COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 95-2462

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

GLEN BASKEN, SHIRLEY BASKEN and AMBER BASKEN, BY HER GUARDIAN AD LITEM, RODNEY W. DEQUAINE,

Plaintiffs-Appellants,

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Subrogated Party,

v.

DR. RICHARD BECHTEL, ST. VINCENT HOSPITAL WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN and WISCONSIN PATIENT'S COMPENSATION FUND, JOINED PURSUANT TO 655.27(5) WIS. STATS.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Glen Basken, Shirley Basken and Amber Basken, by her guardian ad litem, appeal a judgment dismissing their complaint following a jury verdict finding no negligence and zero damages. The Baskens argue that the trial court deprived them of a fair trial because it erroneously (1) ruled on numerous occasions that no evidence could be repeated, and interfered with cross-examination; (2) demeaned the Baskens' counsel and their proofs, demonstrating its lack of impartiality; (3) instructed the jury on "the alternative method of treatment"; and (4) refused to set aside the verdict on the grounds that the damages were inadequate. They argue that a new trial is required in the interest of justice. We reject these contentions and affirm the judgment.

FACTS

This complex medical malpractice trial began May 1 and ended May 17, 1995. The Baskens' version of facts is as follows.[1] Shirley Basken, thirty-seven years old, was admitted to St. Vincent Hospital in her thirty-ninth week of pregnancy by her obstetrician, Dr. Richard Bechtel, to deliver her baby by induction. Earlier tests showed a well-developed healthy baby. Starting at approximately 8:30 a.m., the doctor used the drug Pitocin continuously for eleven and one-half hours in doses that exceeded recommended limits.

At 8:29 p.m., Amber was delivered by cesarean. She was not breathing, was motionless, had no reflexes, no color and a dropped heart rate. She was put on a respirator. Shirley's uterus had ruptured, and Amber and the placenta were found outside the uterus.

Pitocin causes the uterus to contract, and oxygen deprivation and uterine rupture are risks because of Pitocin's ability to hyperstimulate the uterus. These risks are enhanced by the length of time the drug is given, the amount of the dosage and the prior stretching of the uterus. Because Shirley

[1] The Baskens do not support their statement of facts by citation to the record. *See* § 809.19(1)(d), STATS. ("The brief must contain ... a statement of facts relevant to the issues presented for review, with appropriate references to the record.") The Baskens' statement of facts was much disputed by the respondents. However, in order to put the issues on appeal in context, we summarize the Baskens' version of facts.

had several prior births, she was in the class of women who should not be given Pitocin or should be recognized as at the greatest risk for rupture.

At trial, the Baskens showed that tracings produced by monitors during Shirley's labor should have alerted Bechtel and the nurses that the mother and child were in serious trouble and the Pitocin should have been shut off. The Baskens' medical experts testified that Amber had suffered severe oxygen deprivation at birth, resulting in her cerebral palsy and severe mental retardation.

The defendants strenuously disputed the Baskens' version of the facts. The defendants showed that shortly before labor was induced, Shirley developed preeclampsia, a life threatening condition, for which the only known treatment is delivery. In addition, Shirley suffered from uncontrolled Class R diabetes, a significant risk to the baby. Although realizing this risk, Shirley was noncompliant with dietary restrictions and checking blood sugars. Also, Bechtel had previously used Pitocin with Shirley during which she was able to deliver vaginally.

The defendants disputed that ultrasound and other tests revealed a fetus in good health, because a fetus may have suffered undiagnosed brain damage and yet have normal tests. Their expert witnesses opined that Amber's neurological injuries occurred well before labor and delivery as a result of uncontrolled diabetes rather than events during labor.[2] The defendants maintained that the hospital had no upper limit of Pitocin, and that it was up to the physician to determine dosage. Dr. Harry Farb, perinatologist, testified that the dosage of Pitocin was appropriate. Defense witnesses testified that the monitor tracings and other evidence showed no cause for concern until just

[2] A pathologist who examined the placenta in this case testified that abnormal blood vessels from the bottom of the placenta were characteristic of diabetes and hypertension, indicating the placenta was not getting enough oxygen and nourishment from the mother. His finding of 23% nucleated red blood cells suggests a severe abnormality associated with oxygen deprivation that would take "many, many hours and probably days" to produce. He also testified that the syncytial knotting he observed demonstrate that the placenta was not being properly oxygenated, characteristic of severe placental undernourishment, suggesting a longstanding process of probably several days or more likely several weeks duration due in this case to hypertension and diabetes. Other longstanding abnormalities of weeks if not months were observed.

before delivery, when a drop in fetal heart rate was followed by the emergency cesarean.

