testimony." In response to the Vasquezes' argument that they had been prejudiced because, in view of Bellin's motion in limine, they had refrained from asking Professor Murray questions about other nurses on direct, the court ruled that this was not within "the scope or the intent" of the motion in limine and there was no prejudice to the Vasquezes.

¶28 Elaborating on its ruling on motions after verdict, the circuit court explained that the cross-examination of Professor Murray went to whether "she has a predisposition to view events in a fashion which would generally, if not exclusively, suggest a consistent violation of the standard of care." The court likened these questions to asking paid professional witnesses if they generally testify for the plaintiff or the defense.

[3] At certain points in the circuit court proceedings it appears that both parties and the circuit court may have believed the court had ruled on this motion in limine. However, the court ruled that it was holding this motion in limine "in abeyance, depending on the evidence that is offered," and we find nothing in the record indicating that the court later ruled on the motion. On appeal, neither party provides a record cite for a ruling, and, instead, they appear to be in agreement that the court did not rule on the motion. The Vasquezes in their main brief frame their argument in terms of what Bellin "sought to" do in the motion and how they viewed the merits of the motion. Bellin responds that the motion was never granted, and the Vasquezes do not dispute this in their reply brief.

¶29 On appeal the Vasquezes contend the circuit court erroneously exercised its discretion when it permitted Bellin to question Professor Murray about the negligence of hospital staff that was not causally related to Brittany's injuries. This was error, the Vasquezes assert, because Bellin elicited on cross-examination the very testimony it had sought in its motion to bar them from presenting, and they thus lost the opportunity to "preemptively confront[]" the topic of Professor Murray's many criticisms of the nursing staff.

¶30 "The extent and scope of cross-examination allowed for impeachment purposes is a matter within the sound discretion of the circuit court." ***State v. McCall***, 202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996) (citations omitted). "[T]he proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." ***Id.*** at 37 (quotation omitted). We will reverse a circuit court's decision regarding the scope of cross-examination only if the circuit court's determination "represents a prejudicial abuse of discretion." ***Id.*** at 35 (quotation omitted). If there is a reasonable basis for the circuit court's decision, no erroneous exercise of discretion will be found. ***State v. Ross***, 2003 WI App 27, ¶43, 260 Wis. 2d 291, 659 N.W.2d 122 (citation omitted).

¶31 We conclude the circuit court did not erroneously exercise its discretion when it permitted Bellin to cross-examine Professor Murray by asking her about her criticisms of nurses other than nurses Wydeven and Bilotto. The court's view that this testimony was relevant to how the jury should credit and weigh her testimony—was she "hypercritical," in Bellin's words—is a reasonable one. The Vasquezes' position appears to be that, even if the testimony might be

relevant (which they dispute), it was unfair to allow it because they had foregone the advantage of blunting the impact of this testimony on direct examination. However, if the Vasquezes did that, it was based on an assumption they made about Bellin's motion, without a ruling from the court and without an agreement with Bellin. The Vasquezes could have asked the court to rule on the motion so they would know before presenting Professor Murray precisely what the scope of the permissible testimony regarding the other nurses would be; and nothing indicates that the circuit court would not have allowed the Vasquezes to question Professor Murray on direct examination as they assert they would have liked to do. The Vasquezes appear to suggest that Bellin misled them by filing the motion, but the circuit court implicitly rejected this proposition, and nothing in the record causes us to conclude this was unreasonable.

