

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2014

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. 2011AP1558

Cir. Ct. No. 2009CV4835

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KELLIE ENGEN AND JONATHAN ENGEN,

PLAINTIFFS-APPELLANTS,

V.

AMY R. GRELE, M.D.,

DEFENDANT-RESPONDENT,

ABC INSURANCE COMPANY,

DEFENDANT,

UNITY HEALTH PLANS INS. CORP.,

SUBROGATED PARTY-DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. Kellie and Jonathan Engen brought a medical malpractice action against Dr. Amy Grelle, a family physician, alleging that Dr. Grelle was negligent in the care and delivery of the Engens' son, Nathan, and for failing to provide the Engens with informed consent, and that her negligence was a cause of Nathan's death. The case was tried to a jury, which found Dr. Grelle negligent on both grounds, but also found that Dr. Grelle's negligence was not a cause of Nathan's death. The Engens appeal the jury's no-causation verdicts and a court order denying their motions after verdict. The issues we address on appeal are: (1) whether the circuit court erred in denying the Engens' motion to change the answers to Questions 2 and 6 on the special verdict concerning causation from "No" to "Yes," on the ground that the no-causation findings were not supported by any credible evidence; and (2) whether the court erroneously exercised its discretion in denying the Engens' motion for a new trial based on juror misconduct. We conclude, under the applicable standard of review, that there was credible evidence to support the jury's no-causation findings. We also conclude that the trial court properly exercised its discretion in denying the Engens' motion for a new trial on the basis of juror misconduct. Accordingly, we affirm.

BACKGROUND

¶2 This medical malpractice case arises out of the death of Nathan Engen shortly before his delivery. Kellie and Jonathan Engen are Nathan's parents. Throughout her pregnancy, Kellie was under the care of Dr. Amy Grelle, a family practitioner, who concentrated her medical practice on obstetrics. As a family practitioner, Dr. Grelle was not certified to perform cesarean sections.

¶3 Kellie went to the hospital on April 3, 2008, to give birth. Kellie went into labor the next morning. At some point on April 3, Dr. Grelle put Kellie and the baby on an electric fetal monitor, a routine tool used to detect and trace the baby's heart rate to determine whether the fetus is receiving sufficient oxygen. Throughout most of the morning of April 4, the electronic monitoring strip "was very reassuring," indicating that Nathan was "well oxygenated" and "very normal at that point." However, from about 11:45 a.m. on, the fetal heart rate pattern became "non-reassuring." According to the testimony of one of the Engens' medical experts, a "non-reassuring" fetal heart pattern indicates a twenty percent chance that the fetus is not receiving adequate oxygen. As the afternoon and evening progressed, the fetal heart pattern became progressively worse, indicating an increasing possibility that Nathan was not receiving enough oxygen. Dr. Grelle did not consult with an obstetrician or discuss with the Engens the option of a cesarean section as opposed to a vaginal delivery because, in her opinion, nothing indicated a need for an obstetrical consult.

¶4 At 8:48 p.m. the fetal heart monitoring strip indicated a sudden and significant deceleration of the baby's heart rate. At that point, Dr. Grelle determined that the baby needed to be delivered. At 8:59 p.m. the baby's head became visible. Shortly before 9:00 p.m., Dr. Grelle told the Engens that the baby "was getting tired" and obtained permission from the Engens to perform a vacuum-assisted delivery. Dr. Grelle testified that she did not pursue a cesarean section because the baby's head was visible, which made it possible for her to deliver the baby by vacuum extraction. At 9:44 p.m., Dr. Grelle delivered Nathan using a vacuum extractor. Dr. Grelle was not able to pull Nathan's umbilical cord over his head because the umbilical cord was tightly wound around Nathan's neck and that she had to cut the cord. Dr. Grelle, among others, immediately began

resuscitation efforts because Nathan was not breathing. Resuscitation efforts failed. The autopsy report listed Nathan's cause of death as an "[umbilical] cord accident."

¶5 The central dispute at trial was whether Dr. Grelle was negligent in failing to consult with an obstetrician about the baby's progress and about the best course of action, and whether Dr. Grelle failed to inform the Engens of their medical options, and, if so, whether Dr. Grelle's negligence was a cause of Nathan's death. The jury returned a special verdict, finding Dr. Grelle was negligent in her care of the baby and mother and found that Dr. Grelle failed to provide informed consent to the Engens. However, the jury found that Dr. Grelle's negligence and her failure to provide informed consent were not causes of Nathan's death.

