COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1829 **Cir. Ct. No. 00CV23**

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

FRANCES E. JALOWITZ, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF PETER G. JALOWITZ,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., MIDELFORT CLINIC, LTD. AND LUTHER HOSPITAL

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

M. TERRY MCENANY, M.D.,

DEFENDANT-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Barron County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Frances E. Jalowitz, individually and as Special Administrator for the Estate of Peter Jalowitz, appeals judgments dismissing her claims against M. Terry McEnany, M.D., Luther Hospital, Midelfort Clinic and Physicians Insurance Company of Wisconsin, Inc. She also appeals an order denying her motions after verdict.[1] Jalowitz makes a number of factually laden arguments in support of her contention that the circuit court erroneously (1) directed a verdict on her informed consent claim; (2) entered summary judgment on her negligent credentialing claim; (3) made numerous erroneous evidentiary rulings: excluding her "California evidence," ruling that her credentialing expert witnesses' testimony was inadmissible and rejecting evidence offered on the issue of credibility. She further claims the court erroneously denied her motion for a new trial in the interest of justice.

¶2 Because the jury returned a verdict finding no negligence by McEnany, Jalowitz's informed consent and negligent credentialing arguments fail for lack of causation. The record lacks support for her claim that the court erroneously exercised its discretion with respect to its evidentiary rulings. Therefore, the record reveals no basis for a new trial in the interest of justice. Consequently, Jalowitz's arguments are rejected.

[1] Jalowitz's notice of appeal also states that it appeals a number of nonfinal orders entered prior to the judgment. Pursuant to WIS. STAT. RULE 809.10(4), an appeal from a final judgment brings before the court all prior nonfinal orders and rulings adverse to the appellant. Therefore, we do not specifically enumerate each prior nonfinal order and ruling.

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

¶3 The hospital, clinic and insurer cross-appeal an order denying their motions under WIS. STAT. §§ 802.05 and 814.025 for sanctions for filing and continuing frivolous claims. In addition, they move for sanctions for bringing a frivolous appeal. We reject their arguments. Consequently, we deny their motion and affirm the judgment and order.

Background

¶4 Jalowitz brought this action alleging medical malpractice by M. Terry McEnany, M.D., following the 1997 death of his patient, eighty-one year old Peter Jalowitz, who had undergone surgery to repair an aortic valve. Peter, who had an enlarged heart and a history of severe aortic stenosis, was at risk of sudden death without the surgery. Preoperative x-rays showed congestive heart failure and hypertrophy of the left ventricle.

¶5 After a referral from his cardiologist, Peter met with McEnany, who obtained a history and performed a physical examination during their forty- to fifty-minute conference.[2] McEnany's report states that following "a long

[2] As to be expected, the record discloses conflicting evidence. However, instead of fairly summarizing the testimony, Jalowitz's "Statement of Facts" is a "tendentious recap" of her view of her case. *See* ***Albrechtsen v. Board of Regents***, 309 F.3d 433, 435 (7th Cir. 2002). No opportunity to disparage her opponents' positions is missed and any facts that might support their positions do not see the light of day. *See* ***id.***; *see also* WIS. STAT. RULE 809.19(1)(d). Also, her description of the trial court's decisions on a number of issues is abbreviated and unhelpful. Her approach conflicts with the norm that "supposes that the parties have presented the evidence to the court of appeals in a digestible fashion, so that we may evaluate the record's contents." ***Albrechtsen***, 309 F.3d at 435.

The respondents' briefs similarly re-cap their defense cases. Here, however, the sufficiency of the evidence is not an issue raised on appeal. Even if it were, on review, we accept the jury's verdict if there is any credible evidence to support it, ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659, reviewing the record for evidence that supports the verdict and accepting any reasonable inferences the jury could reach. ***In re Quinsanna D.***, 2002 WI App 318, ¶39, 259 Wis. 2d 429, 655 N.W.2d 752. Our brief factual summary is consistent with our standard of review.

(continued)

discussion" with Peter, his wife and son, "regarding the various options, including surgical and non-surgical therapy. … [T]he risks and gains of aortic valve replacement utilizing a pericardial venograft," Peter agreed to proceed with the operation.

¶6 At trial, one of Jalowitz's medical experts, Dr. Robert Wuerflein, testified that Peter was an excellent candidate for the surgery. Wuerflein described the aortic valve replacement surgery as a "very simple procedure" for a trained, experienced cardiac surgeon. There is no challenge to McEnany's credentials as a trained, experienced cardiac surgeon.

¶7 On October 1, 1997, at the outset of the surgery, while Peter's chest was being opened, a small vein, the innominate vein, was torn. Wuerflein testified that McEnany promptly and appropriately noticed the tear and clipped the ends of the vein with surgical clips. According to Wuerflein, with the exception of the tearing of the innominate vein, it "was an uncomplicated surgery" and the valve replacement was "uneventful." Peter "came out of the operating room with good vital signs, blood pressure, pulse, temperature, all of that." During the ten days following surgery, there was no problem with the aortic valve function.

Also, we would be remiss if we did not comment on the tone of the briefs, particularly on cross-appeal. We caution counsel that in their professional endeavors, lawyers "at all times" must display "a cordial and respectful demeanor." SCR 62.02(1)(a). They must refrain from "disparaging, demeaning or sarcastic" remarks and abstain from "uncivil, abrasive, abusive, hostile or obstructive" conduct. SCR 62.02(1)(c) and (d). In their written and spoken words, lawyers have the responsibility to display "courtesy, good manners and dignity." SCR 62.02(4). Abusive and disparaging remarks provide no tactical advantage and, in fact, are counter-productive. Courts have the inherent authority to impose sanctions for incivility. ***Aspen Servs., Inc. v. IT Corp.***, 220 Wis. 2d 491, 495-96, 583 N.W.2d 849 (Ct. App. 1998). Also, incivility may constitute grounds for public admonishment. ***In re Disciplinary Proceedings Against Coe***, 2003 WI 117, ¶41, 265 Wis. 2d 27, 665 N.W.2d 849. Further, impertinent language may be stricken from a pleading or a brief. *See* WIS. STAT. §§ 802.06(6), 809.83(2) and 809.84.

¶8 Wuerflein acknowledged the cardiologist's progress note the day after the surgery that Peter looked great, was awake and alert. However, on October 10, when Peter was beginning dialysis treatment, he went into cardiac arrest. McEnany performed a prolonged resuscitation. The following morning, Peter's condition had deteriorated and an echocardiogram McEnany ordered indicated blood pooling around the heart, causing a condition called tamponade.[3] McEnany performed an emergency sternotomy to relieve the tamponade. Although the surgery relieved the tamponade, Jalowitz never recovered from the cardiac arrest and passed away on October 24.

¶9 In January 2000, Jalowitz filed this action, alleging negligence in obtaining informed consent, negligence in performing the surgery and negligent post-operative care. The complaint also alleged negligence on the part of the hospital and clinic and negligent credentialing of McEnany.

¶10 Pretrial motions were extensive. The court granted the hospital and clinic's motion to bifurcate Jalowitz's negligence and informed consent claims against McEnany from her negligent credentialing claims against the hospital and clinic. Also before trial, the parties sought rulings on evidence concerning McEnany's surgical practice in California prior to his accepting his 1993 registration and subsequent position in Wisconsin. Jalowitz sought to admit evidence that included accusations of negligence against McEnany and a memorandum of an agreement with the California medical facility where he had

[3] A tamponade is a constriction of the heart that limits its ability to fill with blood. Dr. Wuerflein, testifying as an expert witness for Jalowitz, explained that a tamponade is a common type of complication that can occur following any cardiac surgery. He stated that it does not need to be specifically discussed with the patient.

been employed as a surgeon that he would not perform surgery without the assistance of another staff cardiovascular surgeon. The memorandum stated that this was a "temporary solution to potentially reduce the situations where [the doctor] exposes himself (and subsequently, the patient) unnecessarily to problems by doing complex operative procedures with inadequate assistance." While the review of the allegations was pending, McEnany accepted employment in Wisconsin at Luther Hospital and Midelfort Clinic, ending his practice in California. The California hospital subsequently terminated the review and filed no reports with the California medical board, later agreeing to pay a penalty for the lack of filing.

¶11 After the trial court held numerous hearings on the discovery and admissibility of this "California evidence," it ultimately ruled that proof of McEnany's surgical practice years earlier in California was not admissible at the informed consent and negligent care and treatment phases of the trial. Subsequently, the trial court entered summary judgment dismissing Jalowitz's credentialing claim against the hospital and clinic. The hospital and clinic filed motions for sanctions for a frivolous claim, which were denied. The case proceeded to trial against McEnany on the issues of informed consent and negligent care and treatment.

