**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

MAY 13, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

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

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

**No. 97-1819**

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

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**ALBERT CARINI, PATRICIA CARINI, AND JOHN M. CARINI, BY HIS GUARDIAN AD LITEM, DANIEL W. STEVENS,**

**PLAINTIFFS-APPELLANTS,**

**SENECA FOODS CORPORATION, PILLSBURY COMPANY, WPS HEALTH INSURANCE AND DEPARTMENT OF HEALTH AND SOCIAL SERVICES,**

**PLAINTIFFS,**

**V.**

**THE MEDICAL PROTECTIVE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Reversed.*

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

ANDERSON, J. In this medical malpractice case, the plaintiffs, Albert and Patricia Carini and John M. Carini, by his guardian ad litem (the Carinis), appeal from a judgment dismissing their complaint against the Medical Protective Company and the Wisconsin Patients Compensation Fund (collectively MPC). At the close of the evidence, the trial court determined that the evidence was insufficient to allow the allegation of informed consent to be included in the jury instructions or special verdict. The court concluded that it would have been virtually impossible for the Carinis' physician, Dr. Patricia Liethen, to have given or have been aware of alternative forms of treatment and that questions relating to the ultrasound for a more precise determination of the delivery date concern the issue of negligence under the standard of care, rather than informed consent. The jury determined that Liethen was not negligent in her care and treatment of Patricia, and it awarded over $7 million to the Carinis for pain and suffering and medical expenses.

We conclude that the Carinis' treating physician did have sufficient knowledge that the due date was uncertain which should have alerted her to order an ultrasound to confirm the conception date and to seek the informed consent of the Carinis as to that treatment. We therefore reverse and remand for a new trial on the issue of informed consent.

## BACKGROUND

On September 27, 1992, Patricia was admitted to the hospital due to labor contractions. On two previous occasions, Patricia was admitted with contractions but the contractions subsided and she was sent home. On this occasion, the hospital monitored her condition for five hours. When Liethen returned to the hospital, she concluded that Patricia was in labor and felt that it was appropriate to rupture the membranes to augment labor. Once the membranes

were ruptured, Patricia continued dilating to about four centimeters before stalling. At that point, Liethen used Pitocin to strengthen the contractions and to make them more organized.

John was delivered on September 28, 1992. He did well immediately after birth. However, he soon developed problems breathing and Liethen transferred him to a larger hospital in Milwaukee. It was later learned that John was delivered five weeks before term and x-rays revealed hyaline membrane disease, also known as respiratory distress syndrome. He was later diagnosed with spastic diplegia cerebral palsy.

In March 1995, the Carinis filed suit against The Medical Protective Company, Liethen's insurer, and the Wisconsin Patients Compensation Fund alleging both negligence and lack of informed consent in Liethen's treatment and care of Patricia and John.[1] The Carinis requested a jury trial. At the jury instructions conference, the trial court rejected the Carinis' requested instructions on informed consent. The court concluded that: (1) it would have been virtually impossible, under the facts known to Liethen, to have given or have been aware of alternative forms of treatment and (2) the allegation of not having the benefit of an ultrasound in order to determine a more precise delivery date goes to the issue of the negligence under the standard of care, rather than to informed consent.

Thus, negligence was the only issue put before the jury and it found that Liethen was not negligent in her care and treatment of Patricia. Nevertheless,

[1] Subsequently, the Carinis filed an amended summons and complaint adding Seneca Foods Corporation, Pillsbury Company, WPS Health Insurance and the Department of Health and Social Services as additional plaintiffs, each with a subrogated interest. The four additional plaintiffs are not part of this appeal.

the jury awarded $6.05 million to John for past and future pain and suffering, loss of future earning capacity, and medical and related expenses; $1.25 million to Patricia and Albert for loss of society and companionship; and $50,000 to Patricia and Albert for medical and health-related expenses. In motions after verdict, the Carinis moved for a new trial requesting the issue of informed consent be answered by a jury and the MPC moved for judgment on the verdict. The trial court granted the MPC's motion, and judgment was entered dismissing the Carinis' complaint with prejudice and awarding statutory costs to the MPC. The Carinis appeal. Additional facts will be included within the body of the discussion as necessary.

