COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1508

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

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

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Albert, Patricia and John Carini (the Carinis) appeal from a judgment dismissing their claim against the Medical Protective Company and the Wisconsin Patients Compensation Fund (collectively, MPC) that their obstetrician was negligent with respect to obtaining informed consent during prenatal care, labor, and delivery. They claim that the jury instructions prejudiced the jury and misstated the law. While a portion of the jury instructions were inartfully worded, we conclude that the total instructions to the jury were accurate and proper. We affirm the judgment.

¶2 John Carini was born on September 28, 1992. His mother was under the care of Dr. Patricia Liethen during the pregnancy. It was later determined that John was not born two weeks premature, as Dr. Liethen had calculated, but five weeks premature.[1] John suffered from respiratory distress syndrome and was later diagnosed with spastic diplegia cerebral palsy.

¶3 The Carinis brought this action alleging that Dr. Liethen was negligent with regard to treatment. They claimed that because Dr. Liethen knew Patricia had recently stopped taking birth control pills and that she had a negative February 7, 1992 pregnancy test, an ultrasound should have been performed to date the pregnancy and labor stopped to prevent the baby's premature birth.[2] They also alleged that Dr. Liethen was negligent in failing to inform them of alternative

[1] At Patricia's first prenatal examination, Dr. Liethen calculated the baby's due date as October 13, 1992, based on Patricia's last reported menstrual period commencing January 7, 1992.

[2] When labor did not progress, Dr. Liethen ruptured the amniotic membrane to further stimulate labor.

medical procedures during prenatal dating of the pregnancy and during labor and delivery. A jury trial was held. The jury found that Dr. Liethen was not negligent in her care and treatment of Patricia. On appeal, we reversed the circuit court's refusal to submit the issue of informed consent to the jury and remanded the case to the circuit court for a new trial only on the issue of informed consent. ***Carini v. The Med. Protective Co.***, No. 97-1819, unpublished slip op. at 12 (Wis. Ct. App. May 13, 1998).

¶4 Prior to the commencement of the second trial, MPC requested a special jury instruction regarding the applicable standard of care, to inform the jury that the care and treatment of Patricia was not at issue, and to explain that Patricia had a duty to provide a complete and accurate medical history to Dr. Liethen. The Carinis objected, arguing that the previous no negligence verdict was irrelevant and that there was no evidence to support the suggestion that Patricia failed to present an accurate medical history.[3] The circuit court determined that the proposed special instruction was appropriate in assisting the jury in understanding the full impact of the case and to focus the jury only on the issue of informed consent.[4] Thus, the jury was given the following special instruction before opening statements:

> You are instructed that this Court has determined that Dr. Liethen did conform with the standard of care of a reasonable family practitioner providing obstetric care to Patricia Carini during her pregnancy, labor, and delivery of John Carini, including the dating of the age of the fetus

[3] The Carinis filed a brief in opposition to the motion. The record does not include a transcript of the motion hearing at which MPC's motion was first considered and ruled on in part.

[4] This reflects the circuit court's reasoning on the first day of trial when MPC's motion was discussed again based on the Carinis' motion for reconsideration and to decide unresolved portions of the motion.

> during the pregnancy. In this case, the only issues relating to the conduct of Dr. Liethen involve informed consent. Dr. Liethen is to be judged as to whether she conformed to the standard of the reasonable family practitioner practicing under the same or similar circumstances given the state of medical knowledge as of 1992 relative to the obtaining or need to obtain informed consent from Mrs. Carini as to utilizing prenatal ultrasound and alternatives, if any, to handling labor. In connection with this instruction, you are advised that Mrs. Carini had a duty to give a complete and accurate medical history and pregnancy-related information to Dr. Liethen, and Mrs. Carini's failure to do so may operate to relieve Dr. Liethen of the duty to discuss the risks and benefits of prenatal ultrasound and alternative methods of treatment during labor.

