COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3194

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

MILDRED R. CERMAK,

PLAINTIFF-APPELLANT,

V.

MICHAEL SWANK, M.D., WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN AND ST. MARY'S HOSPITAL, MILWAUKEE,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

NETTESHEIM, J. Mildred R. Cermak brought this medical malpractice action to recover damages for an infection of a surgical incision in her right leg caused by a sponge left in the wound. Cermak alleged that the physician who performed her surgery, Michael Swank, M.D., and St. Mary's Hospital,

Milwaukee, were negligent in providing her care and treatment. Following a four-day trial, a jury found that Swank and St. Mary's Hospital were not negligent. On appeal, Cermak raises two jury instruction issues. First, Cermak argues that the trial court erroneously failed to instruct the jury on res ipsa loquitur. Second, Cermak contends that the trial court erred by limiting the jury's negligence inquiry to the date of her surgery. We reject each of Cermak's arguments. We additionally reject Cermak's request for a new trial in the interests of justice. We affirm the trial court's denial of Cermak's motion for postverdict relief and the judgments entered upon the verdict.

FACTS

Cermak's physician, Swank, testified that on April 5, 1993, he and his assistant, Joseph Perez, performed heart bypass surgery on Cermak at St. Mary's Hospital. The procedure involved the use of veins removed, or "harvested," by Perez from Cermak's upper right and left legs. After Perez harvested the veins from Cermak's legs, the incisions were closed under the supervision of Swank. Following the operation, Cermak remained in the hospital through April 24, 1993.

On April 13, 1993, Swank noted a problem developing in Cermak's right incision site. On April 15, Swank requested an "infectious disease consult" from Charles Brummit, M.D., to determine the cause of Cermak's right leg wound infection. After conferring with Brummitt, Swank performed a debridement procedure on the right leg wound on April 16. This procedure involved opening the wound and clearing it of pus and dead tissue. During this procedure, Swank discovered a hematoma which he removed. Swank testified that there was no sponge in Cermak's wound at the time of the debridement. However, following

the debridement procedure, Swank packed the wound with sponges and left the wound open so that it could be kept clean and treated appropriately.

On April 20, 1993, Swank and Brummitt attempted to close the entire wound site. The procedure was only partially successful. On April 22, Swank opened the distal[1] portion of the wound because it was not healing. In addition, there was a sinus tract extending from the unhealed portion of the wound into the tissue underlying the healed portion.[2] Swank packed the tract and the open wound with "packing sponges." Swank testified that on April 23, he personally took out all of the packing, assessed the wound again, irrigated it and repacked it.

When Cermak was discharged from St. Mary's Hospital on April 24, 1993, the distal portion of her wound remained open and infected. Swank determined that Cermak would need home health care to help her take care of the wound. The day after Cermak was discharged, Linda Lonigro, R.N., a home care nurse employed by Caregivers Home Health, began visiting Cermak and treating the infection. As part of this treatment, Lonigro would change the sponge packing in Cermak's wound. Cermak's granddaughter, Saundra Carpenter, was also trained in the care of Cermak's wound and assisted Lonigro.

Cermak continued with home health care treatment from April 25 to June 7, 1993, when she was hospitalized for her infection at Good Shepherd

[1] Cermak's incision extended down her upper leg from the groin area. The portion of the wound nearest the groin area is the proximal end and the portion furthest from the groin is the distal end.

[2] A sinus tract is a "little tunnel inside the body that allows infection to drain out of the body."

Hospital in Illinois.[3] At that time, Cermak's wound was documented to be seven to ten centimeters in size with a draining sinus tract that was the size of a nickel. Cermak was discharged from Good Shepherd on June 11. She continued to receive wound care from Good Shepherd on an outpatient basis. Caregivers Home Health and Cermak's granddaughter also continued to be involved in her treatment until July 26, 1993.

Cermak then returned to Swank for treatment. On July 27, 1993, Swank operated on the wound site and found a sponge which had been retained in the wound. Swank identified the sponge as a "packing sponge," measuring four inches by four inches. Because only surgical sponges with a radiopaque blue line running through them are used during surgery, Swank concluded that the sponge had not been left at the time of Cermak's surgery. After the sponge was removed by Swank, Cermak suffered no further infection and her leg began to heal. Swank testified that in his opinion Cermak's "chronic sinus tract, this chronic infection, this chronic failure to heal on her right leg wound was caused by the retained sponge[.]"