## DISCUSSION

### *Standard of Review*

The first issue we must address is the appropriate standard of review. Our standard of review is dependent on whether the trial court directed a verdict at the close of all of the evidence or refused the Carinis' request for a jury instruction and special verdict question on informed consent. At the close of the Carinis' case, the MPC moved to dismiss the case under § 805.14(3), STATS., on the grounds of insufficiency of the evidence establishing causal negligence against Liethen. The trial court concluded that it could be inferred from the testimony of Drs. James Green and Leon Charash that Liethen's negligence increased the risk that John would be born prematurely and that the prematurity caused his cerebral palsy. Because the Carinis met their burden of proof, the trial court denied the MPC's motion at that time.

Once both parties rested, an informal jury instructions conference was held, after which the trial court concluded that under the specific facts of this

case, "[T]his is not the type of case that should … go to the Jury on Informed Consent." The court stated that:

> In this case, we have a young woman who had given, to two separate doctors, a specific date of when her last menstrual period was. Thereafter, the husband alleges that his wife had had bleeding; and she confirmed that on her Rebuttal testimony.
>
> There was very little, if anything, in this record to indicate to Doctor Liethen that during the course of pregnancy anything was untoward. It would have been virtually impossible, under the facts that were known to her, to have given or have been aware of alternative forms of treatment.
>
> Basically, she was assisting in the childbirth. The allegations of the plaintiffs of not having the benefit of ultrasound in order to determine a more precise delivery date goes to the issue of the negligence under the standard of care rather than to Informed Consent.
>
> ….
>
> For the reasons I have thus far stated, and in my analysis of the facts in this case, I am, therefore, rejecting the requested Instructions of the plaintiff for Informed Consent. That would have been 1023.2 and .3; .3 being the cause.
>
> ….
>
> [A]lso, I wanted to add … if I gave the Informed Consent, I believe that there would have to have been then, a contributory negligence question with respect to the parents or the mother informing the doctor as to any event, particularly the February bleeding, which would have altered her understanding of what the prenatal period would have been.

The Carinis contend that by refusing to submit the issue of informed consent to the jury at the instructions conference, the trial court effectively granted a directed verdict be it on its own motion or on the MPC's earlier motion at the close of the Carinis' case. Thus, the Carinis argue for de novo review by this court. The MPC, on the other hand, argues that the standard of review is a mixed

question of fact and law—requiring deference be given to the trial court's factual findings and independent review of questions of law.

It is undisputed that the trial court's ultimate decision was to reject the requested jury instruction on informed consent. It is well established that a trial court has wide discretion when considering possible jury instructions. "If the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous." ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976).

Nevertheless, we agree with the Carinis that in refusing to instruct the jury on informed consent, which was tried as a separate cause of action, the trial court was doing the equivalent of directing a verdict on behalf of the MPC. The court properly grants a directed verdict when it considers "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made" and determines that "there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1), STATS. Here, the trial court effectively dismissed the informed consent cause of action based on insufficient evidence. Whether the trial court erroneously directed the verdict is a question of law that we review de novo. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983) (whether the facts fulfill the legal standard is a determination of law). Because the trial court effectively directed a verdict in favor of the MPC, we will independently examine whether the informed consent cause of action was properly dismissed or whether it should have been deliberated by the jury.

*Informed Consent*

Turning to the informed consent question, the Carinis argue that the trial court erred in ruling that it was impossible for Liethen to have been aware of and to consider offering an ultrasound to confirm the conception date. Thus, we must determine whether there was any credible evidence for a jury to determine that Liethen breached her duty to inform under § 448.30, STATS. *See* ***Martin v. Richards***, 192 Wis.2d 156, 168, 531 N.W.2d 70, 75 (1995). The Wisconsin informed consent statute provides:

> **Information on alternate modes of treatment.** Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
>
> (1) Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
>
> (2) Detailed technical information that in all probability a patient would not understand.
>
> (3) Risks apparent or known to the patient.
>
> (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
>
> (5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
>
> (6) Information in cases where the patient is incapable of consenting.

