COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0678

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

STEVEN LEVSEN AND JENNIFER LEVSEN,

PLAINTIFFS-APPELLANTS,

V.

MEDICAL COLLEGE OF WISCONSIN AND E. JAMES AIMAN, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Steven and Jennifer Levsen appeal from the trial court's judgment, entered after a jury trial, dismissing their claims against the Medical College of Wisconsin for negligence and breach of contract. The Levsens claim the trial court erred by: (1) permitting Martha Rinke, a lay witness, to testify

as an expert; (2) permitting Dr. E. James Aiman to testify as an expert witness when he was not designated as such by the medical college; (3) failing to include the breach-of-contract cause of action on the special-verdict form; and (4) precluding the Levsen's from "fully questioning" one of the medical college's expert witnesses about his Iranian background. We affirm.

I. BACKGROUND

¶2 Steven Levsen was diagnosed with leukemia and underwent radiation treatment. Prior to receiving treatment, however, Levsen was informed that radiation would cause sterility. Levsen then preserved 75 semen samples at the Medical College of Wisconsin. Levsen eventually recovered from his illness, and he and his wife succeeded in having one child by using the semen samples Levsen had preserved at the medical college. The Levsens began the insemination process for a second time, this time without success, and discovered that many of the samples were missing and that the remaining samples had a reduced level of motility. The medical college searched for the samples, which were kept in straws, and found some of them at the bottom of the storage freezer, known as a Dewar, which is a nitrogen freezer container used in cryo-preservation laboratories.

¶3 The Levsens sued the medical college for negligence and breach of contract, claiming that the medical college negligently maintained Steven Levsen's semen samples and that "the loss in motility was due to a thaw attributable to the negligence" of the defendant. In addition, the Levsens alleged "serious doubts" as to whether the remaining straws actually belonged to Steven Levsen. At trial, each party presented expert testimony. Plaintiff's expert Dr. Rajasingam Jeyendran testified that the medical college was negligent in its

maintenance of Levsen's samples, and that its negligence resulted in a reduction in the motility of the samples. Defense expert Dr. Aiman testified that he was not aware of any circumstance in which Levsen's semen samples were jeopardized by a thaw, and that it was scientifically impossible to conclude that there was a reduction in the motility level of Levsen's semen samples. Another defense expert, Dr. Mahmood Morshedi, found no substantial evidence that any harm was done to Levsen's samples. After the presentation of evidence, the trial court allowed only the negligence claim to go to the jury. Although the jury found that the medical college was negligent, it also found that this negligence was not a substantial factor in causing injury to the Levsens.

II. DISCUSSION

A. Testimony of Martha Rinke

¶4 The Levsens claim that Martha Rinke, manager of the medical college's cryo-preservation laboratory, should not have been permitted to testify as an expert witness because she was not identified as such. In response, the medical college argues that Ms. Rinke did not give any expert opinions. Ms. Rinke was called adversely by the plaintiffs and did not offer any expert opinions during this direct, adverse testimony. The medical college's lawyer asked no clarifying questions and Ms. Rinke was excused at that time. The medical college then called Ms. Rinke during its case; it is during this examination that the Levsens allege several instances of expert opinion testimony were impermissibly given by Ms. Rinke.

¶5 The medical college told the trial court that it wanted to elicit from Ms. Rinke "what a lay person with special expertise" in a laboratory would have. Ms. Rinke testified that it was her opinion that the straws that were found were the

same straws that were used to hold Mr. Levsen's semen. After the medical college's lawyer asked Ms. Rinke about the use of a piece of lab equipment, the trial court overruled the Levsens' lawyer's objection and Ms. Rinke then stated: "I've heard both experts testify, and I agree totally." Ms. Rinke then continued testifying and described the use of a piece of laboratory equipment called the Makler chamber. Finally, Ms. Rinke testified how the laboratory assessed semen motility in 1988, which was prior to the Makler-chamber technology. The Levsens' lawyer moved to strike Ms. Rinke's opinions "as being in the nature of expert opinions." The trial court denied the motion, noting: "This witness is primarily a fact witness, and she is able in her – essentially her day to day work and extensive experience in this department to draw some logical conclusions from what she has observed. But she is not testifying here as an expert."