1. Evidentiary rulings.

The first several issues involve the extent of the trial court's discretion in limiting the repetition of expert testimony and cross-examination. The judge shall exercise reasonable control over interrogation of witnesses. Section 906.11(1), STATS. "We have repeatedly held that the conduct of a trial is largely within the discretion of the trial court and its determination will not be disturbed unless the rights of the parties have been prejudiced." ***Dutcher v. Phoenix Ins. Co.,*** 37 Wis.2d 591, 606, 155 N.W.2d 609, 617 (1968). Relevant evidence may be excluded if its probative value is substantially outweighed by considerations of delay, waste of time and needless presentation of cumulative evidence. Section 904.03, STATS. Although cross-examiners "can repeat the questions or put others until the witness is forced to answer the precise point required, or squarely refuse," ***Trowbridge v. Sickler,*** 54 Wis. 306, 309, 11 N.W. 581, 582 (1882), the trial court has reasonable discretion in limiting repetitive questioning. *See* ***State v. Seibert,*** 141 Wis.2d 753, 760, 416 N.W.2d 900, 903 (Ct. App. 1987). "The exercise of discretion by the trial court to deny or restrict cross-examination must be dependent upon the circumstances of the trial." ***Neider v. Spoehr,*** 41 Wis.2d 610, 617, 165 N.W.2d 171, 175 (1969).

Our review of evidentiary rulings is deferential, and when the court's reasoning is not articulated, we must examine the record to determine whether it provides a reasonable basis for the ruling. ***State v. Pharr,*** 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). Also, to preserve an evidentiary ruling that excludes evidence, the record must reflect an offer of proof and resulting prejudice. *See* § 901.03(1), STATS.

The Baskens first called Bechtel and three attending nurses adversely. The Baskens contend that the trial court erroneously denied their right to adversely examine Bechtel with respect to an exhibit comparing

Shirley's monitor tracings to a nursing manual. Counsel was attempting to prove nonreassuring deceleration in Amber's fetal heart rate as a sign of oxygen deprivation. The trial court sustained objection to the exhibit, explaining:

> The problem is that this isn't a learned treatise that this witness would rely on or has even seen. It is not a learned treatise that is made for doctors. ... you can certainly question the nurses ... since it's [for nurses].

The Baskens do not suggest that the exhibit was offered to prove any standard of care. Rather, it was offered to demonstrate the existence of a medical condition, that Amber's fetal heart rate showed signs of oxygen deprivation. Bechtel testified that although the nurses manual was on the ward, he had not reviewed it. There was no showing that the manual set forth any standard of care for doctors to observe. Because the nursing manual chart was not designed for doctors to use, and because the doctor was not required to use the manual and had not reviewed it, the trial court reasonably concluded that necessary foundation to introduce the exhibit through the doctor was lacking. In any event, the court also ruled that the exhibit could be used when counsel examined the nurses. Because the court's ruling in effect permits for later introduction of the exhibit, the ruling also fails to demonstrate any prejudicial error, if there was error. *See* § 901.03(1), STATS.

Next, the Baskens argue that the following ruling on a question before nurse Ann Bins demonstrates error.

> Q. [BASKENS' COUNSEL]: And then at 16:50 she's got pain in the upper left quadrant, correct?
>
> [DEFENSE COUNSEL]: ... Asked and answered.
>
> [BASKENS' COUNSEL]: I haven't asked this.
>
> THE COURT: Yeah, you have. Sustained, but that's all right. Proceed.
>
> ....
>
> I'm not going to strike it.

The Baskens argue that this excerpt illustrates the court's "unthinking" rulings that sustain defense objections. We disagree. This excerpt follows a line of questions regarding Shirley's pain. Bins had testified that she does not use the word pain, but rather "contractions" or discomfort, unless the patient was experiencing something other than a contraction or discomfort of labor. There is no offer of proof that Bins' notes, from which this question apparently derived, varied from her testimony. Although this precise question had not been previously asked, to the extent the question asked about pain, the court could reasonably conclude that it was repetitive and argumentative. Further, because the court allowed the question to stand, the ruling did not prejudice the Baskens.[3]

Next, the Baskens argue that the trial court erroneously refused to strike the nurse's unresponsive answer. When asked if Shirley was throwing up at 19:40, Bins answered: "That's not listed here. A lady in labor will oftentimes vomit throughout the course of labor. It's not an unusual sign." The Baskens' counsel asked that the answer be stricken as nonresponsive, but the trial court denied his request. Counsel continued: "At 19:40 you wrote that she was vomiting, correct?" and Bins answered: "Correct, on the monitor tracing."

