COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP177 **Cir. Ct. No. 2012CV914**

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

CAROL KEKULA,

PLAINTIFF-APPELLANT,

SENTRY CASUALTY COMPANY,

SUBROGATED-PLAINTIFF,

V.

ROBERT CORISH, M.D., C/O ST. MARY'S HOSPITAL AND THE MEDICAL PROTECTIVE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

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

¶1 STARK, J. Carol Kekula appeals a judgment, entered on a jury's verdict, dismissing her medical negligence and informed consent claims against Robert Corish, M.D., and The Medical Protective Company (MPC). With respect to the medical negligence claim, Kekula asserts the circuit court erred by admitting evidence that other doctors perform the procedure in question—an interscalene nerve block—in the same manner as Corish. We conclude the court properly exercised its discretion by admitting this evidence, and we therefore affirm that portion of the judgment dismissing Kekula's medical negligence claim.

¶2 Regarding the informed consent claim, Kekula argues the special verdict form was misleading because it was not properly tailored to the facts and arguments presented to the jury. We agree. Accordingly, we reverse in part and remand for a new trial on Kekula's informed consent claim.

BACKGROUND

¶3 On January 4, 2010, Kekula's husband, Robert Kekula, underwent rotator cuff surgery at St. Mary's Hospital in Green Bay.[1] The surgery was performed under general anesthesia, and Corish was the anesthesiologist. After the shoulder repair was complete, but while Robert was still under general anesthesia, Corish performed an interscalene nerve block. That procedure involves injecting a needle attached to a catheter into the patient's neck and then slowly administering a local anesthetic—in this case bupivacaine—over a period of about seven to ten minutes. The local anesthetic provides postoperative pain

[1] We refer to Carol Kekula as Kekula and Robert Kekula as Robert throughout the remainder of this opinion.

relief by preventing the nerves from carrying pain from the area of the surgery to the central nervous system.

¶4 Tragically, Robert went into cardiac arrest shortly after Corish performed the interscalene block and died in the operating room. Kekula sued Corish, alleging he was negligent by: (1) performing the interscalene block while Robert was under general anesthesia, instead of before the surgery while Robert was conscious; and (2) performing the interscalene block without having a lipid emulsion available in the operating room to counteract the effects of an inadvertent intravascular injection—that is, injection into a vein or artery. In addition, Kekula alleged Corish failed to obtain Robert's informed consent for the interscalene block because he did not advise Robert of the option to perform the procedure while Robert was conscious or of the option to have a lipid emulsion available.

¶5 Before trial, Kekula filed a motion in limine asking the circuit court to prohibit testimony "that all of the anesthesiologists who practiced at St. Mary's during the time leading up to the January 4, 2010, surgery also performed interscalene nerve blocks on fully anesthetized patients." Kekula asserted, "[W]hat some other doctor did on some other patient under different or unknown circumstances is irrelevant and can only serve to prejudice the jury." The circuit court rejected this argument and denied Kekula's motion.

¶6 At trial, Kekula relied on the expert testimony of anesthesiologist Marc Sloan. Sloan testified Robert's death was caused by bupivacaine cardiotoxicity. Sloan explained that, if an intravascular injection occurs during an interscalene block, bupivacaine enters the bloodstream and travels to the heart,

where it binds to sodium receptors. This prevents the heart from contracting and can lead to cardiac arrest.

¶7 Sloan testified performing an interscalene block while Robert was under general anesthesia violated the standard of care for two reasons. First, Sloan explained that central nervous system toxicity is an early sign of an intravascular injection. Symptoms of central nervous system toxicity include ringing in the ears, numbness and tingling around the mouth, heaviness of the tongue, and a metallic taste in the mouth. If an interscalene block is performed while the patient is awake, Sloan testified the patient can report these symptoms before the full dose of bupivacaine is administered.

¶8 Sloan also testified Corish violated the standard of care by performing the interscalene block without having a lipid emulsion available in the operating room. Sloan explained typical resuscitative measures are ineffective against cardiac arrest induced by an intravascular injection of bupivacaine. However, as of January 2010, lipid emulsions had been successfully used to treat bupivacaine cardiotoxicity in two animal studies, and there were anecdotal reports of successful human use. Sloan testified it was more likely than not Robert would have survived had a lipid emulsion been administered.

