COURT OF APPEALS DECISION DATED AND FILED

September 10, 2008

David R. Schanker
Clerk of Court of Appeals

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*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2006AP2718 **Cir. Ct. No. 2004CV1489**

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

MARLA WEISS AND ROBERT WEISS,

PLAINTIFFS-APPELLANTS,

KATIE LYNN WEISS, JONATHAN WEISS, AND NATHAN WEISS,

PLAINTIFFS,

V.

WILLIAM E. MARTENS, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., AND OB-GYN ASSOCIATES, S.C.,

DEFENDANTS-RESPONDENTS,

HCN EMPLOYERS HEALTH,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Marla and Robert Weiss have appealed from a judgment dismissing their complaint against the respondents, William E. Martens, M.D., Physicians Insurance Company of Wisconsin, Inc., and OB-GYN Associates, S.C. In their complaint, the Weisses alleged that Dr. Martens negligently performed a laparoscopic tubal sterilization on Marla, resulting in pregnancy. The Weisses also alleged that Dr. Martens negligently failed to provide them with all information necessary for informed consent. Judgment was entered after a jury trial. We affirm the judgment.

¶2 Dr. Martens performed a bilateral cauterization of Marla's fallopian tubes on March 15, 2001. Marla became pregnant approximately fifteen months later, and gave birth to her fourth child on March 14, 2003. The Weisses subsequently brought this "wrongful birth" action against Dr. Martens and the remaining respondents, alleging that Dr. Martens negligently performed the bilateral cauterization and that he failed to comply with his responsibility under Wisconsin's informed consent law. The jury answered "No" to special verdict Question No. 1, which asked: "Was Dr. Martens negligent with respect to the care and treatment of Marla Weiss?" It also answered "No" to Question No. 3 of the special verdict, which asked: "Did Dr. Martens fail to disclose information about the failure rates of tubal sterilizations necessary for Marla Weiss to make an informed decision?"

¶3 The Weisses' first argument on appeal is that the trial court erroneously exercised its discretion by refusing to give the jury a res ipsa loquitur instruction. At the conclusion of the evidence, the trial court instructed the jury that the standard to be applied by it in determining whether Dr. Martens was

negligent was whether he failed to use the degree of care, skill, and judgment which reasonable obstetricians and gynecologists would exercise given the state of medical knowledge at the time of the treatment. However, it denied the Weisses' request for a res ipsa loquitur instruction as set forth in Wis JI—Civil 1024. The requested instruction would have instructed the jury that it could infer negligence if it found that the injury to Marla was of a kind that does not ordinarily occur if a surgeon exercises proper care and skill.

¶4 "*Res ipsa loquitur* is a rule of circumstantial evidence which permits, but does not require, a permissible inference of negligence to be drawn by the jury." ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993). "The doctrine applies where there is insufficient proof available to explain an injury-causing event, yet the physical causes of the accident are of the kind which ordinarily do not exist in the absence of negligence." ***Id.*** "The failure to give the res ipsa instruction in a medical malpractice case where the evidence warrants it has been found prejudicial in the past." ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 600, 492 N.W.2d 167 (Ct. App. 1992).

¶5 The doctrine can be invoked in a medical malpractice action when: (1) either a layperson can determine as a matter of common knowledge or an expert testifies that the result does not ordinarily occur in the absence of negligence; (2) the agent or instrumentality that caused the harm was within the defendant's exclusive control; and (3) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but is not so substantial as to provide a full and complete explanation for the event. ***Id.*** at 601-02. *See also* ***Richards v. Mendivil***, 200 Wis. 2d 665, 674, 548 N.W.2d 85 (Ct. App. 1996).

