



## Alerts

### Wisconsin 2020 Med Mal Update: Physicians Can Use a Reasonable Alternative Method in Delivering Care Without Being Found Negligent

December 11, 2020

*Health Care Alert*

Earlier this year, the Wisconsin Supreme Court confirmed a physician's ability to choose from reasonable alternative methods when it ruled a trial court properly instructed the jury on alternative methods.

*Barney v. Mickelson, 2020 WI 40*

#### Pertinent Jury Instruction

The standard used to determine if a physician is negligent, according to Wisconsin form jury instruction 1023, is that a physician is required to use the degree of care, skill, and judgment which reasonable physicians who are in the same specialty would exercise in the same or similar circumstances, having due regard for the state of medical science at the time a patient was treated.

A provision of jury instruction 1023 further explains that a physician can choose from reasonable recognized methods—and that a physician is not negligent because one recognized method was chosen instead of another—if the physician used reasonable care, skill, and judgment in administering the method.

#### Patient's Claim

The patient sued her obstetrician for negligence because the obstetrician only used an external monitor to record the fetal heart rate. The patient's counsel argued that it was improper to instruct the jury on reasonable recognized methods because only using the external heart rate monitor was akin to doing nothing. The Supreme Court disagreed, noting that two of the obstetrician's experts testified that the external tracing interpreted the fetal heart rate throughout the labor, other than the period of the epidural, and that using the external monitor was a reasonable alternative that fell within the standard of care.

#### Attorneys

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## Guidance from the Decision

Physicians can continue to argue it is not negligence to choose one reasonable diagnostic or treatment method instead of another method.