The Baskens ask us to compare this ruling with the defense's cross-examination of Dr. Peck, a medical expert for the Baskens. Defense asked Peck: "[T]here are also physicians like Dr. Cruikshank who think[] we can use more [Pitocin]?" To which Peck replied: "I doubt very seriously if he would get up to 44 milliliters per minute."

Defense counsel then asked the court to instruct the doctor to respond to the questions being asked. The court stated:

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[3] The Baskens also argue that when asked about Shirley's monitor strip, nurse Bins answered that she did not have enough information to answer the question and that she was unable to tell anything from the limited strip. Evasive answers to adverse exam do not create trial court error. Also, the Baskens' brief cites to "Doc. 112 pp. 225-230" to support their arguments. Because Doc. 112 consist of only 13 pages, none of which is testimony, we assume that the correct reference is to Doc. 113. Also, appellants' brief refers to the exhibit as "exhibit 111"; however, the transcripts of Bechtel's and Bins' testimony refer not to exhibit 111, but "exhibit 11." In this record of over 100 documents and thousands of pages, the need for accurate record citation cannot be over emphasized. *See* ***Keplin v. Hardware Mut. Cas. Co.,*** 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964).

> I would ask that you limit yourself to the questions being asked. The attorney for the [Baskens] can clarify on redirect. I'm sure he will. Go ahead.
>
> ....
>
> ... He cannot restrict you to a yes or no answer.

In comparing these two episodes, we have three observations. First, during Bins' questioning, the Baskens' counsel was permitted to repeat his question and obtained the answer he sought. Second, although the court granted defense counsel's request for the instruction to the witness, Peck's answer was not stricken and was allowed to stand. As a result, even if one were to assume error, the Baskens were not prejudiced by the court's rulings.

Third, to the extent the comparison is meant to demonstrate bias against the Baskens, we disagree. The trial court's management of a trial is a delicate balancing act to which we owe deference. Section 906.11, STATS. Although in one instance the court denied the Baskens' request but later granted the defense's, the difference could be attributed to the court's decision to tighten the reins as the trial progressed in order to save time. The court softened the effect of its ruling by clarifying that Peck was not limited to yes or no answers. We decline to reverse this exercise of discretion.

Next, the Baskens argue that outside the presence of the jury, the trial court unfairly berated their counsel for repetitious questioning of their expert, Dr. Mary Dominski. After an hour of testimony, the trial court called a break and excused the jury. The court stated that it would not permit repetition, explaining:

> She may give her testimony. She's a very good witness. She explains it much better than the treatise explains it, and then you have her re-read the same testimony on the treatise. ... Either use the treatise or use your witness, but I only want the testimony once ....
>
> ....
>
> What she does right now is she gives her opinion, then she reads the treatise, then she tells what the treatise means, which is exactly the same as her opinion. That is

> three times that you're presenting the same information.
>
> ....
>
> ... I am not preventing you from having her say that this is supported by the literature.

The trial court ruled that it was needlessly cumulative to read the treatise and then explain what it means, when it is exactly the same as the doctor's opinion. It did not deny the use of the treatise, but rather exercised control over the mode of questioning. The doctor could have been asked if his opinion was consistent with the treatise. Because § 904.03, STATS., permits the court to limit evidence if its probative value is outweighed by considerations of needless presentation of cumulative evidence, the court did not erroneously exercise its discretion.

Next, the Baskens argue that the trial court demeaned counsel and erroneously limited their adverse exam of Dr. Joseph Brand, a treating neonatologist at Shirley's cesarean. When counsel asked Brand about opinions expressed in a textbook by Volpe, defense counsel objected that it was the same exhibit used with another witness. The trial court replied: "*[W]e'll excuse the jury for a few minutes when he argues it, okay ... because I'm sure he's going to argue it.*" (Emphasis added.)

