COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2011

A. John Voelker
Acting 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. 2010AP258 **Cir. Ct. No. 2007CV59**

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

THERESA C. WEBORG, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM N. WEBORG, DECEASED, NICHOLAS WEBORG, BY HIS GUARDIAN AD LITEM, J. MICHAEL END, MITCHELL WEBORG, BY HIS GUARDIAN AD LITEM, J. MICHAEL END AND MICHAEL WEBORG, BY HIS GUARDIAN AD LITEM, J. MICHAEL END,

PLAINTIFFS-APPELLANTS,

V.

DONALD B. JENNY, M.D., ERIK M. BORGNES, M.D., JOSEPH J. REBHAN, M.D. AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Theresa Weborg and her children, who are the surviving spouse and children of William Weborg, appeal judgments finding in favor of Dr. Joseph Rebhan, Dr. Donald Jenny and Dr. Erik Borgnes on the Weborgs' medical malpractice actions against them. The Weborgs contend they are entitled to a new trial because the circuit court erred in the following three respects: (1) allowing the admission of evidence at trial regarding the amount Theresa received in life insurance proceeds and Social Security as a result of William's death; (2) including the optional paragraph in WIS JI—CIVIL 1023; and (3) modifying WIS JI—CIVIL 260. We disagree and affirm.

BACKGROUND

1. FACTUAL HISTORY

¶2 William Weborg died of severe coronary artery disease in September 2004. Prior to his death, William had sought medical care from Dr. Rebhan, a family practitioner, for chest discomfort. William underwent an exercise stress test, as well as a nuclear scan.[1] The results of William's nuclear scan were interpreted by Dr. Borgnes, a diagnostic radiologist, as abnormal. William was then referred to Dr. Jenny, a cardiologist, to determine whether or not William's chest pain was related to his heart. Dr. Jenny ultimately determined that William's chest pain was musculoskeletal, and not heart related.

[1] During a nuclear study, a dye is injected into the patient, which travels all over the patient's body and "gets stuck in tissues in the body," including the heart, allowing for a picture of the heart to be taken. If an artery of the heart "is very, very narrowed," less dye will go to that area, and this will be visible to those reading the picture. Dye is injected into the patient when he or she has been stressed and when he or she has been resting and photos are taken at both times. The stress pictures are then compared to the rest pictures.

¶3 Following his consultation with Dr. Jenny, William continued to have occasional chest pains when he exercised and was referred to a physical therapist, who determined that William suffered no signs of musculoskeletal impairment and discharged William from therapy. William died before he was able to return to Dr. Rebhan.

2. RELEVANT PROCEDURAL HISTORY

¶4 The Weborgs brought the present action against Drs. Rebhan, Jenny and Borgnes, and Physicians Insurance Company of Wisconsin, Inc., seeking compensation for loss of companionship and for financial losses suffered as a result of William's death.

¶5 Motions in limine were filed requesting permission from the court to present into evidence facts regarding collateral source payments received by the Weborgs, which included life insurance proceeds and social security paid to the Weborgs as a result of William's death. The circuit court granted the motion allowing the evidence to be admitted at trial.

¶6 Prior to the case being submitted to the jury, the parties also disputed the propriety of various jury instructions. WISCONSIN JI—CIVIL 1023, which instructs the jury regarding medical negligence, contains an optional paragraph to be given "only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable." Dr. Rebhan and Dr. Jenny argued that this paragraph should be included in the instructions given to the jury. However, the Weborgs argued that it should not be included in the instructions because it was not appropriate in light of the evidence adduced at trial. The court included the optional paragraph in the instructions.

¶7 The parties also disputed whether additional language should have been included in WIS JI—CIVIL 260, which instructs the jury regarding expert testimony. Instruction 260 provides:

> Usually witnesses can testify only to facts they know.
>
> But, a witness with expertise in a calling (specialty) may give an opinion in that calling (specialty). In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. Opinion evidence was admitted in this case to help you reach a conclusion. You are not bound by any expert's opinion.
>
> (In resolving conflicts in expert testimony, weigh the different expert opinions against each other and consider the relative qualifications and credibility of the experts and the reasons and facts supporting their opinions.)

