

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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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. 2025AP180

Cir. Ct. No. 2021CV272

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**HEATHER MICEK, JASON MICEK AND K. M. M., A MINOR, BY HER
GUARDIAN AD LITEM, ALLYSON M. MOORE,**

PLAINTIFFS-APPELLANTS,

FORWARD HEALTH,

INVOLUNTARY-PLAINTIFF,

V.

**JAMES WALKER, MD, MAYO CLINIC HEALTH SYSTEM – NORTHWEST
WISCONSIN REGION, INC. AND INJURED PATIENTS AND FAMILIES
COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dunn County:
CHRISTINA M. MAYER, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. In this medical negligence case, Heather Micek; Jason Micek; and Kayla Micek, by her guardian ad litem, Allyson M. Moore,¹ appeal from a circuit court judgment, entered following a jury trial, in favor of James Walker, M.D.; Mayo Clinic Health System—Northwest Wisconsin Region, Inc. (Mayo); and the Injured Patients and Families Compensation Fund (the Fund).² The judgment dismissed the Miceks’ claims against those parties with prejudice and ordered the Miceks to pay costs and disbursements to Mayo and the Fund.

¶2 The Miceks’ lawsuit alleged that Walker, a family medicine doctor, was negligent in his care and treatment of Heather during her pregnancy with twins, who developed twin-to-twin transfusion syndrome (TTTS) and suffered injuries as a result. On appeal, the Miceks assert that the circuit court erred by limiting the presentation of evidence and the special verdict question on negligence to the time period from July 18, 2011, to August 3, 2011,³ and by denying the Miceks’ motion for a change of venue after the jury had been

¹ Going forward, and for ease of reading, we will refer to the plaintiffs-appellants, collectively, as “the Miceks” and individually by their first names, as necessary. To protect confidentiality, we refer to the children in this case by the pseudonyms Kayla and Kylie.

² According to the complaint, the Fund “is a mandatory healthcare liability risk-sharing plan created by the Wisconsin legislature ... for the purpose of paying a portion of medical malpractice claims which may exceed individual policy limits for healthcare providers.” For ease of reading, we will refer to Walker, Mayo, and the Fund, collectively, as “Walker” unless there is a need to refer to them individually.

³ Going forward, all dates referenced in this decision are in 2011 unless otherwise noted.

empaneled. For the reasons that follow, we reject the Miceks’ arguments and affirm the circuit court’s judgment.

BACKGROUND

¶3 On August 4, Heather gave birth to twin girls, Kayla and Kylie. Both girls were born with injuries as a result of TTTS.⁴ Heather first saw Walker—her primary health care provider who had full “obstetrical core privileges for family practice” to treat patients “in any condition or state of pregnancy”—for her pregnancy on March 24. She received an ultrasound on this date showing that she was eight weeks pregnant with monochorionic, diamniotic (mono-di) twins, meaning the fetuses were in separate amniotic sacs but shared one placenta. Mono-di twin pregnancies carry a known risk of TTTS.

⁴ According to the complaint, TTTS is “a condition in which abnormal blood vessel connections form in the placenta and allow blood to flow unevenly between the fetuses, creating an imbalance in the blood exchange between the twins.” With this disease of the placenta, one twin will “give[] away more blood than it receives in return,” which is the “donor twin.” The donor twin, due to “progressive loss of blood volume” and low amniotic fluid, is at risk of “malnourishment and organ failure” leading to death. The “recipient twin is at risk for successively increasing blood volume” that “ultimately affects the function of the heart muscle in the recipient ... and can then lead to cardiovascular dysfunction and even heart failure and death.”

As relevant to this appeal, the Miceks’ amended complaint alleged that Kayla

was born prematurely and suffers from permanent and disabling injuries including triplegic spastic cerebral palsy, is unable to walk, and is confined to a wheelchair. She has limited use of her right arm and hand. She has developmental delays and has an [Individualized Education Program] at her school. She has pain, discomfort, disability, embarrassment, and emotional distress as a result of her injuries.

¶4 Thereafter, Heather had approximately monthly routine ultrasounds, as ordered by Walker.⁵ As relevant here, Heather had one of these routine ultrasounds on July 7, which, according to the trial testimony, did not show any obvious signs of TTTS. On July 18, Heather came to the clinic concerned her water had broken based on feeling a gush of fluid, but tests were negative for the presence of amniotic fluid. Walker did not order an ultrasound examination on this date. Two days later, on July 20, Heather had a prenatal visit with Walker where she mentioned having pain in her lower back, which can be an indication of preterm labor and “could be a sign of TTTS.” Walker confirmed that her cervix was closed—which meant that she was not in active preterm labor—but he did not order an ultrasound.