¶32 The Vasquezes argue that ***McCall*** supports their position that the circuit court erroneously exercised its discretion in permitting the cross-examination of Professor Murray regarding her opinion of the actions of the other nurses, but we disagree. In ***McCall*** the court upheld the circuit court's disallowance of cross-examination of a state's witness about an alleged "clandestine agreement" between the witness and the prosecutor, which, the defendant alleged, resulted in charges being dropped against the witness. ***McCall***, 202 Wis. 2d at 40. The circuit court reasoned that there was a minimal and largely irrelevant variance in the witness's testimony and no evidence that there was an agreement between the witness and the prosecutor. ***Id.*** The reviewing court concluded this was not an erroneous exercise of discretion because the "defense inquiry [was] based upon this purely speculative theory [that was] too far afield of any rational relationship to the truthful character of the witness or his testimony …." ***Id.***

¶33 As an initial matter, we note that a case that affirms a *limitation* on cross-examination as a proper exercise of discretion provides little guidance on whether *allowing* an inquiry on cross-examination is a proper exercise of discretion. *See* ***State v. St. George***, 2002 WI 50, ¶58, 252 Wis. 2d 499, 643 N.W.2d 777 ("It is well settled that judicial discretion is by definition an exercise of proper judgment that could reasonably permit an opposite conclusion by another judge …."). This is particularly true when the facts of the two cases differ as significantly as do the facts in ***McCall*** and this case. Whether Professor Murray had a "predisposition" to find violations of the standard of care is directly and highly relevant to assessing her opinion that nurses Wydeven and Bilotto violated the standard of care. Whether those two nurses violated the standard of care is without doubt a central issue in the case. There is no indication in the record that the cross-examination permitted by the court caused the jury to be confused or distracted by extraneous matters.

¶34 The Vasquezes also appear to contend that the court did not allow sufficient time to rehabilitate Professor Murray on redirect. We are satisfied the record does not support such a contention. On redirect the Vasquezes were able to elicit further testimony from Professor Murray regarding the criticisms she held of the other nurses. Nothing in the record indicates the court terminated the Vasquezes' redirect before counsel intended to conclude it. Counsel for the Vasquezes ended his redirect by stating "No further questions, your honor." Bellin re-crossed Professor Murray, and the Vasquezes were permitted to ask an additional question on re-redirect examination.

IV. Admission of Dr. Michael Ross's Testimony

¶35 Dr. Ross, a maternal-fetal medicine physician, was initially going to be an expert witness for Dr. Stevens. After Dr. Stevens was dismissed from the case, Bellin "adopted" Dr. Ross as an expert. Dr. Ross had testified at his depositions that in his opinion Brittany's permanent neurologic injury was caused by metabolic acidosis—a build-up of lactic acid in the tissues of the body caused by lack of oxygen going to the tissues.[4] In his opinion, the degree of acidosis at Brittany's birth "was not sufficient to lead to permanent neurologic injury." In his opinion, some event occurring approximately nine hours after birth decreased Brittany's oxygen supply and this increased the acidosis to a level "sufficient to lead to permanent neurologic injury." Dr. Ross did not have an opinion on what event caused this level of acidosis.

¶36 Prior to Dr. Ross testifying at trial, the Vasquezes raised two issues concerning his anticipated testimony that are relevant to this appeal. First, they sought to bar his testimony on the cause of Brittany's injuries. Second, they sought to prevent him from giving opinions on the nursing standard of care.

¶37 With respect to Dr. Ross's causation testimony, the Vasquezes filed a motion in limine, arguing that this testimony was irrelevant. It was irrelevant, they asserted, because he could not identify what event caused Brittany's injuries and could not testify that the event that caused her injuries was unrelated to the uterine rupture. In the Vasquezes' view, because there was evidence that the two nurses were negligent and evidence that the uterine rupture caused Brittany's

[4] Dr. Ross did not define metabolic acidosis in his deposition, but he did in his trial testimony.

injuries, Dr. Ross's testimony was relevant only if his opinion was that the uterine rupture was not a cause of—meaning not part of a chain of events causing—her injuries. The Vasquezes based this argument on the applicable legal standard under which negligent conduct need only be "*a* cause" and not "*the* cause" in order to establish liability.[5]

¶38 The circuit court disagreed and allowed Dr. Ross to testify to his opinions on causation. The court ruled that Dr. Ross's opinions on causation were relevant to the Vasquezes' claim even if he could not identify the specific event subsequent to Brittany's birth that caused the reduction in oxygen and thus the increased acidosis. The court also ruled that Dr. Ross's testimony on cause was relevant even if, as the Vasquezes argued, he could not establish that the uterine rupture was not *a* cause.

