

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 1995

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, STATS.

NOTICE

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No. 94-1266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**T. J. YELICH, a minor, by,
E. CAMPION KERSTEN, his guardian ad litem,
and DALE YELICH,**

Plaintiffs-Appellants-Cross Respondents,

KAREN ANN YELICH,

Plaintiff,

v.

**JOHN P. GRAUSZ, M.D.,
and THE WISCONSIN PATIENTS COMPENSATION FUND,**

Defendants-Respondents-Cross Appellants.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. T. J. Yelich and his father, Dale Yelich, appeal from a judgment entered in favor of Dr. John P. Grausz. The judgment, dismissing their complaint on the merits, was entered after a jury found Grausz not liable in a medical malpractice action. The Yeliches contend that the trial court erred when it did not submit the theory of general medical malpractice to the jury or give a *res ipsa loquitur* jury instruction. Further, the Yeliches contend that the trial court should have set aside the verdict either because it was inconsistent or because it was perverse and the result of prejudice. They also contend that the trial court should have found, as a matter of law, that Grausz was not an employee of Milwaukee County when he treated T. J. Yelich. Grausz filed a cross-appeal to preserve his right to challenge the jury's finding on damages. We reject the Yeliches' claims and affirm the circuit court's judgment. We do not reach Grausz's cross-appeal.

T. J. Yelich was delivered by caesarean section approximately six weeks prematurely. Grausz, a neonatologist, immediately assumed responsibility for the infant's care. Although born prematurely and at a gestational age when the lungs are not fully developed, the baby did not initially require assistance to breathe.

A few hours after the infant was born, however, he developed symptoms of respiratory distress syndrome. The syndrome is a combination of symptoms indicating that the baby's lungs are not mature enough to allow sufficient oxygen to reach the bloodstream. Depending upon the seriousness of the underlying condition, respiratory distress syndrome can appear to progressively worsen as signs of distress increase. X-rays of the infant also suggested the presence of hyaline membrane disease, which occurs when thick membranes develop and coat the air sacs of the lungs. This condition can be fatal. Because hyaline membranes are associated with respiratory distress, it is assumed to be the cause of respiratory distress syndrome in premature infants.

According to the testimony, respiratory distress syndrome and hyaline membrane disease in premature infants are treated by providing supplemental oxygen. Too much oxygen, however, can contribute to blindness and burn the lungs. Consequently, the levels of oxygen and carbon dioxide in the blood and the acidity level of the blood are monitored.

Initially, Grausz ordered that T. J. Yelich be given supplemental oxygen via a hood placed over the incubator. Later, the child was placed on a respirator. His blood gas levels were monitored by blood drawn from his heel and by readings from a non-invasive device called a transcutaneous monitor, which measures the flow of oxygen and carbon dioxide through the skin. In order to directly monitor the gas levels in the arterial blood, Grausz also inserted an umbilical artery catheter. The catheter is a thin, flexible tube that is threaded through an umbilical artery into the aorta. An x-ray taken after the catheter was inserted showed that the catheter had looped back on itself with the tip located near where the blood vessels to the kidneys and intestines branch off the aorta. Grausz testified that he was concerned that this location could irritate these organs. Consequently, he pulled the catheter out until the tip was just above where arteries to the lower left half of the body branch off the aorta.

Approximately ten hours after the umbilical artery catheter was inserted, it was used to medicate the infant. Almost immediately, the infant's left leg blanched, and no pulse could be detected in the leg. The hospital staff removed the catheter. Additionally, Grausz and the consulting doctors treated the infant for thrombosis with blood-clot-dissolving drugs. After several hours, circulation and color were restored to the leg; however, a small patch of skin on the left buttock was dead.

Ultimately, the child was transferred to Children's Hospital to have the dead skin surgically removed. During the surgery, the surgeon discovered that the dead tissue was much more extensive and included the child's left gluteus maximus and gluteus minimus muscles. The removal of the muscles prevented the child's left hip joint from properly forming and resulted in substantial deformity of the child's left leg.