¶6 On appeal, this court's standard of review of a trial court decision refusing to give a res ipsa loquitur instruction varies depending upon which factor is being reviewed. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 18-19, 531 N.W.2d 597 (1995). The first two requirements present mixed questions of fact and law. ***Id.*** at 19. We must first consider whether the trial court's factual findings were clearly erroneous, and must then consider whether the facts, as a matter of law, fulfill the legal standard. ***Id.*** Because the trial court is in a better position to consider the evidence and has the benefit of having heard and observed the witnesses, the third element is reviewed under an erroneous exercise of discretion standard. ***Id.*** at 20. The trial court's decision will be upheld if the facts of record support its conclusion. ***Id.***

¶7 At trial, the Weisses contended that they were entitled to a res ipsa loquitur instruction because the evidence established that a pregnancy does not ordinarily occur after a tubal sterilization. We conclude that the Weisses' request for a res ipsa loquitur instruction was properly denied because the Weisses presented evidence of negligence that was so substantial as to constitute a full and complete explanation of the event.

¶8 At trial, the Weisses relied on the expert testimony of Dr. Ramona Slupik, who testified that there was no evidence of any destruction of Marla's right fallopian tube and that, to a reasonable degree of medical probability, Marla became pregnant fifteen months after the tubal cauterization because there was no destruction of that tube. The Weisses also relied on learned treatises and studies indicating that the incomplete destruction of a fallopian tube is the most common cause of the failure of a bipolar cautery sterilization. They relied on information in the studies indicating that the number of sterilization failures goes down when proper technique is used to corroborate their claim that improper technique, not

recanalization, was the cause of Marla's post-sterilization pregnancy. They also relied on information indicating that when a pregnancy occurs less than two years after a sterilization procedure, the operative assumption in the studies is that the failure resulted from incomplete occlusion of a tube, not regeneration or recanalization.

¶9 The Weisses also relied on physical evidence that Dr. Martens employed an improper technique during the sterilization, including the lack of physical signs of destruction on the right tube, and evidence that he occluded the wrong structure on the left tube. They relied on a portion of Dr. Martens' testimony which indicated that he confirmed the closure and destruction of Marla's tubes by visual observation, citing expert testimony that visualization is inadequate and that confirmation of the destruction of the tube must be confirmed through the use of an ohmmeter.

¶10 In contending that Dr. Martens was negligent in his performance of the tubal cauterization, the Weisses also relied on evidence that Marla's baby was born in a normal uterine delivery, and that there was no ectopic pregnancy as would commonly result if pregnancy occurred after a tubal cauterization. In addition, they relied on evidence that similar parts of a person's body heal at similar rates, contending that if the right tube recanalized, the left tube should also have recanalized, but it did not. Finally, in contending that Dr. Martens used an improper technique in performing the cauterization, they relied on evidence that Dr. Rebecca Lawrence performed a second tubal cauterization on Marla after the birth of the baby, that the procedure took longer when Dr. Lawrence performed it, and that recanalization did not occur after the second procedure.

¶11 As this discussion makes clear, the evidence presented and relied upon by the Weisses constituted a full and complete explanation of the pregnancy—namely, that Marla became pregnant fifteen months after the tubal cauterization was performed by Dr. Martens because Dr. Martens failed to properly cauterize her right fallopian tube. They therefore proved "too much," and were not entitled to a res ipsa loquitur instruction.[1] *See* ***id.*** at 17.

¶12 Relying on ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶34, 241 Wis. 2d 804, 623 N.W.2d 751, the Weisses contend that doubt has been cast on the third part of the test for a res ipsa loquitur instruction, and that they were entitled to the instruction because they satisfied the first two parts of the test. ***Lambrecht*** is distinguishable. It was an appeal from a summary judgment granted in favor of the defendant in an automobile accident case before trial. The supreme court concluded that the defendant could not defeat a negligence claim grounded on res ipsa loquitur at the summary judgment stage merely by showing a possible non-negligent cause of the accident. ***Id.***, ¶¶4-8. It did not address when a res ipsa loquitur instruction is warranted in a medical malpractice trial. Because appellate courts reviewing whether a res ipsa loquitur instruction was properly given or denied in medical malpractice cases have applied the three-part test set forth above, we do so here. *See, e.g.,* ***Richards***, 200 Wis. 2d at 674; ***Fiumefreddo v.***

