COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP179 **Cir. Ct. No. 2012CV618**

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

ALEXIS KREBSBACH, A MINOR, BY HER GUARDIAN AD LITEM, PAUL SCOPTUR, TINA M. KREBSBACH AND DAVID LEE KREBSBACH, INDIVIDUALLY, AND AS PARENTS AND NATURAL GUARDIANS OF ALEXIS KREBSBACH,

PLAINTIFFS-APPELLANTS,

V.

MMIC INSURANCE, INC., KATHRYN J. KOSTIC, M.D. AND ADVANCED HEALTHCARE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: REBECCA L. PERSICK, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 NEUBAUER, C.J. During the birth and delivery of Alexis Krebsbach, she suffered a brachial plexus injury. A jury found the obstetrician-gynecologist who delivered Alexis, Dr. Kathryn J. Kostic, was not negligent in the manner in which she delivered her, but that Kostic did not obtain informed consent from Alexis' mother, Tina Krebsbach. The circuit court granted a new trial on the informed consent claim, concluding that one of the questions posed to the jury—"Did Kathryn Kostic, M.D. fail to disclose to Tina Krebsbach the risks and benefits of proceeding with a vaginal delivery *and the alternative of a delivery by cesarean section*?" (emphasis added)—invaded the province of the jury because it assumed that a reasonable patient under these circumstances would want to know about the alternative treatment of delivery by cesarean section. After a second trial on the informed consent claim, the jury found in favor of MMIC Insurance, Inc., Kathryn J. Kostic, M.D., and Advanced Healthcare, Inc. (collectively, Kostic). On appeal, the Krebsbachs challenge the circuit court's decision to overturn the first jury's verdict.[1] We reject the Krebsbachs' challenge and affirm.

BACKGROUND

¶2 During a conference on the instructions to the jury and the special verdict form, for question number three, Kostic proposed that the court ask the jury, "Did Kathryn Kostic, M.D. fail to disclose information to Tina Krebsbach necessary for her to make an informed decision as to proceeding with a vaginal delivery?" In contrast, the Krebsbachs proposed asking for question number three,

[1] The Honorable Terence T. Bourke presided over the first trial and granted a motion for new trial (solely on the issue of informed consent). The Honorable Rebecca L. Persick presided over the second trial and denied a motion for reconsideration (the Krebsbachs' motions after verdict to reinstate original jury verdict from first trial and for judgment on the verdict and to strike entire second verdict) and entered judgment.

"Did Kathryn Kostic, M.D. fail to inform Tina Krebsbach of the risks and benefits of proceeding with a vaginal delivery and the alternative of a delivery by cesarean section?" Kostic objected to the question the Krebsbachs proposed, arguing that the language regarding "the alternative of a delivery by Cesarean section," added "an additional component."[2] Whether Tina would have chosen a cesarean section, Kostic argued, "was irrelevant" because "[t]hat was not the choice that she made." Kostic believed that the way she framed the issue without the additional inclusion of a reference to the alternative of a cesarean section was the proper way to frame the informed consent issue.

¶3 The circuit court rejected Kostic's objection, concluding that the Krebsbachs' version accurately reflected the law. The jury was asked in question number three on the special verdict, "Did Kathryn Kostic, M.D. fail to disclose to Tina Krebsbach the risks and benefits of proceeding with a vaginal delivery and the alternative of a delivery by cesarean section?"

¶4 During its charge to the jury on informed consent, the court instructed the jury as follows:

> Question 3 asks:
>
> > Did Kathryn Kostic MD fail to disclose to Tina Krebsbach the risks and benefits of proceeding with a vaginal delivery and the alternative of a delivery by cesarean section?
> >
> > A doctor has the duty to provide her patient with information necessary to enable the patient to make an

[2] Kostic lodged similar objections to two other special verdict questions related to the informed consent claim. Although the parties also argue about the propriety of these other questions, we need not address them because the court's error on question number three alone warranted overturning the jury's verdict.

