COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP1278

Cir. Ct. No. 2004CV84

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

ELIZABETH A. CHOBANIAN, BRETT CARL WEUM
AND JAKE TYLER WEUM,

PLAINTIFFS-APPELLANTS,

PHYSICIANS PLUS INSURANCE CORPORATION, WISCONSIN
DEPARTMENT OF HEALTH AND FAMILY SERVICES, CIGNA,

SUBROGATED-PLAINTIFFS,

V.

MERITER HOSPITAL, INC. D/B/A MERITER HOSPITAL/PARK, OHIC
INSURANCE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

MERITER HEALTH SERVICES, INC. D/B/A MERITER HOSPITAL, INC.
D/B/A MERITER HOSPITAL/PARK, JODEE R. BRANDON, M.D.,
AND CATHERINE T. JAMES, M.D.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 DYKMAN, J. Elizabeth Chobanian appeals from a judgment entered on a jury verdict in her negligence action against Meriter Hospital, Dr. Catherine James, and Dr. JoDee Brandon following the birth of her son at Meriter Hospital. Chobanian argues that the trial court erred in (1) denying Chobanian's motion for a new trial because the jury findings were contrary to the evidence; (2) denying her motion for a new trial in the interest of justice because the real controversy was not fully tried when the trial court bifurcated Chobanian's direct liability claim against Meriter for negligently monitoring the competence of its nurses from her vicarious liability claim against Meriter for the negligence of its nurses; (3) excluding testimony regarding Meriter's policies and procedures because it was relevant to the issue of causal negligence; (4) submitting an instruction and verdict question on Chobanian's contributory negligence because it was not supported by the evidence; (5) refusing to allow cross-examination of Dr. James on causation because Dr. James was an expert witness and did not have a privilege to refuse to testify on that topic; and (6) refusing to allow the jury to hear evidence relevant to spoliation based on destroyed original copies and late entries and alterations in the medical records.

¶2 We conclude that the evidence at trial supports the jury's findings that Meriter's nurses were not causally negligent and that Dr. Brandon was not negligent, and we therefore will not disturb the jury verdict. Because we uphold the jury verdict, we conclude that any trial court error in bifurcating the trial, excluding evidence of Meriter's policies, or submitting a contributory negligence

instruction is rendered harmless. Finally, we conclude that there was no foundation for Dr. James to testify as to causation and that the trial court properly exercised its discretion in declining to give a spoliation instruction. Accordingly, we affirm.

Background

¶3 The following facts are taken from trial testimony. Elizabeth Chobanian was admitted to Meriter Hospital on December 26, 2001, for the birth of her first child. Dr. Catherine James, a family practitioner, had treated Chobanian over the course of her pregnancy, and began attending Chobanian at Meriter at 8:00 a.m. on December 27. At 10:45 a.m., Dr. James began administering Pitocin to Chobanian to promote stronger contractions.

¶4 Dr. JoDee Brandon, an obstetrician available during Chobanian's delivery for consultation, testified at trial that Dr. James called her for a consultation at 11:30 p.m. on December 27. She testified that at the consultation, she gave Chobanian several delivery options, including a vacuum or forceps delivery, a cesarean section, or to continue pushing, and explained the risks associated with each. Dr. Brandon testified that she told Chobanian that she recommended a vacuum delivery. She testified that Chobanian opted to continue pushing at that time.

¶5 Chobanian's child, Jake, was born at 2:15 a.m. on December 28, without the use of the delivery interventions that Dr. Brandon testified that she offered Chobanian. Jake was diagnosed with neurological injury. Chobanian sued Meriter Hospital, alleging its nurses were negligent during her labor and delivery for failing to recognize the risk to Jake during Chobanian's prolonged labor and failing to advocate for her when the doctors took no action during that time. She

also sued Dr. James and Dr. Brandon, asserting negligence during the labor and delivery. Following a jury trial, the jury found that the nurses were negligent, but that the negligence was not causal, and that Dr. Brandon was not negligent. The jury could not reach a decision as to Dr. James, so a mistrial was declared as to her. Chobanian appeals, claiming that the jury verdict was contrary to the evidence and claiming multiple trial errors.

Standard of Review

¶6 We review a jury verdict for whether there is any credible evidence to support it. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. "Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding." ***Id.*** When, as here, the trial court has approved the jury's verdict, we "will not overturn the jury's verdict unless there is such a complete failure of proof that the verdict must be based on speculation." ***Id.***, ¶40 (citation omitted).