¶9 Corish disagreed with Sloan's conclusions. At trial, he testified there are "two schools of thought" among anesthesiologists as to whether interscalene blocks should be performed on patients under general anesthesia. Corish stated physicians in his school prefer to perform interscalene blocks on unconscious patients because they do not "flinch" when the needle is inserted, making it easier to place the needle in the correct location. Corish also testified he prefers to perform interscalene blocks after surgery, rather than before, because:

(1) if the surgery is less extensive than expected, the patient may not need an interscalene block; and (2) if the patient's medical condition changes during the surgery, an interscalene block may no longer be appropriate.

¶10 Corish further asserted that, as of January 2010, there was "absolutely no evidence" in the reported medical literature that it was safer to perform interscalene blocks on conscious patients. He testified all the anesthesiologists in his practice group performed interscalene blocks on patients under general anesthesia at that time. Corish acknowledged some physicians prefer to perform interscalene blocks on conscious patients because they believe those patients will be able to report early symptoms of central nervous system toxicity. However, he opined that is an "unreliable" method of determining whether an intravascular injection has occurred.

¶11 Finally, Corish disagreed with Sloan's opinion that an interscalene block should not be performed unless a lipid emulsion is available in the operating room. Corish testified there was debate in the medical literature as of January 2010 about whether lipid emulsions were an effective treatment for bupivacaine cardiotoxicity. He further stated neither the American Anesthesia Society nor the American Society of Regional Anesthesia had published a standard recommending that lipid emulsions be present in operating rooms during interscalene blocks at the time of Robert's surgery.

¶12 Corish's opinions were echoed by one of the defense experts, anesthesiologist Sherman McMurray. McMurray opined that performing an interscalene block on a patient under general anesthesia is "a recognized alternative as far as the standard of care[.]" He testified twelve of the fifteen anesthesiologists in his practice group who perform interscalene blocks do so on

patients under general anesthesia. He also opined the standard of care did not require lipid emulsions to be present in the operating room at the time of Robert's interscalene block.

¶13 The jury determined Corish was not negligent in his treatment of Robert. However, with respect to the informed consent claim, the jury determined Corish "fail[ed] to disclose information about the interscalene nerve block necessary for [Robert] to make an informed decision[.]" Nevertheless, the next question on the special verdict—Question 4—asked, "If a reasonable person, placed in [Robert's] position, had been provided necessary information about the interscalene nerve block, would that person have refused the interscalene nerve block?" The jury answered Question 4, "No."

¶14 Kekula filed a postverdict motion for a new trial, arguing: (1) the circuit court erred by permitting testimony that the other anesthesiologists in Corish's practice group performed interscalene blocks on patients under general anesthesia; and (2) Question 4 on the special verdict was misleading because it was not tailored to the specific facts and arguments presented to the jury. The circuit court denied Kekula's motion without explanation and entered a judgment dismissing her claims. This appeal follows.[2]

[2] Before turning to the merits of Kekula's arguments, we pause to note that both parties' appellate briefs contain a significant amount of editorializing and hyperbole. They are laden with irrelevant information better suited to improperly influencing a jury than to persuading an appellate court. This sort of posturing serves no legitimate purpose in appellate advocacy.

DISCUSSION

I. Admission of evidence

¶15 On appeal, Kekula first argues the circuit court erred by admitting testimony that other physicians in Corish's and McMurray's practice groups performed interscalene blocks on patients under general anesthesia. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will affirm the circuit court's decision if it applied the correct law to the facts of record and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Id.*** "We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision."[3] ***Id.***, ¶29.

¶16 To be admissible, evidence must be relevant. WIS. STAT. § 904.02.[4] Evidence is relevant when 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.

