COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 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. 2010AP2615 **Cir. Ct. No. 2005CV234**

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

SAREC TRUDEAU, A MINOR, JENNIFER J. TRUDEAU AND JACOB TRUDEAU,

PLAINTIFFS-APPELLANTS,

WISCONSIN AUTO AND TRUCK DEALERS INSURANCE CORPORATION AND WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., INJURED PATIENTS AND FAMILIES COMPENSATION FUND, SACRED HEART - SAINT MARY'S HOSPITAL, INC., MINISTRY HEALTH CARE, INC., MINISTRY MEDICAL GROUP, INC. AND BRUCE R. ABRAMS, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: NEAL A. NIELSEN III, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Jennifer, Jacob, and Sarec Trudeau appeal a judgment dismissing their medical malpractice claims following a jury trial. The Trudeaus argue the circuit court erred by: (1) including the optional "alternative methods" paragraph of WIS JI—CIVIL 1023 in its instruction to the jury; (2) excluding an expert's opinions on causation; and (3) precluding cross-examination of a defense nurse with the protocols of the neonatal resuscitation program. We reject the Trudeaus' arguments and affirm.

BACKGROUND

¶2 Jennifer went into labor and was admitted to Sacred Heart-St. Mary's Hospital in Rhinelander. Jennifer and her fetus were monitored by an electronic fetal monitoring unit that tracks the mother's contractions and the fetal heart rate and records that information on a "strip."

¶3 Jennifer was admitted to the hospital in the morning. Dr. Bruce Abrams took over Jennifer's care in the early afternoon. Nurse Ruth Young came on duty in the late evening and assumed Jennifer's nursing care. Jennifer started second-stage (pushing) labor around 9:15 p.m., under Young's care. Abrams entered Jennifer's room around 10:10 p.m. Neither Young nor Abrams believed the fetal monitoring strips indicated a problem. Another nurse also arrived to assist with the delivery.

¶4 Upon the emergence of baby Sarec's head, Abrams observed the umbilical cord wrapped tightly around Sarec's neck, requiring that the cord be immediately clamped and cut before delivery was completed. Before completing delivery, Abrams also twice suctioned Sarec's nose and mouth. Sarec was born at

10:15 p.m. and made two gasping respirations. Abrams noted Sarec was pale, but the Trudeaus contend Sarec was also blue. As Abrams' brief explains, Sarec "was towel dried, warmed and placed on [Jennifer's stomach] for a brief period of time as a means to stimulate the child. As this was occurring, Dr. Abrams was continuing to assess the child."

¶5 Throughout their briefs, the parties occasionally refer ambiguously to "stimulation," without explaining what the term means or identifying what the stimulation consisted of. Our review of the record indicates that stimulation—also referred to as tactile stimulation—may include, among other things, suctioning the baby's nose and mouth, towel drying it, and placing it on the mother's stomach.

¶6 After observing that Sarec did not respond to the stimulation and breathe on his own, Abrams moved him to a warming table and gave positive pressure oxygen ventilation. However, Sarec still failed to breathe unassisted. At 10:18 p.m., Abrams called for additional assistance, causing a second doctor to respond at 10:22 p.m. and insert an endotracheal tube to establish an airway. Sarec's condition then improved.

¶7 Although Sarec was promptly transferred to another hospital and remained there for nine days, he was discharged with the belief he was a normal, healthy baby. Problems were first detected about eight months after birth. Subsequent testing revealed Sarec had periventricular leukomalacia, a brain injury that includes a diagnosis of cerebral palsy.

¶8 The Trudeaus sued, alleging Abrams and the Sacred Heart nurses negligently cared for Sarec. Their two main contentions were that Young failed to alleviate stressors in the final hour of labor, causing Sarec's depressed birth state, and that Abrams failed to immediately initiate resuscitation. The matter first went

to trial in June 2009, but the court ordered a mistrial on the fifth day after jurors were exposed to witnesses outside of the courtroom. The case then proceeded to trial in June 2010. The jury found that there was no negligence by any party, thus it did not answer the causation questions on the special verdict. The circuit court denied the Trudeaus' motions after verdict, and they now appeal.

DISCUSSION

Whether the court erroneously instructed the jury

¶9 The Trudeaus argue the circuit court erroneously instructed the jury by including the optional "alternative methods" paragraph of WIS JI—CIVIL 1023. Instruction 1023 explains the concept of medical negligence, including standard of care, and includes the following:

> **[Use this paragraph only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable:** If you find from the evidence that more than one method of (treatment for) (diagnosing) (p1aintiff)'s (injuries) (condition) was recognized as reasonable given the state of medical knowledge at that time, then (doctor) was at liberty to select any of the recognized methods. (Doctor) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnostic) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

¶10 It is proper to instruct a jury using the alternative method instruction when "evidence allows the jury to find that more than one method of diagnosis or treatment of the patient" is recognized as legitimate. ***Finley v. Culligan***, 201 Wis. 2d 611, 622, 548 N.W.2d 854 (Ct. App. 1996). A trial court has broad discretion when instructing the jury. ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992).

