COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2406 **Cir. Ct. No. 2004CV3848**

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

LYNNE WALTON, TIMOTHY WALTON, KYLE WALTON, COURTNEY WALTON AND JACOB WALTON BY THEIR GUARDIAN AD LITEM, PAMELA J. SMOLER,

PLAINTIFFS-APPELLANTS,

V.

NANCY DEATON, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC. AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 HIGGINBOTHAM, J. Lynne Walton appeals a judgment entered on a jury verdict dismissing her informed consent and medical negligence claims

against Dr. Nancy Deaton, and an order denying her motion for a new trial on the informed consent claim. Walton allegedly suffered injuries resulting from the vaginal delivery of her son, Kyle. She alleges that Dr. Deaton failed to discuss with her treatment and diagnostic options that may have mitigated her injuries, including a late-term ultrasound to ascertain the baby's size and a cesarean section delivery.

¶2 During the trial, Dr. Deaton's medical experts were asked to render an opinion about whether a reasonable physician would offer the treatment options of a late-term ultrasound and a cesarean delivery to a patient in Walton's circumstances. In Walton's view, such questions were not consistent with the informed consent statute, WIS. STAT. § 448.30 (2007-08),[1] which imposes a patient-based standard that requires disclosure of all viable treatment options, not just those options a reasonable physician would customarily disclose under the circumstances. Walton further argues that the trial court improperly denied her request for a limiting instruction that would have directed the jury to disregard certain testimony when considering the informed consent claim. She also contends that the court erred in allowing expert testimony and references made by defense counsel during closing arguments that were based on treatises and other literature published after the 2001 birth. We reject Walton's arguments, and conclude that the trial court did not misuse its discretion in admitting the objected-to testimony, or in admitting certain expert testimony about medical literature. We further conclude that, by failing to include a relevant portion of the trial transcript

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

in the appellate record, Walton forfeited her objection to the denial of her request for a limiting instruction. Accordingly, we affirm.[2]

BACKGROUND

¶3 Dr. Nancy Deaton is a family practitioner with Group Health Cooperative in Madison who provided obstetrics services to her patients. She had been Lynne Walton's primary care physician for several years prior to the delivery of Walton's third child, Kyle, in December 2001. Dr. Deaton treated Walton during all three of her pregnancies and was the physician who delivered Kyle.

¶4 Walton, who was 5' 2" and weighed 120 pounds at the time of Kyle's birth, delivered Kyle vaginally on December 27, 2001. Following the appearance of the head, the baby's shoulder became stuck in the birth canal. Dr. Deaton attempted to release the shoulder and requested assistance from the obstetrician on call at the hospital, who performed an episiotomy on Walton to successfully dislodge the baby's shoulder and complete the delivery. Kyle was born 11 pounds 10 ounces. Walton presented evidence that, as a result of the delivery, she suffered rectal, vaginal, and nerve damage, as well as chronic pain and a lack of bowel and bladder control. Since her son's birth, Walton has undergone twelve surgeries, and she is unable to work full-time.

¶5 Walton subsequently filed suit, alleging that her injuries were caused by Dr. Deaton's medical negligence, and that Dr. Deaton had failed to obtain

[2] We note that the fact section of Walton's brief lacks proper cites to the record. *See* WIS. STAT. § 809.19(1) (appellant's brief must include cites to parts of the record relied on). For example, two entire paragraphs end with a single cite to Record 223, Trial Exhibit 356. However, after examining six boxes of trial exhibits, we found no Exhibit 356 in the record. It appears that only 188 Exhibits were offered at trial, and that they were numbered sequentially from 1 to 188.

Walton's informed consent because she did not discuss with Walton the risks and benefits of performing a late-term ultrasound or a delivery by cesarean section.[3]

¶6 After a two-week trial, the jury found that Dr. Deaton was not negligent with respect to her care and treatment of Walton, and that she had provided Walton adequate information to obtain her informed consent for treatment. Walton moved for a new trial on her informed consent claim, and the trial court denied her motion and entered judgment on the jury verdict. Walton appeals that portion of the judgment dismissing her informed consent claim, and the order denying her motion for a new trial.[4]

DISCUSSION

¶7 Walton contends that the trial court erroneously allowed testimony by Dr. Deaton's medical experts about whether a reasonable physician would have discussed the treatment options of a late-term ultrasound and a caesarean section with Walton and erroneously denied her request for a limiting instruction directing the jury to disregard certain expert testimony when deciding the informed consent claim. She argues that, as a result, the court failed in its gate-keeping function