¶17 Here, testimony that other physicians in Corish's and McMurray's practice groups performed interscalene blocks on patients under general anesthesia

[3] The appellate record does not contain a transcript of the hearing on Kekula's motion in limine or a written order memorializing the circuit court's ruling. Thus, we have no way of knowing why the court denied Kekula's motion. However, when the appellate record does not contain an explanation of the circuit court's reasoning, we may independently review the record to determine whether it provides an appropriate basis for the court's decision. *See, e.g.*, ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771.

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

was relevant to show that Corish's treatment of Robert complied with the standard of care. To find Corish negligent, the jury had to conclude he failed to "use the degree of care, skill, and judgment which reasonable [anesthesiologists] would exercise in the same or similar circumstances, having due regard for the state of medical science at the time [Robert] was [treated]." *See* WIS JI—CIVIL 1023 (2013). While not dispositive, "evidence of the usual and customary conduct of [other physicians] under similar circumstances is ordinarily relevant and admissible as an indication of what is reasonably prudent[.]" ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 438, 543 N.W.2d 265 (1996), *abrogated on other grounds by* ***Nommensen v. American Continental Ins. Co.***, 2001 WI 112, 246 Wis. 2d 132, 629 N.W.2d 301.

¶18 Kekula cites two cases for the proposition that "what an individual physician would have done in a given situation is essentially irrelevant in the context of a malpractice action." However, neither case stands for that proposition. In the first case, ***Shier v. Freedman***, 58 Wis. 2d 269, 278, 283-84, 206 N.W.2d 166 (1973), our supreme court abandoned the "locality rule," under which the standard of care in medical negligence cases was determined with reference to what a reasonable practitioner in the same or similar locality would have done. Contrary to Kekula's assertion, ***Shier*** did not hold that evidence about what other physicians do is irrelevant to whether the defendant physician complied with the standard of care.

¶19 In the second case Kekula cites, ***Francois v. Mokrohisky***, 67 Wis. 2d 196, 197, 226 N.W.2d 470 (1975), the supreme court considered whether the circuit court erred by giving a res ipsa loquitur instruction in the absence of expert medical testimony establishing a standard of care. The court stated, "True, there was evidence that other physicians might have acted differently and that

there were alternate procedures available, but no physician testified that what was done did not comport with approved medical practice under the circumstances." ***Id.*** at 201. As a result, the ***Francois*** court simply concluded evidence that other physicians would have acted differently was insufficient, by itself, to establish the standard of care. It did not hold that such evidence was irrelevant.

¶20 Kekula also argues the disputed testimony was irrelevant because the other physicians in Corish's and McMurray's practice groups were "treating other patients, not [Robert] with his particular unique presenting circumstances." This complaint goes to the weight of the evidence, not its relevance. Kekula was free to argue to the jury that, even if other physicians typically performed interscalene blocks on patients under general anesthesia, doing so was inappropriate under the specific circumstances of Robert's case.[5] We therefore reject Kekula's argument that the evidence was irrelevant.

¶21 Nevertheless, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03. In a one-sentence argument, Kekula asserts the disputed evidence was unfairly prejudicial because "the jury was likely swayed by the theory that, 'It must be okay if all of these other doctors do it that way ….'" However, Kekula does not explain why any prejudice caused by the disputed evidence was unfair. "Nearly

[5] In fact, Kekula did argue it was inappropriate to perform the interscalene block while Robert was under general anesthesia because: (1) Robert had a "short, fat, thick" neck, which would have made it more difficult to locate an appropriate injection site; and (2) Robert was taking a beta blocker, which would have masked early signs of an intravascular injection.

all evidence operates to the prejudice of the party against whom it is offered." ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994). "In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect." ***Id.*** The standard for unfair prejudice is not whether the evidence harms the opposing party's case, but whether the evidence tends to influence the outcome of the case by improper means. ***Id.*** Kekula fails to explain why the disputed evidence's influence on the outcome of this case was improper. Accordingly, we conclude the circuit court properly exercised its discretion by admitting the evidence.

