COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 99-2828

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

DAVID SENSENBRENNER AND MARY ELLYN SENSENBRENNER,

PLAINTIFFS-RESPONDENTS,

V.

ST. PAUL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN AND PHYSICIANS PLUS INSURANCE CORPORATION,

DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed*.

Before Deininger, Lundsten and Brown, JJ.

¶1 DEININGER, J. St. Paul Insurance Company (St. Paul) appeals an order granting a new trial to David Sensenbrenner on his personal injury claim. The trial court granted Sensenbrenner's motion "in the interest of justice" under WIS. STAT. § 805.15(1) (1999-2000).[1] St. Paul claims the court erred by overriding the jury's credibility determinations, and that its decision was based on both a mistaken view of the evidence and an erroneous view of the law. We disagree. The trial court acted within its authority under § 805.15, and provided a satisfactory explanation of its reasons for ordering a new trial. We conclude that the court's decision is not based on a mistaken view of either the evidence or the law. Accordingly, and because the trial court's decision to order a new trial is entitled to our deference, we affirm.

BACKGROUND

¶2 Sensenbrenner suffered injuries as a passenger in a one-car-rollover accident. Following the accident, he complained of headaches and underwent evaluations and treatment from a number of physicians over several years. He was ultimately diagnosed as having a condition known as pseudotumor cerebri, or elevated cerebral spinal fluid pressure. Treatment for the condition alleviated, but did not eliminate, Sensenbrenner's headaches as of the time of trial. His post-accident medical expenses totaled over $200,000.

¶3 St. Paul conceded the negligence of its insured, and the issue at trial was whether Sensenbrenner's post-accident headaches were caused by head trauma he suffered in the accident. St. Paul maintained that Sensenbrenner had

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

suffered only whiplash-type injuries, which resolved within six months, while Sensenbrenner claimed that his pseudotumor and persistent headaches were caused by accident-related head trauma. Each side presented testimony from a number of experts during the eight-day jury trial. The jury returned a verdict of $20,000 for "medical and health care expenses sustained as a result of the accident," and $30,000 for "past pain, suffering and disability." The jury awarded nothing for either future pain and suffering or for impairment of Sensenbrenner's earning capacity, and it denied any recovery to Sensenbrenner's mother for loss of his society and companionship for the twenty-seven months between the date of the accident and his eighteenth birthday.

¶4 On post-verdict motions, the trial court granted Sensenbrenner's request for a new trial. The court concluded that the jury had ignored "clear" evidence that Sensenbrenner's continuing headaches stemmed from a head injury he suffered in the accident. The court stated that its conscience was "shocked" by the jury's apparent "failure to conclude that there was causation." We granted St. Paul's motion for leave to appeal the order for a new trial. We present additional details of the evidence at trial and the trial court's rationale in granting a new trial in the analysis which follows.

ANALYSIS

¶5 Under WIS. STAT. § 805.15(1), a trial court may set aside a jury verdict and order a new trial on one or more of several grounds:

> A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly discovered evidence, or in the interest of justice.

When a trial court grants a motion for a new trial, it must specify the grounds on which it relies: "No order granting a new trial shall be valid or effective unless the reasons that prompted the court to make such order are set forth on the record, or in the order or in a written decision." Section 805.15(2).

¶6 The parties disagree whether the trial court granted Sensenbrenner a new trial *solely* "in the interest of justice," or whether the court implicitly grounded its order on a determination that the verdict was "contrary … to the weight of the evidence." Sensenbrenner maintains that the trial court granted a new trial solely in the interest of justice, which he asserts is a "free standing, independent ground" from "contrary … to the weight of evidence," given the language and structure of WIS. STAT. § 805.15(1). We agree that, inasmuch as "the interest of justice" is separately stated as a ground for a new trial under § 805.15(1), it arguably constitutes a catch-all alternative to the more specific grounds which precede it in the statute. We conclude, however, that Sensenbrenner has not articulated a rationale for the new trial order in this case that is divorced from the trial court's assessment of the evidence at trial.