The Yeliches sought to submit the case to the jury on two theories of liability. They argued that Grausz was liable under a general malpractice theory because he chose to use an unreasonably risky procedure; i.e., the umbilical artery catheter, to sample blood gasses. They also claimed liability based on the theory that Grausz failed to obtain informed consent before using the catheter. The trial court submitted only the issue of informed consent to the jury. The jury answered the special verdict question by finding that Grausz was not negligent in failing to obtain informed consent. The jury set damages for T. J. Yelich's past and future pain, suffering, and disability at \$1,750,000, but

denied any compensation to Dale Yelich for the loss of society and companionship of his son. The trial court denied the Yeliches' motions after verdict and entered judgment dismissing the complaint on the merits.

GENERAL MEDICAL NEGLIGENCE

Generally, the form of special verdict questions is left to the trial court's discretion. *Dahl v. K-Mart*, 46 Wis.2d 605, 609, 176 N.W.2d 342, 344 (1970). Reviewing courts will not interfere if the questions cover the issues of fact in the case; however, the trial court may not submit issues on which there was a failure of proof. *Id.* Whether a party has failed to prove a *prima facie* case is a question of law that this court decides independently. *Burg v. Miniature Precision Components, Inc.*, 111 Wis.2d 1, 12, 330 N.W.2d 192, 198 (1983).

The Yeliches did not present expert testimony on the issue of whether Grausz was negligent. They elicited testimony from Grausz and the defense's expert witness that due care requires a physician to choose a treatment method that presents the least risk to the patient and that the physician should not subject the patient to unnecessary risks. The Yeliches relied upon several medical textbooks to inform the jury that thrombosis and embolism are major complications of umbilical artery catheters and the use of the catheters is only recommended for very ill infants or high-risk infants when blood monitoring is essential for diagnosis and therapeutic management. According to the texts, umbilical artery catheters should not be used when safer alternative procedures can provide needed information. The Yeliches also rely on their interpretation of testimony to argue that Grausz's use of the umbilical artery catheter to monitor T. J. Yelich's condition presented an unreasonable risk of harm.

The plaintiff in a medical negligence case has the burden of proving that the physician failed to conform to the proper standard of care; i.e., that he or she "fail[ed] to exercise that degree of care and skill which is exercised by the average practitioner in the class to which [the physician] belongs, acting in the same or similar circumstances." *Francois v. Mokrohisky*, 67 Wis.2d 196, 200, 226 N.W.2d 470, 472 (1975) (citation omitted). It is not enough to show that other physicians might have acted differently, that alternative procedures were available, or that the defending physician made a mistake. *Id.* at 201, 226

N.W.2d at 472. The test is whether, under the circumstances, the defendant's act did not comport with approved medical practices. *Id.*

Expert testimony is required when contested matters involve special learning, study, or experience or involve special knowledge, skill, or experience on a subject matter that is not within the realm of ordinary experience. *Cramer v. Theda Clark Memorial Hosp.*, 45 Wis.2d 147, 150, 172 N.W.2d 427, 428-29 (1969). Generally, matters involving professional medical care require expert medical testimony to establish the degree of care and skill required of the physician and to prove that a defendant departed from the standard. See *Christianson v. Downs*, 90 Wis.2d 332, 338, 279 N.W.2d 918, 921 (1979). Only where the alleged negligence is within the ordinary knowledge of laypeople is expert testimony not required. *Id.* Whether expert opinion testimony is necessary in a particular case presents a question of law, which this court independently reviews. *Kujawski v. Arbor View Health Care Center*, 132 Wis.2d 178, 181, 389 N.W.2d 831, 832 (Ct. App. 1986).

Proof of the Yeliches' case requires expert opinion testimony. Whether or not T. J. Yelich's condition was so critical or unstable that the need to accurately monitor arterial blood gases outweighed the risks created by the use of umbilical artery catheter is beyond the ordinary knowledge and experience of laypeople. The Yeliches attempted to overcome the deficiency in their case by bootstrapping the medical textbooks to testimony of Grausz and other physicians about the specifics of the infant's physical condition as recorded in the medical records. Although the textbooks provide general information, they do not give any guidance as to the particular situation facing Grausz when he made the decision to insert the catheter. The textbooks, even with the infant's medical records and the doctors' testimony, do not enlighten the jury on the critical issue—whether, under the particular facts and circumstances of this case, Grausz violated the standard of care when he decided to use an the umbilical artery catheter in this infant. The trial court properly refused the request to submit a special verdict question on general medical negligence to the jury.