II. Special verdict

¶22 Kekula next argues she is entitled to a new trial on her informed consent claim because Question 4 on the special verdict was misleading. The form of a special verdict is within the circuit court's sound discretion. ***Z.E. v. State***, 163 Wis. 2d 270, 276, 471 N.W.2d 519 (Ct. App. 1991). "We will not interfere with the form of a special verdict unless the question, taken with the applicable instruction, does not fairly present the material issues of fact to the jury for determination." ***Id.*** The circuit court has a duty to submit a verdict "with due regard to the facts of the case." ***Vogel v. Grant-Lafayette Elec. Coop.***, 201 Wis. 2d 416, 429, 548 N.W.2d 829 (1996). A misleading verdict question which may cause jury confusion is a sufficient basis for a new trial. ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis. 2d 594, 603, 541 N.W.2d 173 (Ct. App. 1995).

¶23 At the time of Robert's surgery, WIS. STAT. § 448.30 (2009-10), required Corish to inform Robert "about the availability of all alternate, viable

medical modes of treatment and about the benefits and risks of these treatments."[6] In other words, Corish was required to "make such disclosures as [would] enable a reasonable person under the circumstances confronting the patient to exercise the patient's right to consent to, or to refuse the procedure proposed or to request an alternative treatment or method of diagnosis." ***Martin v. Richards***, 192 Wis. 2d 156, 176, 531 N.W.2d 70 (1995). At trial, Kekula argued Robert would have chosen an alternative method of treatment had Corish provided necessary information about the interscalene block. Namely, he would have chosen to have the block performed: (1) while he was conscious; and (2) with a lipid emulsion available in the operating room.

¶24 However, Question 4 on the special verdict did not ask whether Robert would have chosen an alternative method of treatment had Corish provided necessary information about the interscalene block. Instead, it asked, "If a reasonable person, placed in [Robert's] position, had been provided necessary information about the interscalene nerve block, would that person have *refused* the interscalene nerve block?" (Emphasis added.) There was no evidence, and Kekula never argued, that Robert would have refused the interscalene block entirely had he received necessary information about the procedure. We therefore agree with Kekula that Question 4 was misleading because it asked a question not raised by the evidence. Whether Robert would have refused the interscalene block was simply not germane to Kekula's informed consent claim.

[6] WISCONSIN STAT. § 448.30 was significantly amended in 2013. *See* 2013 Wis. Act 111.

¶25 In the circuit court, Kekula objected to the form of Question 4, arguing it should be "adapted to the facts of the case[,] which include electing to have the interscalene nerve block performed prior to going under general anesthesia or in the presence of a lipid emulsion therapy." The court rejected Kekula's argument, reasoning Question 4 was appropriate because it was taken from the pattern special verdict on informed consent contained in the civil jury instructions. *See* WIS JI—CIVIL 1023.1 (2014). The court conceded, "I understand [plaintiff's counsel's] argument, and it's not a needless argument. He's inviting me to tailor the instruction to fit the particular facts and the arguments that counsel have both been focusing on throughout the evidence in this case." Nevertheless, the court concluded, "I'm satisfied that in this case the verdict form as prepared by the committee and approved is an acceptable tool or method for allowing the jury to answer the relevant fact questions that they are called upon to do in this case." The court also reasoned that, despite the language of Question 4, Kekula was free to argue her theory of the case to the jury.

¶26 The circuit court erroneously exercised its discretion. Our supreme court has explained that "[t]he jury instructions published in Wisconsin Jury Instructions—Civil are undoubtedly of great assistance to both the trial judges and lawyers. However, they are only suggested instructions, not necessarily approved by this court, and *where necessary and desirable, they should be tailored to meet the needs of the specific case*." ***Leibl v. St. Mary's Hosp.***, 57 Wis. 2d 227, 233, 203 N.W.2d 715 (1973) (emphasis added). Here, Kekula's attorney specifically asked the circuit court to tailor the special verdict to the facts and arguments presented to the jury, but the court refused to do so. The court provided virtually no explanation for its conclusion that using the pattern special verdict was appropriate.