¶7 Sensenbrenner points out, correctly, that when we review a trial court's decision to grant a new trial in the interest of justice, we accord "great deference" to the trial court's exercise of discretion. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). In the same paragraph of argument, however, Sensenbrenner explains that the reason for our great deference is the trial court's superior opportunity to "evaluate the evidence" by observing "the demeanor of witnesses and gauge the persuasiveness of their testimony." *See* ***Krolikowski v. Chicago & N.W. Transp. Co.***, 89 Wis. 2d 573, 580-81, 278 N.W.2d 865 (1979) (citing ***Bartell v. Luedtke***, 52 Wis. 2d 372, 377, 190 N.W.2d

145 (1971)). Thus, even though Sensenbrenner argues that the trial court's new trial order in this case must be reviewed as being unrelated to the court's view of the weight of the evidence, he acknowledges that our deferential standard of review is premised on that very relationship.

¶8 Our review of the case law indicates that the "interest of justice" ground is invariably linked with a determination that the verdict is "contrary to the great weight and clear preponderance of the evidence." *See, e.g.,* ***Krolikowski***, 89 Wis. 2d at 580; ***Pingel v. Thielman***, 20 Wis. 2d 246, 248, 121 N.W.2d 749 (1963) ("A trial court has the power to grant a new trial in the interest of justice because the verdict is against the great weight of the evidence."); ***Schill v. Meers***, 269 Wis. 653, 660-61, 70 N.W.2d 234 (1955); ***Sievert,*** 180 Wis. 2d at 431. Moreover, it appears that when a trial court's rationale for ordering a new trial "in the interest of justice" is *not* premised on a verdict that is deemed contrary to the weight of the evidence, reviewing courts have a difficult time sustaining the order on appeal. *See* ***Luedtke***, 52 Wis. 2d at 379 (reversing a new trial order granted "in the interest of justice" because the supreme court concluded that "the great weight of credible evidence supports the findings of the jury"); ***Rodenkirch v. Johnson***, 9 Wis. 2d 245, 254-55, 101 N.W.2d 83 (1960) (reversing a new trial order which was *not* based on a determination that jury findings were against great weight of the evidence, and no other "reason [was] assigned that justice was not done at the trial"); ***Schill***, 269 Wis. at 660-62 (reversing a new trial order granted "in the interest of justice" that was based on an "erroneous conception of the law," but suggesting that if the trial court "had granted a new trial in the interest of justice because he [sic] had determined that the jury's comparison of negligence was against the great weight and clear preponderance of the evidence," the supreme court would have affirmed the order).

¶9 It is not necessary, however, for us to decide whether there may be circumstances in which a trial court sets forth a sufficient rationale for granting a new trial in the interest of justice that does not relate in any way to the weight of the evidence. This is not such a case. The court's explanation of its reasons for ordering a new trial consists largely of a review and evaluation of the evidence presented at trial on the issue of what caused Sensenbrenner's headaches. The court stated explicitly at one point in its decision that certain "evidence was ignored by the jury and satisfies the standard of great weight and clear preponderance of the evidence, in my opinion." At other points in its decision, the court evaluated the weight and credibility of the testimony of the expert witnesses, and at another, the court noted there was "clear evidence" of a closed head injury. We conclude that the trial court granted Sensenbrenner a new trial "in the interest of justice" based on its determination that the verdict was contrary to the weight of evidence presented at trial.

¶10 We must therefore proceed as follows:

> This court owes great deference to a ... decision granting a new trial. This is because the order is itself discretionary, and the trial court is in the best position to observe and evaluate the evidence. Thus, a decision to grant a new trial in the interest of justice will not be disturbed unless the court clearly abused its discretion.
>
> Our role is not to seek to sustain the jury's verdict but to look for reasons to sustain the trial court. No abuse of discretion [will be] found where the trial court sets forth a reasonable basis for its determination that one or more material answers in the verdict is against the great weight and clear preponderance of the evidence. There is an abuse of discretion if the trial court grounds its decision upon a mistaken view of the evidence or an erroneous view of the law.