¶6 The admission of expert testimony requires the trial court to exercise its discretion. *See* ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406, 410–411 (Ct. App. 1995). This court will not reverse the trial court's decision to admit or exclude expert testimony if the decision was reasonable and if "it was made 'in accordance with accepted legal standards and in accordance with the facts of the record.'" ***Id.***, 195 Wis. 2d at 305, 536 N.W.2d at 410 (citation omitted). The record reflects that the Levsens failed to object contemporaneously to many of the alleged instances of expert testimony given by Ms. Rinke.[1] Accordingly, the Levsens' arguments on these alleged errors are waived. *See* WIS. STAT.

[1] The Levsens claim that Ms. Rinke was impermissibly asked for expert opinions regarding: (1) how straws were put in the Dewar; (2) how procedures were performed in Steven Levsen's case; (3) if it was possible to check motility at the time a deposit was made; (4) whether "there was any more checking of motility between 1988 and 1993"; (5) whether certain straws containing semen had Steven Levsen's name on them; and (6) whether the handwriting on the straws was consistent with the handwriting of a person who worked in the laboratory at the time the semen straws were taken.

§ 901.03(1)(a);[2] *see also* ***State v. Peotter***, 108 Wis. 2d 359, 366, 321 N.W.2d 265, 268 (1982) (failure to object to admissibility of opinion evidence in timely fashion precludes party from raising objection on appeal). We now address the testimony to which objection was made timely.

¶7 WISCONSIN STAT. § 907.01 is not a vehicle to circumvent the requirement that expert witnesses be named.[3] Here, the trial court applied the wrong legal basis when it allowed the medical college to elicit from Ms. Rinke

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[2] WISCONSIN STAT. § 901.03 provides:

> **Rulings on evidence. (1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> (a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific grounds of objection, if the specific ground was not apparent from the context; or
>
> (b) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted

[3] WISCONSIN STAT. § 907.01 provides:

> **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

The trial court's scheduling order required the parties to identify and disclose all expert witnesses prior to trial.

"what a lay person with special expertise" in a laboratory would have done. Some of the questions asked by the medical college to Ms. Rinke, however, were not questions calling for expert testimony. For instance, Ms. Rinke's opinion as to whether the recovered straws belonged to Mr. Levsen was permissible lay testimony under WIS. STAT. § 907.01 as an opinion "rationally based on the perception of the witness." In addition, Ms. Rinke's testimony that the laboratory used visual assessments of semen motility prior to the use of the Makler-chamber technology was not an expert opinion. Rather, this question required Ms. Rinke to testify merely as a fact witness, namely, testifying about what the laboratory did.

¶8 The medical college did, however, ask Ms. Rinke about the specific operation of Makler chamber machine. This called for an expert opinion:

> [Defense Counsel]: Have you or can you tell us whether or not there has been anything you have observed whether or not the numbers for example rather than being rounded off in ten, fifteen, and twenty by the person using the machine come out to whole numbers?
>
> [Plaintiff's Counsel]: Objection. Calls for an expert opinion.
>
> THE COURT: Overruled.
>
> THE WITNESS: I've heard both experts testify, and I agree totally.
>
> [Plaintiff's Counsel]: Just a minute. It's hearsay object to it [*sic*].
>
> THE COURT: The objection also is overruled. Go ahead.
>
> THE WITNESS: Yes. The use of the Makler chamber reduces the calculation of the motility to an objective value.

Ms. Rinke's responses in this regard required specialized knowledge and fell within the ambit of expert testimony under WIS. STAT. § 907.02.[4] The Levsens,

[4] WISCONSIN STAT. § 907.02 provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand

(continued)

however, have not demonstrated that this error was prejudicial to them. Accordingly, we conclude that while an error occurred, the error was harmless. *See* WIS. STAT. § 901.03.