¶12 In January 2003, following three years of pretrial discovery and motion hearings, a six-day jury trial took place. On the third day of trial, the court dismissed Jalowitz's informed consent claim against McEnany. Jalowitz was given the opportunity outside the presence of the jury to submit an offer of proof on the informed consent issue. The court ruled, in effect, that the offer of proof was insufficient to support her informed consent claim and directed a verdict of dismissal.

¶13 The trial proceeded on Jalowitz's negligent care and treatment claim. Much of the medical testimony admitted at trial concerned the tamponade that developed following Peter's surgery. The medical expert witnesses disagreed as to the source of the bleeding that led to the tamponade. McEnany and his expert witness, Dr. William Pierce, testified that it was unrelated to the surgery and probably resulted from the resuscitation efforts, which required pressure on the chest.

¶14 Pierce testified that the tamponade occurred sometime between the resuscitation and the following morning when the chest x-ray revealed it. He testified that because Peter was being dialyzed, he had been given a blood thinner, which would have made him more susceptible to bleeding. He believed that an electrical conduction, change in drugs or change in fluid status led to Peter's asystolic arrest.

¶15 Wuerflein, testifying on behalf of Jalowitz, stated that the tamponade was a substantial factor in causing Peter's cardiac arrest. Wuerflein believed that the tamponade was related to Peter's death, related to Peter's kidney dysfunction and related to the dialysis. He testified the torn innominate vein could have been a source of bleeding. He acknowledged however, that none of the six physicians who were caring for Peter were aware of the tamponade developing. Nonetheless, he believed McEnany was negligent in failing to diagnose it earlier than he did. Wuerflein also stated that the reason the cardiac arrest occurred then will never be known exactly, explaining that during dialysis Peter became acutely low on blood volume and his heart stopped beating.

¶16 Dr. William Moores, a retired cardiac surgeon, a second medical expert for Jalowitz, testified that no one knows for sure what the source of the

bleeding was. He testified that the arrest did not cause the tamponade. Based on his review of almost one thousand pages of medical records, he testified on direct that the tamponade should have been diagnosed on the second or third day after surgery.

¶17 Nonetheless, on cross-examination, Moores acknowledged his deposition testimony to the effect that the removal of pacing wires on October 7 may have been a source of the tamponade. He further observed that post-operatively Peter had several uneventful episodes of dialysis before the one during which he had the arrest.

¶18 Jalowitz's third medical expert, Dr. Patrick Hughes, a cardiologist, believed the tamponade was present before Peter's arrest and decreased the probability of Peter's recovery. Hughes testified that the tearing of the innominate vein was one of two possible causes of the tamponade.[4] He did not know if the vein bled after it was clipped during surgery. On cross-examination, Hughes acknowledged that when he was asked at a deposition whether the tearing of the innominate vein led to the tamponade, he had responded, "Only God knows." Hughes acknowledged that some of Peter's symptoms had been inconsistent with tamponade. Hughes also testified that he studied the case thoroughly and was not able to say what the cause of the arrest was, but it was not the kind that is caused by a tamponade. He could not associate Peter's cardiac arrest with anyone's actions. Hughes testified that in spite of all due care, people do die following aortic valve replacement surgery necessitated because of severe stenosis.

[4] The other potential cause of the bleeding may have been due to Dr. Daniel Kincaid's difficulty inserting a catheter dialysis device because of the torn innominate vein. Jalowitz was critical of McEnany for not informing Kincaid of the torn innominate vein.

¶19 The jury ultimately returned a verdict finding that McEnany was not negligent in the care and treatment he provided to Peter. The court denied Jalowitz's motions after verdict, rejecting her argument that its evidentiary rulings provided a basis for a new trial. The court explained it understood why Jalowitz wanted the California evidence to be admitted, because it was "juicy stuff to get in front of a jury and see if you can obscure the main issue here of what was important," which was whether Peter received negligent care and treatment. The court concluded that even if the California evidence were relevant, it was "of such limited relevance that the prejudicial effect would be outweighed under 904.03 of the statutes." The court concluded that the jury accepted McEnany's and his expert witness's testimony. It entered judgment dismissing Jalowitz's claims; this appeal and cross-appeal follow.

Discussion

A. Appeal

1. *Informed Consent Claim*

¶20 Jalowitz argues that the trial court erroneously directed a verdict dismissing her informed consent claim, where there was credible evidence that McEnany failed to inform Peter of information a reasonable patient would want to know concerning the risks of proceeding with the operation by McEnany. She argues that McEnany violated his duty by failing to disclose to Peter the California memorandum regarding an agreement requiring McEnany to perform surgery only with another staff cardiovascular surgeon assisting. We conclude that any error Jalowitz claims the court may have made with respect to the dismissal of the informed consent claim was rendered harmless by the jury's verdict finding no

negligence with respect to Peter's care and treatment. Therefore, her argument provides no basis for reversal.

¶21 The court properly grants a directed verdict when it considers "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made" and determines that "there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). Whether the trial court erroneously directed the verdict is a question of law we review de novo. ***Weiss v. United Fire & Cas. Co.,*** 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995).

¶22 Wisconsin's informed consent law, codified in WIS. STAT. § 448.30, requires a physician to disclose information necessary for a reasonable person to make an intelligent decision with respect to the choices of treatment or diagnosis.[5]

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[5] WISCONSIN STAT. § 448.30 reads:

> **Information on alternate modes of treatment.** 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.

(continued)

Montalvo v. Borkovec, 2002 WI App 147, ¶12, 256 Wis. 2d 472, 647 N.W.2d 413. Information regarding risk is material when "a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy." ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 631, 545 N.W.2d 495 (1996) (citing ***Canterbury v. Spence***, 464 F.2d 772, 787 (D.C. Cir. 1972)). Material information includes "all information regarding 'the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated.'" ***Id.*** (citation omitted). The standard to which a physician is held is determined not by what the particular patient being treated would want to know, but rather by what a reasonable person in the patient's position would want to know. ***Id.***

¶23 To prevail on an informed consent claim, the plaintiff must establish that: "(1) the patient was not told of risks and alternatives; (2) the patient would have chosen an alternative if he or she had been adequately informed; and (3) the failure to disclose information was a cause of the patient's injuries." ***Fischer v. Wisconsin Patient's Compensation Fund***, 2002 WI App 192, ¶8, 256 Wis. 2d 848, 650 N.W.2d 75.

¶24 Jalowitz contends that the causal element requires showing that the patient would have elected against the procedure and that the patient suffered

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(6) Information in cases where the patient is incapable of consenting.

some harm.[6] We conclude that Jalowitz's characterization of the cause element is incomplete. To prove causation, there must be a causal connection between the undisclosed risk and the harm to the patient. ***Fischer***, 256 Wis. 2d 848, ¶8.

¶25 As in malpractice actions generally, there must be a causal connection between a physician's failure to disclose and injury to the patient. ***Scaria v. St. Paul Fire & Marine Ins. Co.***, 68 Wis. 2d 1, 13, 227 N.W.2d 647 (1975). "Tort-based informed/consent law requires a showing that the failure to disclose information caused actual injury." ***Painter v. Dentistry Exam. Bd.***, 2003 WI App 123, ¶14, 265 Wis. 2d 248, 665 N.W.2d 397.

¶26 If the jury finds that a reasonable patient, suitably informed of the risks, benefits and viable alternatives, would have refused the proposed treatment, the jury must also be asked whether the failure to disclose the necessary information was a cause of the patient's injury. ***Martin v. Richards***, 192 Wis. 2d 156, 166, 531 N.W.2d 70 (1995). In ***Martin***, our supreme court explained that having answered in the affirmative the question whether the patient would have agreed to the alternate forms of care and treatment had he been informed of their availability, "the jury must then be asked, in effect, whether the alternate forms of care and treatment would have made a difference, i.e., whether the same or similar injuries would have resulted even if the injured party availed himself or herself of the alternate treatment." ***Id.*** at 182.

[6] We reject the hospital and clinic's argument that Jalowitz conceded that injury causation was required and not proved at trial. A review of the cited transcript, in which her attorney states that the patient's decision must be shown to "make a difference," is not sufficiently specific for this court to determine what counsel meant. Therefore, we conclude it is not a concession.

