COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0244 **Cir. Ct. No. 99 CV 4412**

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

BRIAN MAU, DAWN MAU, AND JORDAN AND AMELIA MAU, BY THEIR GUARDIAN AD LITEM,

PLAINTIFFS-APPELLANTS,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION AND WISCONSIN HEALTH INSURANCE RISK SHARING PLAN,

SUBROGATED-PLAINTIFFS-CO-APPELLANTS,

V.

WISCONSIN PATIENTS COMPENSATION FUND, MARK M. BENSON, M.D., MARK M. BENSON, S.C., AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Brian, Dawn, Jordan and Amelia Mau (collectively, "Mau") appeal judgments[1] dismissing their action against Dr. Mark Benson, Mark Benson S.C., Wisconsin Patients Compensation Fund and Physicians Insurance Company of Wisconsin, Inc.[2] After a three-week jury trial in this medical malpractice case, the jury found that Brian Mau's doctor, Dr. Mark Benson, was not negligent in operating on him or treating him. The issues are: (1) whether the circuit court erred in refusing to give the requested *res ipsa loquitor* instruction; and (2) whether the circuit court erred in deciding not to present the issue of informed consent to the jury. We affirm.[3]

¶2 Mau first argues that the circuit court erred in refusing to give a *res ipsa loquitor* instruction. The doctrine of *res ipsa loquitor* allows a presumption of negligence in certain circumstances. ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 598 n.2, 492 N.W.2d 167 (Ct. App. 1992). The circuit court may give a *res ipsa loquitor* instruction when any of the following factors are present:

> (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

[1] Two separate judgments were entered in this case, apparently because the Wisconsin Patients Compensation Fund was not included in the first judgment.

[2] Wisconsin Physician Service Insurance Corporation and Wisconsin Health Insurance Risk Sharing Plan are co-appellants. They have joined the appellants' brief filed by the Maus.

[3] The appellants also argue: (1) that the circuit court erred in allowing the jury to consider payments to the Mau family from collateral sources to reduce the damage award; and (2) that the circuit court erred in concluding that Brian Mau's stepchild, who lives exclusively with his mother and Brian, was not allowed to recover damages for loss of society and companionship. Because we affirm the verdict, we do not reach these issues.

> 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.

Id. at 601-02. On appeal, our review of the circuit court's *res ipsa loquitor* instruction decision varies depending on which factor is being reviewed. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 19-20, 531 N.W.2d 597 (1995). We review the circuit court's decision on factors (a) and (b) as mixed questions of fact and law, and the circuit court's decision on factor (c) for an erroneous exercise of discretion. ***Id.***

¶3 The circuit court refused to give the *res ipsa loquitor* instruction for several reasons, but we address only one.[4] Dr. Meub, Mau's expert witness, testified that there were only four possible causes of Mau's injury: (1) misuse of a medical instrument (a ronguer) during surgery; (2) misuse of cottonoids during surgery; (3) compression of the nerve by Gelfoam; or (4) compression of the nerve by a hematoma (a blood clot) that developed after surgery. Dr. Meub also testified that the last of these, compression of the nerve root by a hematoma, can arise as a result of the surgery without any negligence on behalf of the surgeon. The circuit court reasoned that the instruction should not be given because expert testimony showed that one of the possible causes of Mau's condition could have occurred without negligence. Our review of the testimony and evidence satisfies us that the circuit court properly concluded that Mau was not entitled to the *res ipsa loquitor* instruction as a matter of law because Mau's condition could have arisen as a

[4] Mau challenges the circuit court's decision not to give the *res ipsa loquitor* instruction on a number of other grounds. Because the circuit court properly refused to give the instruction because one of the possible causes of Mau's injury was non-negligent, we need not address Mau's other arguments.

result of something beyond Dr. Benson's control. *See* ***Lecander***, 171 Wis. 2d at 602 n.2 (the circuit court should give a *res ipsa loquitor* instruction when "an expert testifies that the result which has occurred does not ordinarily occur in the absence of negligence").

