COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2656

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

CRYSTAL R. STEINHART, A MINOR, BY HER GUARDIAN AD LITEM, DEAN M. HORWITZ, RUSSELL R. STEINHART AND JILL STEINHART,

PLAINTIFFS-APPELLANTS,

V.

ST. PAUL FIRE & CASUALTY INSURANCE, LEONARD H. KLEINMAN, M.D., WISCONSIN PATIENTS COMPENSATION FUND AND WISCONSIN HEALTH FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Reserve Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Crystal R. Steinhart, a minor, by Dean M. Horwitz, her guardian ad litem, Russell R. Steinhart and Jill Steinhart appeal from a

judgment dismissing their medical malpractice action entered after a jury determined that Leonard H. Kleinman, M.D., was not negligent in his care and treatment of Crystal. On appeal, the Steinharts challenge certain evidentiary rulings by the trial court. Specifically, the Steinharts claim that: (1) one of the defense expert witnesses should not have been permitted to testify that there was a .005 percent occurrence rate of developing choreoathetosis, a form of cerebral palsy, during pediatric cardiac surgery; (2) the trial court erroneously instructed the jury that a doctor is not required to give information regarding "extremely remote possibilities that might falsely or detrimentally alarm the patient's parents"; (3) the trial court erred by allowing the jury to view a computer simulation of Crystal's surgeries that the Steinharts claim was not substantially similar to the actual events and was therefore unduly prejudicial; and (4) an editorial comment contained in an article on choreoathetosis was erroneously admitted into evidence as a learned treatise. We affirm.

On August 27, 1987, Crystal was born prematurely and, within a year, required surgery for a heart defect. Dr. Kleinman performed surgery to repair the defect. Four years later, he performed additional surgery to cure a defect in the heart where he had placed a pericardial patch during the first surgery. Dr. Kleinman did not tell the Steinharts that hypothermia, a process used to cool the blood during surgery so that the operative field can be seen more easily, would be used during the second surgery. After the second surgery, Crystal developed permanent severe choreoathetosis. The Steinharts filed this medical-malpractice action against Dr. Kleinman, alleging that he did not properly place the pericardial patch in the first surgery, thus necessitating the second surgery, and that he negligently failed to advise them of the high risk of developing choreoathetosis when hypothermia is utilized during surgery.

The Steinharts testified at trial that had they known of the risk of choreoathetosis they would not have agreed to the surgery. During trial, Dr. Ross Ungerleider, a defense expert witness, testified regarding the risk of choreoathetosis. He testified that choreoathetosis is such a rare complication of heart surgery that the average cardiac and thoracic surgeon would not discuss it with a patient. Over the Steinharts' objection, Dr. Ungerleider testified that the statistical occurrence rate of choreoathetosis after pediatric cardiac surgery since 1980 was .005 percent. On cross-examination, Dr. Ungerleider conceded that the numbers on which he based his projection were "off the top of [my] head" and were not based on a systematic review of any statistical studies.

During trial, Dr. Kleinman was allowed to introduce into evidence a videotaped computer simulation of the 1988 and 1992 operations he performed on Crystal. Dr. Kleinman testified that he used the videotaped computer simulation to explain the surgeries he performed on Crystal and to illustrate his testimony at trial that the second surgery required deep hypothermia. The Steinharts objected to the videotaped computer simulation on the grounds that it failed to accurately reproduce the actual conditions of the surgeries and, therefore, it was misleading to the jury. The trial court viewed the videotaped computer simulation and concluded that it would be helpful to the jury. The trial court allowed the simulation, instructing the jury that it was not a replication of the actual surgeries involved here.

During the direct examination of another defense expert, Dr. S. Bert Litwin, defense counsel read into the record an excerpt from an article authored by Dr. Brian Barrett-Boyes entitled, "Choreoathethosis as a Complication of Cardiopulmonary Bypass," published in the *Annal of Thoracic Surgery*. The excerpt was an editorial comment on a medical treatise on choreoathetosis

authored by another doctor. The article was used as evidence to support Dr. Kleinman's position that choreoathetosis was such a rare development after cardiac surgery that Dr. Kleinman had no duty to inform the Steinharts of the risk and that there were many other factors besides deep hypothermia that could cause choreoathetosis. The Steinharts objected to admission of the article on the grounds that it was not a learned treatise on a scientific subject but rather was an editorial opinion reviewing a treatise. The trial court overruled the Steinharts' objection, concluding that the Barrett-Boyes article was a learned treatise, and admitted the article into evidence.