¶27 Moreover, the defect in Question 4 was not cured by the court's suggestion that Kekula was free to argue her theory of the case to the jury. We agree with Kekula that "it is unrealistic to believe that plaintiff's counsel can undo the prejudice of an inaccurately phrased verdict question by convincing the jury in argument that the question means something other than what it states." More importantly, we also agree with Kekula that there is no reason an attorney should have to argue the correct meaning of a verdict question to the jury when the question can simply be phrased accurately in the first place.

¶28 Corish and MPC do not directly respond to Kekula's argument that Question 4 was misleading. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Instead, they assert that, "[d]espite evolving case law, shifts in legislation and the [Wisconsin Civil Jury Instruction Committee's] scrutiny and pruning, the pattern special verdict of WIS JI—CIVIL 1023.1 stands unchanged." That WIS JI—CIVIL 1023.1 has remained unchanged despite changes in the law is irrelevant. The relevant question is whether it was appropriate to use one of the pattern questions from WIS JI—CIVIL 1023.1 under the specific facts and circumstances of this case.

¶29 Corish and MPC also argue the circuit court properly relied on the pattern special verdict because Kekula's proposed Question 4 was defective. Kekula's proposed Question 4 stated:

> If a reasonable, prudent person, placed in [Robert's] position, had been provided necessary information about risks and complications of the block, the option of receiving the block before going under general anesthesia, or the use of a lipid emulsion as an antidote, would that person have elected instead to have the block performed before going under general anesthesia or with a lipid emulsion readily available?

¶30 We agree with Corish and MPC that this question was defective at the very least because it embodied multiple distinct issues of fact. *See* ***Jewell v. Chicago, St. P. & M. Ry. Co.***, 54 Wis. 610, 618, 12 N.W. 83 (1882) (Each special verdict question "should be limited to a single, direct and material controverted issue of fact[.]"). However, that Kekula's proposed question was defective does not justify the circuit court's erroneous reliance on the pattern special verdict. A court need not submit verdict questions in the form requested by either party. ***Werner v. Chicago & N.W. Ry. Co.***, 105 Wis. 300, 307, 81 N.W. 416 (1900). Instead, it is the court's duty to submit a special verdict "with due regard to the facts of the case." ***Vogel***, 201 Wis. 2d at 429. In this instance, the circuit court failed to fulfill its duty.

¶31 Finally, Corish and MPC argue Kekula forfeited her right to challenge Question 4 on appeal by failing to object to the corresponding jury instruction in the circuit court. The circuit court instructed the jury:

> A doctor has a duty to provide his patient with information necessary to enable the patient to make an informed decision about a procedure and alternative choices of procedures. If the doctor fails to perform this duty, he is negligent.
>
> To meet this duty … to inform his patient, the doctor must provide his patient with the information a reasonable person in the patient's position would regard as significant *when deciding to accept or reject the procedure*.
>
> In answering this question, you should determine what a reasonable person in the patient's position would want to know *in consenting to [or] rejecting a medical procedure*.

(Emphasis added.) *See* WIS JI—CIVIL 1023.2 (2014). Corish and MPC observe that this instruction expresses a patient's options as accepting or rejecting a particular procedure. Because Kekula failed to object to this instruction, Corish

and MPC argue she cannot now challenge Question 4 on the ground that it asked whether Robert would have refused the interscalene block.

¶32 We reject this forfeiture argument for three reasons. First, Corish and MPC do not cite any authority for the proposition that a litigant who has objected to a special verdict question must also object to the corresponding jury instruction in order to obtain appellate review. We need not consider arguments that are undeveloped or unsupported by legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶33 Second, as a practical matter, jury instructions flow from the way the special verdict is written. Once the circuit court rejected Kekula's argument regarding Question 4, it would have been fruitless for her to argue the court should instruct the jury in a manner inconsistent with the special verdict.

¶34 Third, the purpose of the forfeiture rule is to force the parties to bring perceived errors to the circuit court's attention so that the court may "avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. Kekula properly objected to Question 4 on the ground that it was not adequately tailored to the facts of the case. The circuit court considered and rejected her argument. Applying the forfeiture rule under these circumstances would serve no purpose.

¶35 No WIS. STAT. RULE 809.25(1) costs allowed to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.