

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

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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 Nos. 2007AP2729
2008AP154**

Cir. Ct. No. 2004CV1011

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2007AP2729

DALE SKRZYPCHAK AND DOREEN SKRZYPCHAK,

PLAINTIFFS-APPELLANTS,

**SECURITY HEALTH PLAN, COMBINED INSURANCE COMPANY,
WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION AND
UNITED STATES CENTER FOR MEDICARE & MEDICAID SERVICES,**

INVOLUNTARY-PLAINTIFFS,

v.

**PAUL LLOYD JENSEN, M.D. AND PHYSICIANS INSURANCE COMPANY
OF WISCONSIN, INC.,**

DEFENDANTS-RESPONDENTS,

**WAUSAU SPINE AND NEUROSCIENCES, LLC, SPINE CARE
SPECIALISTS OF WISCONSIN, SC AND WISCONSIN PATIENTS
COMPENSATION FUND,**

DEFENDANTS.

NO. 2008AP154

DALE SKRZYPCHAK AND DOREEN SKRZYPCHAK,

PLAINTIFFS-RESPONDENTS,

**SECURITY HEALTH PLAN, COMBINED INSURANCE COMPANY,
WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION AND
UNITED STATES CENTER FOR MEDICARE & MEDICAID SERVICES,**

INVOLUNTARY-PLAINTIFFS,

V.

**PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.
AND SPINE CARE SPECIALISTS OF WISCONSIN, SC,**

DEFENDANTS-APPELLANTS,

**PAUL LLOYD JENSEN, M.D., WAUSAU SPINE AND NEUROSCIENCES, LLC
AND WISCONSIN PATIENTS COMPENSATION FUND,**

DEFENDANTS.

APPEALS from judgments of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dale and Doreen Skrzypchak appeal a judgment dismissing their claim against Dr. Paul Jensen in a medical malpractice action after a jury found Jensen was not negligent in treating Dale Skrzypchak. The Skrzypchaks seek a new trial, raising multiple claims of circuit court error. They also ask that we exercise our discretionary power of reversal.

¶2 Spine Care Specialists of Wisconsin, S.C., and Physicians Insurance Company of Wisconsin appeal a judgment against them for \$1,000,000 of Skrzypchak's damages.¹ They claim the circuit court properly denied the Skrzypchaks' motion for a new trial, but that if we reverse and grant a new trial, it should be granted as to all defendants.² Therefore, their claim is contingent upon us granting the Skrzypchaks a new trial.

¶3 We reject the Skrzypchaks' claims and affirm the judgment. Because our decision renders the issues in Spine Care Specialists and Physicians Insurance Company's appeal moot, we do not address them. We also sanction the Skrzypchaks' attorney \$500 for violating the rules of appellate procedure.

BACKGROUND

¶4 This action arose from the alleged malpractice of Dr. Paul Jensen and his physician's assistant, Brad Bodner, in treating Dale Skrzypchak. Both were employed by Spine Care Specialists. At the outset, it is worth noting that the Skrzypchaks' grievance with the judgment stems from the jury allocating sixty percent of the causal negligence to nurse Lynn Bennett, an employee of Wausau Hospital. The Skrzypchaks did not sue Bennett or Wausau Hospital, and therefore sixty percent of their damages were uncollectable.

¶5 Dale Skrzypchak suffered from cauda equina syndrome, which is a neurosurgical emergency. It involves a compressed nerve extending into the cauda equina region of the body, which is that portion below where the spinal cord

¹ By order dated January 24, 2008, we granted a motion to consolidate the appeals.

² The Skrzypchaks sought a new trial against some defendants, but not others.

terminates. The longer the nerve is compressed, the more nerve cells die, which can result in permanent impairments in bowel function, bladder function, sexual function, and leg strength. There was expert testimony that, had Skrzypchak been operated on earlier, the magnitude of his injuries would have been reduced.