On April 12, 1995, Cermak filed a summons and complaint against Swank, his insurance carrier, Wisconsin Health Care Liability Insurance Plan, and St. Mary's Hospital. Cermak's complaint alleged, in part, that Swank and the employees of St. Mary's Hospital "were negligent with respect to the care and treatment rendered to [Cermak] in that they, among other things, left a surgical sponge in the surgical site in question and … for a substantial period of time,

[3] During this span of time, according to Swank's testimony, he saw Cermak in his office on April 29 and May 11, and Cermak talked to his nurse by telephone on June 4.

failed to discover the existence of said sponge ….” Cermak sought to recover damages for bodily injury, pain and suffering and medical expenses.[4]

The matter was tried to a jury over a four-day period from May 20 to May 23, 1996. At trial, various theories were presented regarding the placement and negligent failure to remove the sponge. In addition to testifying herself, Cermak presented testimony from Lonigro and Carpenter. Cermak additionally presented the testimony of one expert, David Easter, M.D., via a videotaped deposition taken May 6, 1996. Easter opined that the sponge had been left during Cermak’s initial surgery on April 5, 1993.

Swank and his physician’s assistant, Perez, testified that the sponge was not left during the initial surgery because the sponges used during surgery were counted and because the packing sponge extracted from Cermak’s leg was not the type used during the surgical procedure. Both Perez and the defense expert, Dr. Edward Dunn, a coronary and thoracic surgeon, testified to the possibility that the sponge may have been left during the debridement procedure performed by Swank at St. Mary’s Hospital on April 16. Additional testimony from Lonigro and Carpenter confirmed the use of packing sponges during the period of Cermak’s home care treatment.

At the jury instruction conference, the trial court rejected Cermak’s request for a res ipsa loquitur instruction. The court ruled that Cermak had not demonstrated that Swank had exclusive control over her treatment and that Cermak’s expert, Easter, had offered a full and complete explanation in support of

[4] Since Cermak’s allegations of negligence against Swank and St. Mary’s Hospital all stem from Swank’s treatment of her while a patient at St. Mary’s Hospital, we will hereafter refer to the defendants as “Swank” unless the context requires otherwise.

Cermak's negligence allegations. The trial court additionally modified WIS J I—CIVIL 1023 to limit the jury's negligence inquiry to April 5, 1993, the date of Cermak's surgery,[5] in spite of Cermak's contention that sufficient evidence had been presented at trial demonstrating that the defendants had been negligent in performing the debridement and packing procedures on April 16, 1993. The court based its ruling on Easter's testimony which limited the defendants' negligence to the surgical procedure of April 5.

Shortly into deliberations, the jury inquired of the trial court whether its deliberations were to be limited to the April 5, 1993 procedure. The trial court instructed the jury to follow the instructions it had received. The jury then found that Swank was not negligent.

Following the verdict, Cermak obtained signed statements from nine of the twelve jurors indicating that the jury did not find negligence because it was limited to the April 5, 1993 procedure. The statements also indicated that the jury generally believed that the sponge was left in Cermak's leg by Swank or St.

[5] The trial court gave the jury a modified version of WIS J I—CIVIL 1023. The limiting portion of the instruction was as follows:

> In treating Mildred Cermak, Michael Swank was required to use the degree of care, skill and judgment which is usually exercised in the same or similar circumstances, by the average specialist who practices the specialty which Michael Swank practices, having due regard for the state of medical science at the time Mildred Cermak was treated. Failure to conform to this standard is negligence. The burden of proof in this case is on Mildred Cermak to prove that Michael Swank failed to conform to this standard on April 5, 1993, during the vein harvesting procedure.
>
> A physician does not guarantee the results of his care and treatment. A physician must use reasonable care and is not liable for failing to use the highest degree of care, skill, and judgment. Michael Swank cannot be found negligent simply because a bad result may have followed from his surgical procedure.…

Mary's Hospital staff on or about April 16, 1993, the date of the debridement procedure.

In her motions after verdict, Cermak sought a new trial. In support, she argued that: (1) the trial court had erred by failing to instruct the jury on res ipsa loquitur, (2) the verdict was contrary to law and against the weight of the evidence, and (3) a new trial should be granted in the interests of justice. The trial court denied Cermak's motion and entered judgment on the verdict dismissing Cermak's complaint.