¶5 Heather’s next routine ultrasound occurred on August 3. At that time, “[a]bnormalities” between the size of the twins were seen on the ultrasound, “including less than expected interval growth for [one of the twins] as compared to the previous scan and in comparison to [the other twin], causing suspicion for intrauterine growth restriction”; Kayla’s “[a]bdominal circumference [was] approximately 2 weeks behind [her] head circumference,” which raised “suspicion for intrauterine growth retardation”; and no separating membrane was visible between the fetuses. Walker referred Heather to Minnesota Perinatal Physicians in St. Paul, Minnesota, for further evaluation.

¶6 The following day, Heather was seen by a maternal fetal medicine specialist. Heather received another ultrasound, and the twins were diagnosed at

⁵ According to Walker’s testimony, his “plan” was for Heather “to get ultrasounds every four weeks,” and then “after 28 weeks of gestation,” to “get ultrasounds every two weeks.” Walker also stated that he “planned to” refer Heather to an obstetrician “at 30 to 32 weeks.”

that time with TTTS. The twins were delivered via urgent cesarean section that day.

¶7 The Miceks filed this medical negligence action against Walker, Mayo, and the Fund, among others, on November 17, 2021.⁶ The complaint alleged that because Heather’s pregnancy was considered high risk, Walker had a duty to refer her to a specialist for care and treatment as soon as the mono-di twin pregnancy diagnosis was made. The Miceks further alleged that Walker did not provide Heather the accepted standard of care by failing “to adequately and appropriately order antepartum monitoring and assessments of [Heather] in order to timely identify signs and symptoms of TTTS before progression of TTTS ... cause[d] injury to [Kayla].”

¶8 Early on, the issue of causal negligence became a key question for trial. The Miceks sought to argue that Walker was negligent by failing to refer Heather to a specialist immediately and by failing to request that the July 7 ultrasound include the deepest vertical pocket measurement rather than just the amniotic fluid index measurement, which are both methods of assessing the level of amniotic fluid during a pregnancy.

¶9 In contrast, Walker argued that the deposition testimony of the Miceks’ maternal fetal medicine expert, Dr. Ramesha Papanna, was insufficient to support a finding that any negligence by Walker, under either of the above

⁶ On November 3, 2022, the Miceks amended their complaint to name a guardian ad litem for Kayla and Kylie. Over time, the additional defendants that the Miceks had named in their complaint were dismissed from the case, and the Miceks also dismissed their claim related to Kylie near the time of trial. Therefore, only Kayla’s claims proceeded to trial against Walker, Mayo, and the Fund.

theories, *caused* the injury to Kayla. Papanna testified during his deposition that “[t]he ultrasound completed on July 7 was normal for both twins” and that there was not “anything evidentiary wrong with the pregnancy as of the July 7 ultrasound.” As a result, Walker filed motions in limine, requesting orders precluding evidence or argument about Walker’s alleged negligence absent a causal connection to an injury and precluding experts from offering new opinions at trial. After additional hearings and supplemental briefing, the circuit court granted the motions in limine on those issues.⁷

¶10 The trial took place in Menomonie, Wisconsin, where Walker was a well-known member of the community and had been practicing family medicine for more than 40 years. Therefore, during voir dire, multiple members of the potential jury pool admitted to relationships or connections with Walker. Then, as some of those potential jurors were dismissed, members of the Miceks’ legal team witnessed exchanges of physical affection with Walker in front of the remaining jury pool members, including hugs, winks, and a pat on his shoulder, and one dismissed individual stayed behind to watch the proceedings. The circuit court also acknowledged witnessing at least one potential juror hug Walker and call him “wonderful.”

⁷ Despite the circuit court granting the motions in limine, the Miceks’ opening statement at trial included comments relating to Walker’s negligence on July 7. As a result, Walker moved for a mistrial or a curative instruction, and the parties again argued over the causal negligence issue. The court denied the motion for a mistrial, but it agreed to a curative instruction.

This issue was again revisited when Walker was called to testify as an adverse witness, prior to Papanna’s testimony, and an objection was made to a question about the July 7 ultrasound. In a sidebar discussion, the Miceks’ counsel made an offer of proof, representing that Papanna would establish a causal connection between Walker’s negligence and the July 7 ultrasound. The circuit court ruled that if Papanna’s testimony established the required causal link, then the Miceks could recall Walker and question him about the July 7 ultrasound.