Sievert, 180 Wis. 2d at 431 (citations omitted). Accordingly, we will affirm the order before us unless we conclude (1) the trial court failed to set forth a reasonable basis for its determination that the verdict is contrary to the great weight and clear preponderance of the evidence; (2) the trial court's decision is based on a mistaken view of the evidence; or (3) the decision is grounded on an erroneous view of the law. ***Id.****; see also* ***Krolikowski***, 89 Wis. 2d at 581.

¶11 There can be no dispute that the trial court met the threshold statutory requirement of specifying its reasons "on the record, or in the order or in a written decision." WIS. STAT. § 805.15(2). In its written order, it stated that Sensenbrenner's motion for a new trial "is hereby granted in the interest of justice based on those reasons stated on the record at the hearing." The incorporated bench decision encompasses some eleven pages of transcript and is set forth at length below. Our task is thus to determine whether the trial court satisfied the further requirement that it set forth "a reasonable basis for its determination that one or more material answers in the verdict is against the great weight and clear preponderance of the evidence." ***Sievert***, 180 Wis. 2d at 431. We conclude that the court met this requirement.

¶12 "A mere statement that a jury's finding is against the great weight and clear preponderance of the evidence, without more, is ... insufficient to support such a decision." ***DeGroff v. Schmude***, 71 Wis. 2d 554, 564, 238 N.W.2d 730 (1976). Rather, where a verdict is deemed contrary to the great weight and clear preponderance of the evidence, "the order should recite or the incorporated opinion should contain the subsidiary reasons and basis for the general statement." ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 661, 158 N.W.2d 318 (1968) (citing ***Bair & Staats***, 10 Wis. 2d 70, 102 N.W.2d 267 (1960)). For example, a simple statement that the jury "either didn't understand or didn't listen

to the ... instruction" and "may or may not have been sidetracked" has been considered insufficient. ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 477-78, 543 N.W.2d 277 (1996). However, a circuit court's statements, "(1) [t]hat there was no evidence to justify the apportionment of the causal negligence and (2), that the jury granted no damages although the testimony of personal injuries was uncontroverted," followed by some discussion of these reasons, was deemed adequate in ***Loomans***, 38 Wis. 2d at 661.

¶13 With these principles in mind, we review the reasons cited by the trial court for granting a new trial:

> I'm granting the motion. And I will tell you why. I'm required under Wisconsin law to be highly specific as to my reasons.
>
> First of all, … the day of the accident, David presents himself to the emergency room with a severe headache, and it never really stopped. And it is right there. The medical records reflect closed head injury, the defendants experts time and time again seem to ignore that, and I have strong recollection of being in total amazement as to their constant efforts to ignore what it says very clearly in the medical records. The medical records also reflect right after the accident, I believe it was January three, that he was suffering post accident trauma to the brain. And presenting with headaches. This is very significant in light of the evidence that was presented that clearly establish[es] that before the accident David didn't have anything approaching this level of headaches…. [G]reat effort was made to present David as a young fella who seemed to always have medical problems that didn't appear to have any kind of basis outside of psychological issues. It is my belief that the testimony presented as to that was extra-ordinarily weak, and my notes even reflect that. There is no evidence indicating that David suffered any of the problems that he suffered right after the accident, prior to the accident. There is substantial evidence reflecting that during the period in which David was being treated by Dr. Weiss over a period of six to seven months, that he was very inactive. Stayed in a dark room, and his life changed very substantially. The medical records reflect over and over again, a diagnosis of closed head injury with

consequence of headaches. Dr. Saper testified that a wide variety of approaches were made to deal with the headaches in Michigan such as biofeedback, meditation, group family therapy, a wide range of meds, even presenting antidepressants, nothing seemed to deal with the issue. Acupuncture, psychiatry, craniosapial work, craniopathy and light therapy. None of these … medical modalities worked. Mayo Clinic couldn't identify the organic causes of the headaches and Dr. Mellenger thought parental pressure was the cause and suggested family counseling, … but later on, evidence was presented that Dr. Mellenger, once informed as to the pseudotumor cerebri, changed his opinion. So his initial opinion deserved no credibility whatsoever.

