**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 21, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-2187** **Cir. Ct. No. 99-CV-583**

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

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**SANDRA L. WOJTASIAK AND EDWARD WOJTASIAK,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**PODIATRY ASSOCIATES, S.C., THOMAS N. TILKENS, D.P.M., PODIATRY INSURANCE COMPANY OF AMERICA, AND BROWN COUNTY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Sandra and Edward Wojtasiak appeal a judgment dismissing their medical malpractice action against Dr. Thomas Tilkens after a jury found Tilkens not negligent. The Wojtasiaks contend that the trial court erred

when it (1) admitted expert testimony from Dr. Richard Reinherz; (2) refused to admit prior deposition testimony during Dr. Joseph Cullen's videotaped trial testimony where Tilkens' counsel made no objection during the taping; and (3) refused to give the medical res ipsa loquitur instruction to the jury. We reject these arguments and affirm the judgment.

## BACKGROUND

¶2 Sandra visited Tilkens in 1996 for treatment of bunions on both of her big toes. Tilkens performed surgery to correct the bunion deformity on her left foot on March 28 and on her right foot on May 9. During this procedure, the doctor uses a bone saw to make a cut in the big toe bone to put it in a more normal position. After the second surgery, Sandra was unable to move her right big toe to a downward position.

¶3 The Wojtasiaks filed suit against Tilkens alleging that Tilkens was negligent in his care and treatment of Sandra. They contend that Tilkens compromised Sandra's right longus flexor tendon by lacerating it in the course of the bunionectomy procedure, presumably through the use of the bone saw.[1]

¶4 This case was tried to a jury. Tilkens presented Reinherz as a podiatry expert witness. The trial court admitted Reinherz's opinion testimony because it was based on his education, knowledge and experience rather than hearsay. It did not admit a portion of videotaped testimony where the Wojtasiaks' counsel attempted to rehabilitate Cullen, an orthopedic surgeon who treated

[1] The longus flexor tendon is located directly underneath the joint where Tilkens performed the procedure. The Wojtasiaks contend that an MRI revealed that there was a void in Sandra's right longus flexor tendon, but that was disputed at trial.

Sandra, with testimony from an earlier deposition. Finally, the court refused to give the medical res ipsa loquitur instruction because it found that there was insufficient evidence to conclude that the severance of the tendon does not ordinarily occur in the absence of negligence. The jury found that Tilkens was not negligent. The Wojtasiaks appeal.

## ANALYSIS

### I. REINHERZ

¶5 The Wojtasiaks argue that Reinherz should not have been permitted to testify as to his conclusions that Sandra's tendon was intact after the procedure because his interpretation of Sandra's MRI was based upon hearsay opinions from an unidentified radiologist who read the MRI in conjunction with Reinherz. In essence, the Wojtasiaks contend that (1) Reinherz was not expressing his own opinion that the tendon was intact, but the radiologist's opinion to that effect and (2) the radiologist's opinion was the sole basis for Reinherz's own opinion. We disagree and conclude that the trial court properly admitted Reinherz's opinion because it was based on his education, expertise and experience.

¶6 Tilkens presented Reinherz as a podiatry expert witness. Reinherz testified that he only reviews MRIs in conjunction with board certified radiologists because he is not so certified. The Wojtasiaks objected that any opinions Reinherz offered interpreting Sandra's MRI would be the hearsay opinion of an unidentified radiologist. The trial court overruled the objection and permitted Reinherz to testify.

¶7 A trial court's decision to admit or exclude expert testimony is a discretionary determination. ***Green v. Smith & Nephew AHP***, 2001 WI 109, ¶89,

245 Wis. 2d 772, 629 N.W.2d 727. The determination must have a reasonable basis and be made in accordance with accepted legal standards and in accordance with the facts of record. ***Id.*** We sustain the trial court's discretionary decision if the court "examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Id.***

¶8 The Wojtasiaks start from the mistaken premise that Reinherz's opinions were based solely on the radiologist's findings. They argue that Reinherz's testimony exceeds WIS. STAT. § 907.03[2] because his opinion was nothing more than an unidentified radiologist's interpretation of Sandra's MRI. However, this was not the exclusive basis of Reinherz's opinion that Sandra's tendon was intact. Viewing the entirety of Reinherz's testimony, as summarized below, we conclude that Reinherz's opinion was also based on his experience and training.