¶8 Dr. Rebhan proposed that the following language be added to the end of the first paragraph in instruction 260: "except with regard to the standard of care exercised by medical doctors." Over the Weborgs' objection, the court included this additional language.

¶9 The jury ultimately returned a verdict in favor of the defendants. The Weborgs appeal. Additional facts will be discussed below as necessary.

DISCUSSION

¶10 The Weborgs contend on appeal that they are entitled to a new trial because the circuit court erred in the following three respects: (1) allowing the admission of evidence of the amounts Theresa received in life insurance proceeds and Social Security as a result of William's death; (2) including the optional

paragraph of WIS JI—CIVIL 1023; and (3) modifying WIS JI—CIVIL 260. We address each issue in turn.

1. Admissibility of Evidence Regarding the Collateral Amounts Received in Life Insurance Proceeds and Social Security Payments

¶11 The Weborgs contend that the circuit court erred in allowing the admission of evidence regarding collateral source payments, which in this case included the amount of life insurance proceeds and social security benefits Teresa received as a result of William's death. The circuit court allowed the admission of that evidence based on WIS. STAT. § 893.55(7) (2009-10),[2] which provides that "[e]vidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice." The Weborgs contend that although § 893.55(7) allows for the admission of collateral source payments, it does not require that such evidence be admitted when the evidence is not otherwise relevant or when its probative value is outweighed by the damage of unfair prejudice. They claim that here, the evidence was not relevant to any issue the jury would have to decide and was prejudicial to their case.

¶12 We assume, without deciding, that the circuit court erred in admitting evidence regarding the collateral payments, but conclude the error was harmless. A new trial is warranted only if the error affected the substantial rights of the party. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. If the error did not, it is considered harmless. ***Id.*** "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the error contributed to the outcome of the action or proceeding at issue." ***Id.***, ¶32 (quoted source omitted).

¶13 The parties stipulated that the Weborgs' damages totaled $1,000,000, and thereby removed that issue from the jury. The sole questions for the jury to determine were thus: whether Dr. Jenny and Dr. Rebhan were negligent in their care and treatment of William; whether Dr. Borgnes was negligent at the time he read William's nuclear scan; whether William was negligent with regard to his own health; and, if any of the physicians or William were negligent, whether their individual negligence was the cause of William's death. The jury determined that none of the doctors were negligent.

¶14 In determining the negligence of Drs. Jenny, Rebhan and Borgnes, the jury was instructed that,

> In treating and diagnosing William Weborg, Dr. Jenny, Dr. Rebhan and Dr. Borgnes were required to use the degree of care, skill, and judgment which a reasonable cardiologist, family practitioner and general diagnostic radiologist, respectively, would exercise in the same or similar circumstances, having due regard for the state of medical science at the time William Weborg was treated and diagnosed. A doctor who fails to conform to this standard is negligent. The burden is on the plaintiffs to prove that Dr. Jenny, Dr. Rebhan and/or Dr. Borgnes was negligent.
>
> … The standard you must apply in determining if Dr. Jenny was negligent is whether he failed to use the degree of care, skill, and judgment which reasonable cardiologists would exercise given the state of medical knowledge at the time of the treatment in issue.
>
> The standard you must apply in determining if Dr. Rebhan was negligent is whether the doctor failed to use the degree of care, skill, and judgment which reasonable family practitioners would exercise given the state of medical knowledge at the time of the treatment in issue.

> The standard you must apply in determining if Dr. Borgnes was negligent is whether the doctor failed to use the degree of care, skill, and judgment which reasonable general diagnostic radiologist would exercise given the state of medical knowledge at the time he read the nuclear [scan] portion of William Weborg's stress test.

See WIS JI—CIVIL 1023.

¶15 The Weborgs' finances were not a factor to be considered by the jury in determining the doctors' negligence. Thus, in order for the admission of evidence relating to Teresa's collateral source payments to have "contributed to the outcome of the action or proceeding at issue," the jury would have had to have acted improperly by considering evidence irrelevant to the determinations before it and holding the collateral payments against the Weborgs. *See* ***Martindale***, 246 Wis. 2d 67, ¶32. We presume that juries follow the instructions given to them. ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994). The Weborgs have presented no evidence to rebut the presumption that the jury did so and we have been presented with no reasonable grounds to make such an assumption. Accordingly, we conclude that any error on the circuit court's part in admitting evidence of collateral payments was harmless.