¶6 Following the jury's verdict, the Engens moved to change the answers on the jury's verdict regarding causation from "No" to "Yes." The Engens argued that there was no credible evidence to support the jury's verdict because the Engens' medical experts provided undisputed testimony that Dr. Grelle's negligence was a cause of Nathan's death. The court denied the motion.

¶7 The Engens also moved for a new trial because of alleged misconduct by one of the jurors, who was seen outside the courtroom having a discussion with Dr. Grelle's sister-in-law, who was observing the trial. The juror testified under oath and the court denied the Engens' motion based on the juror's testimony, which the court found credible.

¶8 The Engens appeal.

DISCUSSION

A. Motion to Change Causation Answers

¶9 A motion to change the answers on a special verdict challenges the sufficiency of the evidence to sustain the jury’s verdict. *See* WIS. STAT. § 805.14(5)(c) (2011-12).¹ In considering a motion to change the answers in a jury’s verdict, a trial court “must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence.” *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). The trial court, as well as appellate courts, are guided by the proposition that “[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury’s judgment, and where more than one inference can be drawn from the evidence, th[e] court must accept the inference drawn by the jury.” *Bennett v. Larsen Co.*, 118 Wis. 2d 681, 706, 348 N.W.2d 540 (1984) (quoted source omitted).

¶10 Where, as here, the circuit court has approved the jury’s verdict, “special deference” is given to the jury’s verdict. *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996). When the circuit court has approved the jury’s verdict, a jury’s verdict may not be overturned unless there is “such a complete failure of proof that the verdict must be based on speculation.” *Id.* (quoted source omitted).

¹ *Motion to change answer.* Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer. WIS. STAT. § 805.14(5)(c).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Labor and Delivery of the Baby

¶11 The Engens argue that the circuit court erred in denying their motion to change the jury's answer to Question 2 on the special verdict from "No" to "Yes," finding that Dr. Grelle's negligence in the care she provided during the labor and delivery of Nathan was not a cause of Nathan's death. The Engens argue there is no credible evidence to support the jury's verdict. The Engens take the position that the only reasonable inference to be drawn from the evidence is that Dr. Grelle's negligence in the care she provided during the labor and delivery of Nathan was a cause of Nathan's death. We disagree.

¶12 Because the jury's verdict was mixed, that is, the jury found Dr. Grelle negligent but that her negligence was not a cause of Nathan's death, we reconcile the verdicts by examining the record for evidence that would permit the jury to find Dr. Grelle negligent, but that her negligence was not a cause of Nathan's death. Stated differently, the question we must answer is whether the evidence supports the view that there was a point in time during labor and delivery when Dr. Grelle's conduct became negligent, but that such negligence did not cause Nathan's death.

¶13 We begin with the evidence concerning the cause of death. An autopsy was performed on Nathan, which concluded that Nathan died as a result of an "[umbilical] cord accident." According to Dr. Janice Lage, a pathologist and one of Dr. Grelle's expert witnesses, the accident was caused by three factors,² of

² The second factor, according to Dr. Lage, was that the placenta was very small for the baby's gestational age, which is significant because the placenta is the "sole source of all oxygen and all nourishment and all food for the baby" Dr. Lage's third finding was that there was an infection in the amniotic fluid, which surrounds the baby in utero. The infection inflamed the

(continued)

which one was the primary cause of Nathan's death. Dr. Lage testified that, according to the autopsy report, the umbilical cord was very short, causing the baby to tether to the mother while moving down the birth canal. The autopsy report indicated that Nathan's cord was eighteen centimeters, whereas, according to Dr. Lage, a normal umbilical cord measured at forty-five to fifty-five centimeters. This is significant, Dr. Lage testified, because "it takes 32 centimeters to get a baby out of the mother's uterus....," and the unusually short umbilical cord made it very difficult to deliver Nathan vaginally. Dr. Lage further testified that the shortened umbilical cord flattened during delivery, which stopped the mother's blood supply from flowing to the baby. Also significant, Dr. Lage testified that the autopsy report revealed that the short umbilical cord was tightly wrapped around Nathan's neck when he was delivered, essentially strangulating him. In Dr. Lage's opinion, Nathan's death was caused by a deprivation of oxygen and strangulation because the umbilical cord was too short. Dr. Lage concluded that the baby died approximately ten to twenty minutes prior to delivery.

¶14 With the cause and timing of the baby's death in mind, our inquiry turns to whether there is any credible evidence that could support the jury's mixed verdicts on negligence and no causation.