¶7 We review a trial court's decision to bifurcate trial claims for an erroneous exercise of discretion. ***Dahmen v. American Family Mut. Ins. Co.***, 2001 WI App 198, ¶11, 247 Wis. 2d 541, 635 N.W.2d 1. Similarly, "[a] response to a request for the imposition of sanctions for the destruction of evidence or the negligent failure to preserve it is a matter subject to the sound discretion of the trial court." ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI App 15, ¶14, 269 Wis. 2d 286, 674 N.W.2d 886. Whether to admit or exclude evidence is also within the trial court's discretion. ***Grube v. Daun***, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997). "However, whether a witness has a legal privilege to refuse to provide expert opinion testimony is a question of law, which we review de novo." ***Carney-Hayes v. Northwest Wisconsin Home Care, Inc.***, 2005 WI 118,

¶18, 284 Wis. 2d 56, 699 N.W.2d 524 (citation omitted). We also review de novo whether there was sufficient evidence to submit a matter to the jury. ***Zintek v. Perchik***, 163 Wis. 2d 439, 454, 471 N.W.2d 522 (Ct. App. 1991), *overruled on other grounds by* ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). Finally, we will not set aside a jury verdict based on claimed error if the error is harmless. WIS. STAT. § 805.18. An error is only reversible if "the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment." Section 805.18(2).

Discussion

¶8 Chobanian first argues that the jury's finding that the Meriter nurses were not causally negligent is contrary to the evidence. Specifically, Chobanian fist argues that she presented unrefuted evidence that Jake was injured during the labor process. We disagree.

¶9 Chobanian's experts testified that Jake's appearance at birth and the results of his medical testing established that his neurological injury was the result of injury sustained during the last two hours of Chobanian's labor. They explained that the medical evidence established that Jake suffered oxygen deprivation immediately before his birth, and that if he had been delivered earlier the injury would have been avoided. In contrast, Meriter presented two expert witnesses who testified that Jake's neurological injury was due to injury occurring in the early stages or even prior to the onset of labor. They testified that Jake's appearance at birth and the medical evidence established that Jake had suffered from prolonged partial oxygen deprivation rather than acute oxygen deprivation. They testified that the evidence established that Jake had suffered the injury significantly earlier than the delivery period and thus he had recovered

significantly from the initial trauma by the time he was born. Chobanian refutes Meriter's experts by claiming that their testimony was incredible as a matter of law, because it was in conflict with established facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Chobanian argues that the lack of credible evidence to support the defense theory means that the jury verdict of no causal negligence must have been based on conjecture and speculation, and therefore must be overturned. *See* ***Herbst v. Wuennenberg***, 83 Wis. 2d 768, 773-74, 266 N.W.2d 391 (1978). We disagree with Chobanian's interpretation of the trial evidence.

¶10 The plaintiff and defense experts disagreed over the timing of the injury, and disagreed with the analyses used by the others. Based on the medical records, each expert testified, to a reasonable degree of medical certainty, as to when the injury occurred. Chobanian had the opportunity to cross-examine Meriter's experts and to question their credibility. Chobanian's argument that the defense experts based their theories on an incomplete view of the medical records and disregarded key facts was properly directed to the jury. However, despite any failings in the defense experts' testimony, the jury was entitled to find Meriter's experts more credible than Chobanian's. *See* ***Morden***, 235 Wis. 2d 325, ¶39 (explaining that we "will uphold the jury verdict even though the evidence be contradicted and the contradictory evidence be stronger and more convincing" (citation omitted)). It is not our role to weigh conflicting evidence or determine the credibility of witnesses. ***Id.*** We therefore have no basis to overturn the jury's finding that the Meriter nurses' negligence was not causal.

¶11 Chobanian also argues that the jury's finding that Dr. Brandon was not negligent is contrary to the evidence. However, the record supports a jury finding of no negligence as to Dr. Brandon. Dr. Brandon testified that she had a

consultation with Chobanian at 11:30 p.m. on December 27, explained Chobanian's delivery options and the risks associated with each, and recommended a vacuum delivery. Dr. Brandon's expert witnesses testified that such conduct met the standard of care required of Dr. Brandon under the circumstances. The jury was entitled to accept that testimony. Because evidence at trial supports the jury finding of no negligence by Dr. Brandon, we must uphold the jury's verdict.

¶12 Our conclusion that the jury verdict is supported by the evidence is dispositive as to several of Chobanian's other claims of trial court error. First, any error in bifurcating the claim of Meriter's direct liability for negligently monitoring its nurses from the claim for Meriter's vicarious liability for the negligence of its nurses is rendered harmless. Any theory to hold Meriter liable based on the negligence of its nurses requires that the nurses were, in fact, causally negligent. *See* ***Johnson v. Misericordia Community Hospital***, 99 Wis. 2d 708, 710-11, 301 N.W.2d 156 (1981).