> informed decision about a procedure and alternative choices of procedure. If the doctor fails to perform this duty, she is negligent.
>
> To meet this duty to inform her patient, the doctor must provide her patient with information a reasonable person in the patient's position would regard as significant when deciding to accept or reject a medical 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.
>
> The doctor must inform the patient whether a procedure is ordinarily performed in the circumstances confronting the patient, whether alternate procedures approved by the medical profession are available, what the outlook is for success or failure of each alternate procedure, and the benefits and risks inherent in each alternate procedure.
>
> However, the physician's duty to inform does not require disclosure of:
>
> > Detailed technical information that in all probability the patient would not understand;
> >
> > Risks apparent or known to the patient;
> >
> > Extremely remote possibilities that might falsely or detrimentally alarm the patient.
>
> If Kathryn Kostic, MD offers to you an explanation as to why she did not provide information to Tina Krebsbach, and if this explanation satisfies you that a reasonable person in Tina Krebsbach's position would not have wanted to know that information, then Kathryn Kostic, MD was not negligent.

¶5 The jury, by at least a five-sixths majority, returned a verdict finding that Kostic failed to disclose the risks and benefits of proceeding with a vaginal delivery and the alternative of a delivery by cesarean section; that a reasonable person placed in Tina's position, had she been provided necessary information about her delivery options, would have refused to proceed with a vaginal delivery and chosen the option of a delivery by cesarean section; and that this failure

caused Alexis's brachial plexus injury. In total, the jury awarded the Krebsbachs $448,000.

¶6 Kostic moved to vacate the jury's verdict on the informed consent claim and for a new trial because the special verdict questions on informed consent were erroneous.

¶7 The circuit court agreed with Kostic, first concluding that she had not waived her challenge to the special verdict questions on informed consent. Although her arguments were not as expansive at trial as after trial, "that's normal." Second, focusing on question number three, it did not reflect the standard jury instructions or the law. Question number three assumed that a patient would want to know about a cesarean section delivery, but that was a question for the jury. Third, the error was not harmless. The court invaded the province of the jury and, thereby, denied Kostic the right to have a jury decide a material question. By answering that question for the jury, the jury was not allowed to consider the exceptions to a doctor's duty to inform as set forth in WIS. STAT. § 448.30 (2003-04).[3] Considering that there were two dissenting votes on question number three, it was not clear, beyond a reasonable doubt, that the jury would have reached the same result.

¶8 The parties proceeded to a second trial on the informed consent claim only. That jury found, as framed on the special verdict form which was consistent with the standard special verdict form set forth in WIS JI—CIVIL

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

1023.2, that Kostic did not fail to disclose information about proceeding with a vaginal delivery that was necessary for Tina to make an informed decision.

¶9 The Krebsbachs moved for reconsideration of the court's ruling to vacate the first jury's verdict on the informed consent claim, to reinstate the first jury's verdict on the informed consent claim, and to strike the second verdict. The court denied the motion, and entered judgment in favor of Kostic. The Krebsbachs appeal from the judgment.

DISCUSSION

Preservation

¶10 The Krebsbachs contend that Kostic did not preserve at trial the challenges she raised in her postverdict motion. Kostic, the Krebsbachs acknowledge, did object at trial—that the reference to a cesarean section added "an additional component"—but that objection was different from those she raised after trial. Thus, Kostic's objections were not made with particularity.

¶11 WISCONSIN STAT. § 805.13(3) (2015-16) provides that at the jury instruction and verdict conference, the court shall inform the parties' counsel on its proposed action on their motions to instruct the jury on the law and rule on submitted verdict questions. Counsel may object to the proposed instructions or verdict "stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." ***Id.*** The objection must be specific so as to bring into focus the nature of the alleged error. ***Wright v. Mercy Hosp.***, 206 Wis. 2d 449, 463, 557 N.W.2d 846 (Ct. App. 1996). The purpose of the rule is to afford the circuit court "an opportunity to correct the error and to afford appellate review of

the grounds for objection." ***Douglas v. Dewey***, 154 Wis. 2d 451, 467, 453 N.W.2d 500 (Ct. App. 1990). Whether a waiver occurred is a question of law, which we review de novo. ***LaCombe v. Aurora Med. Grp., Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532.

¶12 We agree with Kostic that her objection was properly preserved. Although the nature of the error she claimed on the special verdict form could have been stated more artfully, as it was after trial, it was stated with sufficient particularity. Kostic submitted her own proposed special verdict for question number three which was consistent with the standard special verdict form WIS JI—CIVIL 1023.2. She objected to that question as posed by the Krebsbachs, articulating that it did not reflect the proper standard. This is the same objection Kostic raised after trial, albeit with greater clarity. The objection at the time of the special verdict/instruction conference pointed out the error to the circuit court and afforded it the opportunity to correct the error. Kostic's objection served the purpose of the preservation rule.