¶11 The next morning, after the jury had already been selected and sworn, the Miceks moved for a change of venue based on their belief that they would not receive a fair trial “because the jurors who weren’t familiar with Dr. Walker at all and were impartial ... saw their peers and community members expressing emphatic approval of Dr. Walker.” The circuit court denied the motion, but it agreed to give a curative instruction regarding impartiality and further expressed its beliefs that the Miceks would “receive a fair trial” and that the jury “was open to both sides” and “said they would treat the parties fairly.”

¶12 After a two-week trial, the jury found that Walker was not “negligent with respect to his care, treatment, and management of [Heather’s] 2011 pregnancy between July 18th and August 3rd.” During trial, Papanna testified to a reasonable degree of medical certainty that if ultrasounds had been ordered by Walker on July 18, July 20, and July 21, they would have shown signs of TTTS, but he could only postulate that it was *possible* that the July 7 ultrasound would have shown TTTS had the deepest vertical pocket measurement been used. We will address additional details of Papanna’s testimony as necessary below.

¶13 The Miceks filed a motion for judgment notwithstanding the verdict or for a new trial on several bases. The circuit court held a nonevidentiary hearing on the motion, and, after arguments from the parties, the court denied the motion by oral ruling, which was later memorialized by written order. Thereafter, the court entered judgment in favor of Walker, Mayo, and the Fund; dismissed all of

the Miceks’ claims with prejudice; and ordered the Miceks to pay costs and disbursements to Mayo and the Fund. The Miceks appeal.⁸

DISCUSSION

I. Special verdict question

¶14 On appeal, the Miceks first assert that the circuit court erred by limiting the special verdict question to Walker’s negligence from July 18 to August 3. According to the Miceks, the special verdict form “improperly denied [the Miceks] the opportunity to fully and fairly litigate their case” because they “should have been allowed to argue that” Walker was negligent based on his failure to refer Heather to a specialist on March 24—when he first diagnosed Heather with a mono-di twin pregnancy—and that his allegedly “negligent conduct spanned a much broader range of time than that artificially conceived and ordered by the circuit court.” They contend that the court erred by “making its own factual determinations: (1) that TTTS could not have started developing before July 7, and (2) that Dr. Walker’s earlier actions, including his failure to refer to a specialist, could not have caused the injuries to [Kayla].” “These rulings,” argue the Miceks, “invaded the province of the jury and were inconsistent with expert testimony,” and “the verdict must be overturned.”

¶15 As relevant here, “[a] claim for medical malpractice requires a negligent act or omission *that causes an injury*.” **Paul v. Skemp**, 2001 WI 42,

⁸ We pause to note that Walker’s respondent’s brief fails to comply with our Rules of Appellate Procedure. Walker cites a summary disposition order in violation of WIS. STAT. RULE 809.23(3) (2023-24). We admonish Walker’s counsel that future violations of the Rules of Appellate Procedure may result in sanctions. See WIS. STAT. RULE 809.83(2) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

¶17, 242 Wis.2d 507, 625 N.W.2d 860 (emphasis added). Therefore, “[t]o establish liability, a plaintiff must prove not only that the defendant’s conduct was negligent, but also that the negligent conduct was ‘the cause in fact or a substantial factor in causing the eventual injury.’” **Ollman v. Wisconsin Health Care Liab. Ins. Plan**, 178 Wis. 2d 648, 666-67, 505 N.W.2d 399 (Ct. App. 1993) (citation omitted). Although causation may be established by inferences, “the lack of expert testimony on the question of causation results in an insufficiency of proof where the issue involves technical, scientific or medical matters which are beyond the common knowledge or experience of jurors and the jury could only speculate as to what inference to draw.” **Id.** at 667 (citation omitted).