¶15 As to negligence, we conclude that the jury could have reasonably determined that 8:48 p.m. was a key point in time and that, at that time, but not before, Dr. Grelle's failure to consult with an obstetrician was negligent. At that

surface of the placenta and bacteria was found in the baby's lungs. According to Dr. Lage, taken together, these problems resulted in the lethal deprivation of oxygen to the baby.

time, according to credible evidence, the fetal heart monitoring strip indicated a significant change in the baby's heart rate, which all medical experts and Dr. Grelle agreed indicated that action was necessary to deliver the baby. It was reasonable for a jury to find that at 8:48 p.m. Dr. Grelle should have initiated consultation with an obstetrician to determine the best course of action, but failed to do so.

¶16 As to causation, a jury could have reasonably found that, as it turned out, such consultation with an obstetrician would not have mattered. This is a reasonable view of the evidence because the baby's head appeared at approximately 8:59 p.m. and, adopting the view of Dr. Grelle and her expert witness, Dr. William Hueston, the best course of action in light of this development, and the one that would have been pursued, even with the consultation of an obstetrician, was a vacuum extraction.

¶17 Dr. Grelle testified that she did not believe that a cesarean section was warranted starting at approximately 8:59 p.m. because the "[baby's] head was right there," and that she could place the vacuum extractor on the baby's head and pull the baby out. Dr. Hueston testified that once the baby's head became visible, vacuum extraction was the most expedient method for delivery because a vacuum extraction takes only ten to fifteen minutes to perform, whereas, according to other credible testimony, a cesarean section takes approximately thirty minutes.

¶18 Moreover, the jury could have found that vacuum extraction was unsuccessful for a reason beyond Dr. Grelle's control. As it turned out, the umbilical cord was unusually short and wrapped around the baby's neck. Blood clots had formed in the umbilical cord, all of which resulted in significant oxygen deprivation to the baby. The testimony was that it was impossible for Dr. Grelle

to predict that the umbilical cord would be too short and that it would be wrapped around Nathan's neck as he moved down the birth canal.

¶19 Under this view of the evidence, a jury could have found that Dr. Grelle negligently failed to initiate consultation with a obstetrician between 8:48 p.m. and approximately 8:59 p.m., but that the result would have been the same because, once the baby's head appeared at the end of that short time interval, the proper course of action was vacuum extraction.

¶20 The jury could have found additional support for this view in the testimony of the Engens' expert witnesses, Dr. William Spellacy. Dr. Spellacy testified that the baby should have been delivered by cesarean section no later than 8:48 p.m. Dr. Spellacy opined that the baby would have been born alive and normal had he been delivered by cesarean section no later than 8:48 p.m. This testimony supported the view that a successful delivery of any type was unlikely after 8:48 p.m.³

¶21 In sum, we conclude that the jury could have reasonably interpreted the evidence as showing that Dr. Grelle was negligent during a short span of time, but that such negligence did not affect the course of the delivery and, therefore, was not causal.

³ The Engens take issue with the circuit court's restatement of Dr. Spellacy's testimony regarding the latest time by which intervention should have occurred. Because we must view the evidence in the light most favorable to the jury's verdict, we read Dr. Spellacy's testimony on this topic in favor of the jury's verdict finding Dr. Grelle negligent with respect to the care of the mother and baby during labor and delivery. Thus, we read Dr. Spellacy as opining that the baby should have been delivered *prior* to 8:48 p.m.

Informed Consent

¶22 As we have discussed, the jury found Dr. Grelle negligent for failing to provide informed consent to the Engens. In other words, the jury found that Dr. Grelle failed in her duty to provide information to the Engens regarding the possibility of delivering the baby by cesarean section. As should be clear by now, we conclude that the jury could have found that Dr. Grelle's negligent failure in this respect commenced at 8:48 p.m., at a time when the jury could also have found that such consultation would not have made a difference.

¶23 We stress that this is not the only reasonable view of the evidence. The Engens present a strong argument that a more reasonable view is that if Dr. Grelle was negligent, her negligence was causal. But that argument does not satisfy the standard of review which requires us to search the record for any reasonable view of the evidence that supports the jury's verdict, especially one that has been approved by the circuit court.