Cermak makes three arguments on appeal. First, Cermak contends that the trial court erroneously refused to submit a res ipsa loquitur instruction to the jury. Second, Cermak contends that the trial court erroneously restricted the jury's negligence inquiry to April 5, 1993, the date of the original surgery. Third, Cermak requests a new trial in the interests of justice. We will provide additional facts as they relate to Cermak's appellate arguments.

DISCUSSION

Res Ipsa Loquitur

Prior to trial, Cermak requested that the trial court deliver the res ipsa loquitur instruction set out at WIS J I—CIVIL 1024.[6] Res ipsa loquitur is a

[6] The following res ipsa loquitur instruction proposed by Cermak was a modified version of WIS J I—CIVIL 1024:

> If you find that the right lower extremity of the plaintiff, Mildred Cermak, was injured during the course of the operation performed by the defendant, Dr. Michael Swank, and if you further find from expert medical testimony in this case that the injury to the right lower extremity of the plaintiff, Mildred Cermak, is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, then you may infer, from the fact of surgery to the right lower extremity of the plaintiff, Mildred Cermak, that the defendant, Dr. Michael Swank, failed to exercise that degree of care and skill which surgeons usually

(continued)

legal principle that permits the jury to draw an inference of a physician's negligence without any direct or expert testimony as to the physician's conduct at the time the negligence occurred. *See* ***Richards v. Mendivil***, 200 Wis.2d 665, 673-74, 548 N.W.2d 85, 89 (Ct. App. 1996). The jury should be instructed on the res ipsa loquitur doctrine in a medical malpractice action when:

> (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

Fiumefreddo v. McLean, 174 Wis.2d 10, 17, 496 N.W.2d 226, 228 (Ct. App. 1993) (quoting ***Lecander v. Billmeyer***, 171 Wis.2d 593, 601-02, 492 N.W.2d 167, 170-71 (Ct. App. 1992)).

The trial court declined to give the res ipsa loquitur instruction based on its conclusion that the evidence presented by Cermak did not satisfy the second and third requirements. The trial court stated:

> Although [Cermak's] position is the sponge was there from April on, the evidence in terms of the application of the doctrine of exclusive control has to be taken from … when it was removed … to when the initial operation occurred in April of '93, did these two defendants have exclusive control…. [T]he answer is no.
>
> ….
>
> On that basis, it would not appear that the doctrine would be applicable but, over and above that, the Court is satisfied

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> exercise. This rule will not apply if the defendant, Dr. Michael Swank, has offered an explanation for the injury to the right lower extremity of the plaintiff, Mildred Cermak, which satisfies you that such injury to the plaintiff, Mildred Cermak, did not occur through any failure on his part to exercise due care and skill.

> that there has been demonstrated, in terms of the third element, by the plaintiff through its own expert witness that the negligence was in fact occurring on a given date as an explanation of why the sponge got there during the operation … there is a firm explanation as to how the sponge got there, and the subsequent removal.

Cermak challenges this ruling on appeal.

The standard of review to be applied when reviewing a trial court's decision on whether to provide the jury with a res ipsa loquitur instruction was clarified by our supreme court in ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 531 N.W.2d 597 (1995). The first two requirements necessary for the granting of a res ipsa loquitur instruction—"exclusive control" and "result does not occur in the absence of negligence"—present a mixed question of fact and law. *See* ***id***. at 18-19, 531 N.W.2d at 601-02. We must first determine whether the trial court's findings of fact were clearly erroneous. *See* ***id***. at 19, 531 N.W.2d at 602. We must next determine whether the facts, as a matter of law, fulfill the applicable legal standard. *See* ***id***. As to the third requirement, this court will not disturb the trial court's determination if it is a reasonable one, based upon the appropriate law and facts of record. *See* ***id***. at 20, 531 N.W.2d at 602. As noted above, the trial court's determination was based on the second and third requirements. We will address each requirement in turn using the appropriate standard of review.