¶16 Additionally, circuit courts “are vested with ‘wide discretion in determining the words and form of a special verdict.’” **City of Milwaukee v. NL Indus.**, 2008 WI App 181, ¶83, 315 Wis. 2d 443, 762 N.W.2d 757 (citation omitted). “We will only disturb the [circuit] court’s drafting of a special verdict where ‘the special verdict questions fail to cover all issues of fact or are inconsistent with the law.’” **Id.** (citation omitted). “In drafting a special verdict the [circuit] court must first consider the issues raised by the pleadings. [The court] should then eliminate from the issues so raised those that are determined by the evidence on the trial by admissions, *by uncontradicted proof, or by failure of proof.*” **Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys.**, 2005 WI 124, ¶97, 285 Wis. 2d 1, 700 N.W.2d 201 (second alteration in original; citation omitted). Our review of “[w]hether a special verdict reflects an accurate statement of the law applicable to the issues of fact in a given case” is de novo. **NL Indus.**, 315 Wis. 2d 443, ¶83 (alteration in original; citation omitted).

¶17 For the reasons that follow, we conclude that the Miceks failed to present sufficient evidence establishing Walker’s *causal* negligence from

March 24 until July 17. As a result, the circuit court properly limited the Miceks' arguments, their presentation of evidence at trial, and the special verdict question to the time period from July 18 to August 3. Here, the causal relationship between the diagnosis of TTTS and Kayla's injury is beyond the knowledge of the average layperson. See *Ollman*, 178 Wis.2d at 667. Accordingly, the Miceks were required to present expert testimony tending to prove that Walker's alleged negligence during the relevant time period caused Kayla's injury, which the Miceks failed to do outside the dates in the special verdict question. Therefore, the circuit court did not erroneously exercise its discretion by determining the date range of the special verdict question.

¶18 At trial, Papanna provided his expert opinion on when the TTTS began to develop during Heather's pregnancy. He stated, unequivocally, that the July 7 ultrasound "appear[ed] normal in my interpretation" for both twins based on his review of the actual ultrasound images as well as the radiologist's report. However, he qualified his opinion by agreeing "that [the] ultrasound didn't give [him] all the information [he] need[ed] to determine that [the ultrasound was] normal" because it "lacked the standard of measuring the deepest vertical pocket at that time."⁹ According to Papanna, he "could not see the membranes between the two" babies, and, therefore, the ultrasound "was ... incomplete for us to know for sure." On cross-examination, however, Papanna acknowledged that professional medical publications state that it is acceptable to use the amniotic

⁹ According to the testimony at trial, Walker deferred to the expertise of the Mayo radiologists on how to measure and report the amount of amniotic fluid. In response to plaintiff counsel's question, Papanna, who is not a radiologist, appeared to agree during his testimony that if "the radiologist reading the scan did not measure the deepest vertical pocket," then "that [is] something that Dr. Walker should have gotten from a radiologist."

fluid index when evaluating amniotic fluid levels in a multiple gestation pregnancy.

¶19 Papanna additionally explained that TTTS does not develop “overnight,”¹⁰ and, therefore, by the time the disease was evident on the August 3 and 4 ultrasounds, the TTTS had already been developing for “at least one or two weeks.” Thus, Papanna testified, to a reasonable degree of medical certainty, that “it [was] a breach of the standard of care to fail to get another ultrasound two weeks after that July 7 ultrasound, i.e., around July 21,” and that had Walker ordered an ultrasound on that date, it “more likely than not” would have shown “signs of TTTS in that interval time given what we saw on August 3rd.”

¶20 Further, Papanna explained that when Heather presented with “vaginal discharge”—when she thought her water broke—“and the low back pain around July 18 and July 20,” based on her symptoms, if an ultrasound had been ordered by Walker at that time, “more likely than not,” it would have shown “signs of TTTS.” The basis for his medical opinion was that in the August 3 ultrasound,

the amount of fluid [Heather had] in her belly and the disease stage that was there of a Stage 3 [TTTS] makes me think that it took a couple weeks to develop to that stage. So there was something happening then, you know, approximately ten days before when she ended up with [a] severe disease.

¹⁰ While Papanna testified that TTTS does not develop overnight, he also agreed on cross-examination that “some cases of [TTTS] progress slowly over weeks” and “some cases of [TTTS] develop quickly within a period of days with rapid deterioration in the well-being of the twins.”

However, when asked whether the TTTS could have been developing for longer than two weeks, Papanna could state only, “It’s possible.”¹¹

¶21 On appeal, the Miceks assert that Papanna’s testimony “supported TTTS developing well before July 7” and that his “testimony directly rebuts the assertion that TTTS could not have been developing before July 18,” but our review of the above testimony fails to reveal support for the Miceks’ claims. The Miceks’ position throughout this lawsuit was essentially, as counsel argued to the circuit court repeatedly, that had Heather’s medical providers “measured the right thing”—the deepest vertical pocket measurement rather than the amniotic fluid index—that Walker “would have detected [TTTS] earlier” than August 3.