RES IPSA LOQUITUR

The Yeliches also contend that the trial court erred by not giving the jury a *res ipsa loquitur* instruction. *Res ipsa loquitur* is a doctrine from the law of evidence that allows negligence to be inferred from circumstantial evidence. *Hoven v. Kelble*, 79 Wis.2d 444, 449, 256 N.W.2d 379, 381 (1977). The instruction is appropriate where there is evidence suggesting negligence, but the evidence does not furnish a full and complete explanation of the event causing the injury. *Peplinski v. Fobe's Roofing, Inc.*, 186 Wis.2d 308, 315, 519 N.W.2d 346, 348 (Ct. App. 1994). The instruction should be given: (1) where there is evidence that the event in question would not ordinarily occur unless there was negligence; (2) where the agent or instrumentality that caused the harm was within the defendant's exclusive control; and (3) where the evidence allows more than speculation but does not fully explain the event. *Lecander v. Billmeyer*, 171 Wis.2d 593, 600-601, 492 N.W.2d 167, 170 (Ct. App. 1992).

The first requirement may be satisfied by expert medical testimony or, in the appropriate case, by a layperson's common knowledge. *Id.* at 601, 492 N.W.2d at 170. The requirement is not satisfied merely by evidence that the event is a rare result of the particular procedure. *Id.* Although the second requirement is usually identified as one of exclusive control, this is not completely accurate. *Kelly v. Hartford Casualty Ins. Co.*, 86 Wis.2d 129, 138, 271 N.W.2d 676, 680 (1978). A more accurate statement of the requirement is that other responsible causes of the event can be reasonably eliminated, leaving only the defendant responsible for any negligence connected with the apparent cause of the accident. *Id.* Whether the first and second requirements are met are questions of law, subject to an appellate court's independent review. *Peplinski*, 186 Wis.2d at 316, 519 N.W.2d at 349.

The third requirement addresses the quantum of evidence presented. *Res ipsa loquitur* permits a jury to draw a permissible inference, not a rebuttable presumption, from circumstantial evidence. *Fehrman v. Smirl*, 20 Wis.2d 1, 21, 121 N.W.2d 255, 265, 122 N.W.2d 439 (1963). A plaintiff must present enough evidence to allow the jury to reasonably infer that the negligence caused the injury; and the jury's verdict must be based upon more than conjecture or speculation. *Lecander*, 171 Wis.2d at 601, 492 N.W.2d at 170. Conversely, the plaintiff must not present so much evidence that, if accepted by the jury, it provides a full and complete explanation of the event. *Id.* Whether the evidence is within the appropriate mid-range is influenced by the impressions made by the witnesses' testimony. *Peplinski*, 186 Wis.2d at 317, 519 N.W.2d at 349. Although the issue of whether the proper quantum of

evidence was presented is also a question of law, deference is given to the trial court's analysis. *Id.*

The Yeliches' request for a *res ipsa loquitur* instruction is defeated by the first and third requirements. The medical textbooks upon which they relied indicate that thrombosis and embolism are complications from the use of the umbilical artery catheter. The textbooks do not suggest that the risks only occur as a result of negligence. Additionally, the Yeliches presented a full and complete explanation for the cause of the injuries suffered by T. J. Yelich. Their theory throughout the case was that because of the catheter, he suffered a blood clot that, due to the catheter's location, impaired circulation to his left hip and leg; this impaired circulation resulted in the extensive destruction of skin and muscle tissue. Their theory, if accepted by the jury, completely explained the event.

INCONSISTENT OR PERVERSE JURY VERDICT

The Yeliches contend that the jury's answer to the damages question was inconsistent with its finding that Grausz was not negligent in failing to obtain informed consent. They also contend that the verdict was perverse and the result of prejudice because the jury found no damages to Dale Yelich for loss of society and companionship. Although the Yeliches state that the jury's answer to the informed-consent question was wrong, they do not challenge the trial court's denial of their motion to change the answer to that question, nor do they present an argument based upon the sufficiency of the evidence. Therefore, we will not review the jury's answer to the informed-consent question.