1. Exclusive Control

Noting that the evidence revealed that Cermak had also received treatment for her leg infection from her home nurse, her granddaughter and Good Shepherd Hospital, the trial court ruled that Cermak had not established that Swank had exclusive control over Cermak's treatment. The court noted that any of these entities had the opportunity to place the sponge in Cermak's wound. Thus, the court concluded that Cermak failed to satisfy the second element of the

res ipsa loquitur inquiry—that the agent or instrumentality causing the harm was within the exclusive control of the defendant. *See* ***Fiumefreddo***, 174 Wis.2d at 17, 496 N.W.2d at 228. On this basis, the court denied Cermak's request for a res ipsa loquitur instruction.

All that is required to meet the "exclusive control" requirement is that the plaintiff must present sufficient evidence which eliminates other responsible causes. *See* ***Richards***, 200 Wis.2d at 676, 548 N.W.2d at 90. Cermak contends that she has satisfied this test. She points to the evidence presented at trial which "makes it elementary that the negligence in question occurred … under [Swank's] exclusive control[.]" First, a pocket was formed in the wound after Swank removed the hematoma during the debridement procedure on April 16. The wound, including the pocket, was packed with sponges at that time. Second, the wound became infected under Swank's care and Cermak left the hospital with the infection. Third, Swank and his expert, Dunn, admitted that a retained sponge could cause an infection and according to Swank, the sponge removed on July 27, 1993, was the primary cause of Cermak's infection. Cermak also argues that the decreased size of her wound after her discharge from St. Mary's Hospital would have prevented any other person from inserting a sponge into the area from which it was recovered.

However, Cermak's evidence regarding the size of her wound following her discharge was disputed by other evidence presented by Swank. This evidence demonstrated that Cermak's wound was left open at the time that she was discharged from St. Mary's Hospital and from the exclusive care of Swank. There was evidence that the wound was packed and unpacked on numerous occasions between the April 16 debridement procedure and the removal of the sponge on July 27. The wound care was performed by at least three different

parties—Cermak's home care nurse, Cermak's granddaughter and Good Shepherd Hospital. There was also evidence that at times between Cermak's discharge from St. Mary's Hospital and the removal of the sponge on July 27, Cermak's wound was large enough for a packing sponge to be inserted into the far end of the sinus tract where it would later be discovered.

Given the trial court's ruling, it is evident that the court accepted Swank's version of Cermak's wound history. In light of the evidence presented, this finding is not clearly erroneous. *See* ***Peplinski***, 193 Wis.2d at 19, 531 N.W.2d at 602.[7] Nor was the trial court's determination that the evidence presented by Cermak did not satisfy the element of "exclusive control" erroneous as a matter of law. There was evidence that, in addition to the sponge packing performed by Swank at St. Mary's Hospital, Cermak's wound was packed by Lonigro, Carpenter and the staff at Good Shepherd Hospital.[8]

We affirm the trial court's ruling that Cermak failed to meet the "exclusive control" requirement for the granting of a res ipsa loquitur instruction.

[7] Although this was a jury case, the res ipsa loquitur methodology places the trial court in the role of fact finder for purposes of determining whether the instruction should be given. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 18, 531 N.W.2d 597, 601 (1995).

[8] Swank also argues that Cermak's failure to name the other possible responsible parties precluded her from succeeding on the "exclusive control" element. Although we need not reach this argument based on our holding that Cermak has failed to provide sufficient evidence eliminating other responsible causes, we nevertheless point out that we are unaware of any law which makes this statement. Rather, the obligation of the plaintiff is to present sufficient evidence that eliminates other responsible causes. *See* ***Richards v. Mendivil***, 200 Wis.2d 665, 676, 548 N.W.2d 85, 90 (Ct. App. 1996).

2. Full and Complete Explanation of the Event

The trial court also rejected Cermak's request for a res ipsa loquitur instruction because Cermak had presented a full and complete explanation of the event by the testimony of her own expert witness, Easter.

"Courts have generally recognized that the leaving of a foreign object in the patient's body is sufficient in itself to create a presumption or inference of negligence or to give rise to the application of res ipsa loquitur." ***Froh v. Milwaukee Med. Clinic, S.C***., 85 Wis.2d 308, 314, 270 N.W.2d 83, 85 (Ct. App. 1978). Cermak argues that this is a classic "foreign object" case and as such, jurors may infer negligence without the benefit of expert testimony. However, "it is possible that the plaintiff's evidence of negligence in a given case has been so substantial that it provides a full and complete explanation of the event, if the jury chooses to accept it. In that case, causation is no longer a mystery, and the *res ipsa loquitur* instruction would be superfluous and erroneous." ***Utica Mut. Ins. Co. v. Ripon Coop***., 50 Wis.2d 431, 439, 184 N.W.2d 65, 69 (1971).

