

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 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. 2010AP1716

Cir. Ct. No. 2004CV309

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**BRENDA OLSON AND EMILY OLSON, A MINOR BY, DAVID P. LOWE,
HER GUARDIAN AD LITEM,**

PLAINTIFFS-APPELLANTS,

HIGHMARK BLUE CROSS BLUE SHIELD,

INVOLUNTARY-PLAINTIFF,

v.

**PHYSICIANS INSURANCE COMPANY OF WISCONSIN INC., MILE BLUFF
CLINIC, LLP, ROBERT C. BUSS, M.D. AND WISCONSIN PATIENTS
COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Juneau County:
JOHN P. ROEMER JR., Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This is a medical malpractice case. Brenda Olson and her daughter, Emily Olson, claim that a doctor’s negligence committed during Brenda’s pregnancy caused neurological damage to Emily. A jury found that the doctor was not negligent. The Olsons appeal from the judgment in favor of the defendants arguing that the jury’s verdict was against the great weight of the evidence, that the circuit court erred when instructing the jury, and that the trial court made a prejudicial remark during the Olsons’ closing argument. We conclude that there was credible evidence to support the jury’s verdict, and that if the circuit court erred, any error was harmless. We affirm the circuit court’s judgment.

¶2 The issue presented to the jury in this case was whether Dr. Robert C. Buss negligently treated Brenda Olson’s gestational diabetes when Brenda was pregnant, resulting in severe and permanent neurological injury to Emily. The jury found that he did not, and the Olsons moved for a new trial. The trial court denied the motion.

¶3 We first address the Olsons’ argument that the jury’s verdict was against the weight of the evidence. *See* WIS. STAT. § 805.15(1) (2009-10).¹ Our review of a jury’s verdict “is very limited, narrow, and circumscribed.” *Hoffmann v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55.

This court must sustain a jury verdict if there is any credible evidence to support the verdict. This court views the evidence in the light most favorable to a jury’s verdict and must sustain the verdict if there is any credible evidence in the record to support it, regardless of whether there is evidence to support a different verdict. In addition,

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the credibility of witnesses and the weight given to their testimony is for the judgment of the jury, not an appellate court. Moreover, special deference is afforded to a jury determination that has been upheld by the circuit court. This court will uphold a jury verdict even if it is contradicted by evidence that is stronger and more convincing. Therefore, this court will not upset a jury verdict unless there is such a complete failure of proof that the verdict must have been based on speculation.

Id. (citations omitted).

¶4 The Olsons argue that there was no credible evidence upon which a jury could have concluded that Dr. Buss was not negligent in his care and treatment of Brenda. They argue that the only evidence that supports the jury’s verdict was “a vacuous opinion that ‘Dr. Buss complied with the standard of care.’” At the hearing on the Olsons’ motion for a new trial, the circuit court found that there was credible evidence to support the jury’s verdict. The court found that there was evidence presented from experts about the standard of care.

¶5 We are not convinced that the jury’s verdict was against the great weight of the evidence. The Olsons’ argue that Dr. Buss applied the wrong standard of care in lowering Brenda’s blood sugar levels during her pregnancy. They assert that there was no evidence to contradict their expert’s testimony that Brenda’s blood sugar levels could have been controlled by increased doses of insulin.

¶6 The record, however, shows that the defendants’ witness, Dr. Blackwell, testified that there was no “cook book” for determining the precise amount of insulin to use to start treatment, and that the treatment Dr. Buss followed was “within the standard of care,” both for initial insulin doses and for increasing doses. We agree with the circuit court that there was credible evidence

on which to base the verdict and that the verdict was not against the great weight of the evidence. The Olsons are not entitled to a new trial on this basis.

¶7 The Olsons also argue that the circuit court erred when it gave the “alternative methods” paragraph of the jury instruction on medical negligence, WIS JI—CIVIL 1023. The court instructed the jury:

If you find from the evidence that more than one method of treatment of Brenda Olson was recognized as reasonable given the medical knowledge at that time, then Dr. Robert C. Buss was at liberty to select any recognized methods.

Dr. Robert C. Buss was not negligent because he chose to use one of these recognized treatment methods rather than another recognized method if he used reasonable care, skill and judgment in administering this method....

The Olsons argue that the paragraph prejudiced them because the instruction required the jury to consider alternate methods when there was no expert testimony presented that there were alternate methods of treatment available, and because the paragraph required the Olsons to prove a negative.

¶8 Even assuming that the circuit court erred when it gave the alternate methods part of the instruction, any such error was harmless. The “alternative methods” paragraph does not require the jury to consider alternate methods of treatment, as the Olsons argue. Rather the paragraph specifically states that the jury should consider alternate methods only if it finds from the evidence that there was more than one method of treatment. The instruction, therefore, only would have come into play if the jury found that there was evidence of more than one reasonable method. If it found there was not evidence of more than one method established, then the jury would not have considered other methods. The

instruction did not require the jury to consider more than one method, and it did not require the Olsons to disprove anything.

¶9 The Olsons also argue that they are entitled to a new trial because the circuit court made a comment in response to an objection during closing argument that conveyed a “less than fully impartial status.” During the Olsons’ rebuttal closing, a defendant’s counsel objected on the basis that the Olsons’ counsel was misstating the evidence. The circuit court sustained the objection and said:

As I recall, ladies and gentlemen of the jury, I may be recalling it inaccurate. But that is, as I use my memory of the testimony, what was read concerning [a doctor’s] deposition, that’s what I recall. However, if it doesn’t jive with your memories, you have to use [your] own memories and own notes.

The Olsons’ counsel did not object to the court’s remark.

¶10 The Olsons argue that they were prejudiced by the court’s remarks because the remark suggested that their attorney had misstated the evidence. The Olsons further argue that the remark was especially prejudicial because it was made at the very end of the trial.

¶11 We conclude that because counsel did not object at the time the court made the remark, the issue was forfeited. *See Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990) (“in the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review”). And, even if we decided the issue on its merits, we would reject it.

¶12 Assuming that the court's remark was inappropriate, it was harmless error. The record shows, as we quoted above, that the court immediately explained to the jury that they needed to use their own memories and notes. The court also gave the jury an instruction on ignoring a judge's demeanor. In light of the court's statement following the remark and the jury instruction the court gave, we conclude there is no reasonable possibility it affected the verdicts.

By the Court.—Judgment affirmed.

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