¶22 However, even if we assume, without deciding, that Walker was negligent on July 7 for failing to request that the ultrasound include the deepest vertical pocket measurement, there is insufficient evidentiary support within Papanna’s testimony for the Miceks’ claim that Walker’s alleged negligence on that date caused the injury to Kayla because there is a lack of evidence that the TTTS existed on July 7 and would have been apparent using the deepest vertical pocket measurement. Therefore, absent supporting evidence—i.e., either an ultrasound or Papanna’s expert testimony—establishing that TTTS either was or was more likely than not occurring on July 7, any assertion that Walker’s failure to identify the condition on that date was a substantial factor in causing Kayla’s injury is entirely speculative. See *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis.2d 455, 460-61, 267 N.W.2d 652 (1978) (“[I]t is

¹¹ Walker’s counsel objected to Papanna’s answer, and the circuit court sustained the objection.

impermissible to base a judgment on ‘conjecture, unproved assumptions, or mere possibilities.’” (citation omitted)).

¶23 The Miceks respond to the above argument by asserting that “there was evidence at trial that the injury occurred ‘days to weeks,’ ‘over a period of weeks,’ and ‘at least weeks, at least one or two weeks’”; therefore, “there was a question of fact as to when the injury began.” The Miceks’ argument mischaracterizes Papanna’s testimony in an attempt to expand the relevant time period. The Miceks proceed as though “weeks” inherently means more than two, whereas the plural definition of the word merely denotes more than a single seven-day period.

¶24 As outlined above, Papanna could testify, to a reasonable degree of medical certainty, only that the TTTS had been developing for “at least one or two weeks.” Two weeks before August 3 or 4, was July 20 or 21—not July 7. Papanna could only say it was a *possibility* that the TTTS had been developing longer, meaning he could not say to a reasonable degree of medical certainty and, thus, did not know. Allowing a jury to decide an issue based on a possibility forces the jury to cross the line from evaluating evidence into making an unsupported guess. See **Schulz v. St. Mary’s Hosp.**, 81 Wis.2d 638, 656, 260 N.W.2d 783 (1978) (“The burden is on the plaintiff to establish to a reasonable certainty the damages sustained. The jury is not allowed to speculate.” (citation omitted)); WIS JI—CIVIL 200 (“‘Reasonable certainty’ means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.”). Therefore, the court properly limited the special verdict question to account for Papanna’s testimony, which, at best, provided evidence that Walker violated the

standard of care as early as July 18 by not ordering an ultrasound based on Heather's clinical symptoms.

¶25 The Miceks' remaining arguments on appeal regarding this issue can all be resolved on the basis of our above conclusions. First, the Miceks assert that "[f]rom the very beginning, the circuit court prejudiced [the Miceks] regarding the July 7 ultrasound" because the court issued a curative instruction after their counsel's opening statement. Next, the Miceks contend that they were prejudiced when the court prevented them from questioning witnesses about the July 7 ultrasound. The Miceks further argue that the circuit court mischaracterized the July 7 ultrasound as "normal." Additionally, the Miceks assert that a "factual dispute existed as to duty of referral and standard of care from March 24 onward." (Formatting altered.) Finally, the Miceks contend that they were prevented from arguing about the failure to measure the deepest vertical pocket during the July 7 ultrasound and how that contributed to the injury during closing argument.

¶26 Given our above conclusions regarding Papanna's testimony, there was no evidence presented that any alleged negligence by Walker prior to July 18 caused the injury to Kayla in this case. Furthermore, if there was no causal negligence on July 7, then there was likewise no causal negligence on March 24. In other words, if the standard of care did not require referral to a specialist on July 7, then the standard of care necessarily did not require referral earlier on March 24.¹² Papanna testified that 85 to 90% of mono-di twin pregnancies do not

¹² The Miceks also alleged negligence in their complaint based on the following:

(continued)

develop TTTS, and he further agreed that “[a]s of July 7, Dr. Walker was justified in believing that [Heather’s] pregnancy was in that 80 to 90 percent group” that does not develop TTTS. It was Papanna, not the circuit court, who first used the term “normal” to refer to the July 7 ultrasound. Further, according to Papanna’s testimony, the standard of care “for a doctor who is managing a mono-di twin pregnancy” is that he or she “should refer to a specialist when there are signs of [TTTS],” the August 3 ultrasound was “the first indication of any concern” about TTTS, and Walker “made an immediate referral,” “[w]hich is exactly what he should have done.”