The jury returned a special verdict finding that Dr. Kleinman was not negligent in the care and treatment of Crystal. The jury also found that Dr. Kleinman did not negligently fail to inform the Steinharts of the risks and benefits of the second surgery. The trial court denied the Steinharts' motions after verdict and ordered judgment for Dr. Kleinman. Judgment was entered and the case was dismissed. The Steinharts appeal.

Evidentiary rulings are discretionary. ***State v. Weber***, 174 Wis.2d 98, 106, 496 N.W.2d 762, 766 (Ct. App. 1993). We affirm a discretionary decision by the trial court if the trial court examined the relevant facts, applied the proper standard of law, and showed a demonstrated rational process in reaching a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis.2d 400, 414–415, 320 N.W.2d 175, 184 (1982).

First, the Steinharts contend that the trial court erred when it allowed defense expert Dr. Ungerleider to testify about the statistical occurrence rate of choreoathetosis, claiming that the material upon which Dr. Ungerleider relied was not "of a type reasonably relied upon by experts in the particular field." As noted,

Dr. Ungerleider testified that there is a .005 percent occurrence rate of choreoathetosis after pediatric cardiac surgery. Dr. Ungerleider based his estimate on the fact that there were thirty or so incidents of choreoathetosis with respect to a million operations that had been performed for pediatric cardiac disease and giving a figure of fifty, to account for incidents that were not reported in the literature, he projected an incidence of .005 percent.

The trial court permitted the testimony to come in under RULE 907.03, STATS., which provides:

> **Bases of opinion testimony by experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The basis of an expert's opinion may be one or more of the following: (1) firsthand observations made by the expert; (2) evidence presented at trial; and (3) data presented to the expert outside of trial. *See* RULE 907.03, STATS. Opinion evidence may be based upon hearsay if "of a type reasonably relied upon by experts" in the field. Under ***State v. Walstad***, 119 Wis.2d 483, 518–519, 351 N.W.2d 469, 487 (1984), the trial court is not required to determine the reliability of the data underlying an expert's opinion. Our deferential standard of review requires that we look to the record for reasons to sustain the trial court's discretionary determination. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

Here, there is no dispute that Dr. Ungerleider was qualified to render an expert opinion, and that his opinion was relevant and would assist the jury in determining an ultimate fact. Dr. Ungerleider based the statistical projection on

numbers that, he testified, came from literature he had received prior to trial. He was subject to a vigorous cross-examination, admitting that the figure he gave on direct examination was "off the top of his head" and that he had not done a systematic review of the literature for his opinion, but that his opinion was based on his recollection of the literature. Reliability of Dr. Ungerleider's testimony is a weight and credibility issue, ***State v. Peters***, 192 Wis.2d 674, 534 N.W.2d 867 (Ct. App. 1995). The trial court did not erroneously exercise its discretion in admitting Dr. Ungerleider's testimony.

The Steinharts also claim that the trial court's jury instruction that a doctor is not required to advise "of minor risks inherent in common procedures when such procedures rarely result in serious ill effects" was given erroneously because there was no reliable statistical evidence in the record that choreoathetosis was a remote risk of pediatric cardiac surgery.[1] We disagree. In addition to Dr. Ungerleider's opinion, Dr. Kleinman, Dr. Litwin, and Dr. Lawrence Tomasi, the Steinharts' expert witness, all testified that choreoathetosis is a very rare, unique syndrome. There was no testimony to the contrary. A doctor is not "required to

[1] The instruction given was a revision of WIS J I—CIVIL 1023.2, the standard informed consent jury instruction. Paragraph 6 of the comment to WIS J I—CIVIL 1023.2 provides:

> The evidence presented in a case may make advisable the giving of additional instructions, such as: a doctor is not required to give a detailed technical medical explanation that the patient probably would not understand; to advise the patient of minor risks inherent in common procedures, when such procedures rarely result in serious ill effects; to advise the patient of remote possibilities that under the circumstances might only falsely or detrimentally alarm the patient; to disclose information to the patient if a doctor as a reasonable, prudent person knows that disclosure would so seriously upset the patient that the patient would not have been able to weigh rationally the risks of refusing to undergo the recommended treatment; to advise the patient of risks apparent or known to the patient; to disclose risks that the patient has requested that he or she not be informed.

disclose extremely remote possibilities that at least in some instances might only serve to falsely or detrimentally alarm the particular patient." ***Scaria v. St. Paul Fire & Marine Ins. Co.***, 68 Wis.2d 1, 13, 227 N.W.2d 647, 653 (1975). A doctor is bound to disclose only those risks that a reasonable person would consider material to his or her decision whether or not to undergo treatment. ***Martin v. Richards***, 192 Wis.2d 156, 175, 531 N.W.2d 70, 78 (1995). This is an issue for the jury. ***Id.***, 192 Wis.2d at 176–177, 531 N.W.2d at 75. Adequate instructions are those instructions that fairly and reasonably summarize the issues presented by the pleadings and evidence and that provide correct principles of law for the jury's application thereto. *See* ***D.L. v. Huebner***, 110 Wis.2d 581, 624, 329 N.W.2d 890, 909 (1983). Given the testimony from Drs. Ungerleider, Kleinman, Litwin and Tomasi, the trial court did not err in giving the instruction.