¶5 At the final instruction conference, the Carinis again objected to the above special instruction on the ground that it tended to confuse the jury, that it was not relevant to the issues, and that it was prejudicial in leaving the jury to speculate why the case was presented to it when there had been a determination that Dr. Liethen did nothing wrong. The final instruction included only a slight variation based on clarifying language the parties agreed on. The special instruction was prefaced as follows: "In order to clarify a prior reading of a special instruction, you are instructed that in a previous trial, it was determined that Dr. Liethen did conform with the standard of care of a reasonable family practitioner."

¶6 The jury's verdict was that Dr. Liethen did not fail to adequately inform Patricia of the risks and benefits of a prenatal ultrasound and of rupturing the amniotic membrane during labor. In their motion after verdict, the Carinis renewed their objection to the special instruction. The circuit court denied the Carinis' motion for a new trial and entered judgment dismissing the action.

¶7 Our standard of review is carefully outlined in ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428-29, 543 N.W.2d 265 (1996). "[A] circuit court

has broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case." ***Id.*** at 428. The instructions should not be unduly favorable to any party. ***Id.*** In determining whether the challenged instruction or part of an instruction is erroneous, the instruction should not be fractured into segments or considered out of context; we consider whether as a whole the instructions adequately and properly informed the jury. ***Id.*** at 429. Even if the instruction is erroneous, a new trial is not warranted unless the error is prejudicial. ***Id.***

¶8 The Carinis first argue that the special instruction improperly influenced the jury and thereby encroached upon the province of the jury by informing the jury that the trial court had already determined that Dr. Liethen was not negligent. They equate the instruction with an expression that the trial court had "assessed the entire case and determined that the defendant did nothing wrong." They argue that the trial court "basically told the jury what the final result of the case should be" and "what to decide." They suggest that the error was reinforced when the instruction made reference to the standard of care of the reasonable family practitioner. Thus, the jury could find in favor of the Carinis only if it disagreed with the trial court's predetermination of the case.

¶9 We observe that the special instruction was necessary because of the potential for jury confusion. The trial included evidence about Dr. Liethen's care and treatment of Patricia. Any reasonable jury would think it was being asked to evaluate the case for medical malpractice and not the more specialized, less familiar, concept of informed consent.[5] The instruction at both the beginning and

[5] We concur with the trial court's assessment that absent the special instruction, the "jury's going to be in limbo in terms of understanding the full impact of this case that we're trying."

end of trial served to inform the jury that the focus was not on the quality of treatment because that issue had already been determined.[6] Indeed, it separated the two issues for the jury and directed the jury to the issue it was asked to decide.

¶10 The use of the phrase "this Court" in informing the jury on the previously determined issue did not strongly convey to the jury that the trial court had predetermined the issue at hand in this trial. While it may have been better to have attempted to "de-personalize" the instruction,[7] the potential prejudice was reduced by the trial court's instruction to the jury that it disregard any impression it may have about the judge's feelings about the case. WIS JI—CIVIL 120. We assume that the jury follows an admonitory instruction. ***Sommers v. Friedman***, 172 Wis. 2d 459, 468, 493 N.W.2d 393 (Ct. App. 1992). We conclude that the instruction did not invade the province of the jury or convey the trial court's assessment of the case.

¶11 We turn to consider the Carinis' claim that the instruction misstated the law with regard to informed consent. The Carinis point to the language that

[6] We observe that the instruction informed the jury not only that the quality of care issue had been decided by a previous jury, but also who had prevailed on that issue. In our view, it is irrelevant who won and who lost. The jury had to know that the quality of care issue had previously been decided and was not to be revisited by the jury. Instead, the jury was to concern itself only with the more narrow issue of whether the doctor negligently informed the Carinis. It is further our view that such signaling of who prevailed posed the danger of prejudicing the Carinis' case. However, our observation did not take the form of an objection by the Carinis. The Carinis' position was that *no* instruction should have been given. As we state in the body of the opinion, we disagree and hold that the trial court properly decided to give such an instruction. Our problem is with the non-neutral content of the instruction. Had the Carinis argued for a neutral instruction, rather than no instruction at all, and had the trial court denied it, this would have been a much closer case. But that did not occur.