I have to agree, [defense counsel], that a major problem in this case, had to do with anybody being able to clearly show a relationship between the accident and the pseudotumor cerebri, but Dr. Ommaya's testimony is establishing that although he does not know the exact etiology of pseudotumor cerebri, he stated that since we know the trauma may cause a pseudotumor cerebri, and David suffered a trauma, that it is logical to arrive at the conclusion as to causation. Dr. Saper testified that he believed that the incident is tied to the headaches, that neck pain and the minor head injury indicate that … David's head contacted with a hard object and even if he didn't, the neck injury indicates trauma to the head. He had seen patients with similar symptoms that reflect brain trauma. He went onto testify that head pain for whatever reasons is connected to the accident. He also testified that [there was] an increase in pressure … that was related to the accident, although is not fully explained or understood. Dr. Saper rejected the notion that depression caused the headaches. He did testify that depression and headaches may be associated. I recall the testimony of Dr. Smith and I thought that on direct examination, his testimony was quite strong. On cross, however, and with all due respect [defense counsel], I disagree with your characterization that his testimony wasn't shaken. I walked away from that cross examination seriously doubting the premise upon which he reached his conclusions. More specifically, it was very compelling to me when [David's counsel] presented to Dr. Smith work … that somebody in his own business had done in a different case, that totally contradicted what Dr. Smith was arguing. There were I believe great problems with his argument that it was not possible for David to have suffered any kind of a head injury and I found his testimony to be lacking in credibility

in that regard. The cut-aways that were used in this trial were different than the cut-aways that were used in a different trial, they came out of his same office. We know it is a different car, but the general concepts which still apply and yet it was the general concepts that were different, and raised a real question as to essentially whether or not he was just working as a hired gun or whether or not he was actually doing the work objectively. Raise serious questions in my mind as to that.

I understand experts are usually hired as hired guns, that is the sort of the nature of their business, there is a question about that, but I walked away from his testimony seriously doubting the premise upon which he was making his conclusions. I found Dr. Diamond's testimony well, I found his whole demeanor to be arrogant at least, if not condescending. But more specifically as to substance, he is an internist, not a neurologist, he is not a psychologist, not a psychiatrist and yet he attempted to make conclusions that are more properly made by individuals in those areas of expertise. He is not board certified in any specialty, he works with lots of drugs; there are physicians out there who have the belief that no narcotics should be given to anybody and he is apparently one of them, and it seemed to me that an awful lot of his testimony was related to his belief system rather than based on what I consider to be clear objective science.

He argued that the headaches are secondary to depression and he cited for the reasons family history is positive for severe headaches from the mother and grandmother, history of infrequent mild headaches when he was younger, situational depression, dyslexia, mild learning disability. He was becoming somewhat bored by school, that was reflected by stomachaches and headaches and he cited 12 incidents in the record that pre-date the accident of depression. Also argued that headaches are stress-related, or rebound medicine headaches by taking medication on a daily basis and when he stops taking medications the headache returns. He presents nothing to show that is what happened. No science, nothing. Nothing to support that conclusion whatsoever. And clearly I—not being a psychologist or a psychiatrist in my opinion he was not at all even competent to testify as to what situations cause depression or which didn't. I think that is a personal opinion, and it is not a competent medical opinion.