¶6 On July 8, 2003, Skrzypchak went to the emergency room at Wausau Hospital with a complaint of lower back pain, tingling in his legs, and trouble urinating. Following an MRI, Skrzypchak was referred to Jensen, a neurosurgeon. Jensen ordered an epidural steroid injection and believed Skrzypchak would be discharged afterward. However, Skrzypchak was not discharged, but was instead admitted by another doctor after complaining of trouble urinating and increased numbness in his feet.

¶7 On the morning of July 9, Jensen's physician's assistant, Bodner, made rounds on patients and examined Skrzypchak, noting that he had lower extremity numbness from his buttock to the back of his right thigh. Bodner also noted that Skrzypchak was not experiencing any pain after the epidural steroid injection and that he could possibly be discharged if physical therapy goals were met. Later that morning, around 11:00, Bodner spoke with Jensen and informed him Skrzypchak was in the hospital. After Bodner's conversation with Jensen, the plan remained for Skrzypchak to be discharged.

¶8 Later on July 9, around 4:00 p.m., Bodner visited Skrzypchak again, and noted that Skrzypchak stated the epidural steroid injection provided no relief, which was contrary to what Skrzypchak communicated earlier that day. Bodner also noted that Skrzypchak reported more numbness and that he was unable to void or defecate. Bodner did not inform Jensen about these new concerns. There

was expert testimony that Skrzypchak's cauda equina syndrome was diagnosable as early as 4:00 p.m.

¶9 Later on July 9, nurse Bennett saw Skrzypchak, though she had no recollection at trial of anything beyond what was in Skrzypchak's hospital records. Based on those records, she acknowledged she was under orders from a hospitalist, Dr. Tejas Brahmbhatt, to perform neurologic checks and a bladder scan on Skrzypchak, and to report any abnormal results to Brahmbhatt. At 4:50 p.m. and 8:30 p.m., Bennett performed the neurological checks and noted abnormal neurological symptoms. A bladder scan also had abnormal results. While the records reflect that Bennett paged and spoke with Brahmbhatt about the abnormal bladder scan at 7:00 p.m., the records did not indicate she reported the abnormal neurological results.

¶10 Brahmbhatt testified that, in his conversation with Bennett at 7:00 p.m., he instructed her to page Jensen. Bennett testified that, had Brahmbhatt ordered her to call Jensen or Bodner, she would have documented it. No order to page Jensen or Bodner was documented, and both denied receiving a page regarding Skrzypchak. Bennett did not recall paging Jensen or Bodner, and the hospital records contain no notation that she paged them.

¶11 Surgery on Skrzypchak was not performed until July 10. Skrzypchak claimed to have suffered permanent injuries because of the delay in surgery. After a two-week trial, a jury allocated sixty percent of the causal

negligence to Bennett and forty percent to Bodner. Other background facts are contained in the discussion below.³

DISCUSSION

¶12 The Skrzypchaks challenge a myriad of circuit court rulings, seeking a new trial. They contend the circuit court erroneously: (1) instructed the jury to disregard evidence of pages sent from the hospital to Jensen and Bodner; (2) found nurse Bennett negligent as a matter of law; (3) included Bennett on the special verdict form; (4) excluded evidence of Jensen's other patients' hospital records; (5) prohibited the jury from considering imputed knowledge; (6) excluded evidence of hospital policies applicable to Jensen; (7) refused to instruct the jury on the defendants' right to implead third parties; and (8) denied the Skrzypchaks' motion for a new trial. They also ask that we exercise our discretionary power of reversal, contending the real controversy was not fully tried.

