COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP522 **Cir. Ct. No. 2008CV451**

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

MICHELLE ARMAGOST,

PLAINTIFF,

XAVIER R. ARMAGOST, A MINOR, BY HIS GUARDIAN AD LITEM, M. ANGELA DENTICE,

PLAINTIFF-APPELLANT,

MINNESOTA DEPARTMENT OF HUMAN SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

GUNDERSEN CLINIC, LTD., GUNDERSEN CLINIC PROFESSIONAL LIABILITY INSURANCE PLAN AND INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. In this medical malpractice action, the plaintiffs Xavier Armagost and his mother, Michelle Armagost, claimed that Gundersen Clinic, Ltd. (Gundersen), acting through two certified nurse midwives, was negligent in providing medical services to Xavier during his mother, Michelle's, labor and delivery, allegedly resulting in permanent physical injuries to Xavier. At trial, the jury found that the nurse midwives were negligent, but also that their negligence was not a cause of Xavier's injuries, resulting in judgment for the defendants. Xavier, by his guardian ad litem, appeals an order denying his motion for a new trial and raises two main issues.[1]

¶2 Xavier first argues that the circuit court erroneously exercised its discretion in allowing the jury to hear expert testimony suggesting that Michelle's smoking could have been a cause of the neurological and cognitive disabilities Xavier suffers. We conclude that Xavier fails to show that the court erroneously exercised its discretion in allowing the jury to consider evidence related to smoking based on the testimony of defense experts.

¶3 Xavier also argues that the court erred in giving jury instructions that misled the jury on the issue of causation. We conclude that Xavier fails to develop an argument showing that any aspect of the instructions to which he objected at trial rendered the instructions as a whole misleading regarding the law. Accordingly, we affirm the order.

[1] The only appellant is Xavier, following dismissal of Michelle as a party during proceedings before the circuit court.

BACKGROUND

¶4 The following are relevant background facts. Additional facts are provided as necessary in the discussion section of this opinion.

Injuries to Xavier; Parties' Theories at Trial

¶5 After experiencing contractions, Michelle presented as a patient at Gundersen one evening, remaining as a patient until Xavier was delivered the next day just after noon. Xavier alleged that two certified nurse midwives attending to Michelle and Xavier during labor and delivery were negligent in response to problem signs, failing to communicate effectively with attending obstetricians and to arrange for necessary interventions, including a timely delivery. Xavier argued at trial that, as a result of the nurse midwives' negligence, he experienced a lack of oxygen and blood flow to his brain, resulting in damage to his brain, with adverse outcomes that include cerebral palsy.

¶6 The defendants alleged that the injuries were not the result of negligence by the nurse midwives, but instead due to conditions that existed before labor and delivery, specifically, infection and inflammation of the placenta and placental and umbilical cord abnormalities, exacerbated by the negative effects of smoking by his mother during portions of her pregnancy. The defense argued at trial that Xavier's injuries had already occurred by the time Michelle presented at Gundersen and that nothing the nurse midwives did or failed to do contributed to his injuries.

Smoking Evidence

¶7 Xavier moved in limine to preclude all evidence regarding smoking by his mother during her pregnancy as prejudicial and not probative on the issue of

causation. After extensive argument from the parties and the submission of potential testimony in advance of trial, the court denied this motion.

¶8 At trial, the jury heard uncontested evidence that Xavier's mother was smoking ten cigarettes per day when she learned of her pregnancy. By approximately one month later, she was smoking fewer than ten daily; by approximately two months later, fewer than five daily; by the fifth month, she had quit altogether; but during the week leading up to delivery she resumed smoking.

¶9 As discussed in more detail below, at issue is the testimony of two defense experts who testified at trial regarding the effects on fetuses generally of maternal smoking and also regarding the particular effects on Xavier from his mother's smoking during pregnancy.