¶27 Accordingly, the ***Martin*** case held that the special verdict was defective for failing to ask the jury whether a physician's negligence in not informing a minor patient's parents of alternative forms of care and treatment was a cause of the patient's injury. ***Id.*** at 182-83.[7] Therefore, a plaintiff must prove not only that a reasonably prudent patient, adequately apprised of all material risks and viable alternatives, would have chosen a different course of treatment or care, but also must show that the undisclosed risk actually materialized and was caused by the treatment.[8]

¶28 On appeal, Jalowitz argues that she established that the undisclosed risk caused harm because the "physician specific information at issue here," i.e., the undisclosed restriction on Dr. McEnany's operating privileges in California, evidenced "his incompetence and risk to patient safety." Based upon the record before us, the logical structure of her argument fails. Her contention ultimately depends on her claim that the undisclosed risk of complications from the surgery performed by McEnany actually materialized and was caused by McEnany. The jury, however, rejected her claim that McEnany was negligent and caused any harm. Therefore, the causal connection between McEnany's failure to disclose and any injury is absent.

¶29 Because the causal connection is absent, Jalowitz's claim of error with respect to the directed verdict and the court's informed consent analysis would not possibly affect the outcome of the action. As a result, her claims of

[7] In ***Martin***, our supreme court held, however, that the parties had waived their claim of error for failing to object to the form of the verdict. ***Martin v. Richards***, 192 Wis. 2d 156, 183, 531 N.W.2d 70 (1995).

[8] *See also* WIS JI—CIVIL 1023.3 (2004).

error fail to demonstrate grounds for reversal. *See* WIS. STAT. § 805.18; *see also* ***Nowatske v. Osterloh***, 201 Wis. 2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996).

¶30 Nonetheless, while Jalowitz does not directly challenge the jury's finding of no negligence, she contends that because the trial court erroneously excluded a newspaper article, the California evidence and credentialing information, the verdict of no negligence cannot stand and she is entitled to a new trial in the interest of justice. We turn to the court's evidentiary rulings and, for the reasons that follow, conclude that the record supports the trial court's exercise of discretion.

2. *Evidentiary issues*

¶31 A trial court's decision to admit or exclude evidence is a discretionary determination that will not be overturned if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). In the exercise of its discretion, the trial court must determine whether relevant evidence must be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03. The court may consider whether the evidence would divert the trial to an extraneous issue, would confuse the jury by placing undue emphasis on collateral matters, for the trial court has the responsibility of preventing a "sideshow" from overtaking the main event. ***State v. McCall***, 202 Wis. 2d 29, 38, 549 N.W.2d 418 (1996) (citations omitted).

a. The Newspaper Article.

¶32 Throughout her brief, Jalowitz makes numerous references to an April 21, 1996, MILWAUKEE JOURNAL SENTINEL newspaper article ranking Wisconsin surgeons' mortality rates.[9] The article quoted a state official that the ranking may not adequately reflect a surgeon's performance because the risk adjustment software program used did not account for all the patient risk factors that may contribute to deaths. Because the newspaper article was a non-scientific study that questioned its own reliability, the trial court reasonably exercised its discretion under WIS. STAT. § 904.03 in ruling that its probative value with respect to care and treatment was outweighed by its prejudicial effect. Because the trial court reasonably exercised its discretion, we reject Jalowitz's claim that the exclusion of the newspaper article denied her a fair trial on the issue of negligent care and treatment.[10]

¶33 In addition, we note that Jalowitz agreed on the record that the newspaper article would not be admissible on the issue of informed consent. Jalowitz also conceded that the article would not be admitted for the truth of the matters contained therein. Therefore, any claim regarding the newspaper article's admissibility on the issue of informed consent or negligent care and treatment may not now be raised on appeal. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414

[9] Jalowitz claims that the Milwaukee Journal article ranked McEnany "dead last (57 out of 57) in actual/expected mortality rates." The newspaper article actually ranked McEnany 53rd out of 57, not "dead last."

[10] In her cross-response brief, Jalowitz appends a magazine article dated June 9, 2003, asking this court to take judicial notice of its contents. We disregard items that are not part of the trial court record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

N.W.2d 311 (Ct. App. 1987) (A position on appeal that is inconsistent with that taken at trial is subject to judicial estoppel.).

b. The California Evidence.

¶34 Jalowitz essentially argues that the trial court erroneously excluded the California evidence. She contends that, like the evidence in ***Kokemoor***, it proves both a violation of McEnany's duty to obtain informed consent and causation. She further argues the California evidence should have been admitted on the issue of McEnany's credibility at trial. We reject both contentions.

i. Jalowitz's analogy to the ***Kokemoor*** case

¶35 Jalowitz contends that the California evidence was "the equivalent of the information Dr. Kokemoor was required to disclose." She claims that it should have been admitted to prove a lack of informed consent because "[t]he risk of proceeding with an operation by Dr. McEnany is implicit in the restriction that was imposed on his operating privileges … by the investigation by the Medical Board of California which demonstrated that Dr. McEnany was incompetent …." She argues that Peter could have elected to have the operation performed by another surgeon or he could have decided not to have the operation at all, constituting "viable alternatives."[11] We disagree.

[11] This portion of Jalowitz's argument omits record references. *See* WIS. STAT. RULE 809.19(1)(e). The lack of record references implies that the argument asks this court to speculate. For example, Jalowitz points to no evidence of record that a more experienced or more competent surgeon was available or, given Peter's disease, a decision not to have the surgery at all would have been a viable alternative.

¶36 In ***Kokemoor***, the plaintiff brought an informed consent claim after aneurysm surgery rendered her "an incomplete quadriplegic." ***Kokemoor***, 199 Wis. 2d at 623-24. In that case, the trial court considered whether a doctor had sufficient experience with what was one of the most difficult types of neurosurgery and whether his lack of experience with that type of surgery should have been communicated to the patient. ***Id.*** at 624. The plaintiff introduced expert testimony indicating that the "morbidity and mortality rate expected when a surgeon with the defendant's experience performed the surgery would be significantly higher than the rate expected when a more experienced physician performed the same surgery." ***Id.*** at 642-43.

¶37 The plaintiff also introduced evidence that the defendant estimated the risk of death or serious impairment associated with her surgery at two percent. "At trial, however, the defendant conceded that because of his relative lack of experience, he could not hope to match the ten-and-seven-tenths percent morbidity and mortality rate reported for large basilar bifurcation aneurysm surgery by very experienced surgeons." ***Id.*** at 643. He further admitted that he had not shared with the plaintiff information he reviewed prior to surgery establishing that even the most accomplished posterior circulation aneurysm surgeons reported morbidity and mortality rates of fifteen percent for basilar bifurcation aneurysms. ***Id.*** at 644.

¶38 The plaintiff in ***Kokemoor*** demonstrated that the estimated morbidity and mortality rate one might expect when a physician with the defendant's relatively limited experience performed the surgery would be close to thirty percent. ***Id.*** She also introduced evidence that a reasonable physician in the defendant's position would have advised her of the availability of more experienced surgeons and would have referred her to a "tertiary care facility—such as Mayo Clinic, only 90 miles away"—which contain the "proper

neurological intensive care unit [and] microsurgical facilities" staffed by neurosurgeons with the requisite training and experience to perform basilar bifurcation aneurysm surgeries. ***Id.*** at 647-48, 650.

¶39 Our supreme court concluded: "The information that is reasonably necessary for a patient to make an informed decision regarding treatment will vary from case to case." ***Kokemoor***, 199 Wis. 2d at 634 (quoting ***Martin***, 192 Wis. 2d at 175). Cautioning that disclosure of comparative risk evidence in statistical terms is not always required, our supreme court concluded nonetheless that under the facts presented, when different physicians have substantially different success rates, whether surgery is performed by one rather than another represents a choice between "alternate, viable medical modes of treatment" within the meaning of WIS. STAT. §448.30. ***Id.*** at 640. Therefore, in ***Kokemoor***, the accurate physician-specific information was shown to be material because it was evidence of greater risk of the proposed treatment.

¶40 The supreme court concluded that the record disclosed "ample evidence that had a reasonable person in [plaintiff's] position been aware of the defendant's relative lack of experience in performing basilar bifurcation aneurysm surgery, that person would not have undergone surgery with him." ***Id.*** at 641. Not only was it established that a reasonable patient in the plaintiff's position, if accurately apprised of all the risks, would have declined surgery from this doctor, the record also established that the undisclosed risk actually materialized and was caused by the treatment.

¶41 In contrast, under the circumstances presented here, Jalowitz concedes that Peter's was a routine uncomplicated surgery; her expert testified it was a relatively simple surgery for a trained cardiac surgeon, which McEnany

undisputedly was. Peter's surgery was not one in which a high morality rate was expected even if performed with all due care because a bad result was inherent to the procedure itself.