[1] The Weisses also contend that specific negligence and res ipsa loquitur may be pled in the alternative, and that evidence tending to show negligence does not automatically foreclose reliance on res ipsa loquitur. While this is true, it does not change the rule that the doctrine of res ipsa loquitur may not be applied when, as here, the plaintiffs have provided a full and complete explanation of the event. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 603-04, 492 N.W.2d 167 (Ct. App. 1992). ***Lambrecht v. Estate of Kaczmarcyzk***, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751, is inapposite because in that case, no party contended that the evidence provided a complete explanation of the events that transpired. *See* ***id.***, ¶46.

McLean, 174 Wis. 2d 10, 17, 496 N.W.2d 226 (Ct. App. 1993); ***Lecander***, 171 Wis. 2d at 601-02.

¶13 In any event, even if we consider only the first two standards, we conclude that the res ipsa loquitur instruction was properly denied. The trial testimony of Dr. Fredrick Broekhuizen indicated that post-tubal sterilization pregnancies occur despite the use of appropriate techniques, resulting from recanalization or fistula formation or some other opening of the fallopian tube.[2] He testified that the failure of a sterilization, by itself, does not establish negligent care, and that "even in the best of hands" there can be a failure of the procedure used here. He opined to a reasonable degree of medical probability that there can never be a guarantee that a pregnancy will not follow after a tubal sterilization, and that "failure rates will occur under the most optimal circumstances."

¶14 Dr. Brian Bear provided similar testimony, opining that Dr. Martens complied with the proper standard of care when he performed the tubal sterilization on Marla, and that, even with the best of care, there is no guarantee that a pregnancy will not occur.[3] Even Dr. Slupik conceded that a tube could reopen without a breach of the standard of care by the treating surgeon.

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[2] Dr. Broekhuizen further testified that in reviewing the records, he found no evidence that improper technique was responsible for Marla's failed sterilization, and concluded, to a reasonable degree of medical probability, that the failure occurred despite the use of the appropriate techniques.

[3] Other evidence that supported a finding that the pregnancy occurred as a result of the healing of Marla's body and recanalization included evidence that Marla had previously had a caesarian section, but had only limited signs of scarring from it. In addition, in contrast to the testimony regarding visual observation relied on by the Weisses, other evidence presented at trial supported a finding that Dr. Martens had relied on an ohmmeter to determine that the cauterization of Marla's fallopian tubes was complete.

¶15 Because the evidence established that pregnancy can occur even when a tubal sterilization is properly performed, the Weisses were not entitled to a res ipsa loquitur instruction.[4] The trial court therefore properly denied their request.

¶16 The Weisses also argue that the trial court erroneously exercised its discretion by refusing to give the jury a modified instruction on informed consent. A physician's responsibility under the informed consent law is set forth in WIS. STAT. § 448.30 (2005-06).[5] The physician must inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of those treatments. ***Id.*** The physician's duty to disclose the risks of treatments and procedures is limited to those risks that a reasonable person would want to know. ***Hannemann v. Boyson***, 2005 WI 94, ¶38, 282 Wis. 2d 664, 698 N.W.2d 714. "Thus, it is not sufficient for a patient to demonstrate that in hindsight he would not have undergone the procedure if he had been appraised of the risks; rather, there must be proof that a reasonable person, when appraised of the risks involved, would not have consented to the procedure in question." ***Id.*** "[W]hat a physician must disclose is contingent upon what, under the circumstances of a given case, a reasonable person in the patient's position would