¶10 In motions after verdict, Xavier moved for a new trial on the ground that evidence related to smoking should not have been allowed because the defense experts did not testify to a reasonable degree of medical probability that the smoking caused his injuries. The court denied this motion, concluding that the experts testified, to the requisite level of certainty, that smoking was in fact a contributing factor. In addition, the court concluded that even if it had been error to allow smoking evidence, any such error would have been harmless.

Jury Instructions

¶11 Regarding the challenged jury instructions, following extensive argument by the parties, the court determined that WIS JI—CIVIL 1023 ("Medical Negligence"), when considered in the context of all of the instructions and special verdict forms, properly stated the law. The court did not give the following instructions, all or parts of which Xavier now argues should have been given: WIS

JI—CIVIL 1720 ("Aggravation or Activation of Latent Disease or Condition") and 1723 ("Enhanced Injuries").

Special Verdict

¶12 The jury returned a special verdict finding that each of the nurse midwives was negligent in providing care. However, the jury answered "no" to the special verdict questions of whether the negligence of each of the nurse midwives was a cause of Xavier's injuries. For this reason, the jury did not reach the special verdict questions asking whether Xavier's mother was negligent in smoking during pregnancy and, if so, whether such negligence was a cause of Xavier's injuries. The jury also did not reach questions on the topic of damages.

DISCUSSION

I. Smoking Evidence

¶13 Xavier argues that the circuit court erroneously exercised its discretion in denying his motion in limine to preclude evidence regarding maternal smoking and in allowing the defense to call experts on this topic. For the following reasons we conclude that Xavier has failed to show that the court erroneously exercised its discretion in making either decision. For purposes of our review, the court's two decisions amount to a single evidentiary ruling of the court that we will treat as a single issue.

¶14 Our standard of review in this context is well established:

> We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. In making evidentiary rulings, the circuit court has broad discretion. This discretion includes whether a witness is qualified as an expert to offer opinion testimony pursuant to WIS. STAT. § 907.02. As with other

> discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.
>
> Our inquiry into whether a circuit court properly exercised its discretion in making an evidentiary ruling is highly deferential:
>
> > The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. The test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised.

Martindale v. Ripp, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698 (citations omitted).

¶15 Turning to the substantive test for the admission of expert testimony, such testimony "is generally admissible in the circuit court's discretion if the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." ***State v. Kandutsch***, 2011 WI 78, ¶26, 336 Wis. 2d 478, 799 N.W.2d 865 (citations omitted). The version of WIS. STAT. § 907.02(1) (2009-10) applicable here,[2] provides in relevant part: "If

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. In January 2011, the legislature amended WIS. STAT. § 907.02 to adopt the reliability standard for expert testimony embodied in Federal Rule of Evidence 702. *See* 2011 Wis. Act 2, § 34m; *see also* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). The amendment added a requirement that such testimony must be "based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." 2011 Wis. Act 2, § 34m. However, this case was tried in August and September 2010, prior to the effective date of the amendment, *see* 2011 Wis. Act 2, § 45(5), and Xavier does not contend that the new law applies in this case.

scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise …." As the court explained in ***Martindale***, "[t]he standard in this state for the admission of expert testimony is not stringent." ***Martindale***, 246 Wis. 2d 67, ¶68. A jury is entitled to draw reasonable inferences from expert testimony even if it may appear at first that the jury's conclusions based on those inferences require proof through additional, more specialized expert testimony. *See* ***id.***, ¶65.

¶16 Our focus here is on smoking-related testimony adduced by the defense from two witnesses, Professor Theodore Slotkin and Dr. Stephen Glass.[3] Xavier argues that the testimony of each expert should not have been admitted because each lacked an adequate factual basis and consisted of opinions suggesting "mere possibilities," not "medical certainty" or "medical probabilities." As part of this argument, Xavier contends that the testimony of each expert established, at best, only "risk factor association" between smoking by pregnant mothers and potential harm to their fetuses, which is insufficient to support a finding of causation in this case.