After the jury left, the trial court explained that it excused the jury because some of the older members were having trouble sitting so long, and it did not want multiple witnesses testifying on the same evidence:

> THE COURT: ... I don't mind if [counsel] very quickly goes over it, but I don't want any time spent on Volpe with this witness because you've already done that with the other witness, and .... I don't have any difficulty with a couple of questions ... but I don't mean ten, okay?
>
> ....
>
> ... [T]here was a lot of testimony as to Volpe this morning, and I don't want it again ....

[BASKENS' COUNSEL]: *You didn't like Volpe*?

THE COURT: It's not that I didn't like it. I don't think we need to have it twice. (Emphasis added.)

The Baskens argue that trial court's statement, "I'm sure he's going to argue it" demeans counsel before the jury. We disagree. From the record, it appears only that the trial court excused the jury to allow argument by counsel. On the other hand, counsel's comment to the court, "You didn't like Volpe?" shows a patent unwillingness to accept the court's instructions.

The Baskens also argue that this episode shows an erroneous exercise of discretion because the court did not know what the questions would be until they were asked and therefore had no rational basis to limit them. We disagree. Based on the line of questioning, it was reasonable for the court to conclude that Peck's testimony would repeat a subject covered earlier through a different witness. Counsel is required to make an offer of proof if the testimony is not going to be unnecessarily repetitive. *Cf.* § 901.03(1)(b), STATS. (error may not be predicated on a ruling excluding evidence unless its substance was made known to the judge by offer of proof). Because trial counsel failed to make the necessary offer of proof, we are unable to identify what testimony the trial court excluded. In any event, after the discussion, the Baskens' counsel asked Brand to identify Volpe's charts and compare them with Amber's condition, which Brand did. As a result, the Baskens' claim of error also fails to demonstrate prejudice.

Next, the Baskens argue that the trial court erroneously limited the use of an exhibit with their medical expert Peck, an obstetrician specializing in problem pregnancies. The exhibit consisted of a blowup of a page in medical literature. Counsel asked Peck if the exhibit was identical to the testimony he just gave, and Peck said it was, offering to read it. The trial court sustained the defense objection that reading it was repetitive. The witness then asked if it was anything he had done, and the trial court stated that it was nothing *he* had done. The Baskens argue that the trial court's ruling was erroneous and demeaning.

We disagree. The trial court was entitled to enforce its pretrial ruling that repetitive expert testimony was not permitted. Before trial, the court's lengthy explanation included the following interchange:

THE COURT: I do not allow repetitive experts ....

....

If they give the same testimony, if they go over the same testimony, they're going to be cut off.

[BASKENS' COUNSEL]: So in other words, you have a doctor for negligence that is a person who in essence has written in the literature and then a practicing physician that may be talking about standards, the court will only allow one expert in this type of case?

THE COURT: Probably. It depends on whether it is the same testimony. I don't want to hear the same testimony time and time again from experts.

Because Peck testified that the exhibit was "identical" with his testimony, the trial court reasonably concluded that reading it aloud would be unnecessarily cumulative. This ruling is within a reasonable exercise of discretion. Section 904.03, STATS.

Next, the Baskens argue that outside the presence of the jury the trial court "berated" counsel for covering the same ground with Peck as he previously covered with two other doctors. They argue that neither doctor dealt with the care Shirley had received and the information to evaluate the care.

The record cited does not support the Baskens' claim of error. The court objected to Peck giving definitions that other doctors have given:

One of the reasons I asked you to provide me with definitions is so that you wouldn't have to give definitions twenty times because you have them written down so that the jury has something in writing where they can refer to the definitions if they've forgotten about them. We've now had ACOG described to us several times.

The court did not oppose testimony concerning Shirley's care, but ordered that definitions were not to be given repetitiously. The Baskens argue that the repetition was harmless because it took only a matter of seconds. The trial court was reasonably concerned that the seconds of repetition were adding up. *See* § 904.03, STATS.

Next, the Baskens challenge the trial court's ruling that questions of Peck concerning the nursing manual's chart of atypical decelerations were repetitive of testimony the day before. The Baskens' counsel showed Peck a blowup of page ninety-three found in the nursing manual, and asked what it showed. Defense counsel objected on grounds of repetition. Outside the jury's presence, the Baskens' counsel argued that although these questions were asked of an adverse witness, counsel had not had the opportunity to ask them of his own witness on direct. The trial court responded:

> But you have now for over an hour and a half, given the same testimony that has been given before by experts. ... I'm not believing you because you've told me you would stop and you haven't stopped. ... The jury has heard this ... more than once. ...
>
> ....
>
> If you get to the management of this woman, I will allow you to do that. But you're not at the management of this woman and you're not at Amber. You are on the teaching plane .... If you're talking about this specific case, I will allow you to talk about the case specifically ....