2. Inclusion of the Optional Paragraph in Wis JI—Civil 1023

¶16 The Weborgs contend the circuit court erred in including in its instruction to the jury on medical negligence the following optional alternative method instruction, which was requested by Dr. Rebhan and Dr. Jenny:

> If you find from the evidence that more than one method of treating and diagnosing Mr. Weborg's condition was recognized as reasonable given the state of medical knowledge at that time, then the doctors were at liberty to select any of the recognized methods. The doctors were not negligent because they chose to use one of these recognized treatment and diagnostic methods rather than

> another recognized method if they used reasonable care, skill, and judgment in administering the method.

¶17 WISCONSIN JI—CIVIL 1023 instructs that this paragraph should be used only "if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable." The Weborgs argue that the jury should not have been given the optional language because "[a]lternative methods of diagnosis were not part of the equation." We disagree.

¶18 A circuit court is given broad discretion when instructing the jury and no basis for reversal will exist if the overall meaning communicated by the instruction was a correct statement of law. ***Finley v. Culligan,*** 201 Wis. 2d 611, 620, 548 N.W.2d 854 (Ct. App. 1996).

¶19 "The alternative method instruction is optional and should be given only when the evidence allows the jury to find that more than one method of diagnosis or treatment of the patient is recognized by the average practitioner." ***Id.*** at 622 (quoting ***Miller v. Kim,*** 191 Wis. 2d 187, 198, 528 N.W.2d 72 (Ct. App. 1995)). Applied here, giving the instruction was proper if there was medical expert testimony presented at trial that alternative methods of diagnosing William's chest pain were available to the average practitioner. *See* ***id.***

¶20 The Weborgs contend that this case is analogous to ***Miller***. In ***Miller***, we held that the circuit court erred in giving the alternative method instruction to the jury because the symptoms of spinal meningitis were present in a small child, and all the medical experts were unanimous that "where the 'index of suspicion' is sufficiently high" to suggest meningitis, a spinal tap is the only diagnostic method to rule out the illness. ***Miller***, 191 Wis. 2d at 194-98. The Weborgs assert that similarly, the only diagnostic method to ascertain "the extent

and severity of [William's] coronary artery disease was a cardiac catheterization." However, here, unlike ***Miller***, there was evidence of alternatives. The medical experts were not unanimous that a cardiac catheterization was the only diagnostic method to employ when symptoms such as William's were present in a patient. *See* ***Finley***, 201 Wis. 2d at 625-26.

¶21 With respect to Dr. Jenny, the testimony at trial revealed the existence of multiple options in diagnosing and treating a patient who presented with William's symptoms.

¶22 Dr. Jenny evaluated William on April 7, 2004. William presented with a history of chest discomfort. Dr. Jenny's notes indicated that William "developed some chest discomfort in the right pectoral area" after a "particularly strenuous workout" on a cross-trainer. William had not used the cross-trainer for a couple of weeks. Dr. Jenny further reported that since that incident, William continued to notice the discomfort, but that it was "to some degree, a low grade ache that has been present persistently, though there [were] times when the discomfort [] both worsen[ed] and improve[ed] with exercise." In evaluating William, Dr. Jenny reviewed the reports from William's EKG, exercise stress test, and stress nuclear blood flow scan (nuclear scan). According to Dr. Jenny, William's EKG was normal. Dr. Jenny also opined that the results of William's exercise stress report were "reassuring" in that: (1) William was able to exercise to a high level; (2) William's chest pain "didn't change or it got better depending upon how" the test results were interpreted; and (3) while in recovery mode, William's heart rate "went down very nicely."