[3] Xavier also refers in his appeal to testimony touching on the topic of maternal smoking by a third defense expert, Dr. Theonia Kamman Boyd, a medical doctor and associate professor of pathology, but he does not develop a separate argument on appeal that the court erred in allowing her testimony. Accordingly, we limit our discussion to experts Slotkin and Glass. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (appellant "must present developed arguments if it desires this court to address them").

¶17 We now summarize the relevant testimony, then explain why we conclude that Xavier has failed to show that the circuit court erroneously exercised its discretion in allowing the jury to hear that testimony.

¶18 Slotkin is a professor of pharmacology, cancer biology, psychology, behavioral sciences, and neurobiology at Duke University Medical Center, but is not a medical doctor. He testified that he "spends his life working on" the prenatal exposure effects on fetuses of such substances as tobacco and pesticides, including "the effects of toxic chemical insults in general and tobacco in particular."

¶19 As relevant here, Professor Slotkin testified that, to a reasonable degree of scientific certainty, Michelle's smoking during the specified periods of her pregnancy "contributed significantly to the adverse outcome" for Xavier, making his injuries more "devastating." Professor Slotkin testified that it was "unlikely that smoking all by itself would cause an injury" as severe as that Xavier suffered. Instead, the smoking "sort of push[ed] the fetus towards the cliff …," and, once there, such factors as infection, inflammation, or asphyxia pushed the fetus "over the cliff."

¶20 More generally, Professor Slotkin opined, smoking combines with other factors to "compromise brain development" of a fetus. Such compromises occur when maternal smoking is combined with "additional hypoxia [deprivation of an adequate oxygen supply], smoking plus infection, [or] smoking plus inflammation." When pregnant women smoke, "otherwise innocuous exposures individually … become damaging."

¶21 Extensive cross-examination of Professor Slotkin by Xavier's counsel included questions about his credentials and the bases for his conclusions. On the topic of maternal smoking, it included the following exchanges:

Q. [Y]ou've come here into this courtroom today to tell us that "[Xavier's] prenatal exposure to tobacco contributed directly to an adverse outcome." ….

A. That's correct.

Q. Okay. The adverse outcome in this case is cerebral palsy. Do you know that?

A. Yes.

Q. Okay. You never said anywhere, in your deposition, in your report, you've never said that the mother's smoking caused this child's cerebral palsy, did you?

A. I said that the mother's smoking contributed to an adverse neurodevelopmental outcome.

….

Q. Doctor, correct me if I'm wrong, but … you have never published ever in your life … that smoking in pregnancy can cause cerebral palsy. Am I correct?

A. That's correct. We focus on brain damage—

Q. Doctor.

A. —as a generic issue.

….

Q. … [A]re you telling us that the crisis that the baby had that could have ended up in death was caused because his mother smoked?

A. I'm saying that it's more likely than not that her smoking contributed to the likelihood of an adverse outcome of that sort.

….

Q. … [Y]ou don't have the expertise to figure out whether or not the smoking had anything to do with this child's bad outcome?

….

A. I think that my expertise is extremely relevant to this specific case. You have here a series of placental abnormalities that I know from my knowledge of

> placental effects of smoking these are present. We have [in this case] admitted smoking through the critical period … which we know makes [Xavier's] brain vulnerable to insult. We have the presence of an infection. And I'm aware and have participated in research that shows that the combination of smoking and infections is injurious.

¶22 Glass is a medical doctor, board certified in neurology, with qualification in child neurology. He testified that, to a reasonable degree of medical certainty, Michelle's smoking was a contributing factor to Xavier's injuries. Dr. Glass testified that he believed that the smoking created "an hypoxic environment" for Xavier before birth, meaning an environment of reduced oxygenation, which "added to the burden of injury created by the infection [in utero] and the secondary effects of infection."

¶23 Xavier's extensive cross-examination of Dr. Glass included the following exchanges:

> Q. You are unable to link up the smoking in this case with any specific injury to this child's brain, correct?
>
> A. It added to the burden of injury in this child.
>
> ....
>
> Q. ... [Y]ou do not believe that smoking by itself produced this child's cerebral palsy. Can we agree?
>
> A. Alone, I don't think it would have produced the cerebral palsy.
>
> ….
>
> Q. There is no evidence in this case that smoking by itself caused any harm to this baby, correct?
>
> A. I don't have—we don't have smoking by itself. I can't answer that question.