¶13 Like in ***State v. Gomaz***, 141 Wis. 2d 302, 323, 414 N.W.2d 626 (1987), which Kostic cites in support,

> [i]f due regard is given to the purpose of [WIS. STAT. §] 805.13, it is apparent that the requisite degree of particularity cannot be interpreted to require that objections be accompanied by legal argument; such a burdensome requirement would thwart the very purpose of judicial economy which the statute was designed to promote.

There, the defendant was denied a jury instruction on imperfect self-defense to a first-degree murder charge. ***Gomaz***, 141 Wis. 2d at 304. Our supreme court concluded that the defendant's challenge to that omission was preserved for appellate review because he submitted that requested instruction to the court and,

when the trial judge failed to include that instruction, the defendant objected, pointing out that there had been a request for that instruction. ***Id.*** at 317, 322. Guided by ***Gomaz***, we conclude that Kostic's objections raised on appeal were preserved at trial.

Merits

Informed Consent

¶14 During the time of Tina's pregnancy and the birth of Alexis, Wisconsin law on informed consent was as follows:

> 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.

WIS. STAT. § 448.30.[4]

¶15 Our supreme court has "observed that the language of WIS. STAT. § 448.30 'appears clear in its directive. The difficulty in applying the statute, however, is in determining how far the duty to disclose extends, i.e., what is considered an alternate, viable mode of treatment.'" ***Bubb v. Brusky***, 2009 WI 91, ¶62, 321 Wis. 2d 1, 768 N.W.2d 903 (quoting ***Martin v. Richards***, 192 Wis. 2d 156, 169, 531 N.W.2d 70 (1995)). At the time Tina consented to a vaginal delivery, the decision to consent was not considered a "medical decision," but one the patient must make. ***Martin***, 192 Wis. 2d at 174. In order for a patient to make an informed, intelligent decision as to whether to consent to a physician's suggested treatment, the physician must disclose "what is material to the patient's decision, i.e., all of the viable alternatives and risks of the treatment proposed." ***Id.*** "[T]he use of the word 'viable' in the statute was intended to require … disclosure only of information reasonably necessary for a patient to intelligently exercise his or her choice regarding medical treatment." ***Id.*** at 174-75 (quoting § 448.30). In other words, "[a] physician who proposes to treat a patient … must make such disclosures as will 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 …." ***Id.*** at 176. Tailored to the facts of this case, the ultimate question is "whether a reasonable

[4] WISCONSIN STAT. § 448.30 (2015-16) was amended in 2013, and now requires, effective December 15, 2013, "disclosure only of information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances," not a reasonable person. 2013 Wis. Act 111, § 1. These six statutory exceptions are defenses. *See* ***Brown v. Dibbell***, 227 Wis. 2d 28, 56, 595 N.W.2d 358 (1999).

person under the circumstances confronting [Tina] would have wanted to know about the availability of [a cesarean section]." ***Id.*** at 176-77.

¶16 The circuit court has wide discretion in framing the special verdict. ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis. 2d 594, 602, 541 N.W.2d 173 (Ct. App. 1995). An appellate court "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." ***Z.E. v. State***, 163 Wis. 2d 270, 276, 471 N.W.2d 519 (Ct. App. 1991); *see* ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2006 WI App 248, ¶46, 297 Wis. 2d 70, 727 N.W.2d 857 ("[B]oth the special verdict form and the jury instructions must fully and fairly inform the jury regarding the applicable principles of law."). For informed consent, the material issues of ultimate fact are as follows:

> (1) the patient was not informed of the risks in the proposed treatment or procedure of which a reasonable person in the patient's position would wish to be made aware; (2) a reasonable person in the patient's position presented with such information would not have chosen to submit to the treatment or procedure; and (3) the failure to disclose such information was a cause of the patient's injuries.

Hannemann v. Boyson, 2005 WI 94, ¶50, 282 Wis. 2d 664, 698 N.W.2d 714 (citations omitted).

¶17 A misleading verdict question which may cause jury confusion is a sufficient basis for a new trial. ***Runjo***, 197 Wis. 2d at 603.

¶18 WISCONSIN JI—CIVIL 1023.2 proposes under the old law the following special verdict question: "Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an

informed decision?" The question proposed by Kostic was consistent with this special verdict question.

¶19 Here, as Kostic points out, question number three on the special verdict was contrary to the standard proposed in WIS JI—CIVIL 1023.2. This alone, however, does not warrant reversal. Rather, question number three removed from the jury's consideration whether a reasonable patient under these circumstances would have wanted to know about the availability of a cesarean section. Question number three assumed that a reasonable patient would have wanted to know about the availability of a cesarean section.