¶27 The Miceks obviously disagreed with the circuit court’s ruling on this issue; therefore, as their arguments demonstrate, they repeatedly attempted to inject testimony and arguments regarding the July 7 ultrasound into the trial, which the court either disallowed or sought to correct with a curative jury instruction. The court did not erroneously exercise its discretion in this regard. There was no evidence of a causal link between evidence pertaining to the July 7 ultrasound and the injury, meaning that the evidence was irrelevant. *See* WIS. STAT. §§ 904.01 (“‘Relevant evidence’ means evidence having any tendency to

Failure by Defendant Walker to inform [Heather] regarding the diagnosis of [mono-di] twin pregnancy, the potential complication of TTTS, the risk to the fetuses if TTTS developed, the availability of frequent monitoring and testing available to identify TTTS at an early stage, and the available treatments to improve fetal outcomes in case of TTTS, including expectant management, amnioreduction, or fetoscopic laser ablation of placental anastomotic vessels.

However, the Miceks do not develop this argument on appeal, Papanna’s testimony did not support a claim that diagnosis of a mono-di twin pregnancy immediately requires specific conduct, and there was no evidence that the Miceks would have done anything different if they had known about the risk of TTTS.

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.”), 904.02 (“Evidence which is not relevant is not admissible.”); *see also Ollman*, 178 Wis. 2d at 666-67 (“[The Plaintiff] was required to present expert testimony proving cause, but he failed to do so. Thus, we find no error in the court’s striking of the remaining testimony.”). Therefore, the evidence was properly excluded, the curative instruction after opening statements was properly given, and the court properly narrowed the jury’s consideration of the special verdict question to the relevant time period.¹³

¶28 Finally, citing *Wisconsin Builders, Inc. v. General Insurance of America*, 65 Wis. 2d 91, 107, 221 N.W.2d 832 (1974), the Miceks request that we grant them a new trial in the interest of justice because the circuit court “erred in deciding ... questions of fact, which were for a jury’s determination, thereby resulting in prejudice to [the Miceks] and a miscarriage of justice.” “Moreover,” state the Miceks, “where the real issues in a case have not been fully tried, the case should be remanded to the circuit court for a new trial on the issue of negligence.” *See Clark v. Leisure Vehicles, Inc.*, 96 Wis. 2d 607, 620, 292 N.W.2d 630 (1980).

¹³ The Miceks also appear to argue that the special verdict question was misleading to the jury and caused jury confusion, which they argue is a basis for a new trial. *See Runjo v. St. Paul Fire & Marine Ins.*, 197 Wis. 2d 594, 602-03, 541 N.W.2d 173 (Ct. App. 1995). According to the Miceks, “it is simple to conceive that the jury was misled by the verdict form” because “[t]he verdict form adopted by the [circuit] court limited the period in which Dr. Walker could be found negligent to July 18 to August 3,” which was an “arbitrary and artificial limitation” and “would clearly be confusing to a jury which heard testimony from Dr. Papanna that Dr. Walker should have referred [Heather] to a specialist as early as March 24 and that the process of TTS had gone on for ‘weeks.’” We reject the Miceks’ argument that the jury would have been misled or confused by the special verdict question for the reasons addressed above.

¶29 This court has discretion to grant a new trial in the interest of justice “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” WIS. STAT. § 752.35. However, our discretionary reversal power is reserved for exceptional cases, *State v. McKellips*, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258, and “should be exercised sparingly and with great caution,” *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719.

¶30 As noted above, the Miceks appear to argue both that the real controversy was not fully tried and that the judgment resulted from a miscarriage of justice. The real controversy has not been fully tried when “the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case” or “the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.” *State v. Mull*, 2023 WI 26, ¶67, 406 Wis. 2d 491, 987 N.W.2d 707 (citations omitted). We need not determine that the “outcome would be different on retrial” to grant a new trial on the ground that the real controversy was not fully tried; however, reversal based on a miscarriage of justice requires “an appellate court [to] conclude that there is a ‘substantial probability of a different result on retrial,’ before granting a new trial.” *Id.*, ¶¶67-68 (citations omitted).

¶31 Applying these principles here, we conclude that the Miceks are not entitled to discretionary reversal on either basis under WIS. STAT. § 752.35. We determined above that the circuit court did not err by limiting the evidence at trial and the special verdict question to the period during which the Miceks’ expert witness could state to a reasonable degree of medical certainty that Walker’s

alleged negligence caused Kayla’s injury. Therefore, the controversy was fully tried, and a miscarriage of justice did not occur.