¶24 In response to a question posed by a juror regarding the proposition that maternal smoking contributed to Xavier's injuries, Dr. Glass testified:

> It's looking at the sum total of the literature on smoking, and I think that's been testified to before by people more expert than I that smoking has its impact by altering brain chemicals by blood flow in the placenta and thereby altering oxygen delivery.
>
> … [D]espite the incredible character and miraculous parts of human development, babies in utero are given a margin of oxygen that's extremely small. They are given just enough. It's like having to drive 500 miles and you have just enough gas to drive that 500 miles. Nothing extra.
>
> … [Fetuses do not] have an extra tank of oxygen sitting around stuck away in some archaic part of their body. It's rather an issue of[,] can they adapt to a lower level of oxygen provided[?] .... [I]t would be like hyperventilating for a minute before you jump in a swimming pool to hold your breath. Can you fill up with oxygen to make yourself more able to hold your breath longer[?] That would be a reserve.
>
> Babies can't do that.... [C]an they adapt to the presence of a lower level of oxygen[?] And given the fact they're so marginal to begin with, they have a very hard time doing that. And I think that's the factor that's the most significant.

¶25 After the evidence was closed, the court commented that it viewed the evidence supporting the defense theory that maternal smoking contributed to the injuries to be "on the weaker side," "but it's still there." In addressing post-trial motions, the court stated:

> [T]he evidence presented by the Defendants was by qualified experts, who testified to a reasonable degree of medical certainty or probability, that [the mother's] smoking would have added to the impact of the infection during the labor and delivery of the Plaintiff, and therefore could have been a factor in causing his injuries.

¶26 We conclude that Xavier's argument on this issue for the most part ignores the relevant standard, which is whether the circuit court has sufficient reason to conclude that the testimony has the potential to "help the trier of fact understand the evidence or determine a fact at issue." *See* ***Kandutsch***, 336 Wis. 2d 478, ¶26. Under the legal test that the parties have agreed applies, "[o]nce the relevancy of evidence is established and the witness qualifies as an expert, whether to credit that expert's testimony and the weight to give it are judgments for the fact finder to make." ***City of Stoughton v. Thomasson Lumber Co.***, 2004 WI App 6, ¶18, 269 Wis. 2d 339, 675 N.W.2d 487 (Ct. App. 2003).

¶27 The record, as excerpted above, establishes that there was a sufficient foundation for the circuit court to allow the testimony of each expert, and that the experts did not testify to mere possibilities. For this reason, it was not an erroneous exercise of the court's discretion to allow evidence related to smoking. Xavier seems to argue that Professor Slotkin and Dr. Glass were not in fact testifying to a reasonable degree of scientific or medical certainty regarding maternal smoking in conjunction with other factors, but he fails to point to record evidence to support such an argument. Xavier cites ***Green v. Smith & Nephew AHP, Inc.***, 2000 WI App 192, ¶¶21-23, 238 Wis. 2d 477, 617 N.W.2d 881, *aff'd* 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727, in which we concluded that opinion testimony was erroneously admitted where the purported expert admitted to a lack of relevant expertise. However, nothing like that occurred here.

¶28 Xavier essentially argues on appeal that the jury could not reasonably credit the testimony of these experts that smoking could have played a causal role in Xavier's injuries. For example, Xavier points to Professor Slotkin's acknowledgements in his testimony that: he is a researcher, not a medical doctor; "all women who smoke do not have babies with cerebral palsy"; and Slotkin's

research has not focused on cerebral palsy as a particular adverse outcome. However, these aspects of Professor Slotkin's testimony do not show that his opinion regarding the relevance of maternal smoking lacked a sufficient foundation, or that this opinion was not credible as a matter of law.