¶23 Dr. Jeffrey Breall testified at trial that the standard of care for a cardiologist is to weigh the results of a patient's EKG and nuclear scan. Dr. Breall

opined that William's results from those tests were "abnormal" and the appropriate standard of care in that situation is to conduct a cardiac catheterization to see where vessels in the heart are narrowing. Similarly, Dr. Karyl Van Benthuysen testified that in his opinion, the cardiac catheterization should have been done on William to satisfy the standard of care. According to Dr. Van Benthuysen, the changes in William's EKG "were so impressive and so convincing that they almost mandated the … recommendation for a cardiac catheterization."

¶24 However, Dr. Matthew Wolff testified that he agreed with Dr. Jenny's assessment that William's chest discomfort was not related to his heart. Dr. Wolff testified that William's "chest pain syndrome was … much more consistent with a musculoskeletal injury." According to Dr. Wolff, Dr. Jenny was presented with "an atypical chest pain story. He had a stress test that was negative, [one] that [] indicated excellent exercise tolerance, a scan that showed an artifact and really not much else." Dr. Wolff also testified that in situations such as William's where an EKG is suggestive of ischemia, but a nuclear scan is not, the standard of care is to go with the more accurate test, which is the nuclear scan.

¶25 The testimony heard by the jury revealed that a reasonable physician has several options when diagnosing and treating a patient presenting with William's symptoms. Because there was "competing evidence, recognized by the profession, support[ing] the alternative mode of monitoring" William's condition, the instruction was properly given to the jury. ***Finley***, 201 Wis. 2d at 625.

¶26 Likewise, the evidence at trial indicated that Dr. Rebhan had multiple options for diagnosing and treating William, including scheduling him for

a follow-up visit, referring William to a physical therapist for musculoskeletal pain or referring William back to a cardiologist.

¶27 For example, Dr. Alan David testified that chest pain is a frequent complaint heard by family practitioners. It can be caused by a variety of things, including musculoskeletal problems, gastrointestinal problems, or angina, all of which present with the same symptomatology. According to Dr. David, referring William to a physical therapist and scheduling him for a follow-up visit were both appropriate courses of action and within the standard of care. In contrast, Dr. Richard Lewan testified that the standard of care in the field of family practice medicine when dealing with a patient who presented with ongoing chest discomfort, as William did following his visit with Dr. Jenny, is to "get the patient back to the cardiologist to address the fact that the pain is continuing" to determine whether or not the patient's problem is cardiac.

¶28 Because there was medical expert testimony at trial that both Dr. Jenny and Dr. Rebhan had before them alternative methods for diagnosing and treating William, we conclude that the circuit court did not err in giving the alternative methods of treatment and diagnosis instruction of WIS JI—CIVIL 1023.

3. Modification of Wis JI—Civil 260

¶29 The Weborgs contend that the circuit court also erred when it modified the standard language in WIS JI—CIVIL 260, which instructs the jury regarding expert testimony. The standard language of WIS JI—CIVIL 260 provides:

> Usually witnesses can testify only to facts they know.

> But, a witness with expertise in a calling (specialty) may give an opinion in that calling (specialty). In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. Opinion evidence was admitted in this case to help you reach a conclusion. *You are not bound by any expert's opinion.*

(Emphasis added.) The circuit court modified the italicized language and instructed the jury as follows: "You are not bound by any expert's opinion, *except with regard to the standard of care exercised by medical doctors*." (Emphasis added.)

¶30 The Weborgs argue that although the standard instruction informs the jury that they are *not* bound by any expert opinion, the amended instruction was confusing because it suggests that the jury *is* bound by expert medical care opinions. We agree with the Weborgs that the added language is error. It is axiomatic that jurors are not bound to accept an expert's opinion. Moreover, in a case like this, with conflicting expert medical opinions, it was not possible for the jury to accept as true all of the various expert opinions. We conclude, however, that this instructional error was harmless.

¶31 There is not a reasonable probability that the error in modifying the instruction contributed to outcome of the case because the added language was so nonsensical. We simply cannot imagine that a jury would believe that, when presented with different views of the appropriate standard of care, they would believe they were obligated to simultaneously believe conflicting opinions. We therefore find that the modification was harmless.

CONCLUSION

¶32 For the reasons discussed above, we affirm the judgments of the circuit court.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.