When the jury returned, Basken asked Peck to use "the diagram" to explain the difference between the typical and atypical variable, which Peck did.[4] He next asked Peck to define a late deceleration, which Peck did. Defense counsel again objected on the ground that another witness gave the same

[4] Unfortunately, the "diagram" that Peck uses is not identified by exhibit number in the transcript, so we cannot determine whether it is the same page 93 of the nurse's manual that counsel attempted to ask Peck about before the objection.

definition, and the trial court sustained the objection and asked the Baskens' counsel to follow the court's instructions.

Because the witness had already answered, no question was before the witness. The court did not strike any testimony, and the Baskens' counsel proceeded with questioning Peck about his review of Shirley's case. Although a lengthy discourse between the court and the Baskens' counsel concerning the parameters of Peck's testimony is of record, the Baskens do not identify what question counsel would have posed and what answer Peck would have given if the court had not limited Peck's examination. Absent a clearly stated offer of proof, the record reveals no prejudice resulting from the court's ruling. Section 901.03, STATS.

Next, the Baskens challenge the trial court's ruling limiting their cross-examination of Dr. Harry Farb, the defense's medical expert on negligence. The Baskens' counsel asked: "You didn't review any literature for this case?" After the trial court excused the jury, the court explained that consistent with an earlier order, it would allow only the question that Farb did not review any literature specifically for this case: "Beyond that, I'm not going to let you because I believe ... you asked that these people be limited. ... Now, that's my memory of what I determined, and I can see that [the defense] were following that and they did not have him review literature because they didn't want another witness coming up with literature ...."

This argument essentially challenges an earlier trial court ruling with respect to the handling of medical literature. However, the Baskens' appellate brief does not cite the record with respect to the court's earlier decision. Without a citation to the earlier decision, the trial court's comments are out of context and therefore not capable of review. We decline to hold that this ruling results in reversible error.

Next, the Baskens argue that the trial court unfairly interfered with the cross-examination of Farb on the management of uterine hyperstimulation. The Baskens' counsel asked whether Farb agreed with *Williams' Obstetrics,* a medical textbook, that Pitocin should be discontinued immediately if contractions exceed five in a ten-minute period, or last longer than one minute or if the fetal heart rate decelerates significantly. Farb agreed, provided the definition of hyperstimulation included strong contractions. Counsel next read

a definition of hyperstimulation that included contractions that were "too frequent or too intense" and asked Farb: "And they don't use the word strong, do they sir?" Farb answered that they used the word "intense." Counsel then asked: "But they do not say hyperstimulation is too many contractions that are strong, does it?" Farb answered: "Not in those words, no." The court interrupted:

> Mr. Cates, so we can move along, once you read it, that tells the jury what -- and the doctor what you're asking. You do not have to repeat it three times.

The Baskens argue: "Now the examiner has got the witness where he wants him. All he need do to discredit this man is to be able to ask 'If not in those words, what words,' but the Court interrupts ...." We disagree. The trial court reasonably asked counsel to move along. It is apparent that Farb considered the word "intense" to signify "strong" contractions. We agree with the trial court that continued questioning on this point was needlessly repetitious, § 904.03, STATS.

Next, the Baskens argue that the trial court erroneously excluded impeachment evidence in the form of a videotape of a 1984 lecture by Farb to insurance people and lawyers at which he defined "hypertonus" as "An interval, if its less than two minutes, that's hypertonus." The Baskens argue that the statement is impeachment because "[t]hat is more than five contractions in a ten-minute period without any requirement that they be strong." (Emphasis in the original.)

We disagree that the Baskens demonstrated that Farb's lecture definition is inconsistent with his trial testimony. At trial, Farb also had testified that "[H]ypertonus can also mean a resting uterine tone that's significantly above baseline and have nothing to do with contractions." Because there is more than one definition of hypertonus, and at least one that does not have anything to do with contractions, the absence of any requirement that contractions be strong in his lecture definition is not necessarily inconsistent with his trial testimony. Because the Baskens fail to demonstrate that Farb's

lecture comment is necessarily inconsistent with his trial definition, the record reveals no error. *See* § 906.13(2), STATS.[5]

Next, the Baskens challenge a ruling made during their cross-examination of defense expert Claudia Beckmann, nurse and faculty member at the University of Missouri-Kansas City, who testified on the lack of negligence of the nursing staff. On direct, she testified that a definition of uterine hyperstimulation "that most people go by is five contractions in ten minutes." She testified that the stronger contractions generally have more of an impact on fetal heart tones. She testified that there was nothing worrisome in the heart rate tracing until 8:05 p.m.