¶29 Xavier argues that the court improperly allowed the experts to testify to a logical fallacy, namely, that mere "statistical associations" between smoking and injuries "necessarily imply causation." However, the experts each took the position that maternal smoking was not merely statistically associated with adverse outcomes in fetal development, but instead that it likely contributed to Xavier's particular injuries.

¶30 In addition, Xavier seems to argue that the circuit court should not have admitted the smoking evidence because, as Xavier puts it, the experts could not opine that smoking, "*in and of itself*, caused Xavier's neurologic and cognitive injuries." (Emphasis added.) That is, Xavier may be suggesting that the expert testimony was not sufficient, as a matter of law, to support an affirmative defense that Michelle's negligence in smoking constituted contributory negligence unless the experts could testify that smoking, *considered as a single factor*, caused injury. Xavier offers no legal support for this proposition, and the law is to the contrary.

¶31 Contributory negligence is "'conduct by an injured party that falls below the standard to which a reasonably prudent person in that injured party's position should conform for his or her own protection and that is a legally contributing cause of the injured party's harm.'" ***Zak v. Zifferblatt***, 2006 WI App 79, ¶10, 292 Wis. 2d 502, 715 N.W.2d 739 (quoting ***Brown v. Dibbell***, 227 Wis. 2d 28, 41, 595 N.W.2d 358 (1999)). A claim that contributory negligence was a cause of injury may be presented to a jury under the same "substantial

factor" test that is applied to the initial claim of negligence. ***Zak***, 292 Wis. 2d 502, ¶10. Under the "substantial factor" test, the claimant has the burden of producing evidence that satisfies the court that "a jury could reasonably find a causal nexus between the negligent act and the resulting injury." ***Id.*** (citation omitted). "'[I]f the [claimant] meets the burden of production and the causation question is submitted to the jury, the [claimant] has the burden of persuading the jury that the negligence in fact caused the injuries.'" ***Id.*** (quoting ***Fischer v. Ganju***, 168 Wis. 2d 834, 857, 485 N.W.2d 10 (1992)).

¶32 Applied here, the pertinent standards simply require that the smoking evidence was sufficient for a jury to reasonably find a causal nexus between Michelle's smoking while pregnant and injuries to Xavier based on the testimony of Professor Slotkin and Dr. Glass. The summaries of the testimony above clearly show that the smoking evidence meets the cited standards and that Xavier's apparent argument that smoking had to be the cause "in and of itself" is therefore not persuasive.

¶33 For these reasons, we conclude that the circuit court did not erroneously exercise its discretion in allowing the smoking evidence.[4]

[4] Having decided that the circuit court did not erroneously exercise its discretion for the reasons stated, we need not reach an argument the respondents make that any circuit court error in this regard was harmless. *See* ***Horst v. Deere & Co.***, 2009 WI 75, ¶¶17-18, 319 Wis. 2d 147, 769 N.W.2d 536. On this topic, we note only that the circuit court concluded in its decision resolving post-trial motions that the smoking issue "was not a factor of importance" to Xavier's theory of causation at trial, which the court believed was undermined by defense evidence and arguments unrelated to the smoking issue.

II. Jury Instructions

¶34 Xavier contends that the jury instructions were flawed, but as we discuss below, his arguments on this issue were presented in a confusing manner to the circuit court and again now on appeal, poorly supported by citations to the record and legal authority, and in some instances entirely undeveloped. Accordingly, we conclude that Xavier has failed to present a meritorious argument showing that any aspect of the instructions to which he objected at trial rendered the instructions as a whole misleading regarding applicable law.

¶35 When the question is whether an instruction accurately states the law, our review is de novo. ***Horst v. Deere & Co.***, 2009 WI 75, ¶17, 319 Wis. 2d 147, 769 N.W.2d 536.