Here, Cermak presented expert testimony from Easter regarding the source and cause of her injury. The trial court concluded that Easter's testimony provided a "firm explanation" for Cermak's injury. As such, Cermak "proved too much" and was not entitled to a res ipsa loquitur instruction. We agree with the trial court's determination.

Easter was Cermak's lone expert witness. Insofar as any negligence was concerned, Easter's testimony was limited to April 5, 1993, the date of Cermak's initial surgery. Easter opined that the sponge was left in Cermak's leg during her original surgery. In his opinion, "it [was] nearly impossible for the

sponge to have come from anywhere except for that first operation because of the chronology of the events." Based on his review of Cermak's medical records, Easter determined that the infection "originally developed when the wound was still closed[.]" Because he also believed that the original infection was caused by the sponge, Easter concluded that the sponge must have been left during surgery. In support of his opinion, Easter explained the practice of performing a "sponge count" in the operating room: "Nearing the completion of an operation or … a major phase of a complex operation the nurses will initiate a sponge count … to make sure that you've accounted for all the movable pieces that can be left behind." Easter stated that although the sponge count performed during Cermak's surgery was reported as being correct, he believed that the sponge count was incorrect. Easter explained that he believed Swank was negligent for failing to thoroughly inspect Cermak's wound before closing it.

The trial court ruled that Cermak, through her expert witness, had demonstrated that "the negligence was in fact occurring on a given date as an explanation of why the sponge got there during the operation." The trial court determined that, in light of this "firm explanation as to how the sponge got there," the evidence presented did not conform to the third requirement for a res ipsa loquitur instruction. In essence, Cermak had proven too much.

Based on our review of the record, we similarly conclude that Cermak's expert completely explained the injury and the negligence causing it and, by his testimony, limited the date of injury to the date of Cermak's surgery. This court has previously recognized that "[t]here is a danger that when a plaintiff relies upon expert testimony that the evidence of negligence will be so substantial that a full and complete explanation of causation is provided and res ipsa loquitur would not be applicable." ***Richards***, 200 Wis.2d at 674 n.5, 548 N.W.2d at 90.

This is precisely what happened in this case. Cermak argues that Easter's testimony is not necessary to her case because "[t]he jury in this case did not need Dr. Easter, nor any other medical expert, to tell them that the leaving of a sponge in a wound to the point where it caused chronic, long-lasting infection, constitutes negligence." Nevertheless, Cermak presented an expert who fully explained the negligence underlying her injury.[9]

Cermak argues that the trial court should have granted her request for a res ipsa loquitur instruction in spite of Easter's testimony attributing negligence to one particular incident. In support of this contention, Cermak cites to the following language from ***Fehrman v. Smirl***, 25 Wis.2d 645, 652, 131 N.W.2d 314, 317 (1964):

> While [the expert's] testimony constitutes direct proof of malpractice, it does not particularize the nature of the negligence which he had in mind. In other words, the jury was not expressly told by [the expert] in what precise manner the two doctors failed to exercise proper skill and diligence. Since a variety of potential opportunities for negligence existed in the instant case, it is arguable that *res ipsa loquitur* was appropriate to raise an inference of negligence as to conduct which was not included within [the expert's] conclusions. On the other hand, if [the expert's] evidence is deemed to be so broad as to constitute direct proof of the only kinds of negligence which might reasonably have been attributed to [the defending physician], then the instruction on *res ipsa loquitur* would have been redundant.

[9] We acknowledge that Swank's physician's assistant, Perez, and Swank's expert, Dunn, testified that it was possible that the sponge had been introduced into Cermak's leg wound during the debridement procedure. However, this testimony did not rise to the requisite level of expert proof that Swank was negligent during this procedure. As a matter of fact, no expert opined that Swank was negligent during this procedure. And, Cermak makes no argument that this testimony established negligence by Swank during the debridement procedure.

