COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2008

David R. Schanker
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. 2007AP1326 **Cir. Ct. No. 2005CV719**

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

DICK M. MARQUARDT AND JEAN MARQUARDT,

PLAINTIFFS-APPELLANTS,

V.

JAY J. SCHINDLER, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., LUTHER HOSPITAL - MAYO HEALTH SYSTEM AND MIDELFORT CLINIC, LTD. - MAYO HEALTH SYSTEM,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. This is a medical malpractice action. Dick Marquardt and his wife Jean Marquardt appeal a judgment entered after a jury verdict in favor of Dr. Jay Schindler, Schindler's insurer, and two health care

entities.[1] Marquardt argues the court should have instructed the jury on *res ipsa loquitur*[2] and should have given an informed consent special verdict question he requested. Marquardt also requests a new trial in the interest of justice, for the same reasons. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 In April 2004, Marquardt was diagnosed with two ruptured disks in his cervical vertebrae. To correct the problem, Marquardt agreed to surgery fusing his vertebrae at the locations of the ruptured disks. The vertebrae were to be fused between the C5 and C6 vertebrae and the C6 and C7 vertebrae.[3] In other words, the surgery would fuse the C5, C6 and C7 vertebrae together into a single bloc.

¶3 Schindler performed the surgery on April 30, 2004. Schindler intended to begin the surgery by fusing the C5 and C6 vertebrae. However, he misidentified the starting place for the surgery, and began by fusing the C6 and C7 vertebrae instead of the C5 and C6. Schindler then went on to fuse the healthy C7 and T1 vertebrae, believing he was fusing the C6 and C7. At that point, Schindler recognized his error and fused the C5 and C6 vertebrae as well. The net result of

[1] For clarity, we refer to the plaintiffs collectively as Marquardt and the defendants as Schindler.

[2] *Res ipsa loquitur* is a Latin phrase literally meaning "the thing speaks for itself." BLACK'S LAW DICTIONARY 1336 (8th ed. 2004).

[3] The spine consists of seven cervical vertebrae and twelve thoracic vertebrae, followed by the lumbar, sacrum, and coccyx. Vertebrae are referred to by a letter and number combination, with numbers increasing from top to bottom. So, cervical vertebrae are numbered C1 though C7, followed by thoracic vertebrae numbered T1 through T12, and so on for the three remaining levels.

Schindler's error, then, was that four of Marquardt's vertebrae—C5 through T1—were fused together rather than three.

¶4 Marquardt filed suit in November 2005, and the matter was tried in March 2007. At trial, Marquardt alleged Schindler had negligently misidentified the proper starting place for the surgery. Schindler's defense was that although he had made a mistake in identifying the correct starting place for the surgery, he had met the standard of care because he had followed the correct procedures to identify the starting place and had recognized his mistake and fused the correct vertebrae as well.[4]

¶5 Marquardt requested special verdict questions on negligence and informed consent. The circuit court gave a special verdict question on negligence. The court also gave a special verdict on informed consent, although not the one requested by Marquardt. The court instructed the jury using WIS JI—CIVIL 1023.2 (2006), and submitted a special verdict that asked, "Did Dr. Schindler fail to disclose information about the surgery that was necessary for Dick Marquardt to make an informed decision?" The court declined to give Marquardt's requested informed consent special verdict question that asked whether Schindler was "negligent in failing to properly obtain informed consent from Dick Marquardt for the surgery he performed at C7-T1."

¶6 Marquardt also requested the standard jury instruction on *res ipsa loquitur*, WIS JI—CIVIL 1024 (1992):

[4] Schindler's expert testified locating the correct disk space for surgery was difficult, and errors were "known to occur even in the hands of the most experienced surgeons…." He opined that Schindler met the standard of care in the Marquardt operation by recognizing his mistake and ultimately fusing the correct vertebrae.

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

The court refused to instruct on *res ipsa loquitur*, and the jury found for Schindler on both the negligence and the informed consent verdict questions.

DISCUSSION

¶7 Marquardt first challenges the circuit court's decision not to give a *res ipsa loquitur* instruction. However, Marquardt has failed to preserve this issue for appeal. During the jury instructions conference, Marquardt's counsel stated "I think it's a case that involves res ipsa, so I've requested that and ask that the court give that." Counsel then went on to another issue without any argument explaining why a *res ipsa loquitur* instruction was warranted, and did not renew the argument in motions after verdict.