¶36 However, because any given legal principle may be conveyed to a jury in alternatively worded instructions, when a circuit court undertakes the task of selecting and rejecting particular alternative language, the court exercises broad discretion limited only to the extent that objected-to language selected by the court must accurately convey the law. *See* ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. "As a general matter, if we determine 'that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no grounds for reversal exists.'" ***Id.*** (quoting ***White v. Leeder***, 149 Wis. 2d 948, 954-55, 440 N.W.2d 557 (1989)). Thus, "[i]f the instructions ... adequately cover the law applicable to the facts, [we] will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous." ***State v. Higginbotham***, 110 Wis. 2d 393, 403-04, 329 N.W.2d 250, 255 (Ct. App. 1982).

¶37 Given the largely discretionary nature of the circuit court's decision-making in this area and forfeiture principles, in order to preserve a challenge to jury instructions a party must ordinarily both submit an alternative instruction to one proposed by the court and provide a clear explanation as to why the court's proposed version is flawed.

> A party's mere submission of alternate instructions without a particularized objection on the record to the instructions proposed by the court cannot provide a basis for raising the erroneous instruction on appeal as a matter of right. A party's submission of proposed instructions has the effect of notifying the circuit court of an objection to the instructions, but a submission does not explain the basis for the objection and does not aid the circuit court in correcting the instruction if necessary.

Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W., 124 Wis. 2d 47, 54, 368 N.W.2d 47 (1985).

¶38 As indicated above, the record reflects that Xavier's arguments regarding jury instructions were presented in a confusing manner to the circuit court, and this continues on appeal. Xavier argues on appeal that the court erred, in part, "by *refusing* to instruct the jury as to WIS JI—CIVIL 1720 (aggravation of a pre-existing condition) and WIS JI—CIVIL 1723 (enhanced injuries)." (Emphasis added.) In the same vein, Xavier now refers to portions of WIS JI—CIVIL 1720 and 1723 as "[t]he desired portions of those instructions." However, so far as we are able to determine from Xavier's citations to the record and our independent review, these two instructions were not in fact offered to, and rejected by, the court.[5] Instead, so far as Xavier explains to us by reference to the record, he

[5] Xavier points us to discussion among trial counsel and the court reflected in the trial transcript in which his trial counsel stated, without reference to any instruction by number, "But specifically, I would like to mention that we want an instruction having to do with enhanced—I (continued)

intended the court to understand that he sought to have additional language added to the pattern WIS JI—CIVIL 1023 instruction based on concepts *derived from* WIS JI—CIVIL 1720 and 1723. This approach provided the circuit court with a less than clear explanation of the basis for Xavier's objection to the court's proposed instruction, an approach that did not sufficiently "aid the circuit court in correcting the instruction if necessary." *See* ***C.E.W.***, 124 Wis. 2d at 54.

¶39 Moreover, Xavier confusingly asked the circuit court to add two differing sets of additional language to the pattern WIS JI—Civil 1023 instruction,[6]

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guess in Wisconsin they refer to it as enhanced damages or aggravation of a preexisting condition." The court responded, "I think that's part of the standard instruction as one of the possible scenarios," and went on to observe that WIS JI—CIVIL 1023 appeared to address "some causal connection between negligence on the part of the certified nurse-midwives and potential preexisting—or natural progression of a condition." The court also stated that the parties could take up the issue later. In his appellate brief, Xavier inaccurately asserts that the court, at this portion of the trial transcript, "denied" a request for the submission of a particular instruction.

[6] In Xavier's trial-level "Brief in Support of Plaintiffs' Jury Instruction WIS JI—CIVIL 1023," he briefly quoted WIS JI—CIVIL 1723 (although not WIS JI—CIVIL 1720), then proposed that "the last two paragraphs of the [WIS JI—CIVIL 1023] be replaced with the following:"

> If you determine that the negligence of either [nurse midwife] was a cause of [the infant's] brain damage and injuries, you may award such damages as you find, to a reasonable certainty from the greater weight of the credible evidence, naturally resulted from that negligence. Once the Plaintiff has established that negligence of either [nurse midwife] was a cause of [the infant's] brain damage and injuries, then the defendant(s) have the burden of proving the extent to which [the infant] would have suffered injuries, without regard to their negligence.