B. Testimony of Dr. Aiman

¶9 The Levsens next claim that the trial court erred by allowing Dr. Aiman, one of the medical college's witnesses, to give expert opinions because the medical college did not name him as an expert. The Levsens concede, however, that the medical college "reserved the right to elicit expert testimony or other testimony from any and all treating physicians of Steven and/or Jennifer Levsen." Again, the admission of expert testimony is within the trial court's discretion. *See* ***Brewer***, 195 Wis. 2d at 305, 536 N.W.2d at 410–411. Here, the record reflects that Dr. Aiman was indeed a treating physician of Jennifer Levsen.[5] Thus, the trial court clearly acted within the ambit of its discretion when it allowed Dr. Aiman to testify as an expert.[6]

C. Special Verdict Form

¶10 The Levsens also claim that the trial court erred by failing to include their breach-of-contract cause of action on the special-verdict form. The Levsens contend that, had the jury been permitted to consider their contract claim, the jury

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> the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[5] Dr. Aiman performed an artificial insemination attempt on Jennifer Levsen.

[6] Because the Levsens were put on notice that "any and all treating physicians" could be called as experts by the medical college, we reject the Levsens' assertion that they were unfairly surprised by Dr. Aiman's testimony.

would have awarded damages flowing from the breach. Both the contract and negligence theories advanced by the Levsens were premised on the same facts, however. The Levsens alleged that the medical college negligently maintained Steven Levsen's semen samples. A trial court may order an election of remedies where the plaintiffs' two theories of relief are premised on the same identical acts of the defendant. *See* ***Wills v. Regan***, 58 Wis. 2d 328, 345, 206 N.W.2d 398, 407 (1973). This is a discretionary determination. *See* ***id.***, 58 Wis. 2d at 345, 206 N.W.2d at 407. The trial court properly concluded that both claims relied on the same acts (breach only in contract claim) and that the negligence claim was subsumed within the contract claim, noting: "If we ask the question was the contract violated really it's the same question as … is the contract violated by the defendant's negligence." Accordingly, the trial court did not erroneously exercise its discretion.

D. Questioning of Dr. Morshedi

¶11 Finally, the Levsens claim that the trial court erred by preventing them from "fully questioning" one of the medical college's expert witnesses, Dr. Mahmood Morshedi, about his educational background. Pursuant to the medical college's motion *in limine*, the trial court prevented the Levsens from asking about Dr. Morshedi's Iranian background, including his birthplace and service in the Iranian Army, because it considered the information too irrelevant, and even if relevant, unduly prejudicial to the defense, confusing and a waste of time. *See* WIS. STAT. § 904.03.[7] As noted, the admission of evidence is within the sound discretion of the trial court.

[7] WISCONSIN STAT. § 904.03 provides:

(continued)

¶12 The Levsens do not indicate any questions they were prevented from asking, the answers to which would have had any bearing on Dr. Morshedi's expertise or lack of expertise. Instead, the Levsens rest their claim on the assertion that they "believe that it would be common knowledge among a jury of their peers that many foreign educational institutions are inferior to those in the United States and that many foreign countries live with medical care that is inferior to the United States." While this may or may not be true, there was no such evidence in this case, and the Levsens did not make a proper offer of proof. *See* WIS. STAT. § 901.03(1)(b) (error waived unless substantial right affected and "substance of the evidence was made known to the judge by offer"). Moreover, the Levsens cross-examined Dr. Morshedi and asked him if he had graduated from the University of Tehran and whether that school was located in Iran. The Levsens have not demonstrated how the trial court erroneously exercised it discretion in applying WIS. STAT. § 904.03 to narrow the cross-examination of Dr. Morshedi. Indeed, it is clear from their argument that the Levsens were hoping to incite prejudice in the jury; they argue in their appellate brief that Iran is "an enemy of the United States." We are chagrined that without any evidence in the record to support the inferences that the Levsens sought to have the jury and us draw, that they attempted to so smear Dr. Morshedi.

By the Court.—Judgment affirmed.

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although 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.

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