[3] Walton appears to argue that Dr. Deaton also failed to discuss with her the option of obtaining a referral to an obstetrician or of something the parties refer to as "going post-dates." We do not address these potential bases for Walton's informed consent claim because she failed to adequately raise them in the trial court. The informed consent special verdict question did not ask the jury to determine whether Deaton failed to obtain Walton's informed consent on the basis that Deaton failed to discuss the option of being referred to an obstetrician. In addition, Walton does not present a fully developed argument on either topic before this court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

[4] The record does not include a transcript of the hearing on the postverdict motion.

under WIS. STAT. § 904.03,[5] causing the jury to be "hopelessly confused" about Dr. Deaton's duty to obtain Walton's informed consent for the course of treatment. Walton also contends that the trial court erred in allowing testimony related to medical treatises published after 2001, the year of Kyle's birth.

¶8 This appeal concerns the admission of evidence by the trial court and the failure to provide a limiting instruction. Although Walton does not specifically state the relief she requests, we infer from her postverdict motion and her appellate brief that she seeks a new trial based on trial court error. We review a trial court's denial of a WIS. STAT. § 805.15(1) motion for a new trial under the erroneous exercise of discretion standard. *See* ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 476, 543 N.W.2d 277 (1996). Likewise, we will uphold a trial court's decision to admit or exclude evidence absent a misuse of discretion. *See* ***State v. Walters***, 2004 WI 18, ¶13, 269 Wis. 2d 142, 675 N.W.2d 778. A trial court has broad discretion in determining the relevance and admissibility of evidence. ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶9 Our review of the evidentiary rulings at issue in this case requires us to interpret Wisconsin's informed consent statute, WIS. STAT. § 448.30. Statutory

[5] WISCONSIN STAT. § 904.03 states in pertinent part that a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of … confusion of the issues …."

interpretation presents a question of law that we review de novo. ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶26, 313 Wis. 2d 542, 753 N.W.2d 496.

¶10 We independently review whether a particular jury instruction is appropriate under the specific facts of a given case. ***State v. Groth***, 2002 WI App 299, ¶8, 258 Wis. 2d 889, 655 N.W.2d 163, *overruled on other grounds by* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.

Informed Consent

¶11 WISCONSIN STAT. § 448.30 imposes a duty on "[a]ny physician who treats a patient [to] … inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments."[6] Enacted in 1981, this statute codified the prudent-patient standard of

[6] WISCONSIN STAT. § 448.30 provides in full:

> 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.

informed consent adopted in ***Scaria v. St. Paul Fire & Marine Ins. Co.***, 68 Wis. 2d 1, 227 N.W.2d 647 (1975). In ***Scaria***, the supreme court concluded that a physician's duty to inform was not limited to information that other medical professionals in good standing would customarily disclose. *See* ***id.*** at 12. Rather, the ***Scaria*** court enunciated a standard for informed consent that was based on what a reasonable patient would want to know under the circumstances:

> In short, the duty of the doctor is to make such disclosures as appear reasonably necessary under circumstances then existing to enable a reasonable person under the same or similar circumstances confronting the patient at the time of disclosure to intelligently exercise his right to consent or to refuse the treatment or procedure proposed.

Id. at 13.

¶12 Walton contends the trial court erred in allowing testimony from Deaton's medical experts regarding the disclosures a *reasonable physician* would have made under the same or similar circumstances, rather than what a *prudent patient* would want to know under the same or similar circumstances, in violation of the applicable legal standard for informed consent claims. We disagree.

¶13 Walton correctly points out that WIS. STAT. § 448.30 establishes a patient's perspective-based standard for determining whether a physician complied with her or his duty to obtain informed consent. However, Walton ignores case law explaining that, to determine whether a physician has complied with this duty, it is appropriate to consider expert medical testimony concerning what a competent physician in good standing, i.e. a "reasonable physician," would consider adequate disclosure under the same or similar circumstances. *See* ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 633, 545 N.W.2d 495 (1996). "The disclosures which would be made by doctors of good standing, under the same or

similar circumstances, are certainly relevant and material" to the question of what constitutes informed consent under the circumstances. ***Scaria***, 68 Wis. 2d at 12. Thus, although the evidentiary value of such testimony is limited because "ultimately the extent of the physician's disclosures is driven by what a reasonable person under the circumstances then existing would want to know," ***Johnson***, 199 Wis. 2d at 633 (citations omitted), such evidence is plainly admissible.