However, the final paragraph of the instruction actually submitted by Xavier reads as follows:

> If you find that either [nurse midwife] was negligent, you may not deny or limit the plaintiff's right to recover damages resulting from such negligence simply because there is evidence that [the mother's] placenta was abnormal or may have rendered [the infant] more vulnerable to injury. You must still award damages to [the infant] for those injuries or damages that would have been avoided had they not been negligent. The defendants have the burden of proving the extent to which [the

(continued)

and compounds the confusion on appeal by making no effort to address discrepancies between the two sets of proposed language.

¶40 Moreover, there are additional, significant problems with Xavier's challenge to the instructions. We glean from his briefing that his argument is, at least in part, that jurors needed to understand three legal "rules" that they were not told: (1) that there could have been more than one cause of any of his injuries; (2) that a worsening or aggravation of a preexisting injury by the negligence of the nurse midwives was compensable; and (3) injury caused by the nurse midwives did not need to be a wholly new and distinct injury to be compensable. Assuming without deciding that the jury needed to understand each of these "rules," Xavier fails to explain, at least in a clear and logical manner, why we should conclude that the language in the pattern WIS JI—CIVIL 1023 given to the jury was insufficient to convey these rules, or why we should conclude that the instruction in some way contradicts any of these rules.[7]

> infant] would have suffered injuries, without regard to their negligence, as a result of the placental abnormalities.

While these two instruction proposals share overlapping language and ideas, they differ in multiple, significant respects. It is sufficient for our purposes to cite one glaring example, namely, that the first proposed instruction makes no reference to placental abnormalities, while they are a focus of the second.

[7] WIS JI—CIVIL 1023, as given to the jury, stated:

> A person's negligence is a cause of a Plaintiff's condition if the negligence was a substantial factor in producing the present condition of the Plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of a condition. The negligence of one or more persons can cause a condition or that condition can be the result of the natural progression of a pre-existing condition. In addition, the condition can be caused

(continued)

¶41 At times Xavier frames his argument in terms of improper burden-shifting and at other times he does not. These arguments are difficult to follow at best. At points in his briefing, it appears that he intends to argue that WIS JI—CIVIL 1023 wrongly instructed the jury that, if the jury concluded that pre-existing conditions were "a cause" of the injuries, then the burden shifted to Xavier to prove that negligence by the midwives was also "a cause" and to prove what proportion of cause it represented in producing the injuries. However, Xavier fails to identify a passage in WIS JI—CIVIL 1023, considered alone or in combination with any other instruction given, that was likely to leave the jury with this understanding.

¶42 If Xavier assumes that it is obvious how concepts addressed in the *damages-related* WIS JI—CIVIL 1720 ("Aggravation or Activation of Latent Disease or Condition") are in some manner contradictory to those concepts

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> jointly by a person's negligence and also the natural progression of a pre-existing condition.
>
> If you conclude that before [the infant] was born he had a pre-existing brain injury which would cause [the infant] to endure pain and suffering and incur disability, then in answering the questions on damages, you will entirely exclude from your consideration all damages which resulted from [the infant's] pre-existing brain injury and will consider only the damages that [the infant] sustained as a result of any negligent treatment by [either or both of the] Certified Nurse Midwi[ves].
>
> It will, therefore, be necessary for you to distinguish and separate (1) the natural results in damages that flow from [the infant's] pre-existing brain injury, if any, and, (2) the damages that flow from any negligent treatment by [either or both of the nurse midwives] and allow plaintiff only [such] damages as you are satisfied to a reasonable certainty from the greater weight of the credible evidence naturally resulted from any negligent treatment by [either or both of the nurse midwives] as employees of Defendant Gundersen Clinic, Ltd.

conveyed in the *causation-related* WIS JI—CIVIL 1023, at least in the context of this case, that assumption is incorrect.[8] His briefing includes only scattered references to WIS JI—CIVIL 1720, and these references do not represent a developed argument explaining why the jury needed to understand aspects of this damages instruction in a case in which jurors never reached the point of calculating or apportioning damages.