Cermak's reliance on ***Fehrman*** is misplaced.[10] The expert in ***Fehrman*** did not testify to the particular actions by the physician which resulted in the injury. Rather, the expert testified that the plaintiff's injury would not have resulted if his physicians had exercised the proper care, skill and diligence during the performance of the operation. *See* ***id***. at 651, 131 N.W.2d at 317.

Here, Easter did not generally state that Swank was negligent in his care and treatment of Cermak. Unlike the expert in ***Fehrman***, Easter particularized the "nature of the negligence which he had in mind" when stating his opinion that Swank was negligent. *See* ***id.*** at 652, 131 N.W.2d at ___. Specifically, in Easter's opinion, the infection of Cermak's right leg wound was caused when Swank negligently failed to inspect the wound following an incorrect sponge count.

"[T]he doctrine of res ipsa loquitur should not be applied where the specifics of an event can be completely explained." ***Lecander v. Billmeyer***, 171 Wis.2d 593, 604, 492 N.W.2d 167, 171 (Ct. App. 1992). We conclude that the trial court's determination that the evidence presented by Cermak did not fulfill the third requirement for granting a res ipsa loquitur instruction was a reasonable

[10] Cermak additionally relies upon ***Knief v. Sargent***, 40 Wis.2d 4, 161 N.W.2d 232 (1968), and ***Beaudoin v. Watertown Memorial Hospital***, 32 Wis.2d 132, 145 N.W.2d 169 (1966), in support of her proposition that the trial court should have granted a res ipsa loquitur instruction in spite of Easter's expert testimony. However, like ***Fehrman v. Smirl***, 25 Wis.2d 645, 652, 131 N.W.2d 314, 317 (1964), these cases do not support Cermak's position. Cermak correctly argues that according to ***Knief***, "the introduction of some evidence which tends to show specific acts of negligence … but does not purport to furnish a complete and full explanation of the occurrence does not deprive the plaintiff of the benefit of *res ipsa loquitur*…." ***Knief***, 40 Wis.2d at 9, 161 N.W.2d at 234. But, as we have stated, in this case Easter provided a full and complete explanation of Swank's negligence which caused Cermak's infection. Unlike this case, ***Beaudoin*** did not involve a plaintiff who proved too much. Rather, the issue in ***Beaudoin*** was whether the existence of other possibilities which may have caused the plaintiff's injury removed the issue from the res ipsa loquitur doctrine. *See* ***Beaudoin***, 32 Wis.2d at 138, 145 N.W.2d at 169.

one based upon the law and the facts of this case. *See* ***Peplinski***, 193 Wis.2d at 18, 531 N.W.2d at 601.[11]

Restriction of the Jury's Negligence Inquiry to the Date of Surgery

1. Expert Testimony

Having concluded that the trial court properly excluded res ipsa loquitur from this case, we next turn to Cermak's contention that the court erred by limiting the jury's consideration of Swank's negligence to the April 5, 1993 initial surgery. In making its ruling, the court observed that "[t]he only evidence in the record as to malpractice appears to be the operation date." Because Cermak did not provide expert testimony in support of her claim that Swank and St. Mary's Hospital acted negligently during the course of her treatment following her surgery on April 5, we conclude that the trial court did not erroneously limit the jury's inquiry to that date.

"In order to hold a physician liable, the burden is upon the plaintiff to show that the physician failed in the requisite degree of care and skill. That degree of care and skill can only be proved by the testimony of experts. Without such testimony the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him." ***Froh***, 85 Wis.2d at 317, 270 N.W.2d at 87.

Cermak presented expert testimony that on April 5, 1993, Swank negligently failed to inspect the wound prior to closing it following surgery.

[11] Cermak also argues that the trial court's invocation of res ipsa loquitur concepts when denying Swank's motion for dismissal at the close of her case reveals that this was a proper case for the delivery of the instruction. However, a court's ruling made on the basis of a partial record at the close of the plaintiff's case does not govern later rulings made on the basis of a full record at the close of the evidence.

Cermak's expert testified that as a result of Swank's negligence, a sponge was left in Cermak's wound causing the infection which was first noted on April 13, 1993. Cermak's expert did not testify regarding the degree of care and skill Cermak received from Swank and St. Mary's Hospital at any time following the date of her surgery.