[4] In contending that they satisfied the first prong of the test for giving a res ipsa loquitur instruction, the Weisses rely on a portion of Dr. Broekhuizen's testimony in which he acknowledged that pregnancy is not an "ordinary" result of tubal sterilization if the procedure is performed properly. They contend that this satisfies their burden of presenting evidence "that the event in question would not ordinarily occur unless there was negligence." However, based on the undisputed evidence indicating that pregnancies occur even when treating physicians are not negligent, the res ipsa loquitur instruction was properly denied. *See* ***Trogun v. Fruchtman***, 58 Wis. 2d 569, 592, 207 N.W.2d 297 (1973). *See also,* ***Lecander***, 171 Wis. 2d at 601 (the rarity of an event alone is insufficient to satisfy the requirement that a result does not ordinarily occur absent negligence.)

[5] All references to the Wisconsin Statutes are to the 2005-06 version.

need to know in order to make an intelligent and informed decision." ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 639, 545 N.W.2d 495 (1996).

¶17 The evidence at trial indicated that, prior to surgery, Dr. Martens did not discuss with Marla the risk of pregnancy that remained after a tubal sterilization. Marla testified that if she had known about the risk of becoming pregnant after the procedure, she would have had the tubal cauterization, but would also have used another form of birth control. She testified that in her case, that would have been abstinence.

¶18 Based upon this evidence, the Weisses argued at trial that Dr. Martens was negligent under the informed consent law for failing to advise Marla of the risk of pregnancy after the tubal sterilization procedure. The Weisses also requested a modified instruction and special verdict on informed consent, asking the jury to determine whether the Weisses would have undertaken additional precautions to avoid pregnancy if Dr. Martens had informed Marla about the risk of pregnancy after tubal sterilization.

¶19 The trial court denied the Weisses' request for a modified instruction and special verdict. Instead, it instructed the jury in accordance with the pattern instruction set forth in WIS JI—CIVIL 1023.1. It stated:

> Question three on the special verdict asks: Did Dr. Martens fail to disclose information about the failure rates of tubal sterilizations necessary for Marla Weiss to make an informed decision.
>
> A doctor has the 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.
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> 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 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 the medical procedure.
>
> The doctor must inform the patient whether the procedure is ordinarily performed in circumstances confronting the patient, whether alternative procedures approved by the medical profession are available, what the outlook is for success or failure of each alternative procedure, and the benefits and risks inherent in each alternative procedure.
>
> However, the physician's duty to inform does not require disclosure of the following.… Risks apparent or known to the patient. Extreme remote possibilities that might falsely or detrimentally alarm the patient.…
>
> …
>
> If Dr. Martens offers to you an explanation as to why he did not provide information to Marla Weiss and if this explanation satisfies you that a reasonable person in plaintiff's position would not have wanted to know that information, then Dr. Martens was not negligent.
>
> Question five in the special verdict is a cause question. A physician's failure to disclose necessary information is a cause of a plaintiff's injury if the failure to inform was a substantial factor in producing the present condition of the plaintiff's health.

¶20 In conjunction with these instructions, Question No. 3 of the special verdict asked the jury: "Did Dr. Martens fail to disclose information about the failure rates of tubal sterilizations necessary for Marla Weiss to make an informed decision?" Question No. 4 asked: "If a reasonable person placed in Marla Weiss's position had been provided necessary information about the failure rates of tubal sterilizations, would that person have proceeded with the treatment?"

¶21 A trial court has broad discretion in choosing how to instruct the jury. ***State v. Lenarchick*¸** 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). Grounds for reversal do not exist when the overall meaning communicated by the

instructions is a correct statement of the law. ***Finley v. Culligan***, 201 Wis. 2d 611, 620, 548 N.W.2d 854 (Ct. App. 1996).

¶22 The trial court also has significant discretion in crafting the special verdict. *See* ***Runjo v. St. Paul Fire and Marine Ins. Co.*¸** 197 Wis. 2d 594, 602, 541 N.W.2d 173 (Ct. App. 1995). This court will not interfere with the trial court's exercise of discretion so long as all issues of ultimate fact are covered by appropriate questions. ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶7, 256 Wis. 2d 848, 650 N.W.2d 75.