On cross-exam, the Baskens' counsel asked: "The fact of the matter is, you counted the contractions during the course of the day, did you not?" to which she replied: "The activity, yes." Then counsel asked:

Q. And if they are contractions, then basically there's hyperstimulation all afternoon; isn't that true?

A. If in fact those are contractions. There's only one period on the monitor that actually is hyperstimulation based on the monitor. The other is based on uterine activity, uterine irritability, possibly contractions.

Counsel then referred to Beckmann's deposition where he asked: "So whatever they're seeing and calling contractions are occurring all afternoon on a frequency of greater than five per ten minutes?" to which Beckmann replied "Correct."

Defense counsel objected on the grounds that the deposition questions did not use the word hyperstimulation, which was what the original question asked. The trial court denied the objection, stating, "That's fine. I'll let him read it. ... Let's go on." Counsel next asked, "Well, you defined

[5] In any event, the Baskens cite no legal authority for their contention that the videotaped statement is impeachment. *See* ***State v. Shaffer,*** 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980) (argument unsupported by legal authority need not be considered).

hyperstimulation as contractions" when the court cut him off, saying "That has been asked and answered. Let's not repeat. Go ahead."

The trial court's ruling is harmless error. The Baskens' counsel had not previously asked Beckmann's definition of hyperstimulation. However, Beckmann's definition of five contractions in ten minutes was established on direct and was implicitly accepted by counsel in the deposition testimony read in as impeachment. Because Beckmann's definition was in the record and not disputed by the Baskens, the Baskens fail to show prejudice by the court's ruling preventing the repetition of the definition.

Next, the Baskens argue that the trial court erroneously limited their cross-exam of the defense witness Patricia Kempen, an obstetric nurse they had previously called on adverse. The trial court ordered that adverse witnesses were not to be re-asked the same questions on cross-exam that had already been covered. The first example the Baskens ask us to compare is their counsel's questions to nurse Kempen:

Q. And what you wrote at 14:40 was "variables with contractions"; isn't that true?

A. Correct.

....

Q. And we can see that the contractions are occurring very repetitively; correct?

A. Correct.

Q. And you pointed out the variable decelerations; correct?

A. Yes.

Q. But they are occurring after the contractions, are they not?

A. Variables can happen whenever.

The trial court sustained defense counsel's objection to this line of questions on the grounds that the Baskens' counsel already covered this topic on adverse. The Baskens' counsel next asked: "What you saw at 14:30 and 14:40 caused you to decrease the Oxytocin; isn't that true?" to which Kempen replied, "To evaluate the variables."

The Baskens argue that the record reveals that the court was wrong. We disagree. The Baskens' counsel had previously asked Kempen on adverse:

Q. When you came in at 14:30, you saw ... five to seven contractions in about [a] ten-minute time period; correct?

A. I think so.

....

Q. And there were repetitive decelerations with the variability down; isn't that true?

A. Variable, yes.

The Baskens argue that the record demonstrates that "[i]n one case the inquiry was about 'variability'; in the other it was about 'variable decelerations.'" We disagree. The Baskens' argument fails to reveal any material difference in these two lines of questioning. As a result, we conclude that the trial court's ruling that the subject matter was covered was reasonable.

Next, the Baskens ask us to compare nurse Bins' adverse with her cross-examination. On cross, in an attempt to show signs of oxygen deprivation to the fetus, he asked: "When you came in at [3:30 p.m.] that would have been what you saw ... that the variability is considerably less than it was at ten o'clock in the morning?" The trial court sustained an objection as repetitive of adverse, and the Baskens' counsel apologized.

The Baskens argue that the ruling was error because their cross-examination dealt with the fetal heart monitor and their earlier questions on

adverse dealt with the bottom portion of the tracing showing uterine activity.[6] We agree. From the context of the questions, we agree that the two examinations apparently dealt with different portions of the exhibit and the trial court erroneously concluded otherwise. Once again, however, counsel failed to preserve this claim of error for appellate review by making an offer of proof that his line of questioning dealt with a different portion of the exhibit. *See* § 901.03(1)(b), STATS.