¶42 In addition, unlike ***Kokemoor***, the evidence offered at Jalowitz's trial failed to show proof of "substantially different success rates." ***Id.*** at 644-45.[12] The nondisclosure that Jalowitz complains of is not proof of medical risks but evidence of a "restriction." Jalowitz's offer of proof fails to contain evidence that the "morbidity and mortality rate expected when a surgeon with the defendant's experience [or background] performed the surgery would be significantly higher than the rate expected" when any other trained cardiac physician performed the same surgery. ***Id.*** at 642-43.

¶43 Jalowitz claims, nonetheless, that any reasonable patient would want to know about the California evidence and, once learning it, would have refused the surgery, thus establishing a violation of the informed consent statute as well as causation. However, Jalowitz fails to point to any evidence that a more qualified surgeon or facility was available to Peter. In addition, while she contends the surgery was elective, she fails to establish that electing against the surgery was a reasonable alternative, given Peter's risk of sudden death due to his heart disease. Based on the record, a jury would have to speculate whether a reasonable patient, in Peter's position, would have refused surgery. Without this evidence, there was insufficient proof that the undisclosed information was relevant to show a choice

[12] Jalowitz successfully moved to prohibit the hospital and clinic from introducing any evidence of statistics and/or statistical analysis of Dr. McEnany's rate of morbidity and mortality at Luther/Midelfort from the period of 1993 through October 1997, along with evidence of good outcomes for McEnany's patients.

between "alternate, viable medical modes of treatment" within the meaning of WIS. STAT. § 448.30. ***Kokemoor***, 199 Wis. 2d 645. Therefore, Jalowitz's analogy to ***Kokemoor*** fails.

¶44 In any event, the trial court could reasonably conclude that the probative value of the evidence in question all depended on the accuracy of the accusations made against McEnany in California in a review of his practice involving up to twenty-six matters dating from 1993 and before.[13] The record supports the trial court's concern that the trial would break down into numerous malpractice trials within the Jalowitz trial over the allegations of McEnany's negligence in the California cases, thus placing undue emphasis on collateral matters.[14] The sheer volume of the record before us irrefutably demonstrates the

[13] The record does not make clear the precise number of cases in question. At some points, the accusations appear to involve ten cases.

[14] The court also indicated that the evidence lacked probative value because it did not necessarily support Jalowitz's contention that there was a restriction. The court stated that it "read page after page after page of material *in camera* about this peer review process out in California … and I came to the conclusion from reading all these things that this wasn't a restriction." The court explained further:

> It was a procedure that was being used during peer review because the staff that was performing the peer review were not cardiothoracic surgeons or the like and so that the doctors that were sitting on this peer review panel did not feel comfortable in reviewing Dr. McEnany's performance because they weren't of the same expertise in this area. … [T]hey set up this procedure so that Dr. McEnany just during the period where he was being peer reviewed would operate with a fellow doctor that was skilled in … this … area of his profession, to wit, heart surgery. … [T]hey could then report perhaps to the peer review committee and comment on techniques and things like that.
>
> ….
>
> But the peer review was never finished because McEnany left. … The whole thing was dropped.

(continued)

time considerations, potential for distraction and confusion involved in admitting the California evidence. Therefore, we are satisfied that the trial court's considerations of undue delay, distraction and potential for confusion of the issues support its decision under WIS. STAT. § 904.03.[15]

ii. Credibility

¶45 Nonetheless, Jalowitz argues the California evidence should have been admitted on McEnany's credibility. She claims, "[a]lthough going directly to informed consent, this evidence substantially bore on Dr. McEnany's operative and post-operative care." She argues that "[i]f the investigation and the restriction had been ruled admissible, the jury likely would have found Dr. McEnany was negligent in the care and treatment of Mr. Jalowitz," apparently because they would not have believed his testimony regarding the surgery.

¶46 In support of her argument, she cites just one case, ***State v. Long***, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884, for the general proposition that the jury is entitled to assess all evidence that might bear on the accuracy and truth of a witness's testimony. In response, McEnany points out that Jalowitz filed twenty-one motions in limine successfully seeking to exclude "a

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….

[I]t extinguished when he left.

After reading the *in camera* materials, the court concluded that McEnany was not on a restriction because nothing came of this peer review.

[15] Because we conclude the trial court reasonably exercised its discretion in excluding evidence under WIS. STAT. § 904.03, we do not reach Jalowitz's challenge to the court's alternative ground that the California evidence arose as a result of confidential peer review. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

mountain of evidence bearing upon [her chief expert] Dr. Moores' competence, credibility and bias." He argues that the trial court reasonably concluded that previous allegations of malpractice diverted the jury's attention from the medical issues and the standard of care question in the case at hand.

¶47 The record reflects that the court reasonably exercised its discretion when it rejected the California evidence for the issue of credibility. In ***Nowatske***, we held that under WIS. STAT. § 906.08(1), evidence of a prior malpractice action and the pending action did not cast light on a medical expert witness's character for truthfulness or untruthfulness.[16] We explained: "The criterion of relevancy is

[16] WISCONSIN STAT. § 906.08, "Evidence of character and conduct of witness," provides:

> **(1)** OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> **(2)** SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.
>
> **(3)** TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

whether the evidence sought to be introduced would shed any light on the subject of inquiry." ***Id.*** (citation omitted). The subject of inquiry in the case was whether the defendant was or was not negligent in treating the patient. We further stated:

> The character of a witness may be impeached only in regard to matters which go directly to his [or her] reputation for truth and veracity. We have long considered that on cross-examination into the character of a witness, use of irrelevancies, insinuating that a person is of bad moral character, tending to degrade him [or her] in the eyes of the jury, is not a proper impeachment device. Virtually by definition, such evidence is not relevant, tending only to prejudice the jury against the witness.

Id. (citations omitted).

¶48 We are satisfied that the foregoing reasoning applies equally here. The reliability of the California evidence depended on the allegations of malpractice in a number of McEnany's surgical cases in California. Its relationship to character for truth and veracity was tenuous at best, while its potential for distracting the jury from the medical issues in the case before it was great. Thus, the trial court reasonably exercised its discretion when it rejected the evidence of the California evidence on the issue of McEnany's credibility.

c. Other Items of Evidence

¶49 Throughout her brief, Jalowitz alleges a number of facts without providing the context in which they arose. Therefore, her brief does not make clear whether these facts were offered, admitted or established at trial. As a result, we conclude that these facts do not support her claims of error. For example, in the first two paragraphs of the portion of her brief entitled "Facts regarding informed consent," Jalowitz's brief refers to McEnany's informed consent discussion with Peter and McEnany's former surgical practice as chief of

cardiovascular surgery at Kaiser Permanente in California. Jalowitz cites generally to record references that refer to a number of pretrial affidavits and briefs.[17] Because Jalowitz fails to indicate whether these pretrial materials were made part of her offer of proof or admitted at trial, *see* WIS. STAT. RULE 809.19(1)(d), any challenge to the court's exclusion of this material cannot be considered a ground for reversal. *See* WIS. STAT. § 901.03(1)(b).

¶50 In the remaining five pages of her informed consent fact section, Jalowitz relies on evidence of what she terms a "restriction" that was "imposed as a result of a practice review of Dr. McEnany that was conducted in California in 1993." In support of this fact assertion, Jalowitz combines references to pretrial affidavits, trial testimony and exhibits. Again, she neglects to inform us, however, whether this evidence was admitted at trial or was made part of her offer of proof.

¶51 In addition, her description of the testimony is incomplete. For example, she summarizes Moores' testimony at the offer of proof, asserting that he testified to the effect that "the restriction was not imposed as a result of a peer review. Peer review by the American Medico-legal Foundation was to take place but never did because of a deal." Jalowitz's description, however, is incomplete because it neglects the following:

> Q. [Jalowitz's counsel]: The practice review that you were in, did that reach the stage of peer review at any time?

[17] Record document number R160 is "Affidavit of Michael J. Happe in Opposition to Luther/Midelfort's Motions in Limine[;]" R161 is "Plaintiffs' Brief in Opposition to Dr. McEnany's Motions in Limine[;]" R162 is "Affidavit of Michael J. Happe in Support of Plaintiffs' Brief in Opposition to Dr. McEnany's Motions in Limine[;]" R163 is Plaintiff's Brief in Opposition to Defendants' Motion to Adjourn Trial[;]" R164 is Plaintiffs' Notice of Motion and Motion to Strike a Portion of Defendants M. Terry McEnany and Physicians Insurance Company's Notice of Lay Witnesses[;]" and R165 is Plaintiff's Motion to Strike Dr. Julie Swain as a Witness at Trial[.]"