The Steinharts next argue that the videotaped computer simulation of the operations was not substantially similar to the actual events and therefore was prejudicial. As noted, the simulation was offered by Dr. Kleinman to show a demonstration of general surgical procedures and was not intended to be a re-enactment of the actual surgery. Dr. Kleinman testified that the videotape was not a recreation of the actual surgery, but a simulation of various medical concepts. The Steinharts, relying on ***Maskrey v. Volkswagenwerk Aktiengesellschaft***, 125 Wis.2d 145, 370 N.W.2d 815 (Ct. App. 1985), claim that Dr. Kleinman was required to show the videotaped computer simulation was substantially similar to the actual surgeries before the trial court could admit the evidence. In ***Maskrey***, an automobile collision case, the plaintiff sought to introduce a motion picture of crash experiments as a re-enactment of the plaintiff's automobile accident. ***Maskrey*** held that "[d]emonstrative simulations of crashes are to be viewed by a jury if they are similar to the original event and not so

prejudicial as to destroy a party's ability to present a defense." ***Id.***, 125 Wis.2d at 165–166, 370 N.W.2d at 825.

There is a distinction between ***Maskrey*** and the present case. Here, the computer simulation was not a reconstruction of Crystal's surgeries. The jury was told by the trial court that the computer simulation was a schematic to help explain and demonstrate the medical principles involved in Crystal's case. The ***Maskrey*** requirement of substantially similar circumstances does not apply here. *See* ***McKnight v. Johnson Controls, Inc.***, 36 F.3d 1396, 1409–1410 (1994) ("where the experimental tests do not purport to recreate the accident and instead the experiments are used to demonstrate general scientific principles, the requirement of substantially similar circumstances no longer applies"). The trial court did not erroneously exercise its discretion in permitting the jury to see the tape.

Finally, the Steinharts contend error in the admission of Dr. Barrett-Boyes's article entitled "Choreoathetosis as a Complication of Cardiopulmonary Bypass," arguing that it was inadmissible hearsay and unduly prejudicial. The Steinharts contend that the article is not a learned treatise, as determined by the trial court, but an editorial comment on a medical treatise authored by another doctor. Before a learned treatise is received into evidence, the trial court must take judicial notice of the material, or an expert in the subject must testify that the writer of the material is recognized in the writer's profession as an expert in the subject. *See* § 908.03(18), STATS. Here, Dr. Litwin, a defense expert, testified regarding Barrett-Boyes's reputation as an expert in pediatric cardiac surgery:

> Q: Okay. Do you know who Dr. Barrett-Boyes is?
>
> A: He is one of the leading figures in infant heart surgery, and, in fact the gentleman I referred to before, although not by name…

Q: Is he considered in the field of pediatric cardiac surgery to be an authority in that specialty?

A: Yes.

Q: Is he considered to be an expert in that specialty?

A: Yes.

Q: Now, the Annals of Thoracic Surgery, where this article appeared that was filed with the court is what type of a journal?

A: This is a journal which publishes articles only in the field of thoracic surgery, including heart surgery.

Q: And is that a peer reviewed journal?

A: Yes.

Q: And peer reviewed, briefly, means what?

A: It means that articles accepted by this journal are reviewed by peers of the authors to look at the quality of the articles and the validity of the data presented.

Q: And how would you describe the article that Dr. Boyes wrote, "Choreoathetosis as a Complication of Cardiopulmonary Bypass", as it appears in the 1990 Annals of Thoracic Surgery? What is that?

A: This is an editorial incited by another article in the same journal, but in this editorial he presents his opinions and he refers to some of his data that has been peer reviewed.

Q: And how do you get asked to be one to reply in an article such as this by a peer review journal? Is there some sort of process or qualification or can anyone just write to one of these magazines?

A: Generally, one is solicited by the editor of the journal.

After this testimony, the trial court examined the article and concluded that the article could be classified as a learned treatise. We agree. A learned treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the writer's reputation at stake. *See* 6 WIGMORE, EVIDENCE, § 1692 (Chadbourn rev. ed. 1976). An appropriate foundation was laid for the article's admission into evidence.

By the Court.—Judgment affirmed.

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