2. Trial Court Bias

Next, the Baskens argue that the trial court's evident lack of impartiality warrants a new trial. We disagree. Whether a judge's partiality, if any, violated a parties' rights to a fair trial presents a question of law we review de novo. *See* ***State v. Sinks,*** 168 Wis.2d 245, 257, 483 N.W.2d 286, 291 (Ct. App. 1992). A judge's bias must be sufficiently severe to translate into partiality; "antagonism or a strained relationship between counsel and the judge is insufficient." ***Id.*** The Baskens summarily list over seventy-five record citations allegedly demonstrating bias on the part of the trial court. We have reviewed these record citations and conclude that they do not demonstrate bias on the part of the trial court. The trial court did not permit either side to introduce repetitive expert testimony. The record shows that the Baskens' counsel did not accept this ruling. As a result, counsel was subject to several admonitions from the trial court. As stated in ***Oshogay v. Schultz,*** 257 Wis. 323, 327, 43 N.W.2d 485, 488 (1950): "The court might have been somewhat more guarded in its remarks, but defendant's counsel invited it."

> [I]t is clear that there was no prejudicial error in the language used under the circumstances, but, on the contrary, that the purpose of the court was to confine counsel within proper limits, and to prevent him from persistently endeavoring to draw out evidence from the witness after rulings of the court that the same was improper.

[6] The Baskens argue that the court's ruling was unfair because the court and defense counsel had secured a daily copy of the trial transcripts but the Baskens had not. The Baskens' argument implies that if their counsel had a daily copy, he would have made an offer of proof at the time of the objection excluding the cross-examination testimony to show that the line of questioning was not repetitive. Neither the Baskens nor the record indicates why their counsel did not have a daily copy.

Id. at 328, 43 N.W.2d at 485 (quoting ***Hein v. Mildebrandt***, 134 Wis. 582, 589, 115 N.W. 121, 124 (1908)). Here, the trial court's remarks were not outside the bounds of its discretionary authority to control the course of trial. Its rulings were an attempt to make the trial more efficient. The trial court required counsel to prioritize evidence and emphasize the most important evidence rather than matters of minimal relevancy. The Baskens' counsel resisted this ruling, resulting in adverse rulings. Despite what at times might have been technical error, counsel was afforded a fair and reasonable opportunity to present evidence.

3. Erroneous Jury Instruction

Next, the Baskens argue that the trial court erroneously instructed the jury with respect to an "alternative method of treatment." WIS J I—CIVIL 1023; *see also* ***Nowatske v. Osterloh,*** 198 Wis.2d 419, 447-48, 543 N.W.2d 265, 276 (1996). They argue that everyone agreed that if the uterus was overstimulated, the Pitocin had to be reduced or turned off and the "only dispute was whether the evidence established that there was an overstimulation" and "did Defendants fail to diagnose this condition."

A trial court has broad discretion in instructing a jury based on the facts and circumstances of a case. ***Fischer v. Ganju,*** 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). "The 'alternative method' instruction is optional and is only to be given by the trial court when the evidence allows the jury to find that more than one method of treatment of the patient is recognized by the average practitioner." ***Miller v. Kim,*** 191 Wis.2d 187, 198, 528 N.W.2d 72, 76 (Ct. App. 1995).

The evidence at trial reasonably supports the instruction. Whether Pitocin should have been used with Shirley, whether high levels of Pitocin should have been used and whether it should have been reduced sooner were subject to much debate among the experts. Bechtel testified to risks and benefits associated with alternatives available to him with respect to Shirley's condition. He described the risks of cesarean with a diabetic patient and the risks of waiting for a spontaneous delivery in a patient suffering preeclampsia. We conclude that the instruction given was within trial court discretion.

4. New Trial in the Interest of Justice.

Finally, the Baskens argue that they are entitled to a new trial in the interest of justice. They argue that zero damages is not a rational amount based on the evidence and the verdict indicates the influence of the court's conduct on the jury. We disagree. The jury was instructed to "consider only the damages sustained as a result if any from the treatment by the defendants." The instruction required the jury to distinguish and separate the natural results of damages that flow from Shirley's prenatal condition. Because there was expert testimony that the baby's condition resulted in abnormalities present in the uterus as a result of Shirley's prenatal condition, the jury could rationally answer zero damages.

By the Court.—-Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.