¶43 Similarly, we decline to address Xavier's discussion of evolving Wisconsin case law regarding the "burden of apportioning indivisible damages," because he fails to provide a clear explanation of how this *damages-related* case law renders the understanding of the jury in this case defective on the issue of *causation*, as Xavier asserts.

¶44 Regarding Xavier's suggestion that the court should have conveyed to the jury ideas reflected in WIS JI—CIVIL 1723 ("Enhanced Injuries"), he fails even to attempt to respond to the Clinic's extensive argument that, based on the evidence presented and the arguments made at trial, this is not an enhanced injury case with successive tortfeasors but instead involves joint tortfeasors. We take no position on the merits of the Clinic's argument. It is sufficient for current purposes to note that the Clinic has raised substantial questions on this significant issue based on extensive citation to authority, and that Xavier not only fails to

[8] Stated more precisely, as the Clinic points out in its brief, the third paragraph of WIS JI—CIVIL 1023 quoted in the footnote above is intended to address damages and not causation. *See* ***Fischer v. Ganju***, 168 Wis. 2d 834, 848, 854, 485 N.W.2d 10 (1992) (addressing prior version of WIS JI—CIVIL 1023 that contained paragraph with similar language; concluding that similar paragraph "is a damages instruction"). However, the apparent thrust of Xavier's arguments is that WIS JI—CIVIL 1023 as given, including this paragraph, conveyed inaccurate information regarding causation that should have been altered based on concepts found in WIS JI—CIVIL 1720.

meet his burden of persuasion on this issue but in effect concedes it in failing even to acknowledge the question. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶45 Undeveloped arguments offered by Xavier include the following. He suggests that use of the phrase "natural progression of a pre-existing condition" in WIS JI—CIVIL 1023 misled the jury, because that concept applies only to cases involving medical conditions, such as a heart condition, that could be expected to "naturally progress" to an adverse outcome without a negligent act by a health care provider, and Xavier asserts that this was not the case here. However, it is not clear whether Xavier intends for this argument to turn entirely on what he believes the trial record established, or what he believes we should conclude is true, as a matter of logic or common knowledge, regarding clinical differences between a condition such as heart disease on the one hand and, on the other hand, the placental inflammation, infection, and abnormalities, exacerbated by maternal smoking, alleged by the defense here. More generally, Xavier fails to draw any meaningful distinction, based on legal authority, which shows that the use of the phrase "natural progression of a pre-existing condition" misstates the law in the context of this case.

¶46 In another undeveloped argument, Xavier asserts that WIS JI—CIVIL 1023 instructed jurors "to exclude from their consideration any pre-existing condition." He fails to explain what he means by this argument, given that the instruction explained to the jury that, if it concluded that there was a pre-existing condition, then the only damages that could be awarded would be those resulting from negligent treatment by the nurse midwives. If there are defects in the current version of WIS JI—CIVIL 1023 relating to theories of causation or burdens of proof, either specifically in the context of a case of this type or more generally,

then Xavier has failed to effectively demonstrate that such defects exist, either in the circuit court or in this court.

¶47 For these reasons, we conclude that Xavier has failed to present a meritorious argument showing that any aspect of the instructions to which he objected at trial rendered the instructions as a whole misleading regarding the law.

III. New Trial in the Interests of Justice

¶48 In a one-paragraph argument, Xavier requests a new trial in the interests of justice, contending that the combined effect of smoking-related evidence and defects in the jury instructions require a new trial. For the reasons stated above, this request is without merit.

CONCLUSION

¶49 For these reasons, we conclude that Xavier fails to show that the court erroneously exercised its discretion in admitting evidence related to maternal smoking, and that Xavier fails to present a meritorious argument showing that any aspect of the jury instructions to which he objected at trial rendered the instructions as a whole misleading regarding the law. Accordingly, we affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.