¶24 We also note that a reasonable view of the evidence is that Dr. Grelle was not negligent. If the jury had accepted her testimony and the testimony of Dr. Hueston, such testimony would have supported the view that Dr. Grelle acted within the proper standard of care at each step along the way. This observation is significant because it highlights an aspect of this case that the parties do not discuss. This case might be viewed as an inconsistent verdict case. The question then would be which of the answers—the negligence answers or the causation answers—should be changed. If neither we nor the circuit court had been able to reconcile the answers, it is not apparent that either court would have had the authority to change the causation answers in favor of the Engens, as they request. In *Westfall v. Kottke*, 110 Wis. 2d 86, 92-95, 328 N.W.2d 481 (1983),

our supreme court discussed the dilemma. After discussing why an inconsistent verdict is problematic, the court wrote that “when a verdict is inconsistent, such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial.” *Id.* at 98. Thus, it may be that the most the Engens could have achieved after trial was a new trial. However, the parties do not address this topic and we address it no further.⁴

B. Juror Misconduct

¶25 The Engens next argue that the circuit court erroneously denied their motion for a new trial because of juror misconduct. The Engens argue that the court should have excused the challenged juror because the juror engaged in misconduct by having a discussion outside of the courtroom with Dr. Grelle’s sister-in-law, a medical doctor who was observing the trial. The Engens complain that the juror was exposed to matters not of record and that the Engens were prejudiced by the juror’s contact with Dr. Grelle’s sister-in-law.

¶26 In *Castaneda v. Pederson*, 176 Wis. 2d 457, 463, 500 N.W.2d 703 (Ct. App. 1993), we set forth a three-part test a party must meet when seeking to impeach a jury’s verdict in a civil action because of alleged juror-misconduct: (1) the evidence proffered to show juror-misconduct must be competent under WIS. STAT. § 906.06(2); (2) the evidence must be clear and convincing; and

⁴ The Engens also contend that the circuit court erred by denying the Engens’ motion for a new trial in the interest of justice because the jury’s verdict is contrary to the great weight and clear preponderance of the evidence. See *Kubichek v. Kotecki*, 2011 WI App 32, ¶29, 332 Wis. 2d 522, 796 N.W.2d 858; WIS. STAT. § 805.15(1). However, the Engens’ argument on this topic merely duplicates arguments we have already rejected in response to their challenge to the circuit court’s refusal to change the jury’s answers to the special verdict. The arguments are no more persuasive in an interest of justice context.

(3) “the competent evidence must show by the ‘clear and convincing’ standard that the moving party was prejudiced . . . ‘on the basis of the nature of the matter and its probable effect on a hypothetical average jury.’” *Id.* (quoting another source). The Engens have failed to satisfy at least the second and third element of the three-part test.

¶27 On the third day of trial, the circuit court was informed that a juror was observed talking with a woman who had been seated behind Dr. Grelle throughout the trial. The Engens asked the court to either dismiss the juror from the trial altogether, or to at least designate the juror as an alternate. The court conducted a voir dire examination of the juror after learning that she had spoken to Dr. Grelle’s sister-in-law. The juror testified that she was approached by a woman whose son plays basketball at the same high school as her son and that the woman asked her who won the varsity basketball game the night before. The court asked the juror whether she discussed the case with the woman, whether she knew that the woman was Dr. Grelle’s sister-in-law, and whether she told the other jurors that she was socially acquainted with a person who was observing the trial. The juror answered in the negative to each question. The court also asked the juror whether there was anything about her conversation with the woman that affected the juror’s ability to be fair and impartial in this case, to which the juror answered no.

¶28 At the close of the voir dire, the Engens moved the court to declare the juror as the alternate juror based on the juror’s social acquaintance with Dr. Grelle’s sister-in-law. The court denied the motion. The court reasoned that the juror was “very believable in her recitation of what happened” and that her testimony demonstrated that she “can and will be fair” as a juror in this case.

¶29 The circuit court’s denial of the Engens’ motion for a new trial on the ground of juror misconduct rested entirely on the court’s determination that the juror’s testimony regarding her contact with Dr. Grelle’s sister-in-law was credible. It is the trial court’s responsibility to make determinations of credibility, and we will not overturn those determinations unless there is unequivocal evidence that no finder of fact could believe a witness’s testimony. *See State v. Garcia*, 195 Wis. 2d 68, 75-76, 535 N.W.2d 124 (Ct. App. 1995); *see also Fidelity & Deposit Co. v. First Nat’l Bank*, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980). The Engens do not challenge the court’s credibility determination and we find nothing in the record to disturb the court’s ruling. Thus, the Engens have not shown by clear and convincing evidence that the challenged juror engaged in any misconduct and, therefore, have failed to establish by the same legal standard that they were prejudiced by the alleged juror misconduct. Accordingly, we conclude that the Engens are not entitled to a new trial based on alleged juror misconduct.

CONCLUSION

¶30 Based on the foregoing reasons, we conclude that the circuit court properly denied the Engens’ motion to change the no-causation verdicts and the Engens’ motion for a new trial based on alleged juror misconduct. We affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