The Yeliches claim the jury's finding of damages for T. J. Yelich was inconsistent with its finding that Grausz did not negligently fail to obtain informed consent. This claim is based on language in the jury instructions. The trial court instructed the jury, in part, as follows:

But in regard to [the damage questions], you must answer the damage questions no matter how you answered any of the previous questions in the verdict. The amount of damages, if any, if found by you, should in no way be influenced or affected by any of your previous answers to questions in the verdict.

...

If you have determined that a reasonable person in Dale and Karen Yelich's position would not have consented to the treatment given to T. J. Yelich had the reasonable person been fully informed of the possible risks and advantages, you will insert as your answer to the damage question the amount of money which, under the evidence, will reasonably and fairly compensate T. J. Yelich for the injuries suffered by T. J. Yelich as a result of the treatment.

The court went on to instruct the jury regarding the factors to be considered in setting damages, including humiliation, embarrassment, worry and mental distress, if any, as well as the extent to which the injuries had or will impair the child's ability to enjoy the normal activities, pleasures, and benefits of life.

Emphasizing the second paragraph of the quoted jury instructions, the Yeliches argue that because the jury found Grausz was not negligent, the only consistent answer to the damage question was "zero." We reject this reasoning because we cannot view the emphasized language in isolation. See *State v. Paulson*, 106 Wis.2d 96, 108, 315 N.W.2d 350, 356 (1982) (jury instructions considered as a whole). The jury instruction told the jury to answer the damages questions without regard to its answer to the informed consent question. The language highlighted by the Yeliches did not specifically contradict this directive, although, arguably, it created an ambiguity that was not objected to by either party.

Additionally, the special verdict question was phrased as follows:

REGARDLESS OF HOW YOU ANSWERED THE PREVIOUS QUESTIONS, YOU MUST ANSWER THIS FOLLOWING QUESTION: What sum of money will fairly and reasonably compensate T. J. Yelich for the following items of damage which you attribute to Dr. Grausz' treatment: Past and Future Pain, Suffering and Disability?

The question focused on the damages "attributable to Dr. Grausz' treatment" of T. J. Yelich. Even Grausz could not argue that the child did not suffer past and future pain, suffering, and disability attributable to the treatment. That fact is not inconsistent with the finding that Grausz did not negligently fail to obtain informed consent for the treatment.

Interestingly, the Yeliches also argue that the verdict was perverse and the result of prejudice because the jury denied any damages to Dale Yelich for the loss of companionship and society of his son. This is the result, they argue, that should have occurred with respect to the child. In any event, their argument only emphasizes the time that Dale Yelich spent with his son caring for him. Thus, the evidence was that, while burdensome and perhaps often unpleasant, Dale Yelich probably spent more time with his son than if the child had had a normal, healthy childhood.

ISSUES NOT ADDRESSED

The evidence showed that Grausz was dually employed as a faculty member of the Medical College of Wisconsin and as a resident physician at Milwaukee County Medical Hospital. In the latter capacity, he was employed by Milwaukee County. The issue of whether he was acting as an employee of Milwaukee County when he treated T. J. Yelich was submitted to the jury. Relying upon the fact that the Medical College of Wisconsin billed for the medical care Grausz provided to T. J. Yelich, the Yeliches contend that the trial court should have found, as a matter of law, that Grausz was not acting as a Milwaukee County employee.

In his cross-appeal, Grausz contends that the amount of damages found by the jury was excessive. The jury found that \$1.75 million in damages was the appropriate amount to compensate T. J. Yelich for pain, suffering, and disability.

We do not address either of these issues. Our rejections of the Yeliches' challenges to the verdict and the jury instructions allows this court to affirm the trial court's judgment dismissing the complaint. Because those issues dispose of the appeal, any discussion of the additional issues is superfluous. *See Gaertner v. 880 Corp.*, 131 Wis.2d 492, 496 n.4, 389 N.W.2d 59, 61 n.4 (Ct. App. 1986) (if decision on one point disposes of appeal, appellate court does not need reach other issues raised).

By the Court.—Judgment affirmed.

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