> A. [Moores]: It reached the stage, it was peer review from the very beginning in the general sense. That is, it's a review as you would say any peer review is. It's a judgment cast upon a colleague by his peers.

Moores continued that there was a distinction to be made "in what is officially sanctioned peer review" and, to his knowledge, what he participated in was not "that formal sanctioned peer review. … So I was involved with the initial stages of the practice review which meant just evaluating what the medicine was and whether there were issues of negligence or whether the care was up to an acceptable standard." However, when asked about the affidavit of Douglas Grey, M.D., Moores testified as follows:

> Q. [Counsel]: In terms of its suggestion that all of this practice review was part of the process of peer review, is that an accurate statement for him to have made in that affidavit?
>
> A. [Moores]: That it's part of peer review? Yes.

By omitting portions of her offer of proof, Jalowitz's fact statement does not fairly summarize the record, thus unnecessarily complicating our review of her claims of error. *See* WIS. STAT. RULE 809.19(1)(d); ***Albrechtsen v. Board of Regents***, 309 F.3d 433, 435 (7th Cir. 2002).

¶52 Also, in her informed consent fact statement, Jalowitz relies on numerous documents appended to her attorney's 170-page pretrial affidavit filed with her brief in opposition to dismiss the credentialing claim. Again, Jalowitz does not clarify whether she offered this affidavit at trial as part of her offer of proof on her informed consent claim and therefore we do not consider it. *See* WIS. STAT. § 901.03(1)(b). In addition, Jalowitz makes some fact assertions with no

record references whatsoever, thereby eliminating our need to consider them.[18] *See* WIS. STAT. RULE 809.19(1)(d); ***Dieck v. Antigo Sch. Dist.***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990), *aff'd*, 165 Wis. 2d 458, 477 N.W.2d 613 (1991).

¶53 Within her argument that the trial court erroneously directed a verdict on her informed consent claim, Jalowitz makes the following assertion:

> Finally, Dr. McEnany's own expert, Dr. Pierce, testified that the restriction was severe; it was very unusual, that a patient would not agree to be operated on by a physician who had such a restriction; and that a physician with the type of restriction Dr. McEnany had on his privileges would be out of business.

Jalowitz accompanies this statement with a record reference to "R424:89-94." This reference refers to pages of Pierce's deposition appended to her attorney's affidavit filed *after* the January 2003 trial, apparently in connection with post-trial motions.[19] Pierce testified in response to hypothetical questions, stating that he had never encountered the situation described. Jalowitz provides no explanation whether Pierce's deposition testimony contained in her attorney's post-trial affidavit was, or should have been, admitted at trial, or why it should be considered "credible evidence" the trial court was to have considered in a directed

[18] For example, on page 8 of her brief, she states "Dr. McEnany concealed the restriction." Because this statement is not followed by a record reference, but rather an explanation, we consider it argument, which has no place in the fact section of her brief. *See* WIS. STAT. RULE 809.19(1). Also, on page 10 of her brief, Jalowitz states, "As a result of the investigation Dr. McEnany surrendered his license to practice in California." There is no record reference following this statement. However, after the next sentence regarding the California hospital's stipulation to pay a penalty, Jalowitz cites to thirty-five pages of her attorney's pretrial affidavit filed in connection with the credentialing claim. This reference lacks any information about a license surrender.

[19] Jalowitz's attorney's post-trial affidavit was dated April 25, 2003.

verdict analysis under WIS. STAT. § 805.14(1). Therefore, we do not review it. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

3. *Credentialing Claim*

¶54 We conclude that Jalowitz has failed to demonstrate grounds to reverse the trial court's dismissal of her credentialing claim. A hospital has a direct and independent responsibility to take reasonable steps to ensure that its medical staff is qualified. ***Johnson v. Misericordia Cmty. Hosp.***, 99 Wis. 2d 708, 723, 301 N.W.2d 156 (1981). In ***Misericordia***, the plaintiff was a patient who suffered injury from negligent treatment by a staff doctor whose qualifications the hospital failed to investigate. ***Id.*** at 715. "There can be no liability predicated upon a breach of duty unless it is determined that such breach was a legal cause of the plaintiff's injuries." ***Johnson v. Misericordia Cmty. Hosp.***, 97 Wis. 2d 521, 560, 294 N.W.2d 501 (Ct. App. 1980). Absent such a finding, the causal nexus between the allegedly negligent credentialing and the plaintiff's injuries does not exist. ***Misericordia***, 99 Wis. 2d at 723.

¶55 Despite the jury's finding of no negligence, Jalowitz nevertheless argues that the trial court erroneously entered a summary judgment dismissing her negligent credentialing claim against the hospital. She makes numerous arguments that the trial court erroneously struck expert testimony and excluded evidence that went to prove that the hospital and clinic failed to perform their duties to ensure that McEnany was a qualified cardiac surgeon. Again, however, Jalowitz's argument fails because her claim ultimately depends on the premise that McEnany rendered negligent treatment. Because the jury found that McEnany was not negligent, her credentialing claim cannot stand. Therefore, Jalowitz's assertions of error regarding the summary judgment proceedings, as well as the

trial court's discovery and evidentiary rulings with respect to her negligent credentialing claim, would have no affect on the outcome and provide no basis for reversal. *See* ***Nowatske***, 201 Wis. 2d at 549.

4. *Interest of Justice*

¶56 Finally, Jalowitz argues that because the real controversy was not fully tried, she is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35. She contends that the jury was not given the opportunity to hear important testimony concerning the restriction and investigation in California, and that "this evidence bore on the critical issues of informed consent and credibility."

¶57 We exercise our power of discretionary reversal only in extraordinary cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). There are two circumstances under which it has been held the real controversy has not been fully tried: (1) when the jury has been deprived of the opportunity to hear important evidence; and (2) when the jury had before improperly admitted evidence that obscured the real issues. ***State v. Smith***, 153 Wis. 2d 739, 742, 451 N.W.2d 794 (Ct. App. 1989). Neither circumstance occurred here.

¶58 As we concluded previously, the record reflects that the trial court reasonably exercised its discretion when it excluded the California evidence. Also, there is no suggestion that the jury had before it improperly admitted evidence. The record reveals that the court carefully and thoroughly considered the parties' arguments concerning the admissibility of evidence, revisiting this and

other issues several times over the course of three years.[20] Therefore, Jalowitz fails to demonstrate that the real controversy was not fully tried.

B. Cross-Appeal

¶59 The hospital and clinic contend that the trial court erroneously denied their motions seeking the imposition of sanctions for filing and continuing frivolous claims. We reject their arguments.

¶60 "WISCONSIN STAT. § 814.025, like WIS. STAT. § 802.05, authorizes a court to sanction a party or attorney for commencing a frivolous action, but only § 814.025 also authorizes the imposition of sanctions for continuing a frivolous action."[21] ***Wisconsin Chiropractic Ass'n v. State of Wisconsin***, 2004 WI App 30, ¶17, 269 Wis. 2d 837, 676 N.W.2d 580.

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[20] At trial, Jalowitz's counsel pointed out that from October 2001, pretrial motion hearings took ten days. The court disposed of summary judgment motions on four separate occasions.

[21] WISCONSIN STAT. § 802.05 provides in part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

WISCONSIN STAT. § 814.025 provides in part:

> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(continued)

> Section 814.025(3)(b) is similar to the second and third warranties under § 802.05 in that it defines as frivolous an action that is commenced or continued when the party or the party's attorney knew, or should have known, that the action was … without any reasonable basis in law or equity and could not be supported by a good faith argument … of existing law.

Id. (citation omitted). "Wisconsin Stat. § 814.025(3)(a) in some respects parallels the first warranty under Wis. Stat. § 802.05(1)." ***Id.***, ¶19. It defines as frivolous an action commenced, used or continued in bad faith, solely for the purpose of harassing or maliciously injuring another. ***Id.*** The inquiry under this section is subjective–"what was in the person's mind and what were the motivations." ***Id.*** (citation omitted).