[7] The Carinis also argue that it was error to instruct the jury at the end of the case that "in a previous trial" it was determined that Dr. Liethen had rendered adequate care. The substitution of the phrase "in a previous trial" for "this court" was made upon agreement of the parties. No claim of error can be made based solely on the substituted phrase.

Dr. Liethen "is to be judged as to whether she conformed to the standard of the reasonable family practitioner practicing under the same or similar circumstances." They contend that Wisconsin does not use the "reasonable physician" standard but rather what the reasonable patient would have expected under the same circumstances. *See* ***Scaria v. St. Paul Fire & Marine Ins. Co.***, 68 Wis. 2d 1, 13, 227 N.W.2d 647 (1975). They argue that the failure to focus the jury on the reasonable patient standard was compounded when a defense expert witness testified that he would have done exactly as Dr. Liethen did under the circumstances.

¶12 We might agree with the Carinis that the reference in the special instruction to only the reasonable doctor standard was a misstatement of the law if it were the only instruction given. After reading the special instruction, the trial court also gave the standard instruction on informed consent, WIS JI—CIVIL 1023.2.[8] This instruction explained the reasonable patient standard.[9] So the issue

[8] The instruction was:

> 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 treatment proposed.
>
> The doctor's disclosure must be sufficient to enable a reasonable person, situated as was the patient, to understand: his or her existing physical condition, the risks to his or her life or health which the treatment imposes, and the purposes and advantages of the treatment.
>
> The doctor must inform the patient whether the treatment proposed 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 risks inherent in each alternate procedure.
>
> If, however, the doctor has come forward and offers to you an explanation as to why the doctor did not make a disclosure to the

(continued)

becomes whether the special instruction obscured the standard given to the jury under WIS JI—CIVIL 1023.2. We conclude that it did not because of the interrelationship between the reasonable expectations of the patient and the reasonableness of the doctor's corresponding conduct. It is the doctor's duty to determine what a reasonable patient in the same position would want to know. ***Brown v. Dibbell***, 227 Wis. 2d 28, 51, 595 N.W.2d 358 (1999). That determination is based in part on the doctor's assessment of what the patient is able to understand, what risks may be apparent or known to the patient, and whether the patient would be falsely or detrimentally alarmed by the disclosure of remote possibilities connected with treatment. *See* ***Scaria***, 68 Wis. 2d at 13. Thus, the reasonableness of both the doctor and patient are relevant considerations. The special instruction set forth the standard to evaluate the reasonableness of the doctor's conduct but did not overshadow the reasonable patient standard. As a whole, the jury instruction was not a misstatement of the standard applicable on informed consent.

¶13 The Carinis next challenge that portion of the special instruction referencing contributory negligence. They first contend that it was error to

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> plaintiff, and if such explanation satisfies you that it was reasonable for the doctor not to have made such disclosures, you will find that the defendant did not fail in the duties owed by the doctor to the patient.

[9] We recognize that the last paragraph of the standard instruction has been found to be misleading because "it can be construed as stating that the question of a doctor's failure to disclose information is to be answered from the doctor's perspective." ***Brown v. Dibbell***, 227 Wis. 2d 28, 58, 595 N.W.2d 358 (1999). The ***Brown*** decision preceded the trial in this matter. There was no objection to the inclusion of the last paragraph and the Carinis have not challenged the standard instruction on appeal. MPC's motion to strike a portion of the reply brief is denied because the brief does not directly challenge the standard instruction. Additionally, the claim that expert witness testimony compounded focus on the doctor's perspective is waived because there was no objection to the testimony.