Cermak argues that there was "more than sufficient evidence to allow jury inquiry into negligence above and beyond the initial operative procedure." Although there was evidence and testimony which detailed the history of Cermak's course of treatment, there was no expert testimony establishing that this later course of treatment fell below the requisite degree of care and skill. Case law instructs that without expert testimony which sets the standard by which a jury may judge medical care and treatment, the jury may not inquire into negligence. *See* ***id***. Here, the jury did not have a standard by which to measure the degree of care and skill provided by Swank after the April 5, 1993 surgery.

Cermak additionally argues that the trial court effectively directed the verdict in favor of the defendants when it limited the jury's negligence inquiry to the date of surgery. We disagree. Trial courts are routinely required to make rulings which favor one party or the other. Sometimes these rulings may make a jury verdict predictable. But such predictability does not make the ruling wrong, nor transform the ruling into one which directs a verdict. While the trial court's ruling narrowed the scope of the jury's inquiry, it still left a factual dispute for the jury to decide—whether Swank was negligent during the surgery of April 5, 1993. The court did not tell the jury how to answer this question.

2. Juror Statements

Cermak attempted to illustrate the prejudicial effect of the trial court's limitation of the jury's negligence inquiry by submitting postverdict statements elicited from nine of the twelve jurors in this case. These statements generally indicate that the jury would have found the defendants negligent if it had not been limited to the April 5, 1993 date of surgery.[12]

Although we need not address this argument because we have already held that the court properly limited the jury's inquiry, we choose to do so.

Section 906.06(2), STATS., provides in relevant part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith ….

The jurors' statements supplied by Cermak clearly reflect the deliberative process of the jury and as such are prohibited under § 906.06(2). Cermak argues that the

[12] The statements signed by nine of the twelve jurors contained the following assertions:

> 1. That I am one of the jurors that deliberated in the above-captioned matter and participated in the rendering of the verdict on Thursday, May 23, 1996.
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> 2. That the general consensus of the jurors was that we found no negligence on the part of the defendants because of the court's instruction limiting us to consideration of only the April 5, 1993 surgery.
>
> 3. That we as jurors came to the general consensus that the sponge was left in Mildred Cermak's leg by Dr. Swank and/or St. Mary's Hospital on or about April 16, 1993.
>
> 4. That our findings in this case would have been different if we had not been limited to considering only the April 5, 1993 surgery and that we would have found Dr. Swank and/or St. Mary's Hospital negligent if we had not been so limited.

statements are not submitted to attack the validity of the verdict but are meant "to show the prejudice that Cermak suffered as a result of the trial court's rulings that res ipsa did not apply and limiting the scope of the jury's focus." This argument states a distinction without a difference. The function and purpose of this material is to reveal the deliberative process of the jury. As such, the statements are incompetent evidence under § 906.06(2).

New Trial in the Interests of Justice

As a final matter, we reject Cermak's request for a new trial in the interests of justice. This court has the discretionary power to reverse judgments in the interests of justice. However, we will not exercise this power unless the real controversy was not tried or justice has miscarried. *See* § 752.35, STATS.

Much of Cermak's argument for a new trial on this ground restates the arguments we have already addressed. Since we have rejected those arguments, we will not speak to them further.

However, Cermak additionally contends that she "went into this case with the belief that the sponge was left during the original operative procedure. After Dr. Swank testified, it became clear that it was left at a different time." However, Cermak fails to demonstrate how Swank's version of the event, a version presumably known in advance of trial via discovery, caused justice to miscarry or otherwise prevented the real issue from being tried. She makes no claim that she was surprised by Swank's theory of defense. As we have noted, Cermak failed to present any expert testimony which supported her claim of

negligence at any point after the date of surgery. And she gives no valid explanation for failing to do so.[13]

We conclude that Cermak is not entitled to a new trial in the interests of justice.

CONCLUSION

We conclude that the trial court properly rejected Cermak's request for a res ipsa loquitur instruction. We also conclude that the trial court properly limited the jury's negligence inquiry to the initial surgical procedure. Finally, we conclude that Cermak is not entitled to a new trial in the interests of justice.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

[13] Cermak contends that Easter's videotaped testimony was taken on the premise, or without knowledge, that Swank's alleged negligence might extend beyond the date of the initial surgery. But Cermak never explains why she could not have taken additional videotaped testimony from Easter once Swank's theory of defense was known to her.