¶39 With respect to testimony on the nursing standard of care, Bellin agreed that Dr. Ross would not give opinions on that subject. However, the parties disagreed on whether testimony about the fetal heart monitoring strips was relevant if Dr. Ross did not testify on the nursing standard of care. The circuit court agreed with Bellin that it was relevant, noting that there was a clear difference between "using the strip to argue the timing of the … event [causing lack of oxygen] versus using the strip to establish the standard of care."

¶40 On direct examination, Dr. Ross offered the following opinions consistent with his deposition testimony: (1) the uterine rupture did not cause "any

[5] The jury was instructed that "[n]egligence is a cause of plaintiff's injury if the negligence was a substantial factor in producing the present condition of the plaintiff's health." This question does not ask about "the cause" but rather "a cause."

significant brain damage," and there was no evidence of either permanent brain damage or uterine rupture prior to approximately 11:51 a.m.; (2) the level of acid at the time of delivery (12:01 p.m.) and within the first hour-and-a-half of Brittany's life was not at a level that could cause neurologic injury; (3) the cause of Brittany's permanent brain damage was an event, which he could not identify, that occurred approximately nine to ten hours after her birth and caused severe acidosis; and (4) nothing occurring "during the labor and delivery period" was a cause in that event nine to ten hours later. In giving his opinions on the health of the fetus during the approximately three hours immediately preceding birth, Dr. Ross analyzed the fetal heart monitoring strips.

¶41 After the conclusion of Dr. Ross's direct examination, the Vasquezes' counsel moved the court to either strike the entire examination or grant a mistrial. Counsel argued that the true purpose of Dr. Ross's testimony on the fetal heart monitoring strips was to establish that the nurses acted within the standard of care because the strips did not show any cause for concern. The court rejected this argument. It concluded that Dr. Ross's testimony on the fetal heart monitoring strips was more reasonably viewed as foundation for his opinions on causation and it was relevant to the foundation for those opinions. The court also rejected counsel's argument that he and his clients had been "ambushed" by the presentation of Dr. Ross's opinions of what the fetal heart monitoring strips showed. Accordingly, the court denied the motion to strike all testimony or for a mistrial. However, the court did order that the jury not consider Dr. Ross's testimony that electronic fetal heart monitoring is not required and his testimony that, instead of watching the monitor, it is sufficient to listen to the fetal heart tones every fifteen minutes. The court so ordered because it viewed this testimony to be related to the standard of care.

¶42 On appeal the Vasquezes contend that the circuit court erred in allowing Dr. Ross to testify on causation because, for the reasons they argued in the circuit court, that testimony was irrelevant. They also contend that the circuit court erred in allowing Dr. Ross's testimony on the fetal heart monitoring strips because that was testimony on the nursing standard of care and had not previously been disclosed to them.

¶43 The challenged rulings both involve the exercise of the court's discretion in deciding what evidence was relevant. *See* ***State v. LaCount***, 2007 WI App 116, ¶14, 301 Wis. 2d 472, 732 N.W.2d 29. The decision whether to exclude expert testimony because it has not been previously disclosed is also committed to the circuit court's discretion. *See* ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 211 Wis. 2d 296, 302-04, 564 N.W.2d 766 (1997). For the reasons we explain below, we conclude the circuit court did not erroneously exercise its discretion in allowing Dr. Ross's testimony on causation and on the fetal heart monitoring strips.

¶44 Turning first to the court's ruling on Dr. Ross's causation testimony, we conclude it was supported by the record, consistent with the correct legal standard, and is reasonable. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01 (2009-10). The Vasquezes' theory of Bellin's liability was that nurses Wydeven and Bilotto were negligent in not taking action based on what the fetal heart monitor indicated at approximately 9:30 a.m. or shortly thereafter, and this negligence resulted in Angelica's uterine rupture, which caused Brittany's permanent brain injury. Thus, evidence that Brittany's injury was caused by the uterine rupture was of consequence to a determination of the Vasquezes' claim.