II. Change of venue

¶32 The Miceks next argue that the circuit court erroneously exercised its discretion by denying their motion for a change of venue. As an initial matter, we note that there is no dispute that venue was proper in Dunn County where the trial occurred. See WIS. STAT. § 801.50(2)(a), (c). Thus, the only question before us is whether the court properly denied the Miceks’ motion for a change of venue on community prejudice grounds. See WIS. STAT. § 801.52 (“The court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses”). “The granting of a change of venue on the grounds of community prejudice is discretionary with the [circuit] court,” and we will not disturb the court’s decision on appeal absent an erroneous exercise of discretion. **Central Auto Co. v. Reichert**, 87 Wis. 2d 9, 15, 273 N.W.2d 360 (Ct. App. 1978).

¶33 “When there is a likelihood that the [moving party] will not receive a fair trial because of community prejudice, the [moving party’s] constitutional right to a fair trial under the due process clause of the fourteenth amendment is jeopardized.” **Id.** at 16. Therefore, we are “obliged to consider the following factors” to determine whether the circuit court should have granted a change of venue request because of community prejudice:

- (a) the inflammatory nature of the publicity,
- (b) the degree to which the adverse publicity permeated the area from which the jury panel would be drawn,
- (c) the timing and specificity of the publicity,

(d) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury,

(e) the extent to which the jurors were familiar with the publicity, and

(f) the [moving party's] utilization of challenges, both peremptory and for cause, available to him on voir dire.

Id. Further, we have held that “[a]fter reviewing the evidence of community prejudice in light of these criteria, if there is a reasonable likelihood that the moving party will not receive a fair trial, the [circuit] court has no discretion” and “is required to grant a change of venue.” **Id.** at 16-17. However, “[a]ctual community prejudice need not be shown, and any doubts about community prejudice should be resolved in favor of the moving party.” **Id.** at 17 (footnote omitted).

¶34 The Miceks assert that the circuit court had no discretion to deny them a change of venue because Walker was a well-known member of the community who had “worked in Menomonie for over forty years and delivered more than 2,000 babies” and “had numerous connections to members of the jury pool”; therefore, the Miceks could not receive a fair trial in Dunn County. According to the Miceks, “the instant case concerned publicity via open court endorsements and physical gestures of affection towards [Walker]” that were witnessed by all the jurors and went specifically “to the quality of [Heather’s] medical care,” which “was the central issue for the jury’s determination.”

¶35 When we consider the above criteria, however, we are not convinced that there was a reasonable likelihood that the Miceks would not receive a fair trial, and, accordingly, the circuit court did not erroneously exercise its discretion by denying the Miceks’ motion for a change of venue. As Walker notes on appeal, four of the above six criteria involve considerations of publicity within the

community. In their brief-in-chief, the Miceks fail entirely to address any publicity related to the lawsuit. The facts that Walker “delivered more than 2,000 babies” during his over 40 years in practice and that his “status and connection in the community were ubiquitous” are not “publicity” under the cases cited by the Miceks. See *id.* at 15 (newspaper articles); ***Hoppe v. State***, 74 Wis. 2d 107, 112, 246 N.W.2d 122 (1976) (same). The Miceks do not identify any newspaper, television, or radio coverage, either positive or negative, about this case in the community.

¶36 Instead, and for the first time on appeal, the Miceks argue in their reply brief that the publicity in the community was the “publicity via open court endorsements and physical gestures of affection toward” Walker. We do not address arguments raised for the first time in a reply brief, ***A.O. Smith Corp. v. Allstate Ins.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998), but even if we did, the Miceks have provided no legal authority in support of their position that we may consider events occurring in the courtroom during voir dire as “publicity” when evaluating community prejudice in this context, see ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”).