¶8 It is well-established law in Wisconsin that to preserve an alleged trial error for appeal, a litigant must raise the error in motions after verdict, even when an objection is made during the course of trial. ***Suchomel v. University of Wis. Hosp. & Clinics***, 2005 WI App 234, ¶10, 288 Wis. 2d 188, 708 N.W.2d 13 (citations omitted). This rule applies to asserted errors in jury instructions raised during a jury instruction conference. ***Id.***, ¶11. By failing to renew his request for

a *res ipsa loquitur* instruction in motions after verdict, Marquardt has waived this issue. *See* ***id.***

¶9 Even on the merits, however, Marquardt's argument fails. A *res ipsa loquitur* instruction is proper when:

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

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 17, 531 N.W.2d 597 (1995) (citations omitted).

¶10 Schindler argues the evidence provided a full and complete explanation for Schindler's mistake, making a *res ipsa loquitur* instruction inappropriate.[5] This third element—whether the evidence falls into a middle ground between conjecture and a complete explanation—"requires the circuit court to make a determination following a careful weighing of the evidence[]" and therefore calls for an exercise of discretion. ***Id.*** at 20. If the court does not exercise its discretion, we independently review the evidence to determine whether the evidence falls into this middle ground. ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 603, 492 N.W.2d 167 (Ct. App. 1992).

[5] Schindler also argues there was no evidence his error did not ordinarily occur in the absence of negligence. We need not reach this alternative argument.

¶11 In this case, because the circuit court did not explain its reasoning on this point, we independently review the record.[6] *See* ***id.*** In his case in chief, Marquardt called Schindler adversely. Schindler testified he used a localizing needle to determine the correct place to begin surgery. The needle was placed in Marquardt's neck, and an x-ray taken. The x-ray showed the needle in relationship to the bones of Marquardt's spine. Schindler admitted that his preliminary surgery report indicated he had made the mistake because he had confused a retractor[7] in an x-ray with the localizing needle. Marquardt offered the x-ray showing the needle and retractor into evidence.

¶12 This evidence amounted to a complete explanation of the incident. This is true even though Schindler recanted that explanation soon after the surgery. Schindler's recantation only shows he later came to disagree with his earlier explanation. It does not indicate the evidence did not include a complete explanation of his mistake. Because the jury was offered a complete explanation for the mistake, the court correctly concluded a *res ipsa* instruction was not appropriate. *See* ***Peplinski***, 193 Wis. 2d at 17.

¶13 Marquardt next challenges the court's decision not to give his requested informed consent special verdict. Again, this issue was not preserved for appeal, as Marquardt did not raise it in motions after verdict. *See* ***Suchomel***, 288 Wis. 2d 188, ¶10. In addition, this argument is without merit.

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[6] When Marquardt raised the *res ipsa loquitur* issue at the jury instruction conference, he devoted only a single sentence to arguing for an instruction. Under those circumstances, it is not surprising that the court's response was equally brief.

[7] A retractor is a "surgical implement for holding tissues away from the field of operation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1940 (unabr. 1993).

¶14 The court instructed the jury using WIS JI—CIVIL 1023.1 and 1023.2 (2006). The special verdict question asked, "Did Dr. Schindler fail to disclose information about the surgery that was necessary for Dick Marquardt to make an informed decision?" *See* WIS JI—CIVIL 1023.2 (2006). Marquardt argues he was entitled to a special verdict question asking whether he gave Schindler permission to fuse his C7-T1 vertebrae.

¶15 However, informed consent requires the doctor to give information that allows the patient to "intelligently exercise his right to consent or to refuse *the treatment or procedure proposed*." ***Martin v. Richards***, 192 Wis. 2d 156, 173-74, 531 N.W.2d 70 (1995) (emphasis added; citation omitted). It makes no sense to ask a jury whether a doctor had consent to make a mistake. It is the rare patient, indeed, who would agree to allow a doctor to perform a surgery in the wrong place, accidentally sever an artery or nerve, or give a medication overdose. Instead, if a mistake is made—whether a mistake in location, as here, or a mistake such as severing an artery or nerve—the correct question for the jury is whether the mistake fell below the standard of care.

¶16 In this case, the "treatment or procedure proposed" was the C5 through C7 fusion. *See* ***id.*** The additional C7-T1 fusion was a mistake in executing that procedure. The correct questions for the jury, then, were (1) whether Marquardt was provided with the requisite information on the C5 through C7 fusion; and (2) whether Schindler's mistake in this case fell below the applicable standard of care. The first is informed consent and the second is negligence. Those questions were included in the special verdict.

¶17 Finally, Marquardt requests a new trial in the interest of justice. *See* WIS. STAT. § 752.35. He argues the real controversy was not fully tried because of

the alleged errors in the special verdict and jury instructions. *See* ***McKnight v. GMC***, 143 Wis. 2d 67, 71-72, 420 N.W.2d 370 (Ct. App. 1987). Because we reject Marquardt's challenges to the special verdict and jury instructions, we reject this argument as well. The real controversy in this case—whether Schindler's mistake fell below the standard of care—was fully tried.

By the Court.—Judgment affirmed.

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