Dr. Ross's testimony—that the uterine rupture did not cause Brittany's permanent brain injury but that instead it was caused by another event occurring hours later—contradicted the Vasquezes' evidence of causation. His testimony therefore had "a tendency" to make the Vasquezes' causation evidence "less probable than it would be without [his testimony]." *See* § 904.01.

¶45 As we understand the Vasquezes' argument, they contend that Dr. Ross's testimony was not relevant unless he could "break the chain of causation" between the uterine rupture and the unspecified event that, in his opinion, occurred between nine and ten hours after birth and caused the severe acidosis, which caused Brittany's injuries. They assert his testimony did not break this chain because on cross-examination he acknowledged that Brittany was on a ventilator between nine and ten hours after birth and that the primary reason she was on the ventilator at that time was because she was not breathing at birth. We conclude the court reasonably rejected this argument. First, the Vasquezes' characterization of the record omits reference to portions of Dr. Ross's testimony that suggest he did not necessarily view the uterine rupture and the unspecified event occurring nine to ten hours later as an unbroken "chain of causation." For example, Dr. Ross testified that Brittany's not breathing at birth could have been caused either by uterine rupture or by cord compression at birth. He also testified that, while the fact she was not breathing at birth caused the need for the initial ventilation, it may not have caused the need for the later ventilation. Second, and more fundamentally, as the circuit court recognized, Dr. Ross's testimony on causation was not irrelevant simply because aspects of it might be understood to support the Vasquezes' theory of causation. His testimony need not conclusively eliminate the possibility that Brittany's permanent brain injury was caused by the uterine

rupture in order to be relevant; it need only have "a tendency" to establish that a later event caused the injuries.

¶46 Turning next to Dr. Ross's testimony on the fetal heart monitoring strips, we conclude the court's decision that they were relevant to his opinion on causation was a reasonable one, with support in the record and based on the correct law. Testimony regarding the strips was part of Dr. Ross's explanation for his opinion that nothing during labor caused Brittany's injuries. He testified that, based on his review of the fetal heart monitoring strips, no notable medical event occurred during labor other than the uterine rupture. Then, by examining the blood gas results obtained shortly after Brittany's delivery, Dr. Ross testified that the acid levels were too low to indicate she had suffered brain damage at the time of the uterine rupture. The record supports the circuit court's assessment that the jury would not misunderstand the purpose of Dr. Ross's testimony regarding the strips. Except for the small part of this testimony that the circuit court instructed the jurors to disregard, the testimony was focused on Dr. Ross's theory of causation. In addition, as the circuit court pointed out in its post-verdict ruling on this issue, at the beginning of Dr. Ross's testimony, he confirmed that he was not going to render opinions on standard of care but was going to talk about the "status of the fetus during the labor period, at the time of delivery, and … after delivery …."

¶47 The Vasquezes argue that Dr. Ross's opinions of the fetal heart monitoring strips were not previously disclosed to them. This argument appears to be based largely on the premise that this testimony was really standard of care testimony. However we have already concluded the circuit court properly exercised its discretion in deciding it was not.

¶48 The Vasquezes may also mean that, even if Dr. Ross's testimony on the fetal heart monitoring strips is properly considered relevant to his opinions on causation, those opinions were not previously disclosed to them. The circuit court concluded that the Vasquezes were well aware of what Dr. Ross would be testifying to after Dr. Stevens was dismissed from the case. The record shows that the Vasquezes took two depositions of Dr. Ross. In the first, Vasquezes' counsel questioned Dr. Ross by making reference to the fetal heart monitoring strips and Dr. Ross discussed what, in his expert opinion, was indicated in each panel beginning around 9:30 a.m. until Brittany's delivery at 12:01 p.m. The Vasquezes do not identify which portion of Dr. Ross's testimony at trial was not disclosed during that deposition. They therefore do not present a developed argument explaining how the circuit court erroneously exercised its discretion. Accordingly, we do not discuss this issue further. *See* ***State v. West***, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993) (citation omitted) ("We will not search the record to supply the facts necessary to support the appellant's argument, nor will we develop appellant's argument.").