A very compelling part of this case was the suggestive causes for pseudotumor cerebri as testified by Dr. Gennerelli, hormone imbalance and obesity in young

women. Well, nobody has come up with anything that shows that David falls under any one of these categories. And an argument was made—well, strike that. I was actually waiting to here [sic] an argument to be made, that since David doesn't fall under any of these two categories and these are the two categories known to medicine right now as being correlative to pseudotumor cerebri, that given the fact that the headaches started right soon right after the accident, and essentially hadn't stopped, and that he had been diagnosed with pseudotumor cerebri, which most of the experts agree with, but that has to be the only explanation. There doesn't seem to be any other explanation.

I think the clear evidence indicates that there was a closed head injury and Dr. Diamond testified that he didn't think there was, and I find that very hard to believe. I found part of his testimony not credible.

I won't take up the inadequate damages portion, causation was at the heart of the case, there is no question about it, and I think that if we focus only on the absence of literature, that draws a clear connection between the head injury suffered in this accident and the pseudotumor cerebri, then I think we would have a different result today. But the Court's conscious [sic] is shocked by the failure to conclude that there was causation. Accident happens, headache occurs, headache doesn't stop. That in my mind is so powerful that I can only conclude that the jury totally ignored that clear, uncontroverted evidence. On that evidence alone, a reasonable jury should have found causation. Okay, that evidence was ignored by the jury and satisfies the standard of great weight and clear preponderance of the evidence, in my opinion.

I will not get into the total absence of an award to Mary Ellyn Sensenbrenner [David's mother], although I have to state that I recall reading the verdict, and equally being shocked as to that…. David is a young man who is going to go on in life with no prospect of leading a normal life. And I believe the evidence that was presented at trial, clearly establishes that it was related to the auto accident. So there it is. Motion granted.

….

I do this very carefully, and cautiously, and as I mentioned, I gave this an enormous amount of thought, but I kept coming back to that piece of accident-headache doesn't stop. And there is substantial evidence in the

> record to support that conclusion. And I think the jury ignored it.

¶14 We conclude that the foregoing explanation not only meets the requirement under WIS. STAT. § 805.15(2) for "reasons … set forth on the record," but it also satisfies the common law standard of "setting forth a reasonable basis" for the trial court's determination. The court's explanation leaves no doubt that the court concluded the weight of the evidence at trial supported a finding that Sensenbrenner's headaches were caused by head trauma he suffered in the accident. And, the court fully explained the basis for that conclusion: the evidence of a closed head injury and onset of severe headaches following the accident; Sensenbrenner's lack of severe headaches prior to the accident; the testimony of medical experts supporting the accident-related head trauma as a cause of Sensenbrenner's pseudotumor cerebri; contradictory and less credible testimony from defense experts regarding other possible causes of the headaches. The trial court did considerably more than simply state its general conclusion that the jury ignored certain evidence on causation. Rather, the court provided "the subsidiary reasons and basis" for its conclusion by reviewing and commenting extensively on the evidence presented by the parties regarding the cause of Sensenbrenner's headaches and their relationship (or not) to the traffic accident.

¶15 St. Paul contends the verdict was *not* "against the great weight and clear preponderance of the evidence." As part of this argument, St. Paul asserts that a trial court, when considering whether to grant a new trial under WIS. STAT. § 805.15, is not permitted to weigh the credibility of the witnesses, because in doing so, it invades the jury's province. We disagree. The case law is clear that a trial court may set aside a verdict it deems contrary to the great weight and clear preponderance of the evidence, even when there is "credible evidence" to sustain the jury's verdict. ***Krolikowski***, 89 Wis. 2d at 580; ***Mossey v. Mueller***, 63 Wis. 2d

715, 719-20, 218 N.W.2d 514 (1974). We rejected in ***Sievert*** an argument that the trial court "could not consistently find credible evidence to support the verdict, and thereby deny motions for directed verdict, while simultaneously finding the verdict to be contrary to the great weight and clear preponderance of the evidence." We explained as follows:

> Section 805.14, STATS., makes clear that motions challenging the sufficiency of evidence to support a verdict or an answer in a verdict are only to be granted if no credible evidence supports the verdict. This standard is more stringent than that permitting a new trial in the interest of justice if the verdict is contrary to the great weight and clear preponderance of the evidence. Thus, verdicts can be against the great weight of evidence even though supported by credible evidence.