¶61 The trial court's decision whether to award attorney fees under WIS. STAT. §§ 802.05 and 814.025 presents questions of fact, law and discretion, and "our standard of review varies depending on the issue presented." ***Id.***, ¶16. "When made pursuant to Wis. Stat. § 802.05, our review of a circuit court's decision that an action was commenced frivolously is deferential." ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). "Determining what and how much prefiling investigation was done are questions

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> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> **(4)** To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

of fact that will be upheld unless clearly erroneous." ***Id.*** "Determining how much investigation should have been done, however, is a matter within the trial court's discretion because the amount of research necessary to constitute 'reasonable inquiry may vary, depending on such things as the particular issue involved and the stakes of the case.'" ***Id.*** at 548-49 (citation omitted). "A circuit court's discretionary decision will be sustained if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 549.

¶62 Determining whether a claim is frivolously continued under WIS. STAT. § 814.025, involves a mixed question of law and fact. ***Jandrt***, 227 Wis. 2d at 562. What the attorney knew or should have known is factual. ***Id.*** The ultimate conclusion of whether the trial court's factual determinations support his legal determination of frivolousness is, however, a question of law. ***Id.***

¶63 Our supreme court adopted a number of guidelines to direct our analysis: "We believe that these guidelines serve equally well as the framework within which a circuit court should make its discretionary determination of frivolousness under [WIS. STAT.] § 802.05; further, in many respects, these are the same guidelines a circuit court uses in its determination of frivolousness under Wis. Stat. § 814.025." ***Id.*** at 549.

> [I]n determining whether an action has been commenced frivolously, the circuit court is to apply an objective standard of conduct for litigants and attorneys. … Section 802.05 requires that the claim be well grounded in both facts and law. Applying the objective standard when determining whether an attorney made a reasonable inquiry into the facts of a case, the circuit court should consider:
>
> whether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion, or other paper; whether the case was

> accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation; and whether discovery would have been beneficial to the development of the underlying facts.
>
> ….
>
> And in determining whether the attorney made a reasonable inquiry into the law, consideration should include the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law.

Id. at 549-51 (citations omitted).

¶64 Also, "the circuit court's proper analysis must be made from the perspective of the attorney and with a view of the circumstances that existed at the time counsel filed the challenged paper." ***Id.*** at 551. "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." ***Id.*** (citation omitted).

¶65 Our supreme court pointed out that a "claim is not frivolous merely because there was a failure of proof or because a claim was later shown to be incorrect." ***Id.*** "Nor are sanctions appropriate merely because the allegations were disproved at some point during the course of litigation." ***Id.*** For example, a plaintiff's failure to raise a genuine issue of material fact in opposition to a motion for summary judgment was not frivolous where the court found that some evidence supported the plaintiff's claim. *Se* ***id.*** "The test for frivolousness is extremely stringent." ***Dahmen v. American Family Mut. Ins. Co.***, 2001 WI App 198, ¶15 n.7, 247 Wis. 2d 541, 635 N.W.2d 1. Frivolousness exists only when no reasonable basis exists for a claim. ***Id.*** WISCONSIN STAT. § 814.025 requires the trial court "to separately consider the frivolousness of various claims that

constitute an action or a defense." ***Hoey Outdoor Adver., Inc. v. Ricci***, 2002 WI App 231, ¶31, 256 Wis. 2d 347, 653 N.W.2d 763.

¶66 Here, the hospital and clinic contend that because Jalowitz lacked proof that McEnany was negligent in obtaining informed consent and providing care and treatment, and also lacked proof that the hospital breached its credentialing duties, her claim was frivolous. The hospital and clinic contend that the trial court erroneously denied their motion seeking the imposition of sanctions for frivolous action under WIS. STAT. §§ 802.05 and 814.025. They argue that Jalowitz had no viable informed consent claim against them when she filed her complaint or at the time of the summary judgment hearing. In addition, the hospital argues that Jalowitz had no reasonable basis for asserting a negligent credentialing claim against it. We are satisfied that the record supports the trial court's finding that Jalowitz's claims against the hospital and clinic were not frivolous.

¶67 In denying the request for sanctions under WIS. STAT. §§ 802.05 and 814.025, the trial court determined that "there was enough in this facts-specific case of an investigation" for bringing and continuing the lawsuit. The court ruled that Jalowitz's attorneys were required to make certain tactical decisions based on uncertainties in the medical records but concluded, "[t]hat doesn't mean it was all uncertain and … you're trying to get me to look back and make these decisions that are very difficult for plaintiff's attorneys to make." The court determined, "I think there [were] a lot of rulings in these hundreds and hundreds of hours of motions and discussions that both sides had that could have gone perhaps either way …." The court concluded that the action was not commenced nor maintained frivolously. We conclude the record supports the trial court's decision.

1. Informed Consent Claim

¶68 The hospital and clinic argue that Jalowitz's informed consent claim had no basis in fact or law and was therefore frivolous.[22] They criticize Jalowitz's counsel for asserting that ***Kokemoor*** only requires proof that the patient would have foregone the procedure if adequately informed and causation is established if some damage resulted. They claim that Jalowitz's assertion, that because Peter's death would not have occurred "but for" the surgery, thus establishing causation, had no basis in the law. They further contend that Jalowitz's claim that McEnany was negligent with respect to his duty to obtain informed consent was frivolous because it had no basis in fact and she had no proof that the alleged non-disclosure was related to any harm. We are unpersuaded.

a. No basis in law

¶69 Jalowitz responds that her informed consent claim is grounded on broad language from ***Kokemoor*** that material information regarding risk of treatment includes "all information" regarding "potential hazards." She also relies on ***Scaria***: "A causal connection exits when, but only when, disclosure of significant risks incidental to treatment would have resulted in a decision against it." ***Scaria***, 68 Wis. 2d at 13-14 (citation omitted). Further, she claims under ***Martin***, whenever the determination of what a reasonable person would want to know is open to debate, the issue is for the jury. *See* ***Martin***, 192 Wis. 2d at 172-73.

[22] The hospital and clinic do not separate the analyses for WIS. STAT. §§ 802.05 and 814.025. Nor do they effectively separately analyze the claims against one another. Therefore, we address the issues together.

¶70 Jalowitz points to her offer of proof at trial, to the effect that while practicing in California, numerous accusations of negligence led to a review of McEnany's practice that included a provision that he was not to perform surgery without the assistance of a staff surgeon, in order not to present a risk to patient safety. McEnany did not divulge this arrangement to any patient, medical board, licensing authority, Luther Hospital or Midelfort Clinic. A number of medical professionals were critical of his failure to divulge this information. Before the trial, at least one expert witness testified at his deposition that McEnany had an obligation to tell his patients about the restriction as part of the informed consent discussion. In pretrial rulings, the trial court determined that much of the California evidence would be admissible.[23]

¶71 It is not entirely unreasonable for Jalowitz to argue that a reasonable patient would have declined surgery. She provided evidence to support her claim that because Peter was not given adequate post-operative care, he did not survive his hospitalization. She argued that but for McEnany's failure to inform Peter of the restriction on his surgical practice in California, Peter would not have suffered the surgical complications that led to his death.

¶72 In this appeal, we rejected Jalowitz's causation argument and her interpretations of ***Kokemoor*** as overly broad and of ***Scaria*** and ***Martin*** as too narrow. Nonetheless, we are unconvinced that her arguments are so unreasonable as to warrant sanctions. We note that during pretrial hearings, the trial court initially agreed, in effect, with Jalowitz's analysis. The court denied the hospital and clinic's motions, explaining that if Peter had declined the procedure, he may

[23] Later, at trial, the court held that the California evidence was not admissible.

not have lived long, but still may have survived some amount of time. The court stated:

> if he did not have this type of procedure, he might have said, well you know, at least if I die I'm not going to die on the operating table. I'm going to die at home with my loved ones …. So if it's one day or one hour or one minute longer or a couple of weeks or months or years ….

¶73 Our supreme court has long recognized the tension between encouraging zealous and ingenious advocacy and discouraging unreasonable and frivolous litigation. In ***Jandrt***, our supreme court was "mindful of the delicate balance involved in the application of Wis. Stat. § 814.025." ***Jandrt***, 227 Wis. 2d at 572. The court has previously explained:

> "Frivolous action claims are an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 613, 345 N.W.2d 874 (1984). Many areas of the present law would not have developed without creative and innovative positions taken by attorneys for good faith development of the law. *Id.* at 613-614. We also note that an attorney has an obligation to represent his or her client's interests zealously, and that this may include making some claims which are not entirely clear in the law or on the facts, at least when commenced. Thus, when a frivolous action claim is made, all doubts are resolved in favor of finding the claim nonfrivolous. *See*, *In Matter of Estate of Bilsie*, 100 Wis.2d 342, 350, 302 N.W.2d 508 (Ct. App. 1981). However, when it nevertheless becomes clear that the suit was brought solely for the purposes of harassment or malicious injury, under subsection (3)(a) of sec. 814.025, Stats., or was brought without any reasonable basis in law or equity under subsection (3)(b) of sec. 814.025, Stats., the action or claim will be held frivolous.