¶23 The trial court's instructions accurately set forth the law related to informed consent. The Weisses were permitted to argue that Dr. Martens violated his duty by failing to inform Marla about the risk of becoming pregnant after undergoing a tubal cauterization procedure. After listening to the evidence and the Weisses' argument, and after being specifically asked whether Dr. Martens failed to disclose information about the failure rates of tubal sterilizations necessary for Marla Weiss to make an informed decision, the jury found that he had not failed to disclose necessary information. The jury was entitled to make this determination based on evidence that the risk of pregnancy after a tubal cauterization procedure is remote.

¶24 While the Weisses argue that Question No. 4 should have asked the jury whether Marla would have undertaken additional precautions to avoid pregnancy if Dr. Martens had informed her about the risk of pregnancy, rather than asking whether she would have proceeded with the sterilization procedure,

nothing in WIS. STAT. § 448.30 or current case law supports such a determination.[6] The trial court's instruction and the special verdict accurately stated the law, and nothing in the facts of this case necessitated modification.[7] Any expansion of the law related to informed consent in the manner requested by the Weisses must be left to the Wisconsin Supreme Court or the legislature. It is not the function of this court, which is an error-correcting court. *See* ***State ex rel. Swan v. Elections Bd.***, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986).

¶25 The Weisses' final argument is that the jury verdict was perverse, reflecting the jury's intent to nullify the law allowing for the recovery of damages in wrongful birth cases. In support of this argument, they rely on the fact that the jurors awarded "$0" in damages, despite being instructed to answer the damages question regardless of their answers to the other special verdict questions, and despite uncontroverted evidence showing the existence of damages.

¶26 The Weisses' argument fails based on well-established law providing that, when a jury has answered other questions so as to determine that the defendants are not liable and that determination is supported by credible evidence, the failure to award damages does not render the verdict perverse. *See*

[6] Because the jurors ultimately answered Question No. 3 "No," they were not required to answer Question No. 4. Because the jury's answer to Question No. 3 precluded them from answering Question No. 4, the respondents argue that any error in Question No. 4 was harmless. We need not decide the harmless error issue because we are not persuaded that Question No. 4 was improper.

[7] The Weisses' reliance on ***Schuster v. Altenberg***, 144 Wis. 2d 223, 424 N.W.2d 159 (1988) to argue that they were entitled to a modified instruction and special verdict is misplaced, since ***Schuster*** was a "failure to warn" case, and did not deal with the law of informed consent. *See* ***id.*** at 226.

Sell v. Milwaukee Auto. Ins. Co., 17 Wis. 2d 510, 519-20, 117 N.W.2d 719 (1962).

¶27 In support of their claim that the verdict was perverse, the Weisses also rely on statements made by a prospective juror during voir dire. However, they do not dispute the respondents' representation that this prospective juror was struck through use of a peremptory strike.[8]

¶28 The Weisses have made no showing that the jury that decided their case was not impartial. When an appellant claims that a trial court erred in refusing to strike a juror for cause based upon bias, but does not claim that he was deprived of an impartial jury, the reviewing court must consider whether the error affected the substantial rights of the appellant. ***State v. Lindell***, 2001 WI 108, ¶111, 245 Wis. 2d 689, 629 N.W.2d 223. The substantial rights of a party are not affected or impaired when a single peremptory strike is used to correct a circuit court error. ***Id.***, ¶113. Therefore, even assuming the prospective juror should have been struck for cause, no basis for relief on appeal has been shown.

¶29 Because none of the Weisses' arguments provide a basis for disturbing the verdict or ordering a new trial, the judgment is affirmed.

By the Court.—Judgment affirmed.

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

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[8] It is unclear which of the parties struck the prospective juror, but it is undisputed that he was struck.