Sievert, 180 Wis. 2d at 433-34 (citation and footnote omitted).[2]

¶16 If a trial court may set aside a verdict that is supported by credible evidence because the court concludes the verdict is "contrary to the weight of the evidence," the court must necessarily engage in its own weighing and evaluation of the evidence. We acknowledge that a trial court "may not simply substitute its judgment for that of the jury nor order a new trial on the basis that another jury might reach another result." ***Burch***, 198 Wis. 2d at 477. But neither is the trial court relegated to the role of a potted plant:

[2] St. Paul suggests that a ruling the court made during the trial shows that it erred when it later granted a new trial. St. Paul points to its motion to strike the testimony of two of Sensenbrenner's medical experts, which the court denied, saying "there is a real dispute, and that goes to credibility and not admissibility.… it must go to the jury." This ruling is neither inconsistent with, nor does it preclude, the court's post-verdict determination that the verdict was contrary to the weight of the evidence adduced at trial. *See* ***Mossey v. Mueller***, 63 Wis. 2d 715, 719-20, 218 N.W.2d 514 (1974). St. Paul's argument is essentially the same as that made by the insurer in ***Sievert***, and we again reject it.

> As an incident of making a judgment that a verdict is against the great weight and clear preponderance of the evidence, the trial court must be able to evaluate the general credibility of the witness based upon his appearance and demeanor, as well as evaluating the internal content and consistency of his testimony.

Flippin v. Turlock, 24 Wis. 2d 49, 55, 127 N.W.2d 822 (1964). Finally, as we have noted, the very foundation for our deferential standard of review regarding orders under WIS. STAT. § 805.15(1), is the trial court's greater opportunity to evaluate the evidence presented at trial.

¶17 We thus conclude that the trial court in this case acted within its discretionary authority under § 805.15 when it made reasoned judgments regarding the weight and credibility of the evidence presented at trial on the issue of causation. We must next consider, therefore, whether the court properly exercised its discretion.[3] We will only find an erroneous exercise of discretion if the court acted under a mistaken view of either the evidence or the law. *See* ***Sievert***, 180 Wis. 2d at 431. If the trial court ordered a new trial because it misunderstood, misinterpreted or ignored evidence at the trial, or because it erred in applying the law, we will set aside the order. Otherwise, we will not disturb it.

¶18 St. Paul asserts the following "mistakes" in the trial court's view of the evidence presented at trial: (1) "the trial court focused to the exclusion of other evidence on the temporal relationship between the automobile accident and the onset of [Sensenbrenner]'s headache complaints"; (2) "[t]he trial court also stated that [Sensenbrenner]'s 'medical records reflect closed head injury' and 'the

[3] St. Paul advances additional arguments in support of its general claim that the trial court erred in determining the verdict to be contrary to the weight of the evidence. We will address them, however, as part of our consideration of whether "the trial court erred by basing its decision on a mistaken view of the facts," as St. Paul next argues.

defendants' experts time and time again seem to ignore that"; (3) "[t]he trial court believed it was clear that [Sensenbrenner]'s headaches never changed, characterizing them as 'unrelenting' and as having 'never really stopped'"; (4) "[t]he trial court repeatedly relied upon the temporal relationship of [Sensenbrenner]'s headaches and the accident as conclusive evidence of causation and speculated that the jury ignored such evidence"; (5) "[t]he trial court concluded that St. Paul's experts presented 'no science, nothing' to show that somatoform disorder was a cause of the headaches"; and (6) the trial court improperly discounted testimony by defense experts that there is no "medical, scientific link" between Sensenbrenner's pseudotumor cerebri and the "mild head trauma" he suffered in the accident, especially since his own experts largely agreed with this.