Stern v. Thompson & Coates, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994). Therefore, "[i]n making the appropriate balance between these competing interests, we will declare the continuation of an action frivolous only when there is

no reasonable basis for a claim." ***Jandrt***, 227 Wis. 2d at 572-73. Any doubts about the reasonable basis for a claim will be resolved against a finding of frivolousness. *See* ***id.***

¶74 Here, there was no showing that this suit is brought for the purpose of harassment or maliciousness. Although Jalowitz's arguments were not entirely correct on the law, we conclude that they raised a legitimate argument as to the proof necessary to show cause. Therefore, we reject the hospital and clinic's claim that her legal arguments were frivolous.

b. No basis in fact

¶75 The hospital and clinic argue nonetheless that because there was no evidence of negligence or causally related harm, Jalowitz's claims had no basis in fact. We disagree.

¶76 The hospital and clinic contend that Jalowitz had no evidence McEnany acted negligently in his care and treatment of Peter, and there is no evidence he would have fared better had another surgeon performed the operation. They argue:

> Finally, at trial, it became apparent that plaintiff never had any evidence that could have supported her claim that avoiding surgery would have made any difference in outcome. None of plaintiff's experts concluded that Mr. Jalowitz would have lived any longer had he opted against surgery. This is because the temponade [sic] that caused Mr. Jalowitz's death might just as easily have occurred absent the surgery.

The hospital and clinic's argument inexplicably neglects Wuerflein's and Moores' testimony to the effect that, absent McEnany's allegedly negligent post-operative

care and treatment, Peter would have left the hospital and had a chance of living another year or two.

¶77 Wuerflein disputed that Peter was doing well post-operatively. He specifically stated that McEnany showed gross negligence in caring for Peter and that McEnany's gross negligence caused Peter's death. There is no dispute that McEnany was in charge of Peter's post-operative care. According to Wuerflein, the reason Peter did not do well after surgery was because of the undiagnosed tamponade. Wuerflein stated that Peter had a tamponade on October 3 and it should have been relieved by surgery at that time. Wuerflein stated that had the tamponade been relieved, Peter would have lived and gone home from the hospital. He further testified that the failure to obtain an echocardiogram before Peter's cardiac arrest was absolutely negligent. The lack of recognition and treatment of the tamponade was a gross deviation from the standard of care. He believed the tamponade was definitely a factor in causing the cardiac arrest.

¶78 Moores stated that the tamponade was a substantial factor causing Peter's death. Moores explained that not diagnosing the tamponade earlier caused Peter to develop a complication ultimately leading to his death because he did not have enough blood going through his body to support circulation. Moores stated that if the heart cannot fill up with blood, it cannot function, which can result in the death of a patient. Moores testified that in Peter's case, the cause of death was excessive bleeding and low cardiac output. If Peter had been properly treated, he would be alive. Thus, Jalowitz presented evidence showing breach of duty, a causal connection and injury, although her claim was ultimately rejected by the jury.

¶79 As the hospital and clinic point out, Moores and Wuerflein, however, also gave conflicting testimony. For example, Wuerflein testified that the reason the cardiac arrest occurred then will never be known exactly, explaining that Peter became acutely low on blood volume and his heart stopped beating. On cross-examination, Wuerflein acknowledged his deposition testimony in which he stated he did not know the source of bleeding causing the tamponade. Nonetheless, a reasonable inference could be drawn that no matter what the source of the bleeding was, it was the surgeon's duty to diagnose and treat the tamponade in a timely fashion. The fact that portions of Jalowitz's experts' testimony were inconsistent, or that other medical experts disagreed with them, is no basis to find that Jalowitz's claims against McEnany were not based in fact. In order to avoid sanctions, the claim needs only be shown to be debatable. *See* ***Stern***, 185 Wis. 2d at 252-53.

¶80 While we ultimately reject Jalowitz's informed consent arguments, we conclude that her claim was not without any basis in fact. At one of a number of motion hearings on the admissibility of the California evidence, the court initially ruled that it was material and its probative value was not outweighed by its prejudicial effect. It initially held that evidence of the restriction and the alleged cover-up could be admitted.

¶81 The record discloses that the informed consent claim was factually complex and Jalowitz's legal theories were based on an arguably plausible, though incorrect, interpretation of existing case law. Because her informed consent claim had a reasonable basis in law and fact, we conclude that it was not frivolously filed or maintained.

¶82 The hospital and clinic further argue, nonetheless, that at the time of the filing of the complaint and at pretrial hearings, Jalowitz's counsel had not yet performed a thorough investigation and, therefore, his filing and maintaining the claim at that juncture in the proceedings was frivolous. We reject this argument. In ***Gagnow v. Haase***, 149 Wis. 2d 542, 546-47, 439 N.W.2d 593 (Ct. App. 1989), we held that WIS. STAT. § 814.025 applies only when the action is frivolous and it does not apply to the tactics of an attorney in a nonfrivolous action. Here, the informed consent claim is not frivolous. To the extent that Jalowitz's attorneys' tactics can be criticized, tactics do not warrant sanctions.

¶83 Also, in ***Jandrt***, our supreme court reversed that part of a trial court's decision to impose sanctions under WIS. STAT. §§ 802.05 and 814.025 on the basis that the plaintiff *filed* the lawsuit without an adequate investigation. ***Jandrt***, 227 Wis. 2d at 568-69. Here, unlike ***Jandrt,*** Jalowitz's attorney had opinions of two medical expert witnesses, King and Moores, before filing the lawsuit, that McEnany was negligent with respect to informed consent, and care and treatment. We decline the hospital's invitation to extend ***Jandrt*** to demand more than that. We conclude that ***Jandrt*** supports the trial court's implicit determination that although Jalowitz's attorney might have done more, the information he relied upon to file the action was adequate to avoid sanctions.[24] We conclude that under ***Gagnow*** and ***Jandrt***, the record fails to support the hospital and clinic's contention.

[24] To the extent the trial court's determination does not make this specific finding, we may infer findings that are consistent with its decision. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568.

2. Negligent Credentialing Claim

¶84 Next, the hospital argues that Jalowitz had no adequate factual or legal basis for asserting any negligent credentialing claim against Luther. In ***Misericordia Cmty. Hosp.***, 99 Wis. 2d at 723, our supreme court described the hospital's duties as follows:

> The failure of a hospital to scrutinize the credentials of its medical staff applicants could foreseeably result in the appointment of unqualified physicians and surgeons to its staff. Thus, the granting of staff privileges to these doctors would undoubtedly create an unreasonable risk of harm or injury to their patients. Therefore, the failure to investigate a medical staff applicant's qualifications for the privileges requested gives rise to a foreseeable risk of unreasonable harm and we hold that a hospital has a duty to exercise due care in the selection of its medical staff.

¶85 The supreme court held "that a hospital has a direct and independent responsibility to its patients, over and above that of the physicians and surgeons practicing therein, to take reasonable steps to (1) insure that its medical staff is qualified for the privileges granted and/or (2) to evaluate the care provided." ***Id.*** at 724-25.

¶86 The record discloses a factual basis to bring and continue the negligent credentialing claim. Jalowitz's attorney stated that in filing the complaint, he relied on the opinions of two medical experts, King and Moores, who advised him that there was negligence in the credentialing and retention of McEnany by Luther and Midelfort. Also, in November 2002, Jalowitz's attorney took Hughes's deposition. Hughes testified:

> [A.] This is just frankly a crime. And the fact that we're talking about this in civil litigation and not criminal litigation is surprising to me. That this was truly an evil, ugly, unconscionable act, and –

> …
>
> Q. What was?
>
> A. What was? Dr. McEnany's failure to disclose the fact that his privilege was restricted; the fact that the people that he worked with conspired to hide this when he was hired; the fact that when he arrived here, he came with sufficient red flags to – to raise serious concerns about the sanity of hiring him in the first place.

¶87 The hospital claims that Hughes's opinion should have been disregarded because at the deposition, Hughes stated that he would not serve as a credentialing expert. Hughes was available, however, to testify as a fact witness. For example, Kincaid, a cardiologist at Luther, told Hughes that McEnany had "'baggage' that you don't want to know about, that other people are evaluating," suggesting that McEnany's credentials were questionable. Hughes also stated that although McEnany's patients did not do as well as Hughes expected them to, "I had the perception that to be openly critical of [McEnany] would be to my detriment professionally."[25] Nonetheless, a reasonable inference from this deposition is that Hughes previously had shared his opinions with Jalowitz's counsel.