V. Cross-Examination of Dr. Bruce Bryan

¶49 The Vasquezes contend that the circuit court erred when the court allowed one of their experts, Dr. Bryan, to be cross-examined with post-occurrence literature. Prior to trial, the circuit court had entered an order granting motions of both the Vasquezes and Bellin regarding use of post-occurrence literature (dated after April, 20, 2005) regarding standard of care. The Vasquezes' motion sought to "bar[] the use of post-occurrence literature to support an expert's opinion regarding the compliance with the standard of care," and Bellin's motion sought to bar "any and all testimony … or introduction of learned medical treatises relating to the applicable standard of care dated after April 20, 2005." The court

granted both motions "subject to examination as to the particular literature, whether it relates to the standard of care and the timing for any such opinions as contained in the literature." The dispute on appeal concerns Bellin's use of a bulletin, published by the American College of Obstetrics and Gynecology (ACOG) in 2009, in questioning Dr. Bryan about the terms "hyperstimulation" and "borderline hyperstimulation." Dr. Bryan had used these terms in his direct testimony.

¶50 On direct examination Dr. Bryan testified that the fetal heart monitoring strips, for particular time segments, showed that the fetal heart rate was too high and that Angelica was having "hyperstimulation," that is, contractions at a rate above the accepted range. Because of this, he opined, the drug Pitocin, which was being administered to augment Angelica's labor, should have been reduced or "turned off." In Dr. Bryan's opinion, the nurse who increased Pitocin during this time period breached the standard of care. Dr. Bryan testified that "the general definition for hyperstimulation is more than five contractions in a 10-minute segment." Dr. Bryan also used the term "borderline hyperstimulation" in his trial testimony, as he had in his deposition.

¶51 During cross-examination, Bellin's counsel attempted to show that the term "borderline hyperstimulation" is not a term recognized or defined in the literature. Dr. Bryan explained that he did not know if it was used in the literature but that "[w]hen physicians communicate with nurses, we do use borderline hyperstimulation, which means on some 10-minute segment it's more than six [contractions] and others it's not, so it's borderline …." Bellin's counsel then used a bulletin published by ACOG in 2009 to make the point that this bulletin did not contain a definition of "borderline hyperstimulation." Counsel also used the bulletin in an attempt to show that the bulletin's definition of "hyperstimulation"

contained an element that Dr. Bryan had not mentioned in his direct testimony—specifically, that the six or more contractions in a ten-minute period must be repeated over the course of thirty minutes.

¶52 The Vasquezes' counsel objected to use of the bulletin because it was a 2009 publication. The court engaged in a side bar with counsel after which the court stated that the objection was overruled and that the Vasquezes' counsel was allowed "a standing objection to this line of questioning." The appellate record contains no record of what was said during this side bar.

¶53 Cross-examination of Dr. Bryan using the ACOG bulletin continued, with Bellin's counsel suggesting that Dr. Bryan should know, but did not know, about the current thirty-minute requirement and asking Dr. Bryan whether there was a thirty-minute requirement in 2005. Dr. Bryan responded that, as he recalled, there was not a specific thirty-minute requirement in 2005, but instead some more general terminology about continuing time periods, which he viewed as the equivalent. He took that into account in rendering his opinion, he testified, and he agreed that he used the term "borderline hyperstimulation" when the "technical definition of hyperstimulation" was not met. The bulletin was not offered into evidence.