¶19 Several of these claimed "mistakes" overlap. Rather than addressing them serially, therefore, we do so by reviewing the trial court's statements regarding the evidence presented at trial to see if any demonstrate a mistaken view of the evidence, as St. Paul contends. We conclude they do not.

¶20 It is clear from the trial court's remarks that it did find it very significant that Sensenbrenner's headaches began after the accident, that they continued thereafter through the time of trial, and that, in the court's view, no satisfactory explanation for the headaches, other than an accident-related head trauma, was convincingly established at trial. We do not agree with St. Paul that evidence the headaches began immediately after the accident was lacking. Medical records introduced at trial show that when Sensenbrenner was treated in the emergency room on the night of the accident, he was instructed to "call Dr's office or return if [increase] in HA." Two days later, medical personnel noted that he had been "seen in ER—strain neck, upper back pain and headache."

Sensenbrenner testified that he felt headache pain "all over my head" on the day of the accident, and that this headache pain continued as of the time of trial.

¶21 Numerous medical records introduced at trial, beginning with Sensenbrenner's initial emergency room treatment on the night of the accident, reflect that he suffered a "closed head injury" in the accident. And while it may be something of an overstatement to characterize the testimony of all defense experts as "ignoring" this evidence, at least one of those experts, Dr. Diamond, specifically denied that Sensenbrenner suffered such an injury, notwithstanding the references to it in Sensenbrenner's medical records. Other defense experts did not directly dispute that Sensenbrenner suffered "a closed head injury," but they denied that he had suffered a concussion, again despite the fact that records from Sensenbrenner's treating physicians reflected a "history of concussion" and "post-concussion" syndrome. In short, we conclude that the trial court's summary of the disputed evidence regarding the nature and extent of any head or brain injury Sensenbrenner suffered in the accident does not represent a mistaken view of the evidence.

¶22 We also do not agree that the court's characterization of Sensenbrenner's headaches as "unrelenting," and that they "never really stopped," reflects a mistaken view of the evidence. Sensenbrenner's own testimony supports these statements, as does the testimony of his treating physicians and the voluminous documentary evidence of his evaluations and treatment for headache pain for several years after the accident. The fact that Sensenbrenner may have initially felt pain throughout his head, and that the pain subsequently became more localized in the frontal area, does not diminish the fact that the headaches persisted through the time of trial. Defense witnesses did not directly dispute that Sensenbrenner suffered chronic headaches for years following the accident. They

asserted only that the cause of the persistent head pain was not related to any injuries he sustained in the accident.

¶23 As we have noted, the trial court did emphasize the temporal relationship between the accident and Sensenbrenner's headaches, a relationship that finds ample support in testimony and exhibits presented during the trial. Had the court simply ended its explanation with a conclusory statement that the jury ignored this relationship, we might have more difficulty concluding that the court set forth a reasonable basis for its order. But the court went much further, explaining why it found the testimony of defense witnesses to lack weight or credibility, and pointing to testimony from Sensenbrenner's treating physicians and other experts which supported a causal relationship between an accident-related injury and Sensenbrenner's persistent headaches. For example, the court gave specific justifications for discounting the testimony of Drs. Smith and Diamond, who testified for St. Paul, and it pointed to the testimony of Drs. Saper and Ommaya, who testified on Sensenbrenner's behalf that his headaches were caused by accident-related head trauma.

¶24 We have reviewed the relevant portions of the record and conclude that the trial court's assessment of this testimony does not constitute a mistaken view of the evidence. The principal support for the "somatoform" (non-physiological) basis for Sensenbrenner's headaches came from Dr. Diamond, who is an internist not certified in neurology or psychiatry. The court cited his lack of credentials and his refusal to acknowledge a "closed head injury," as well as his demeanor on the witness stand, as diminishing his credibility. These considerations do not constitute a "mistaken view" of the evidence. Rather, they represent precisely the type of evaluation a trial court is entitled and better

positioned than we to make when entertaining a request for a new trial. *See* ***Flippin***, 24 Wis. 2d at 55.