mention contributory negligence because it was neither pled nor proven. MPC's answer to both the complaint and amended complaint included the affirmative defense of contributory negligence. Patricia testified that she believed her last menstrual cycle was February 11, 1992. Patricia informed Dr. Liethen that her last menstrual cycle was January 7, 1992, and she denied any spotting or bleeding since her last menstrual period. Patricia answered negatively to Dr. Liethen when asked if she had a history of twins or multiple births in the family. Yet Patricia indicated that in a prior pregnancy an ultrasound had been ordered because of the history of twins in her family. ***Brown***, 227 Wis. 2d at 48-49, recognizes that a defense of contributory negligence can arise from a patient's duty to tell the truth and give complete and accurate information about personal, family and medical histories in response to inquiries from the doctor. ***Brown*** also explains that the available defenses are not limited to those set forth in WIS. STAT. § 448.30 (1999-2000).[10] ***Brown***, 227 Wis. 2d at 57. This was a case in which contributory negligence could be a defense.

¶14 The Carinis' second contention is that the special instruction misstated the law with respect to contributory negligence because it is only in rare circumstances that contributory negligence can be found. *See* ***id.*** at 46-47. They argue that this is not a case of extraordinary facts justifying a defense of contributory negligence. ***Brown*** discusses three aspects of a patient's duty to exercise ordinary care for the patient's health and well-being. The first is the duty to give a truthful, complete and accurate history in response to the doctor's inquiry. *See* ***id.*** at 48-49. The other two aspects are a patient's duty to ask a

[10] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

doctor or independently seek out specific information the patient wants to know and the patient's duty to make a reasonable choice consistent with the patient's concerns between the viable modes of treatment. *See* ***id.*** at 49-50. In ***Brown***, the court rejected the notion that contributory negligence could be based on the last two aspects discussed, except in an extraordinary fact situation. ***Id.*** at 51, 53. An extraordinary fact situation is not necessary for contributory negligence to exist with respect to the patient's duty to respond to inquiry with a truthful, complete and accurate history, the aspect of contributory negligence presented by this case. Thus, the reference in the special instruction to Patricia's duty to provide a complete and accurate medical history and pregnancy-related information was not a misstatement of the law.

¶15 The Carinis argue rather obliquely that the special instruction improperly informed the jury that any contributory negligence by Patricia would exonerate Dr. Liethen. The instruction is not worded to convey that any contributory negligence is an absolute bar to recovery. The instruction merely states that contributory negligence "may operate to relieve Dr. Liethen of the duty to discuss the risks and benefits of prenatal ultrasound and alternative methods of treatment during labor." The instruction is perhaps inartfully worded with respect to the effect of a finding of contributory negligence.[11] However, the instructions as a whole properly stated the applicable standard on informed consent. Additionally, not until motions after verdict did the Carinis suggest to the trial court that the specific language regarding contributory negligence was misleading;

[11] There was no special verdict question on contributory negligence. Consequently, the reference to contributory negligence was not a specific charge to the jury for determination. Patricia's failure to give a truthful, complete and accurate history—the alleged contributory negligence here—was but a factor for the jury to consider in evaluating the interrelationship between the reasonableness of the doctor's conduct and the patient's expectations.

they had merely argued before trial that this was not a contributory negligence case. We properly decline to review an issue on appeal when the trial court has not been given fair notice of a particular issue and that a particular ruling is sought. ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984).

¶16 In a final effort to impugn the giving of the special instruction, the Carinis argue that undue emphasis was placed on the inaccurate special instruction when it was given at the beginning and end of the trial and read during the cross-examination of one witness. The trial court's discretion with respect to the giving of instructions extends to emphasis. ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). We have already concluded that giving the special instruction at the commencement of the trial was proper in order to focus the jury and remove the impression that this was an ordinary medical malpractice case. A jury instruction may be utilized in the examination of witnesses as the predicate for specific questions. The special instruction was also properly made part of the closing instructions so as to again focus the jury on the correct issues. We cannot conclude that the trial court erroneously exercised its discretion in utilizing the special instruction.

By the Court.—Judgment affirmed.

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