³ We note that our task in writing this decision was unnecessarily complicated by the failure of the Skrzypchaks' attorney, Chris A. Messerly, to provide appropriate citations to the record, as required by the rules of appellate procedure. *See* WIS. STAT. RULE 809.19(1)(d)-(1)(e). For example, Messerly repeatedly cites to trial exhibits one through three, each of which is a binder of medical records. He does not, however, cite to page numbers within those exhibits, even though exhibit two, for instance, is nearly six hundred pages. Also, Messerly does not appropriately cite to the ten days of trial transcripts. Instead of using the record number of a given transcript, he merely cites to the clerk's notes for that trial day.

Failure to follow the rules of appellate procedure "is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate." WIS. STAT. RULE 809.83(2). Here, we deem a sanction of \$500 against Messerly to be an appropriate penalty for these rule violations, and we direct that he pay this amount to the clerk of this court within thirty days of the release of this opinion.

I. Evidence of pages to Jensen and Bodner

¶13 The Skrzypchaks contend the court erred when instructing the jury to disregard evidence of phone pages to Jensen and Bodner. The evidence consisted of hospital phone records showing that, on July 9 at 6:18 p.m., Jensen was paged from an alcove adjacent to Skrzypchak's and another room. At 10:00 p.m., Bodner was paged from an alcove across the hall from Skrzypchak's room. The Skrzypchaks suggest these pages were sent by Bennett.

¶14 A circuit court has broad discretion when making evidentiary determinations. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The question on appeal is whether the court exercised its discretion in accordance with accepted legal standards and in accordance with the facts in the record. *Id.*, ¶29. Under this highly deferential standard, the question is not whether we agree with the court's decision, but whether appropriate discretion was, in fact, exercised. *Id.* We will uphold a court's exercise of discretion on an evidentiary question if there is a rational basis to support it. *Id.*

¶15 The court instructed the jury to disregard evidence of the pages because the jury could only speculate about whether the pages were sent regarding Skrzypchak. The court noted that two rooms shared the alcove from which the page was sent to Jensen, and there was no evidence about whether the other room was occupied and, if so, that patient's condition. The court was not persuaded by the Skrzypchaks' argument that Jensen had only two other patients on that same floor because Jensen was on call for the hospital that night, and therefore he could have been paged about any of the patients there.

¶16 We conclude the court properly exercised its discretion. Bennett did not remember paging Jensen or Bodner, and both Jensen and Bodner denied

receiving a page regarding Skrzypchak. There was no indication in Skrzypchak's hospital records that Bennett paged Jensen or Bodner. Further, as the circuit court noted, because Jensen was on call that day, the pages could have regarded any hospital patient, not just Jensen's. After hearing all the evidence, the court reasonably concluded the jury could only speculate about who sent the pages and why.

II. Bennett's negligence as a matter of law

¶17 The Skrzypchaks contend the court erred when finding Bennett negligent as a matter of law. We review directed verdicts de novo. *Millonig v. Bakken*, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983). A directed verdict is appropriate if “there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion.” *Id.* at 451. The issue of negligence is rarely decided as a matter of law. *Id.*

¶18 The court granted the directed verdict against Bennett because Bennett did not contact a physician about the abnormal neurological signs she observed in her checks on Skrzypchak. The undisputed evidence was that while Bennett reported to Brahmbhatt abnormal bladder scan results at 7:00 p.m., she did not report the abnormal neurological signs she discovered at 4:50 and 8:30 p.m. Experts testified that her failure to contact a physician constituted a breach of the standard of care.

¶19 The Skrzypchaks do not dispute that there was no evidence Bennett contacted Brahmbhatt about the abnormal symptoms discovered at 4:50 and 8:30 p.m. Instead, the Skrzypchaks assert Bennett satisfied her duty to notify Skrzypchak's doctors by paging Jensen and Bodner. As stated above, the court properly excluded evidence of these pages because the jury could only speculate

as to whether they had anything to do with Skrzypchak. Therefore, there was no evidence Bennett contacted any doctors about Skrzypchak's abnormal neurological signs. As a result, the evidence did not permit conflicting inferences on the material issue of whether Bennett contacted a doctor, and the court properly concluded she was negligent as a matter of law. *See id.*