¶37 Absent any publicity, the two remaining criteria—i.e., the degree of care exercised and the amount of difficulty encountered in selecting the jury and the utilization of challenges, both peremptory and for cause—support the circuit court’s exercise of discretion. The record demonstrates that significant care was exercised in selecting the jury by weeding out potentially biased jurors using a jury questionnaire, and the court encountered no difficulty selecting a jury. Prior to trial, the parties created a jury questionnaire that was sent to 80 prospective jurors, and 69 questionnaires were returned. Walker asserts, and the Miceks do

not dispute in their reply brief, that three jurors were excused for knowing Walker and one juror was excused for knowing the Miceks. We agree with Walker that “[o]nly excusing four jurors for knowledge of the parties does not amount to encountering difficulty in selecting a jury under Wisconsin law.” See **State v. Messelt**, 178 Wis. 2d 320, 331, 504 N.W.2d 362 (Ct. App. 1993) (excusing ten jurors for cause because they personally knew the defendant, his family, or the victim and believed that their personal relationships would influence them); **Briggs v. State**, 76 Wis. 2d 313, 328-29, 251 N.W.2d 12 (1977) (collecting cases where larger numbers of jurors were excused for bias or partiality).

¶38 Further, the voir dire process took a full day to complete. The potential jurors were asked numerous questions, and the circuit court did not restrict the amount of time each party could conduct voir dire. See **Central Auto Co.**, 87 Wis. 2d at 17 (“The [circuit] court allowed great latitude to the defendant during the voir dire to insure that the jury panel finally selected was free of any taint or prejudice.”). The court also gave the parties an extra peremptory strike. See WIS. STAT. § 805.08(3); **Central Auto Co.**, 87 Wis. 2d at 17; **Briggs**, 76 Wis. 2d at 328-29. Finally, the court read the following instruction to the jury:

All jurors take an oath of impartiality. You are instructed to ignore the conduct and actions made by others in this courtroom who are not or were not on the witness stand. You are not to be influenced by the actions or conduct of the nonparties or observers in the courtroom, and you should only evaluate this case based upon the evidence presented at trial.

Jurors are presumed to follow jury instructions. See **State v. Grande**, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

¶39 We also recognize that the Miceks’ motion for a change of venue came very late in the process. When the Miceks filed this lawsuit, they were

aware that any future trial would take place in Dunn County and that Walker had a long career in the community. Nevertheless, they did not object to venue at any time as the parties prepared for trial. The Miceks also did not object to venue after voir dire had been completed, peremptory strikes were made, and the circuit court asked the parties if there were any objections to the jury as seated. It was only on the second day of trial that the Miceks finally moved for a change of venue. These facts support the circuit court's exercise of discretion.

¶40 Finally, the Miceks argue, in their reply brief, that they identified to the circuit court that “five or six jurors ... [were] patients or mentees of Dr. Walker,” and they immediately requested that “such people be stricken for cause.” According to the Miceks, the court refused “to dismiss anyone for cause until they [were] in the [jury] box,” which the Miceks identify as evidence that the court “did not take care to ensure a fair and impartial jury.” Beyond mentioning juror No. 91,¹⁴ however, the Miceks do not specify who the “five or six jurors” were, if

¹⁴ The Miceks specifically identify potential juror No. 91, who stated that he knew both parties, had no personal contact with either Walker or the Miceks, and that Walker delivered his grandson. When asked how that fact made him “unable to be fair and impartial,” juror No. 91 responded, “I would rather not answer that question, Judge, sorry.” Later, he stated that three of his family members are nurses and that, therefore, he “would probably lean toward [the] medical” side. Juror No. 91 eventually stated that he “would set aside [his] bias,” but thereafter he admitted that he admired Walker and that the Miceks “would be kind of starting a little bit behind the 8-ball.” The circuit court refused to strike the potential juror despite these comments, stating, “[W]e live in a small community; I’m not striking this juror.” See *Hammill v. State*, 89 Wis. 2d 404, 415-16, 278 N.W.2d 821 (1979) (“Whether a juror is to be dismissed for cause rests within the sound discretion of the [circuit] court.”). According to the Miceks, this refusal “is evidence that there was a reasonable likelihood of community prejudice such that [the Miceks] would not receive a fair trial.”

The Miceks admit, however, that juror No. 91 did not sit on the jury because they used one of their preemptory challenges to remove him. Further, while the Miceks claim that by using preemptory challenges “on some [jurors] who should have been excused for cause,” they were required to “accept[] jurors who [they] would have excused for strategic reasons,” they do not assert that this situation impacted their ability to remove other allegedly biased individuals from the jury.

they became part of the empaneled jury, or if they were excused. Accordingly, their argument on this issue is undeveloped. *See Pettit*, 171 Wis. 2d at 646-47. Therefore, based on this record, we cannot conclude that the circuit court erroneously exercised its discretion by denying the Miceks' motion for a change of venue.

By the Court.—Judgment affirmed.

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