¶54 On the next day of trial after Dr. Bryan completed his testimony, the Vasquezes' attorney asked the court to strike all of Dr. Bryan's testimony on cross-examination that related to the 2009 bulletin. The court denied the motion, stating that the bulletin had been used for purposes of attacking Dr. Bryan's credibility. In motions after verdict the court elaborated on its reasoning, explaining that the bulletin was clearly used to impeach because "the only conclusion you could possibly reach in this case is [that Bellin's counsel] was

attacking this doctor's opinions or abilities or definitions but not as to his standard of care. Instead, it was relative to his use of language … I don't think there was a violation of the motion in limine. I don't think it was used as a learned treatise."[6]

¶55 We conclude the court's ruling was reasonable. The questioning on the term "borderline hyperstimulation," which Dr. Bryan used in his testimony, attempted to show that the term was not used in the literature and, in particular, not used by ACOG, of which Dr. Bryan was a member. This line of questioning also attempted to show that Dr. Bryan did not have a precise meaning for this term. This cross-examination relating to "borderline hyperstimulation" was relevant to whether Dr. Bryan understood the subject matter about which he was testifying—an issue affecting how much weight the jury should give his opinions.

¶56 The 2009 ACOG bulletin was also used by Bellin's counsel in an attempt to show that, although Dr. Bryan was a member of ACOG and testified he

[6] The motion to strike the cross-examination was made after completion of Dr. Bryan's testimony, on the next day of trial, which followed a weekend. When Bellin's counsel asserted that the issue of this cross-examination had been decided by the court at the side bar the previous Friday, the Vasquezes' counsel disagreed. The court could not remember if a side bar had occurred but was certain no record had been created and that the court had not prevented either party from making a record. With the benefit of the transcript of the cross-examination before us, we see no way to read it other than that the side bar addressed the Vasquezes' immediately preceding objection to questions about the ACOG bulletin on the ground that the bulletin was dated August 2009. In ruling on the motion to strike on the following Monday, the court expressed the view that it was hampered in making a more specific ruling given the timing of the motion in relation to the cross-examination and the absence of a record of the side bar. To the extent that the circuit court's ruling on the motion to strike lacked specificity, we note that it was the obligation of the Vasquezes to make a record of the side bar if they wanted to challenge that ruling. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981) ("Counsel who rely on unrecorded sidebar conferences do so at their own peril."); ***State v. Mainiero***, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994) (noting that "appellate review is better served by counsel … stating objections and grounds on the record"). However, the court's explanation during motions after verdict provides us with a sufficient understanding of the court's rationale for purposes of appellate review.

read the ACOG practice bulletins on this topic, he did not know the definition of "hyperstimulation" currently used by the ACOG. This line of questioning was relevant to whether Dr. Bryan stayed current with the literature of a professional organization of which he was a member, another issue affecting how much weight the jury should give his opinions.

¶57 It is true that one question of Bellin's counsel, read in isolation, might suggest that counsel was going to begin using the 2009 ACOG bulletin to suggest that it was relevant to a determination of the standard of care on April 20, 2005. However, as we explain in the following paragraphs, we are satisfied that, when this entire line of cross-examination is considered, the court could reasonably decide that was not the use Bellin's counsel made of the bulletin and the jury would understand this.

¶58 This particular question occurred toward the end of cross-examination on the topic of borderline hyperstimulation and hyperstimulation. Bellin's counsel asked: "ACOG always put an additional time on it. It was more than five contractions in a 10-minute period over currently it's 30 minutes and in 2005 was it 30 minutes?" Dr. Bryan answered: "That's not my recollection. I don't think there was any timeframe on it. There's something about continuing or some terminology that more than just one, but I don't think there's a 30-minute timeframe as I recall in 2005." After Dr. Bryan gave this answer, Bellin's counsel returned to a focus on what Dr. Bryan understood the current definition to be and why Dr. Bryan used the term "borderline hyperstimulation."