III. Inclusion of Bennett on special verdict form

¶20 The Skrzypchaks contend the court erred when including Bennett on the special verdict form. Specifically, the Skrzypchaks contend there was no expert testimony that Bennett's negligence caused Skrzypchak's injuries. The Skrzypchaks rely on *Zak v. Zifferblatt*, 2006 WI App 79, ¶11, 292 Wis. 2d 502, 715 N.W.2d 739, where we affirmed a court's discretionary decision not to give a contributory negligence instruction where there was no expert testimony that the plaintiff's delay in returning to a hospital caused his injuries.

¶21 We reject the Skrzypchaks' argument. The entire theme of the Skrzypchaks' case was that earlier recognition of Skrzypchak's deteriorating condition and earlier surgery would have prevented his injuries. As indicated above, there was expert testimony supporting this assertion. Further, Jensen testified that, had he been contacted between 6:00 and 8:00 p.m. about Skrzypchak's deteriorating condition, he would have immediately come in to examine him. Therefore, unlike in *Zak*, 292 Wis. 2d 502, ¶11, expert testimony here supported a conclusion that the delay in surgery, resulting from Bennett's negligent failure to contact a doctor, caused Skrzypchak's injuries.

IV. Evidence of other patients' hospital records

¶22 The Skrzypchaks contend the court erred when excluding from evidence Jensen's other patients' hospital records. The Skrzypchaks assert the hospital records were relevant to whether Bennett paged Jensen and Bodner and should have been admitted to impeach Jensen's testimony about how often he saw his patients. As discussed above, courts have broad discretion to decide evidentiary issues. See *Martindale*, 246 Wis. 2d 67, ¶¶28-29.

¶23 The court excluded the hospital records for two reasons. First, it concluded the records would not resolve the problem of jury speculation about the purpose of the phone pages because Jensen was on call for the hospital that night. Therefore, the pages could have regarded other hospital patients, not just Jensen's. Second, the court determined expert testimony would be necessary to explain the other patients' hospital records to the jury. The court inquired whether the Skrzypchaks would present expert testimony to explain those records, and the Skrzypchaks' attorney indicated they would not. Therefore, the court concluded jurors could only speculate about the records' meaning.

¶24 The Skrzypchaks' argument ignores the circuit court's rationale for excluding the records. They do not acknowledge that Jensen was on call for other patients at the hospital, nor do they address the court's conclusion that expert testimony would be necessary to explain the hospital records to the jury. In short, they fail to explain why the court's exercise of discretion was erroneous.

V. Imputed knowledge

¶25 Before trial, the court granted a motion in limine excluding evidence that Jensen was legally responsible for Bodner's conduct, including hospital forms

in which Jensen accepted responsibility for Bodner's treatment of Jensen's patients. The court also rejected a proposed jury instruction, which would have instructed the jury to assume Jensen knew what Bodner knew. The court concluded the imputed knowledge issue would be confusing to the jury when allocating negligence. It further concluded the proper procedure was for the jury to determine and allocate negligence in the special verdicts, after which the court could address the legal question of whether Jensen was responsible for any negligence allocated to Bodner.

¶26 The Skrzypchaks argue the court "erroneously refused to allow the jury to consider the issue of imputed knowledge." They contend that "had the jury been allowed to consider the evidence and been instructed on imputed knowledge, it could reasonably have concluded that Bodner's knowledge ... was imputed to Jensen."

¶27 We conclude the Skrzypchaks' argument is inadequately developed, and therefore we need not address it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). First, the imputed knowledge "issue" actually consists of two distinct issues: (1) whether the court erroneously excluded evidence of Jensen's responsibility for Bodner; and (2) whether the court properly refused to instruct the jury to assume Jensen knew what Bodner knew. The Skrzypchaks argument does not recognize these distinct issues.