¶11 The Trudeaus' jury instruction challenge concerns Abrams' diagnosis and treatment of Sarec's condition immediately following Sarec's delivery. At birth, Sarec was not breathing; he was in either primary or secondary apnea. The two conditions, however, are initially indistinguishable. Thus, the child must first be stimulated to induce breathing. If this treatment is successful, the baby was in primary apnea. However, if the baby does not commence breathing after stimulation, the baby is diagnosed with secondary apnea, which requires immediate positive pressure ventilation. Stimulation, therefore, serves as both a treatment and a diagnostic tool.

¶12 The Trudeaus argue that because Sarec was in secondary apnea at birth, Abrams was required to immediately commence positive pressure ventilation. They contended at trial that Abrams' delay, particularly by placing Sarec on Jennifer's stomach, caused Sarec's brain injury by oxygen deprivation. Because the neonatal resuscitation program protocols indicate only one treatment—immediate resuscitation—for secondary apnea, the Trudeaus argue the court's jury instruction was improper.

¶13 The Trudeaus' argument fails for the reason footnoted in their brief: "Admittedly, stimulating the baby first is necessary to confirm that the baby is in secondary apnea and not primary apnea." Contrary to the Trudeaus' suggestion, Abrams did not attempt to treat secondary apnea by briefly placing Sarec on Jennifer's stomach. Rather, doing so (1) constituted continued stimulation of Sarec—treatment for primary apnea, and (2) allowed Abrams to briefly observe whether Sarec would commence breathing, to diagnose secondary apnea. Abrams and his expert both testified that placing Sarec on Jennifer's stomach was a reasonable action under the circumstances, falling within the standard of care.

¶14 The Trudeaus' expert nurse, on the other hand, testified that because Sarec had not responded to the suctioning or towel drying, it was below the standard of care to place Sarec on his mother's abdomen rather than immediately commencing positive pressure ventilation.

¶15 Given that primary and secondary apnea are evaluated on a continuum and are initially indistinguishable, and that the parties' expert testimony conflicted as to when Abrams was required to transition to secondary apnea treatment, the court properly exercised its discretion by instructing the jury that:

> If you find from the evidence that more than one method of diagnosing or treating Sarec's condition was recognized as reasonable given the state of medical knowledge at that time, then Dr. Abrams was at liberty to select any of the recognized methods. Dr. Abrams was not negligent because he chose to use one of these recognized methods rather than another recognized method if he used reasonable care, skill, and judgment in administering the method.

There was a basis in the evidence to allow the jury to find that there were alternatives. The Trudeaus' argument, relying on the false premise that "there was no evidence of reasonable alternatives to immediate resuscitation" at birth, therefore fails.

¶16 Moreover, the instruction did not inform the jury that there *was* more than one reasonable type of diagnosis or treatment. Rather, without focusing the jury on any specific subject or testimony, the instruction merely addressed the potential situation where jurors "[found] from the evidence that more than one method" of diagnosis or treatment was recognized as reasonable. Thus, even if improper, there was little, if any, chance that the instruction would mislead the

jury. *See* ***Fischer***, 168 Wis. 2d at 850 (erroneous jury instruction "is prejudicial if it probably and not merely possibly misled the jury").

Whether the court erroneously limited expert opinion testimony

¶17 The Trudeaus argue the circuit court erroneously limited the testimony of their expert witness, Dr. Geoffrey Schnider. They contend Schnider should have been permitted to offer an opinion that Sarec's depressed condition at birth was caused by the negligent care rendered during labor. We reject the Trudeaus' argument on multiple grounds.

¶18 First and foremost, the jury never reached the causation issue in this case because it concluded neither Abrams nor Young was negligent. Thus, whether Schnider was permitted to testify regarding causation is a moot issue on appeal. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy .... Generally, moot issues will not be considered by an appellate court.").

¶19 Even on the merits, however, we conclude the circuit court properly exercised its discretion to exclude Schnider's opinion as to what caused Sarec's condition at birth. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698 (court's evidentiary rulings subject to broad discretion). At Schnider's deposition, the Trudeaus' counsel stated: "Just to save you some time, we will not be asking Dr. Schnider to act with regard to proximate cause aspects of this case." Additionally, later in the deposition, defense counsel sought further clarification as to Schnider's expertise or opinions regarding the cause of Sarec's brain injury. This led to the following exchange:

> [Trudeaus's counsel]: Just for the record again, we're indicating that the Doctor will not be talking about these things. And we want to remind you again that there is a time limit on today's deposition.
>
> [Defense counsel]: Okay. I understand. I just wanted to be sure because we're—I think we're through this topic, so I just wanted to be sure—
>
> [Trudeaus' counsel]: I just want the record to show that we're just wasting a lot of time in case we run into some time problems.

¶20 In its ruling precluding Schnider from testifying regarding causation, the circuit court explained:

> [T]he record's pretty clear on the deposition that the purpose for Dr. Schnider's participation in the case was the standard of care, and that he had no opinion, and was not going to be asked to express an opinion regarding causation. And I think, clearly, [counsel], you should be held to it or these people would have deposed him in another [manner].