¶13 Similarly, any error in excluding testimony regarding Meriter's policies and procedures was harmless because the jury found that the nurses were negligent, despite the exclusion of evidence on the policies and procedures governing their conduct. Chobanian tries to tie Meriter's nursing policies and procedures to the issue of causation by arguing that those policies and procedures caused harm to Jake by allowing the nurses to negligently treat Chobanian. This is not the correct formulation of causation. The evidence supported a jury finding that Jake was injured prior to Chobanian's admission to Meriter. This supports the jury's finding that the nurses' negligence was not causal because any negligence by the nurses was subsequent to the injury to Jake. Meriter's policies do not relate to the medical question of when Jake's injuries occurred, and thus were not

relevant to the determinative issue at trial: whether the nurses' negligence was causal. Stated differently, any evidence regarding policies or procedures would have no bearing on the jury's conclusion that the injury occurred before Chobanian arrived at the hospital.

¶14 Finally, any error in submitting an instruction and verdict question on Chobanian's contributory negligence is also rendered harmless. The contributory negligence question is only reached if the jury finds causal negligence on the part of one of the defendants. Because it did not, and we do not disturb that verdict, any error in submitting the contributory negligence question did not affect the outcome of the trial.

¶15 Next, Chobanian argues that the trial court erred in refusing to allow her to cross-examine Dr. James on causation. She argues in her brief-in-chief that Dr. James was an expert witness and not subject to the privilege from testifying under ***Burnett v. Alt***, 224 Wis. 2d 72, 589 N.W.2d 21 (1999). She points to her response to an interrogatory on possible expert witnesses for trial in which she names Dr. James. R-106. In its response brief, Meriter argues that Dr. James was not designated as an expert witness, pointing to Chobanian's trial witness list in which Dr. James is named as a fact witness rather than an expert witness. R-184:3-6. In reply, Chobanian argues only that if Dr. James was qualified to deliver Jake, she was qualified to testify as to what she believed was the cause of Jake's injury. She does not refute Meriter's assertion that Dr. James was designated as a fact witness rather than an expert witness at trial. We therefore take this fact as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 Because Dr. James was not designated as an expert witness, there was no foundation for her to testify as to what she believed caused Jake's injuries. Contrary to Chobanian's argument, the cause of Jake's injury is not encompassed in Dr. James' own observations and thought processes in attending Chobanian. *See* ***Carney-Hayes***, 284 Wis. 2d 56, ¶61 (stating that medical witness must testify as to "her own conduct relevant to the case, including her observations and her thought processes, her treatment of the patient, [and] why she took or did not take certain actions, what institutional rules she believed applied to her conduct, and her training and education pertaining to the relevant subject"). Instead, the question of the cause of Jake's injuries required expert opinions based on Jake's appearance at birth and a review of his medical records. *See* WIS. STAT. § 907.52 (expert testimony provides specialized knowledge to assist the jury).

¶17 Finally, Chobanian argues that the trial court erred in refusing to allow the jury to hear evidence relevant to spoliation based on destroyed original copies and late entries and alterations in the medical records. *See* ***Estate of Neumann v. Neumann***, 2001 WI App 61, ¶81, 242 Wis. 2d 205, 626 N.W.2d 821 ("[T]he trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it."). Chobanian argues that she learned during the course of the trial that the original paper labor and deliver chart, the newborn chart, and a printout of the fetal monitor from labor were destroyed. She also argues that there were late entries in the chart and alterations in the chart that warranted a spoliation instruction. Meriter responds that the original paper charts were destroyed in the normal course of business, but only after copies had been provided to Chobanian and they had been stored on microfilm or compact disk. It also responds that the printout from the fetal monitor was not retained but the entire fetal monitor tracing

was stored and then a complete printout was provided to Chobanian. Finally, Meriter points out that late entries and alterations in the record were discussed at trial and are normal in the course of labor and delivery, and that Chobanian has not explained the significance of any destruction of or alterations in the records. In her reply brief, Chobanian does not refute Meriter's spoliation arguments, only reiterating that she did not learn of the destruction of materials until trial. Again, we will take this as a concession that Chobanian did receive all the medical records in some form and had an opportunity to address any alterations to the record. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109. Thus, we conclude that the trial court properly exercised its discretion in refusing to give a spoliation instruction. *See* ***Insurance Co. of N. Am.***, 269 Wis. 2d 286, ¶14. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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