¶20 Kostic's position, as supported by credible evidence in the record, was that a reasonable patient under these circumstances would not have wanted to know about the availability of a cesarean section for several reasons. *See* ***Bubb***, 321 Wis. 2d 1, ¶¶30-31 (stating that where there is credible evidence in the record to support a claim, the matter is one for the jury to decide). The most important for our purposes are related: the risk of a shoulder dystocia and brachial plexus injury was not information a reasonable patient in Tina's position would have considered "significant" when deciding to consent or these risks were extremely remote possibilities that might have falsely or detrimentally alarmed Tina. *See* WIS. STAT. § 448.30(4).[5]

¶21 Kostic presented evidence that a shoulder dystocia is "not uncommon," but it is "manageable." Statistically speaking, a shoulder dystocia

[5] Although Kostic offered other defenses, and the jury was instructed on them, such as the risks were apparent or known to Tina, it is enough for our purposes to limit our discussion to what we consider the strongest arguments offered at trial.

occurs less than one-half of one percent of the time, but about ten percent of the time with larger babies, as Alexis was here. When a shoulder dystocia does occur and involves the anterior shoulder, sixty-six to eighty percent of them are relieved by applying the McRoberts' maneuver, which involves flexing the mother's legs to her abdomen, and pressure on the suprapubic bone. About one-half of the remaining shoulder dystocias can be relieved by rotating the baby using the Woods' screw or Rubin's maneuver. For a shoulder dystocia involving the posterior shoulder—Alexis had a dystocia in both shoulders, but an injury only to the posterior shoulder—the McRoberts' maneuver and pressure on the suprapubic bone do not work as well or, as another expert put it, there is "[n]othing at all" one can do about it; "[i]t just happens, and it stretches the posterior arm," and one has to wait until the baby is delivered to see if she has a weakness in that arm. Nevertheless, there was evidence that a permanent brachial plexus injury is a rare event. For every 1700 births by vaginal delivery, there is one brachial plexus injury, but the majority of those are transient and not permanent. A permanent brachial plexus injury is suffered during a vaginal delivery in every 8000 or 10,000 births. In one study involving approximately 190,000 births at a California hospital, there were one hundred twenty-six shoulder dystocias and thirty-six brachial plexus injuries. One expert related that in the approximately 4800 children he had delivered, none of them had a permanent brachial plexus injury.

¶22 In contrast, if a cesarean section is performed, it presents more risks than a vaginal delivery, namely, the risk of bleeding, infection, scarring, postoperative pain, a longer period of postoperative recovery, the possible use of blood and anesthesia. Six to seven percent more women die from a cesarean section than a vaginal delivery.

¶23 A jury hearing this evidence might have concluded that the risks of a shoulder dystocia and brachial plexus injury were not "significant" information that a reasonable person would have wanted to know or these risks were extremely remote possibilities that might have falsely or detrimentally alarmed Tina such that she could not intelligently weigh the risks of undergoing vaginal delivery. Indeed, Kostic argued just this in summing up to the jury, citing much of the same evidence already discussed.

¶24 The court, by including the additional language on the special verdict, whether Kostic failed to disclose to Tina "the risks and benefits of proceeding with a vaginal delivery *and the alternative of a delivery by cesarean section*," assumed for the jury that a reasonable patient would want to know about the option of a cesarean section. This, however, was for the jury to decide. The question posed asked only whether, as a matter of fact, Kostic informed Tina about the risks and benefits of a cesarean section delivery. As Kostic argues, the jury could not answer "no" to question number three as written if it simply disagreed that a reasonable person in Tina's position would want to know about a

cesarean section.[6] The jury might have concluded that "under the circumstances confronting Tina," that is, the evidence suggesting that the risks of a shoulder dystocia and brachial plexus injury were low, a reasonable person would not have wanted to know about the availability of the alternative of a cesarean section. *See* ***Martin***, 192 Wis. 2d at 176-77; *see also* ***Hannemann***, 282 Wis. 2d 664, ¶50 (stating that one of the material issues for the jury to decide is whether "the patient was not informed of the risks in the proposed treatment or procedure of which a reasonable person in the patient's position would wish to be made aware"). In other words, under the evidence Kostic presented, the jury might have concluded that these risks were not "material" to Tina's decision to consent. *See* ***Martin***, 192 Wis. 2d at 174; *see also* ***Scaria v. St. Paul Fire & Marine Ins. Co.***, 68 Wis. 2d 1, 11, 227 N.W.2d 647 (1975) ("[A] physician has a duty to make a reasonable disclosure to his patient of the *significant risks* in view of the gravity of the patient's condition, the probabilities of success, and any alternative treatment or procedures if such are reasonably appropriate so that the patient has the information reasonably necessary to form the basis of an intelligent and informed