¶59 The purpose of the order barring post-occurrence literature that both parties sought, as explained in the briefs of both, was to preclude the introduction of irrelevant medical literature or treatises. Both parties agreed that medical

literature or treatises published after April 20, 2005, were irrelevant to show the proper standard of care in treating a patient on that date because a health care provider could not have relied on that writing in deciding how to properly treat that patient. We conclude that the circuit court reasonably decided that the 2009 ACOG bulletin was not used to show the proper standard of care on April 20, 2005, but instead was used for the relevant purpose of impeaching Dr. Bryan's direct testimony by attempting to show that he used terminology that was not recognized in the literature and also did not have a clear understanding of the definition of a term he should know.[7]

VI. Sufficiency of the Evidence

¶60 The Vasquezes argue there is insufficient evidence to support the jury's verdict of no negligence.[8]

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[7] The Vasquezes contend that, even if the circuit court errors they have asserted are not individually sufficient to entitle them to a new trial, the cumulative effect of these errors entitles them to a new trial. However, with the exception of the issue of the evidence of Angelica's consent, we have concluded the court did not erroneously exercise its discretion. As to the consent issue, we have assumed error and concluded it was harmless error.

[8] In the circuit court the Vasquezes moved to change the "no" answer on the negligence question to "yes" on the ground of insufficient evidence. They also moved for a new trial in the interest of justice on the ground the verdict was against the manifest weight of the evidence. (The circuit court may grant a new trial in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even if the findings are supported by credible evidence. ***Krolikowski v. Chicago & Nw. Transp. Co.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979).) The circuit court denied both motions. On appeal the Vasquezes title this section of their argument and phrase the first paragraph as though they are appealing the court's denial of their motion for a new trial on the ground the verdict is against the manifest weight of the evidence. However, the substance of their analysis concerns the insufficiency of the evidence to support the verdict and is not framed in terms of our standard of review of a circuit court's discretionary decision whether to grant a new trial in the interest of justice. *See* ***id.*** (noting that whether to grant a new trial in the interest of justice is a discretionary decision for the trial court, and that we look for reasons to sustain the findings and order of the trial judge). Accordingly, we treat their argument as contesting the sufficiency of the evidence to support the verdict.

¶61 We sustain a jury verdict if there is any credible evidence to support it. ***Hoffmann v. Wisconsin Elec. Power Co.***, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55 (citations omitted). This is particularly true where, as here, the circuit court has approved the verdict. ***Finley v. Culligan***, 201 Wis. 2d 611, 630-31, 548 N.W.2d 854 (Ct. App. 1996) (citation omitted). In our review we bear in mind that the credibility of witnesses and the weight to be given to their testimony is a question for the fact finder, not for this court. ***Hoffman***, 262 Wis. 2d 264, ¶9 (citation omitted). Applying this standard, we conclude the jury's verdict was supported by sufficient evidence.

¶62 The Vasquezes contend there was no credible evidence upon which a jury could have concluded that Nurse Wydeven was not negligent in her care and treatment of Angelica. They contend that it was undisputed that Dr. Stevens issued a nondiscretionary order to contact him if there was an abnormal fetal heart rate and that the only credible evidence showed that Nurse Wydeven violated that order by not contacting Dr. Stevens when the fetal heart monitoring strips showed tachycardia (abnormal fetal heart rate) from 10:00 a.m. until 10:50 a.m. Accordingly, the Vasquezes contend, "the jury was obligated to conclude that [Nurse] Wydeven deviated from the standard of care …."

¶63 We do not agree that the evidence the Vasquezes point to is the only credible evidence. Bellin's expert, Dr. Sean Blackwell, testified that, while there was some evidence of tachycardia between 10:00 a.m. and 10:30 a.m., it did not rise to a level where the nurses needed to do anything different or call Dr. Stevens. Nurse Bonnie Flood Chez, who testified as an expert for Bellin, testified that Nurse Wydeven complied with the standard of care in her treatment of Angelica. This is credible evidence that supports the jury's verdict of no negligence.

CONCLUSION

¶64 We affirm the judgments of the circuit court

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.