Section 448.30. This statute requires a physician, before subjecting a patient to medical treatment, to explain all alternate, viable procedures and to warn the patient of any material risks or dangers inherent in or collateral to the proposed treatment. *See* ***Schreiber v. Physicians Ins. Co. of Wis.***, No. 96-3676, slip op. at 3 (Wis. Ct. App. Feb. 17, 1998, ordered published Mar. 25, 1998). This duty enables the patient to make an intelligent and informed choice about whether to follow the physician's recommendation or to select some other medically

acceptable treatment alternative. *See* ***Martin***, 192 Wis.2d at 176, 531 N.W.2d at 79. The doctrine seeks to protect the patient's right to obtain information and to protect the patient's right to choose a medically viable treatment and have that choice respected by his or her doctor. *See* ***Schreiber***, slip op. at 4.

Under this standard, we determine whether there was any credible evidence for the jury to determine that a reasonable person under the circumstances confronting the Carinis would have wanted to know about the availability and accuracy of an ultrasound. *See* ***Martin***, 192 Wis.2d at 176-77, 531 N.W.2d at 79. We therefore consider the facts of the case as they were presented to the jury. *See* ***id.*** at 177, 531 N.W.2d at 79.

The evidence before the jury pertaining to the conception date reveals that Liethen used January 7, 1992, as the first date of pregnancy. According to Liethen, this was the date of Patricia's last menstrual period.

Expert testimony also revealed that the expected date of conception would be approximately thirteen to fourteen days after that date making January 21 the approximate date of conception. Eight to eleven days after the date of conception virtually all blood pregnancy tests will be positive if conception did in fact occur. Thus, using the January 7 date with conception occurring on the 21st, anytime after January 29 to February 1, a blood pregnancy test should have shown positive. However, Liethen ordered a blood pregnancy test on February 7, which showed a negative result. Nevertheless, Liethen continued to calculate the delivery date based on January 7 as the last date of Patricia's menstrual period.

The jury heard conflicting testimony about a menstrual period in February. Patricia testified that she had a normal menstrual period in February and that she specifically told Liethen about it. Albert also recalled some bleeding

that occurred in February on a trip to Florida that he believed to be Patricia's menstrual period. Liethen did not recall being told about this bleeding nor did Patricia's medical records indicate that the Carinis had communicated this to their health care provider.

There was also conflicting testimony as to whether an ultrasound was requested. Patricia testified that at an early prenatal visit in March she requested an ultrasound. Patricia indicated that she wanted an ultrasound because twins are common in her and Albert's families and she knew an ultrasound could accurately determine whether she was pregnant with twins. There was also a notation in Patricia's calendar that on August 26, 1992, she requested an ultrasound from Liethen's partner. Albert testified that he also inquired about an ultrasound because twins run in the family and he wondered about the conception date. According to Albert, Liethen did not think an ultrasound was necessary—it cost too much money and she was pretty sure of the due date. However, Liethen testified that she did not recall any discussions about an ultrasound or twins and that if there was a discussion about it, it would have been documented in Patricia's medical file. She also testified that in seventy percent of the deliveries she handled in 1992, she ordered an ultrasound. She stated, "[I]f I have any kind of inkling that I'm not quite certain of the dates, I will order an ultrasound."

As to causation, the jury heard Dr. Green's deposition testimony:

> Q: Do you have an opinion to a reasonable degree of probability whether the procedure followed by Dr. Liethen in inducing labor and rupturing the membrane substantially contributed to John Carini's premature birth?
>
> A: Yes.
>
> Q: Why do you say that?
>
> A: I believe that, first of all, failing to establish the proper gestational age and then intervening and inducing the labor

> caused the delivery before term which contributed to the prematurity condition.
>
> ….
>
> A: I want to make it clear that my opinion is that Dr. Liethen intervened and induced this labor, that she did not allow a labor to progress or did not allow a labor to happen, that I feel like she intervened unnecessarily.
>
> ….
>
> Q: And the other opinion you have is that she should have used the ultrasound to assist her in dating the pregnancy?
>
> A: Yes. My opinion is she should have made a more specific estimate of gestational age and specifically I would recommend with ultrasound.