¶25 By the same token, while it is true that Sensenbrenner's experts openly acknowledged the dearth of scientific literature to support a causal link between mild head trauma and pseudotumor cerebri, they were steadfast in their testimony that Sensenbrenner's headaches were caused by accident-related head trauma. Dr. Saper, who is board certified by the American Board of Psychiatry and Neurology and the American Board of Pain Medicine, operates the Michigan Head Pain and Neurological Institute, where Sensenbrenner was evaluated and treated. He testified as follows:

> I can't explain which of the possible mechanisms that are possible could explain the headaches. I can't explain everything from here down to get to this point. We don't know whether this is causing this, or this is causing that, or this is causing this, or this is causing this. I don't know. We have no way of knowing. What I am trying to testify is that in my best medical opinion the trauma is responsible for the symptoms this man has.

Dr. Ommaya, a neurosurgeon, testified that, in his opinion, the accident "initiated the syndrome of pseudotumor cerebri." His later acknowledgement on cross-examination that the precise "mechanism of connection" between Sensenbrenner's mild head injury and the elevated cranial fluid pressure was not fully understood, did not deter him for reaffirming his view that the head injury "most likely" caused the pseudotumor cerebri.

¶26 Finally, we note that the trial court concluded that the weight of the testimony given by a defense accident reconstruction expert, Dr. Smith, was greatly diminished during his cross-examination. On direct, Dr. Smith testified that his reconstruction of this accident established that Sensenbrenner's head could

not have come in contact with the vehicle interior during the rollover. On cross-examination, the witness acknowledged that certain exhibits produced by his own accident reconstruction firm for other cases tended to show that the head of a person belted into the front passenger seat would come into contact with the roof of a vehicle in a rollover accident. St. Paul characterizes the court's rejection of Dr. Smith's testimony as a "selective view of the evidence." We tend to agree with the trial court, however, that Dr. Smith's attempts to distinguish the contradictory exhibits could be viewed as less than convincing. Moreover, we note again that an erroneous exercise of discretion in granting a new trial results from a court's *mistaken* view of the evidence, not from a court's reasoned and expressed evaluation of it.

¶27 In summary, we conclude that the trial court acted within its authority under WIS. STAT. § 805.15 when it assessed the weight and credibility of the evidence on disputed issues adduced at trial. We have reviewed the trial court's explanation of its decision, St. Paul's assertions of error, and the record. We are not persuaded that the trial court entertained a mistaken view of the evidence when it ordered a new trial.

¶28 St. Paul also argues that the court acted on an erroneous view of the law, in that the court's emphasis on the temporal relationship between the accident and Sensenbrenner's headaches suggests that it believed expert testimony was not necessary to establish a causal link between the two. As we have noted, the trial court did place great emphasis on the fact that the weight of the evidence at trial showed that Sensenbrenner's headaches began immediately after the accident and persisted thereafter. We do not read the court's decision, however, as espousing the view that expert testimony was unnecessary to support the plaintiff's assertion of a causal link between the accident and his chronic head pain.

¶29 To the contrary, the court found that Drs. Ommaya and Saper gave credible testimony, as medical experts, that the headaches did result from accident-related head trauma. We have quoted from the testimony of these two experts, and note again that the trial court specifically relied on it in concluding that the weight of the evidence at trial supported a causal link:

> Dr. Ommaya's testimony is establishing that although he does not know the exact etiology of pseudotumor cerebri, he stated that since we know the trauma may cause a pseudotumor cerebri, and David suffered a trauma, that it is logical to arrive at the conclusion as to causation. Dr. Saper testified that he believed that the incident is tied to the headaches, that neck pain and the minor head injury ….

We thus conclude that the court's decision to order a new trial in this case was not based on an erroneous view of the law.

CONCLUSION

¶30 For the reasons discussed above, we defer to the trial court's discretionary decision and affirm its order for a new trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.