¶4 Even so, Mau contends that a *res ipsa loquitor* instruction was still proper because, if a hematoma caused nerve compression leading to nerve root damage, the hematoma is the *mechanism* by which the nerve root was damaged, but the *cause* of the damage was Dr. Benson's negligent failure to diagnose and treat the hematoma. For purposes of determining whether a *res ipsa loquitor* instruction should have been given, this analysis is too attenuated. Mau's condition could have been caused in several different ways, at least one of which—compression of the nerve by a hematoma—could have occurred without any negligence. Whether subsequent actions taken by the doctor in treating Mau and diagnosing the cause of his pain after surgery conformed to the proper standard of care is a separate issue, which the circuit court properly submitted to the jury as such.[5]

¶5 Mau next argues that Dr. Benson violated the informed consent law. Wisconsin's informed consent statute provides: "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."

[5] Mau also argues that the instruction should have been given even if there was a possible non-negligent cause of his injuries, relying on ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751. Mau's reliance is misplaced. ***Lambrecht*** was an appeal from a summary judgment in favor of a defendant *before the trial*. The supreme court concluded that a defendant cannot defeat a negligence claim grounded on the doctrine of *res ipsa loquitor* at that early stage of proceedings simply by showing a possible non-negligent cause of the accident. ***Id.***, ¶¶4-8.

WIS. STAT. § 448.30 (2001-02).[6] "[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 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).

¶6 Mau first contends that Dr. Benson should have informed him prior to surgery that he had alcohol and drug problems, thereby allowing Mau to choose a different surgeon if he so desired.[7] Mau relies on ***Johnson***, contending that the supreme court has expanded the doctrine of "informed consent" to require disclosure of physician-specific information that can affect a plaintiff's choice of surgeons. Mau reads ***Johnson*** too broadly. ***Johnson*** addressed whether a doctor must inform a patient about his experience and expertise relating to a specific surgical procedure when asked by the patient for that information. ***Id.*** at 623. It does not require disclosure of personal information about a physician that has no relevance to a particular course of treatment. Here, the evidence introduced in camera to the circuit court showed that Dr. Benson had not been using drugs in the months before, during and after Mau's surgery, a fact substantiated by random drug testing. We agree with the circuit court that, as a matter of law, Dr. Benson had no obligation to inform Mau about his history of drug and alcohol abuse under

[6] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[7] Mau also asserts that Dr. Benson was suffering pain and other problems with his surgical hand, but does not develop this argument. We note, however, that the circuit court did allow evidence that Dr. Benson had problems with his hand as a result of injuries in a car accident and allowed testimony on the fact that he had applied for disability based on the damage to his hand.

the informed consent law because Dr. Benson was not using those substances during the period in which he operated on Mau.[8]

¶7 Mau's second claim that the informed consent law was violated is based on his contention that Dr. Benson should have told him about the availability after surgery of a diagnostic MRI to rule out two potential causes of his pain, damage to the nerve root caused by Gelfoam or a hematoma. We agree with Dr. Benson that this argument presupposes that Mau complained of severe right-sided pain following the surgery. However, medical records presented at trial suggested that Mau did not complain of severe right-sided pain because medical personnel attending him after his surgery made no notations in the medical chart that Mau was experiencing severe right-sided pain, although Mau's other pain and discomfort were noted.[9] Dr. Benson did not have a duty to inform Mau about certain diagnostic tools and alternative treatments if Mau did not present symptoms suggesting those tools or treatments were necessary. Here, the factual dispute about what symptoms Mau presented after surgery and Dr. Benson's consequent actions were properly submitted to the jury for decision in the context of the negligence claim. Mau was not entitled to have the issue of informed consent submitted to the jury on this point because he did not show, through hospital records or testimony by medical personnel, that he had presented symptoms that would trigger the need for a discussion on treatment options.

---

[8] Mau also contends that the circuit court should have allowed him "full discovery" as to Dr. Benson's misuse of drugs and alcohol. The circuit court properly exercised its discretion in limiting discovery because it already had before it proof, in the form of regular random drug tests, that Dr. Benson was not using drugs and alcohol in the months before, during and after the surgery.

[9] Despite any documentation of severe right-sided pain after surgery in the medical charts, we note that Mau and his family testified at trial that he did experience right-sided pain.

¶8 Finally, Dr. Benson and the Physicians Insurance Company of Wisconsin move for double costs based on Mau's failure to comply with some of the briefing rules. *See* WIS. STAT. RULE 809.83(2). We conclude that the requested relief is not warranted.

By the Court.—Judgments affirmed.

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