¶14 Furthermore, a jury instruction properly focused the jury's inquiry on the treatment options a reasonable person in Walton's position would have wanted to discuss with her physician under the circumstances.[7] It reads in part:

> To meet th[e] duty to inform her patient, the doctor must provide her patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject a medically appropriate diagnostic test or medically viable alternative 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 medically appropriate diagnostic test or a medically viable procedure.

¶15 Turning to Walton's argument regarding the trial court's rejection of her proposed limiting instruction, we decline to reach the merits on forfeiture grounds.[8] After denying Walton's request, the court left open the possibility of

[7] On appeal, Walton complains that the inclusion of the term "viable" in addressing the concept of alternative procedures added to the jury's confusion, noting that the pattern civil jury instruction no longer includes this term because it "is not easily understood by jurors." WIS JI—CIVIL 1023.1 Professional Negligence: Medical: Informed Consent: Special Verdict, Comment p. 7 (2006). Because "viable" appears in the language of WIS. STAT. § 448.30, we question whether its inclusion in the jury instruction would have been erroneous. Regardless, Walton has forfeited the right to raise such an objection by failing to object to the instruction in the trial court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed waived).

[8] Walton cites one instance in which the trial court denied her request for a limiting instruction, asserting that this was but one of several such erroneous denials. However, she has (continued)

giving such an instruction at the end of the trial should Walton renew the request. The problem is that Walton does not tell us whether she, in fact, made her request for the instruction at the end of the trial, and the transcript of the jury instruction conference is not included in the appellate record. The jury instructions are included in the record, but we cannot tell from reviewing them whether Walton renewed her request for a limiting instruction during the instruction conference. Thus, we are unable to determine whether Walton requested a limiting instruction at that time.

¶16 As the appellant, Walton bears the responsibility to insure that the record includes all documents pertinent to the issues raised on appeal. *See* ***Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.***, 209 Wis. 2d 457, 469, 563 N.W.2d 554 (citation omitted). Because the appellate record is incomplete, we must assume the missing parts of the record support the trial court's ruling. ***Id.*** at 470. We therefore conclude that Walton forfeited her request for a limiting instruction by failing to make such a request at the end of the trial.[9]

Medical Treatises

¶17 Walton argues that the trial court erred by permitting Dr. Deaton's medical expert witnesses to testify about and rely on medical treatises and literature ostensibly published after Kyle's birth in support of their opinions regarding what information Deaton should have provided to Walton. She also

---

once again failed to provide record cites for these additional allegations of trial court error. We therefore do not consider them in our analysis. *See* WIS. STAT. § 809.19(1).

[9] In the informed consent section of her brief, Walton also appears to make a sufficiency of the evidence argument. Because this argument is not fully developed, we do not consider it. *See* ***Pettit***, 171 Wis. 2d at 646-47.

argues that the trial court should have sustained her objections to Deaton's attorney's references to these publications during closing arguments. Walton's assertions of trial court error apparently stem from references made by Deaton's attorney to the "current literature" or the "most recent" literature on late-term ultrasounds and cesarean sections.

¶18 The problem with Walton's argument is that she fails to identify any treatise or article Deaton's medical experts relied on in rendering their opinions or the publication dates of this literature. In addition, the phrases "current literature" and "most recent literature" do not appear to be an indication that the literature was so current that it post-dated Kyle's birth. Rather, these phrases appear to be assertions that the information is more recent than that contained in the treatises relied on by Walton's medical expert, some of which dated back to the 1960s. We therefore conclude that the trial court did not misuse its discretion in permitting this testimony of Deaton's experts and in permitting references to "current literature" and the "most recent literature" in closing argument.

CONCLUSION

¶19 In sum, we conclude that the trial court did not erroneously exercise its discretion in allowing testimony of Dr. Deaton's medical experts concerning what information a reasonable physician would disclose to a patient. We also conclude that Walton forfeited her objection to the trial court's denial of her request for an instruction directing the jury to disregard certain testimony for purposes of the informed consent claim. We further conclude that the trial court did not misuse its discretion in rejecting Walton's objections to the defense's reference to the learned treatises and articles relied on by Deaton's medical experts as the "current" or "most recent" literature. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.