The jury also heard Dr. Charash's testimony that the prematurity indirectly caused the brain damage:

> Q: Do you have an opinion to a reasonable degree of medical certainty as to whether his prematurity was the cause of his respiratory distress?
>
> A: Yes I believe it and I think I have said it.
>
> Q: Do you have an opinion to a reasonable degree of certainty as to whether his prematurity was the cause of his brain damage?
>
> A: Well indirectly obviously, because he had the vulnerable vessels and … underdeveloped lungs, yes.
>
> Q: Do you have an opinion to a reasonable degree of medical certainty as to whether if he had not been premature whether he would have probably been normal?
>
> A: Yes, of course, I think he would be normal. No reason why he wouldn't be. He certainly wouldn't have diplegia and he had no injury that would have caused any other kind of [cerebral palsy]. He didn't have hypoglycemia. There are many other things that could hurt a baby at birth and he didn't have any of them.
>
> Q: Do you have an opinion as to whether had he even remained inside his mother for another week whether he probably would have suffered this brain damage?
>
> ….

> A: Yes. I think if he had gone to 36 weeks, the chances would be dramatically less. As it is he was almost at the cusp of where he would be in danger. At 36 weeks I think if he did have [cerebral palsy], it would be much milder. So either he would be normal or have a lesser degree of difficulty.

Clearly, Liethen knew of the February 7 negative pregnancy test indicating a possible error in determining the beginning date of the pregnancy and she knew that an ultrasound was a viable alternative method of determining the conception date. An ultrasound would have alerted Liethen that (1) Patricia's contractions were early and labor should not have been induced or (2) if early delivery was unstoppable, then other alternative treatments would have been necessary. However, Liethen failed to discuss or inform the Carinis of the risks of not having an ultrasound or the risks associated with a premature delivery.

Based upon all of the evidence, especially that which should have alerted the doctor to employ an ultrasound to verify the beginning date of the pregnancy, we conclude that there was credible evidence for the jury to determine that in order to make an intelligent decision regarding the choices of treatment or diagnosis, a reasonable person, under the circumstances then existing, would have wanted to know that an ultrasound could more accurately determine this date. Under Wisconsin's doctrine of informed consent, whenever the determination of what a reasonable person in the patient's position would want to know is open to debate by reasonable people, the issue of informed consent is a question for the jury. *See* ***Johnson v. Kokemoor***, 199 Wis.2d 615, 634-35 n.25, 545 N.W.2d 495, 503 (1996). We conclude that the issue of informed consent should have been put

before the jury. Accordingly, we reverse the trial court's judgment and remand for proceedings consistent with this opinion.[2]

We have concluded that a new trial on the issue of informed consent is warranted. However, the Carinis have also argued on appeal that (1) at the time of the delivery, there were alternative, viable modes of treatment available, other than ultrasound, which were never discussed with the Carinis and (2) the trial court erred in excluding the expert testimony of Dr. Green on the issue of informed consent. Because of our conclusion relating to the informed consent of an ultrasound—which would have forestalled the premature induction of labor—we do not address the alternative treatment options once labor was induced. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of appeal, we will not decide other issues raised). Although we need only address a dispositive issue on appeal, this limitation certainly does not preclude consideration by the jury of the alternative, viable modes of treatment at the time of delivery.

And while we assume that the Carinis will again seek to admit Dr. Green's expert testimony on the issue of informed consent, we recognize that the proferred evidence and witnesses may vary from the first trial. Therefore, we do not instruct the trial court to accept or reject this testimony. *See* ***State v. Rushing***,

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[2] The MPC argues for a new trial on damages but cites to no authority in support of its argument. Generally, we do not address arguments which are unsupported. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Although we recognize that the scope of a new trial is generally within the discretion of the trial court, *see* ***Badger Bearing, Inc. v. Drives & Bearings, Inc.***, 111 Wis.2d 659, 673, 331 N.W.2d 847, 855 (Ct. App. 1983), we nevertheless limit the issue on remand to that of informed consent. We do so because the issue of damages is entirely separate from the issue of informed consent, because the law of damages remains the same and because justice would not be served by mandating a new trial on damages. *See* ***id.*** at 673-74, 331 N.W.2d at 855.

197 Wis.2d 631, 650, 541 N.W.2d 155, 163 (Ct. App. 1995). However, we encourage the trial court to review any new motions to admit expert testimony in light of the proper methodology. *See* § 907.02, STATS.; ***State v. Pittman***, 174 Wis.2d 255, 267-68, 496 N.W.2d 74, 79 (1993).

*By the Court.*—Judgment reversed.

Not recommended for publication in the official reports.