COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 98-3284

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

MARION STEINBERG AND RALPH STEINBERG,

PLAINTIFFS-APPELLANTS,

MILLER BREWING COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

DR. THOMAS R. JENSEN, WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN, PHYSICIANS INSURANCE COMPANY OF WISCONSIN AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

MARION STEINBERG AND RALPH STEINBERG,

PLAINTIFFS-APPELLANTS,

MILLER BREWING COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN,

DEFENDANT-RESPONDENT,

DR. WALTER WONG AND DR. FERIDOUN BEROUKHIM, DR. MATTHEW HANNA, WEST ALLIS MEMORIAL HOSPITAL, MEDICAL PROTECTIVE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Cane, C.J., Wedemeyer, P.J., and Fine, J.

¶1 PER CURIAM. Marion and Ralph Steinberg appeal from a judgment entered on a jury verdict. The Steinbergs claim that the trial court erred by: (1) finding sufficient evidence to support the verdict, and (2) precluding the presentation of one of their claims. We affirm.

I. Background

¶2 Marion Steinberg went to see Dr. Thomas Jensen for shingles. During the course of his treatment of her, Dr. Jensen prescribed Maxzide. Although Mrs. Steinberg complained of various ailments following the Maxzide prescription, Dr. Jensen did not order a complete electrolyte panel to determine the cause of these ailments. Mrs. Steinberg suffered brain damage. The Steinbergs claim that Dr. Jensen's failure to obtain an electrolyte panel and his treatment of

her when she was in the hospital was negligence and that it caused Mrs. Steinberg's brain damage.

¶3 An earlier jury found Dr. Jensen negligent but found that Dr. Jensen's negligence was not a cause of Mrs. Steinberg's brain damage. The Steinbergs appealed, and we remanded for a new trial. *See* ***Steinberg v. Jensen***, 204 Wis. 2d 115, 553 N.W.2d 820 (Ct. App. 1996). A new jury again found Dr. Jensen negligent but found no causation. It is from the judgment entered on this verdict that the Steinbergs now appeal, claiming not only that there was not sufficient evidence to support the jury's verdict, but also that the trial court erred in not permitting them to present to the jury their claim that Mrs. Steinberg did not give informed consent for her treatment.

II. Discussion

A. Sufficiency of Evidence to Support Jury Verdict of No Causation

¶4 "On appeal on motion after verdict, all that is required to sustain the jury verdict is any credible evidence." ***Chart v. General Motors Corp.***, 80 Wis. 2d 91, 107, 258 N.W.2d 680, 687 (1977). We will not overturn a verdict unless, after considering all the credible evidence, and all the reasonable inferences that can be drawn from that evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. *See* ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996); WIS. STAT. § 805.14(1) (1997–98).[1] Since the trial court is "better positioned" to decide the weight and relevancy of testimony, we must give

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

substantial deference to a trial court's ruling on the sufficiency of evidence to support a given verdict; we should not disturb such a ruling unless it is "'clearly wrong.'" *Cf.* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388–389, 541 N.W.2d 753, 761 (1995) (discussing trial court's role in assessing sufficiency of evidence with respect to motions made under WIS. STAT. § 805.14) (citation omitted); *see also* ***Morden v. Continental AG***, 2000 WI 51, ¶¶38–39, No. 98-0073.

¶5 Where, as here, a trial court determines that "[t]his is a situation where reasonable jurors can conclude that there was negligent [*sic*], and yet conclude that there was no cause," that determination is entitled to substantial deference. *See* ***Morden***, 2000 WI at ¶40. In this case, the jury heard evidence that Dr. Jensen's negligence did not cause Mrs. Steinberg's brain injury. Dr. Gary Ruoff testified that had Mrs. Steinberg's electrolyte levels been checked, they would have been normal. Dr. Victor Haughton testified that Mrs. Steinberg's brain damage was caused by a seizure disorder and that "the cause of seizures is very – very multifaceted." In addition, while the Steinbergs argue that an electrolyte panel would have diagnosed Mrs. Steinberg with hyponatremia, Dr. Haughton, assuming that hyponatremia was the cause of Mrs. Steinberg's seizure, testified that it was not likely that such a diagnosis would have avoided Mrs. Steinberg's brain damage. Moreover, although the Steinbergs contend that Dr. Jensen's in-hospital treatment of Mrs. Steinberg, by delaying the hyponatremia treatment and over-correcting it, caused her injuries, Dr. Juan Carlos Ayus testified that he did not believe that in-hospital actions caused Mrs. Steinberg's injuries, stating "[T]he damage that Mrs. Steinberg suffer[ed] unfortunately was done at the time that she arrived to the hospital, was related to the first seizure that she suffered at home." Thus, the jury's verdict, finding that Dr. Jensen's

negligence was not the cause of Mrs. Steinberg's brain damage, was supported by evidence that the jury was entitled to believe. Accordingly, we affirm.

B. Preclusion of Informed Consent Claim

¶6 The Steinbergs next assert that the trial court erroneously refused to allow them to present evidence to the second jury on their informed-consent claim. We disagree. This issue was decided in the first trial, where the jury determined that Dr. Jensen was not negligent in failing to obtain informed consent from Mrs. Steinberg. The Steinbergs did not appeal on this issue. *See* ***Steinberg***. As the trial court here noted:

> [Informed consent] was not an error that was raised on appeal, and I'm satisfied that the court of appeals returned this case to us only on the issue of liability; and the issue of liability that they returned to us deal [*sic*] with the question of negligent [*sic*] in the normal sense of the word in terms of medical malpractice … and cause.

"An issue which has not been briefed or argued on appeal is deemed abandoned." ***Young v. Young***, 124 Wis. 2d 306, 317, 369 N.W.2d 178, 182 (Ct. App. 1995). The trial court correctly examined and properly precluded the Steinbergs from retrying the issue of informed consent from the second jury.

By the Court.—Judgment affirmed.

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