¶28 Further, on the admissibility of evidence question, the Skrzypchaks fail to address the court's exercise of discretion. They do not explain why the court's concerns about confusing the jury were unfounded. They also fail to coherently explain why the court erred when determining that Jensen's responsibility for Bodner's negligence was a question of law to be decided

postverdict. As for the court's rejection of their proposed jury instruction, the Skrzypchaks only mention the instruction in passing, without conducting any meaningful analysis.⁴

VI. Evidence of hospital policies regarding Jensen

¶29 The Skrzypchaks contend the court erred by not allowing into evidence “certain exhibits pertaining to the hospital’s policies governing the conduct of its practitioners, including Jensen.” Specifically, they point to a hospital policy requiring Jensen to complete a consultation report after visiting Skrzypchak that demonstrated “an examination of the patient with documented impressions and recommendations.” They also point to a document stating Jensen was responsible “for the daily care and supervision of each patient in the hospital for whom he is providing services....” The court excluded these hospital policies because they did not establish the standard of care applicable to Jensen. As a physician, the applicable standard of care is established by expert testimony. *See* WIS JI—CIVIL 1023 (2006).

¶30 The Skrzypchaks do not contest the court’s conclusion that the hospital policies were irrelevant to the applicable standard of care. They nonetheless contend the policies were relevant because the jury “was entitled to consider Jensen’s ... failure to comply with basic policies and regulations. Moreover, they were relevant to Jensen’s credibility.”

⁴ We also note that Jensen asserts the damages allocated to Bodner are fully covered by insurance and, therefore, imputing Bodner’s negligence to Jensen would not affect the Skrzypchaks’ recovery. The Skrzypchaks do not refute this assertion or otherwise explain how the court’s rulings affected their substantial rights.

¶31 The Skrzypchaks do not explain why the jury “was entitled to consider Jensen’s ... failure to comply with basic policies and regulations,” nor do they explain why the policies were relevant to Jensen’s credibility. As a result, this argument is undeveloped and unsupported, and we need not address it. *See Pettit*, 171 Wis. 2d at 646-47.

VII. Refusal to instruct the jury on the defendants’ right to implead third parties

¶32 The Skrzypchaks claim the circuit court erroneously refused to instruct the jury on the defendants’ right to implead third parties under WIS. STAT. § 803.05. A circuit court has broad discretion when determining whether to give a particular instruction. *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. When determining the appropriate jury instructions, the court is tasked with fully and fairly informing the jury of the applicable law and assisting the jury in making a reasonable analysis of the evidence. *See id.*

¶33 The court concluded the Skrzypchaks’ proposed instruction would not aid the jury in answering the factual questions before it. The court also noted the instruction could lead the jury to speculate about why the plaintiffs failed to sue the nonparties.

¶34 The Skrzypchaks contend their proposed instruction would inform the jury that the defendants prevented nonparties from defending themselves against allegations of negligence by not impleading them. This is a hollow argument; it does not explain how the proposed instruction would assist the jury in making its factual determinations. It also does not address the court’s concern that the instruction would lead the jury to speculate about why the plaintiffs did not sue

the nonparties. The Skrzypchaks provide no basis for concluding the court erroneously exercised its discretion.

VIII. Denial of motion for new trial

¶35 The Skrzypchaks also claim the court erred when denying their motion for a new trial based on the errors discussed above. They contend the various purported errors affected their substantial rights and likely affected the trial's outcome. They also argue the court should have granted a new trial in the interests of justice because the real controversy was not fully tried, due to the court's rulings excluding evidence. They further request that we exercise our discretionary power of reversal under WIS. STAT. § 752.35.

¶36 These arguments are premised on the Skrzypchaks' claims of error discussed above. Having rejected those claims, we see no merit in the Skrzypchaks' claim that the circuit court should have granted a new trial, nor do we see fit to exercise our discretionary power of reversal.

By the Court.—Judgment affirmed; attorney sanctioned.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