¶88 In light of Hughes's opinion, it was not unreasonable for Jalowitz's counsel to pursue a credentialing claim through the testimony of another expert. Jalowitz relied also on the testimony of Dr. Brian J. King in pursuing her claim. According to Jalowitz's counsel, before he had filed the action, he had King's opinion that no reasonable hospital would have credentialed McEnany knowing

[25] Jalowitz also states Luther fired a nurse who had complained about McEnany, in support of her claim that Luther should have investigated McEnany's practice after it hired him. However, it is unclear from the record when Jalowitz's counsel had this information.

the information that was available about him and no reasonable hospital would have failed to conduct a peer review in 1996 or 1997.

¶89 Jalowitz's counsel reasonably relied on King's belief that he was qualified as an expert witness.[26] At a deposition taken in July 2001, King testified that he believed he was qualified as a credentialing expert based on his forty years of practicing surgery and being involved with entities in the hospital required to evaluate the background and expertise of doctors, while acknowledging that he had never served on a credentialing committee.

¶90 At one hearing, the court ruled as follows:

> Dr. King to me he's a board certified surgeon. He's been trained at Cambridge, London, Oxford Universities, and the University of Minnesota, and did a residency in surgery at Mayo Clinic, and he's board certified in general surgery and has practiced for over 40 years in the United States. He was chief of surgery at Luther Hospital for a number of years. I think that Dr. King is an expert witness to testify as to the standard of care for a surgeon on the issue of informed consent, and I also think that he's an expert that can be listened to by the finder of fact and would assist the finder of fact in the issue of credentialing.

¶91 The hospital contends that none of King's experience had to do with credentialing. Although the trial court ultimately held that King was not qualified as a credentialing expert, the court itself acknowledged the discretionary nature of its determination and observed that another judge might have ruled differently. We are satisfied that the record discloses the debatable nature of King's qualifications

[26] The record discloses that in other lawsuits in Wisconsin, King was qualified as an expert in credentialing.

to support Jalowitz's credentialing claim. Therefore, we are not convinced that Jalowitz's credentialing claim was without any legal or factual basis.

¶92 In ***Jandrt***, our supreme court pointed out that subsequent to filing a suit, a party and attorney may bring an action even though some facts are uncertain. ***Jandrt***, 227 Wis. 2d at 568. While this "safe harbor" does not relieve an attorney from establishing a factual basis for a claim, the record demonstrates that Jalowitz's counsel's investigation of the facts was adequate. Unlike ***Jandrt***, counsel did not "file first and ask questions later …." *See* ***id.*** at 568-69.

¶93 The hospital claims, nonetheless, that Jalowitz's subsequent argument that an expert was not needed to establish her negligent credentialing claim is frivolous. We are unpersuaded. Jalowitz's counsel argued that in light of the California evidence, no specialized skill or knowledge was needed to help the jury determine that the hospital should have checked McEnany's background more thoroughly. It is not patently unreasonable to argue that a jury needs no expert to help it decide an obvious case of negligence. *See* ***Payne v. Milwaukee Sanitarium Found.***, 81 Wis. 2d 264, 275-76, 260 N.W.2d 386 (1977) (Whether expert testimony is required depends upon the type of negligent acts involved.). In any event, we conclude that Jalowitz's counsel's argument was a tactic in a nonfrivolous action and, accordingly, does not warrant sanctions. *See* ***Gagnow***, 149 Wis. 2d at 546-47.

¶94 The hospital argues further that even if King's credentials were debatable, Jalowitz "could not possibly establish that the alleged negligent credentialing caused Mr. Jalowitz any harm. This was because [she] had no evidence that there would have been any difference in outcome even if the world's

most qualified cardiothoracic surgeon had performed the surgery and performed it perfectly."

¶95 Once again, the hospital's argument neglects Moores' offer of proof testimony as to the California evidence, as well as his and Wuerflein's testimony concerning McEnany's allegedly negligent post-operative care. Their testimony supports Jalowitz's theory that whatever the source of the bleeding was, McEnany had a duty to diagnose the tamponade in a timely fashion and he breached that duty, leading to complications that ultimately caused Peter's arrest and subsequent death. Moores' and King's testimony supports Jalowitz's theory that, had the hospital carefully evaluated McEnany's background, they would have discovered the restriction that arose out of similar patient deaths in California, thereby precluding the hospital's credentialing of him. Although the trial court's evidentiary rulings and the jury's fact finding ultimately eliminated Jalowitz's claims, we are unpersuaded that they were not debatable. Therefore, we reject the hospital's argument.

¶96 The hospital further argues that Jalowitz's successful attempt to keep out the actual statistics of McEnany's surgical practice, along with evidence of good outcomes for McEnany's patients, renders her claims frivolous. Under ***Gagnow***, Jalowitz's counsel's motion was a tactic in an otherwise nonfrivolous action and, accordingly, does not warrant sanctions.

C. Other claims

¶97 The hospital and clinic also argue that because Jalowitz ultimately did not pursue her other claims, i.e., "vicariously liable," other negligent medical personnel, and negligent credentialing of others, Jalowitz violated WIS. STAT. § 802.05. However, the hospital's characterization of Jalowitz's complaint is

inaccurate. While the complaint included a respondeat superior claim against the clinic, we are unpersuaded that it claims that medical personnel other than McEnany were negligent or negligently credentialed.

¶98 The hospital and clinic's brief fails to provide a record reference to where in the record Jalowitz brought these alleged other claims. If they intended to refer to the complaint, it appears that the complaint's reference to "staff" refers to McEnany, not anyone else. Also, the hospital and clinic do not brief why the respondeat superior claim was frivolously filed. They apparently abandon this contention in their brief.[27]

¶99 Perhaps their brief intends to refer to paragraph three of Jalowitz's complaint, where she alleged "The defendants, Midelfort Clinic, Luther Hospital and M. Terry McEnany, M.D., failed to provide reasonable and appropriate care and treatment to Mr. Jalowitz and such failure produced injury and his untimely death." However, without any record reference, their argument is not specifically referring to one claim or another, thereby unnecessarily complicating our review. *See* WIS. STAT. RULE 809.19(1)(e). Therefore, we do not develop their argument and decline to review their contentions further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988).

[27] Their brief does not mention respondeat superior, but rather refers to "vicariously liable."

D. Frivolous Appeal.

¶100 Pursuant to WIS. STAT. § 809.25(3), the hospital moves for an award of costs, fees and reasonable attorneys fees incurred in Jalowitz's appeal of the negligent credentialing claim. Unlike claims at the trial court, the court of appeals does not consider whether an appeal may be *partially* frivolous. ***Hoey Outdoor Adver.***, 256 Wis. 2d 347, ¶33 n.9. We may not award fees under WIS. STAT. RULE 809.25(3), unless the entire appeal is frivolous. ***Id.***, ¶33. Here, we are unconvinced that the entire appeal is frivolous. The hospital acknowledges in its motion that Jalowitz claimed a negligent credentialing claim could flow from McEnany's alleged negligent informed consent violation. As we previously discussed, we are unconvinced that Jalowitz's characterization of the cause element of her informed consent claim was so unreasonable as to be found frivolous. Because we do not find the entire appeal frivolous, we deny her motion.

Conclusion

¶101 We conclude that absent a finding of negligence by McEnany, Jalowitz's informed consent and negligent credentialing arguments fail for lack of causation. In addition, the record lacks support for her claim that the court erroneously exercised its discretion with respect to its evidentiary rulings. Therefore, the record reveals no basis for a new trial. Jalowitz's arguments are rejected.

¶102 In addition, we are satisfied that the record fails to support the hospital and clinic's cross-appeal. The record reveals a basis in fact for Jalowitz's attorney to file and continue the informed consent and negligent credentialing claims. Also, her legal arguments were not so arcane as to be without any basis in the law. That the trial court lived with this case for three years of motions in

limine and for summary judgment, reversing itself on more than one occasion, indicates the debatable nature of the issues. We defer to the trial court's decision that Jalowitz's informed consent, negligent treatment and negligent credentialing claims were not frivolously filed or maintained. To the extent the parties' briefs can be interpreted to raise additional arguments, they lack adequate record citation and a developed legal analysis to permit meaningful review and, accordingly, are rejected.

By the Court.—Judgment and order affirmed. No costs to any party.

Not recommended for publication in the official reports.