[6] The Krebsbachs argue that ***Jandre v. Wisconsin Injured Patients & Families Comp. Fund***, 2012 WI 39, ¶58, 340 Wis. 2d 31, 813 N.W.2d 627, and ***Martin v. Richards***, 192 Wis. 2d 156, 184, 531 N.W.2d 70 (1995), are two "examples where there seemed to be no objection by the Supreme Court to questions containing alternatives." But, the difference between this case and those cases is that the questions in ***Jandre*** and ***Martin*** did not assume an answer to part of the question. So, in ***Jandre***, where the question was did the "[doctor] fail to disclose to [patient] information about alternative medical diagnoses or treatments, which were [sic] necessary for [patient] to make an informed decision?" or, in ***Martin***, "whether [doctor] was negligent in failing to inform [patient] of alternate forms of care and treatment," a jury could answer "no" to those questions if the risks were not material to the patient's decision to consent. Applying those questions to the case here, the jury could conclude, "no," Kostic did not fail to disclose information about an alternative medical treatment which was necessary to make an informed decision, or that Kostic was not negligent in failing to inform Tina about the alternate treatment of delivery by cesarean section, because the risks of a shoulder dystocia and brachial plexus injury were not significant information that a reasonable patient would want to know or those risks were extremely remote possibilities that would have falsely or detrimentally alarmed Tina.

consent to the proposed treatment or procedure." (emphasis added)). In short, the special verdict did not fairly inform the jury of the material issues of fact and the applicable law, and it may have led to juror confusion.

Harmless Error

¶25 Analysis of whether an error was harmless requires an assessment of the effect of the error on the jury's verdict. ***Hannemann***, 282 Wis. 2d 664, ¶57. An error is harmless if it appears beyond a reasonable doubt that the complained of error did not contribute to the jury's verdict. ***Id.*** In other words, if it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error, the error did not contribute to the verdict and the error was harmless. ***Id.*** The Krebsbachs, as the beneficiaries of the error, have the burden of showing that the error was harmless beyond a reasonable doubt. ***Jones v. State***, 226 Wis. 2d 565, ¶63, 594 N.W.2d 738 (1999).

¶26 The Krebsbachs argue that the error was harmless because "[n]othing suggests that the exclusive duties of the jury were invaded" and "[t]he special verdict addressed all issues of material fact." We disagree and have already explained why we disagree. Otherwise, the Krebsbachs argue that because their attorney's summation was consistent with the law on informed consent, the error was harmless. We fail to see how the arguments of the Krebsbachs' counsel during summation could have rendered this error harmless. What is before the jury in the jury room is the special verdict, not fleeting arguments of counsel during a lengthy summation. The questions on the special verdict are what the jury is called to answer. In other words, how could the error on the special verdict

not have affected the jury's verdict?[7] We also think it somewhat compelling that when question number three was properly posed to the second jury, it found in favor of Kostic.[8] The Krebsbachs have not carried their burden of showing that the error did not contribute to the jury's verdict.

¶27 The circuit court did not erroneously exercise its discretion in granting Kostic a new trial pursuant to WIS. STAT. § 805.15(1) (2015-16), nor did it erroneously exercise its discretion in correctly affirming the same in denying the Krebsbachs' motion for reconsideration. ***Larry v. Commercial Union Ins. Co.***, 88 Wis. 2d 728, 733, 277 N.W.2d 821 (1979) (a circuit court's decision to grant a new trial will not be disturbed on appeal absent an erroneous exercise of discretion).

CONCLUSION

¶28 The circuit court correctly concluded that its special verdict question number three was erroneous, that Kostic's objection at trial preserved this error for review, and that the erroneous question was not harmless. Therefore, we affirm the judgment in Kostic's favor.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] The Krebsbachs do not, for example, argue that there was overwhelming proof that could have led only to the conclusion that informed consent was lacking.

[8] We recognize that the second jury may have based its decision on other considerations, such as Kostic's testimony that she did disclose the risks of shoulder dystocia and discussed cesarean sections, but find that the result is relevant.