We see no error in prohibiting expert testimony on an issue that the proponent expressly represented would not be a proper subject of inquiry. *See* ***id.***

¶21 The Trudeaus nonetheless argue Schnider's testimony was improperly limited because there were two distinct causation issues in the case: (1) whether Schnider's and the nurses' predelivery care caused Sarec to be born depressed due to oxygen deprivation, and (2) whether Sarec's periventricular leukomalacia brain injury resulted from oxygen deprivation (caused by the pre- and/or postdelivery care). The Trudeaus contend Schnider should have been able to testify regarding the first cause issue, although not the second. According to the Trudeaus, only the second question concerns "proximate cause."

¶22 While the cause issue may be broken down into its component parts, the Trudeaus' argument is largely one of semantics. Had they wished to draw the

distinction prior to trial, it was their responsibility to do so clearly and unambiguously, rather than inviting defense counsel to overlook the issue.

¶23 Moreover, the Trudeaus' proximate cause label does not aid their argument. The test for causation is whether the conduct at issue was a "substantial factor" in producing plaintiff's injury. ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶24, 277 Wis. 2d 21, 690 N.W.2d 1. This test encompasses both of the cause components identified by the Trudeaus. While their counsel used the term proximate cause at the deposition when explaining what Schnider would not address, counsel's use of the term was misleading, if not erroneous. In fact, the term can have multiple meanings, and is disfavored:

> Early in Wisconsin jurisprudence, the term "proximate cause" referred to two distinct concepts. The first use of the term was to describe "limitations on liability and on the extent of liability based on [ ] lack of causal connection in fact." The second use of the term was to describe "limitations on liability and on the extent of liability based on ... policy factors making it unfair to hold the party [liable]." ....
>
> The first use and meaning of the term "proximate cause" has long since been abandoned in Wisconsin in favor of the "substantial factor" test used to establish cause-in-fact, which is a jury issue.

Fandrey v. American Family Mut. Ins. Co., 2004 WI 62, ¶¶11-12, 272 Wis. 2d 46, 680 N.W.2d 345 (citations omitted).

Whether the court erroneously limited cross-examination of a defense witness

¶24 The Trudeaus argue the court erred by prohibiting them from cross-examining nurse Young with the neonatal resuscitation program (NRP) protocols when they called her as an adverse witness in their case-in-chief. The Trudeaus assert:

> During the first trial, the ... court prohibited plaintiffs from cross-examining any witnesses with the NRP protocols because the literature was not listed in plaintiffs' disclosure of learned treatises, despite the fact that the material was only desired to be used on cross-examination. The materials were also prohibited in the retrial, since the trial court ordered that all the prior rulings from the first trial would apply in the second trial.

The Trudeaus, however, omit record citation for their assertions. In fact, no record exists for the first assertion because the issue was addressed at a sidebar conference during the first trial.

¶25 At the second trial, the Trudeaus did not attempt to cross-examine Young with the NRP protocols or raise the issue with the court at that time. Later, after Young had testified and been dismissed, the Trudeaus asked the court to reconsider its first-trial ruling excluding the NRP protocols. The court indicated it could not recall the reasoning for excluding the protocols during the first trial, but, regardless, the defense attorneys agreed the protocols could be used for cross-examination. Thus, the Trudeaus were permitted to utilize the NRP protocols, and did so extensively.

¶26 In denying the Trudeaus' motion after verdict, the court observed:

> Now, we have an issue concerning cross-examination of Nurse Young with the NRP protocol. And your motion suggests that ... the Court did not permit you to do so, and that a subsequent ruling concerning the use of the protocol changed the ability to use that protocol in other respects at trial. I have the response by [defense counsel], who indicates that they don't recall it that way at all, and I don't have any evidentiary basis that lets me recall exactly how I may have ruled, or whether there was an objection. And so, again, I am stuck in a position where it's just terribly difficult to recall with certainty what my ruling was on this issue. ... [C]learly the NRP was used extensively throughout the course of this trial .... It was argued at closing, a copy of it is part of the record in evidence, it was waived around in front of the jury for most of ten days .... [I]f it was not [used with Young], whether that was a result

> of the Court precluding its use, I can't recall. And I don't have any evidentiary basis to suggest that that's the case today.
>
> So I am going to deny any motion for a new trial on that basis[.]

¶27 The Trudeaus present us with no basis in the record from which we could determine the court erroneously excluded the NRP protocols. We must therefore reject their argument. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (appellant has burden to establish, "by reference to the court record, that the issue was raised before the circuit court"); ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546 (2006) ("[I]n the absence of a transcript we presume that every fact essential to sustain the circuit court's decision is supported by the record."). Parties who rely on an unrecorded sidebar conference do so at their peril. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981).

¶28 Regardless, as the circuit court stressed, the NRP protocols were eventually presented to the jury and given extensive consideration by the parties. Thus, the jury was adequately apprised of any conflicts that existed between Young's testimony and the protocols. We are therefore satisfied that any error was harmless. *See* ***Martindale***, 246 Wis. 2d 67, ¶¶30-32.

By the Court.—Judgment affirmed.

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