¶9 Reinherz gave many other bases for his opinion that the tendon was intact that a jury could rely upon in addition to the MRI results. Reinherz testified that "[t]here has been no demonstration in the records that I have reviewed that there was anything done during the surgery which was abnormal or below the standard of care." He further stated that even if Tilkens cut the tendon during

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[2] WISCONSIN STAT. § 907.03 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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

surgery, he would not necessarily have fallen below the standard of care. Reinherz also opined that it is impossible for the bone saw to cut a tendon because the saw is not designed to cut soft tissue. Finally, Reinherz stated that if the tendon had been cut, Sandra's big toe would have been pulled upward by the opposing tendon, causing irritation to the top of the toe, and Sandra's medical records do not reveal any evidence of irritation. Thus, Reinherz gave many reasons based on his training and experience that Tilkens did not cause Sandra's injury.

II. CULLEN

¶10 Next, the Wojtasiaks argue that the trial court erred by striking relevant portions of Cullen's videotaped deposition when it was played at trial where Tilkens' counsel made no objection to the testimony at the time of the deposition. We sustain the trial court's discretionary determination if the court reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). Here, the trial court properly determined that Tilkens had not waived the right to object.

¶11 Cullen testified at the trial by videotape. At one point, the Wojtasiaks' counsel asked Cullen whether his opinion that the saw caused the alleged injury was to a reasonable degree of medical probability. Cullen indicated that it was the "most likely possibility." The Wojtasiaks' counsel attempted to rehabilitate Cullen's testimony by introducing portions of an earlier deposition where Cullen answered a similar question by saying it was "the most likely thing." Although there had been no objection to the use of the prior deposition testimony

during the videotaping, Tilkens' counsel objected at trial. The trial court sustained the objection.

¶12 It is not required that all objections to videotaped testimony be made at the time of the taping.[3] The Wojtasiaks rely on WIS. STAT. § 804.07(3)(c)2 and argue that "had a proper objection been raised at the time of taking the deposition, Plaintiffs' counsel could have asked the question in a different manner without reliance upon the deposition transcript …." Section § 804.07(3)(c)2 states that:

> Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

¶13 At trial, however, Tilkens was not objecting to the form of the question proposed to Cullen at the discovery deposition. Rather, his counsel objected to the Wojtasiaks' counsel's improper attempt to use that testimony to rehabilitate Cullen and his opinion regarding cause to a reasonable degree of medical certainty.

¶14 Tilkens' counsel objected not to the form of the question, but to the fact that Cullen already had been asked and answered the question. The trial court held that the prior deposition testimony could not be introduced because it was not being offered for either of its proper uses, as a prior inconsistent statement or to refresh Cullen's memory. *See generally* WIS. STAT. ch. 908. The Wojtasiaks do

[3] *See* WIS. STAT. § 885.44(14).

not argue that the trial court's evidentiary ruling was erroneous. They contend only that the objection was waived. It was not.

## III. RES IPSA LOQUITUR

¶15 Finally, the Wojtasiaks argue that the trial court erred when it failed to give the medical res ipsa loquitur instruction, WIS JI-CIVIL 1024.[4] The instruction should be given when

> (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which has occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

***Lecander v. Billmeyer***, 171 Wis. 2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992).

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[4] WISCONSIN JI-CIVIL 1024 provides:

> If you find that (name the part of the body that was injured) of (plaintiff) was injured during the course of the operation performed by (Dr. _____) and if you further find (from expert medical testimony in this case) that the injury to the (name the part of the body that was injured) (plaintiff) is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, you may infer, from the fact of surgery to the (name the part of the body that was injured) of (plaintiff), that (Dr. _____) failed to exercise that degree of care and skill which surgeons usually exercise. This rule will not apply if (Dr. _____) has offered an explanation for the injury to the (name the part of the body that was injured) of (plaintiff) which satisfies you that the injury to (plaintiff) did not occur through any failure on (Dr. _____)'s part to exercise due care and skill.

¶16 Whether the instruction should be given is a question of law we review de novo. ***Id.*** at 602. However, appellate courts ordinarily defer to the trial court's discretionary determination whether evidence satisfies the last of the three requirements necessary to support the instruction. ***Id.*** at 602-03. Here, the evidence offered was not sufficient to "remove the causation question from the realm of conjecture." ***Id.*** at 602.

¶17 None of the experts the Wojtasiaks refer to in their briefs testified that a severed flexor tendon does not ordinarily occur in the absence of negligence, and they all gave reasons for how the injury occurred. Further, Tilkens offered evidence that the tendon was intact, that the injuries did not occur from the surgery and that such injuries can occur in the absence of negligence. Because the evidence conflicts regarding the causation of Sandra's injury, this is not a res ipsa loquitur case. Therefore, the trial court did not err by refusing to give the instruction.

*By the Court.*—Judgment affirmed.

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