

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2005

Cornelia G. Clark
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. 2004AP1453

Cir. Ct. No. 2001CV883

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TIMOTHY J. MARQUARDT AND AMY MARQUARDT,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

DAIRYLAND INSURANCE COMPANY AND CORE SOURCE, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Reversed in part and remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Timothy and Amy Marquardt appeal that part of a judgment reducing their jury award for future medical expenses from \$20,000 to zero. The Marquardts argue the trial court erred by removing the award because there was credible evidence to sustain it. We agree and reverse that part of the judgment.

BACKGROUND

¶2 In May 2000, Timothy Marquardt was injured in an automobile accident when his car collided with a car driven by Sara Unertl. The Marquardts filed suit against Unertl's insurer, Allstate Property and Casualty Insurance Company, seeking damages for Timothy's injuries. Before trial, the parties stipulated to liability, agreeing that Unertl was 85% liable and Timothy was 15% liable. Therefore, the only issue at trial was Timothy's damages.

¶3 At the close of the evidence, Allstate objected to any question on the special verdict regarding future medical expenses. The court determined, however, that although there was some conflict in the testimony, there was sufficient evidence to justify submitting that question to the jury. Ultimately, the jury returned a verdict awarding Timothy \$109,000 in damages, including \$50,000 for past medical expenses and \$20,000 for future medical expenses. Allstate filed a motion after verdict challenging the award for future medical expenses on grounds there was insufficient credible evidence to support the award. The trial court granted Allstate's motion and changed the jury's award from \$20,000 to zero. This appeal follows.

DISCUSSION

¶4 A motion challenging the sufficiency of the evidence to support a verdict may not be granted “unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” WIS. STAT. § 805.14(1) (2003-04). That standard applies to both the trial court and this court on appeal. *Weiss v. United Fire & Casualty Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). In considering a motion to change the jury’s answer to a question on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. *Nelson v. Travelers Ins. Co.*, 80 Wis. 2d 272, 282-83, 259 N.W.2d 48 (1977).

¶5 In reviewing the evidence, the trial court is guided by the proposition that “[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury’s judgment, and where more than one inference can be drawn from the evidence,” the trial court must accept the inference drawn by the jury. *Bennett v. Larsen Co.*, 118 Wis. 2d 681, 706, 348 N.W.2d 540 (1984). On appeal, this court is guided by these same rules. *See Nelson*, 80 Wis. 2d at 282.

¶6 When we review an order changing the jury’s answers, we begin with considerable respect for the trial court’s better ability to assess the evidence. *See Weiss*, 197 Wis. 2d at 388-89. An appellate court may, however, overturn the trial court’s decision to change the jury’s answer if the record reveals that the trial court was “clearly wrong.” *See id.* at 389. When a trial court overturns a verdict supported by “any credible evidence,” then the trial court is “clearly wrong” in doing so. *See Richards v. Mendivil*, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85

(Ct. App. 1996). When there is *any* credible evidence to support a jury’s verdict, “even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.” *Weiss*, 197 Wis. 2d at 389-90.

¶7 An award of future medical expenses requires expert testimony as to the existence of permanent injuries requiring future treatment and the cost of such treatment. *Franz v. Brennan*, 146 Wis. 2d 541, 551, 431 N.W.2d 711 (Ct. App. 1988). On motions after verdict, the trial court concluded that contradictory medical testimony did not establish the need for future medical treatment and the evidence was insufficient to prove the cost of future medical care. We disagree.

¶8 Two of Timothy’s treating physicians, Dr. James Messerly and Dr. Lester Owens testified that Timothy suffered permanent injuries from the accident. Owens also indicated that Timothy “may periodically have exacerbations where he needs a prescription med.” The trial court, however, focused on Messerly’s testimony, concluding that Messerly had given contradictory statements regarding whether Timothy would need future medical care. After Messerly opined that Timothy had sustained permanent injury as a result of the accident, the following exchange occurred on direct examination by Timothy’s counsel:

[Counsel]: Would you expect Mr. Marquardt to require any additional medical treatment in the future for any injuries related in this accident?

[Messerly]: You know, whether or not further – whether intermittent injection therapy will help say if his pain just gets bad in another year or two and he wants to go through another round of injection therapy, that’s certainly a possibility just to kind of keep his pain under a better level of control or better level of tolerability.

[Counsel]: Can you say whether that’s probable or not, which is –

[Messerly]: I would say that it's probable.

[Counsel]: Is ... that an opinion that you're comfortable –

[Messerly]: Well, based on the fact of what I've gone through and the fact that, you know, he had the epidural and, I mean, just – this is for what he responded to with me was the – the lumbar epidural injections. He had, you know, initially, complete resolution after two injections and was doing really pretty well but then kind of flares up again, you know.

And so then we, you know, some of the injections went after his facet joints. And so the question is, do we just go back to his old epidurals and ... see if that would help him again in the future. And if he got one or two injections a year and that ... helped control his pain, that wouldn't be a bad thing to consider, I don't think.

[Counsel]: Do you think that would be probable?

....

[Messerly]: You know, I ... don't know. It kind of depends on how – what Tim wants to do. You know, if he feels like I can't take it anymore, I want to go with the – I want to try one of the epidurals again, then I assume he'll try to pursue that.

....

[Counsel]: How about medication for the future? Would you expect him to be taking, you know, prescription or over-the-counter medication in the future?

[Messerly]: He may need some, I mean, if he has a bad flare-up where pain medications are needed and he calls this office, we'll certainly give him those pain medicines. But as far as traditional anti-inflammatories and muscle relaxers and some of the other things, he just doesn't seem to respond to those.

Messerly then followed up with the following:

Okay. The general comment would be, this is one of those cases where it has – it's been frustrating for us as medical providers to, you know, number one, determine exactly where the pain is coming from. Is it coming from that disk, is it coming from the facet joints? I believe it's probably a

combination of both in – in both areas, not – in the neck and the low back. And he’s had temporary response to injections. Unfortunately, it has not been a prolonged response, and I believe that this is a legitimate patient that – that continues in pain.

¶9 In context, we do not view Messerly’s testimony as inconsistent. Messerly opined that Timothy would probably need future injection therapy. Messerly later indicated that whether Timothy would submit to further injection therapy would depend on how much pain Timothy could endure. In other words, if Timothy feels he can not endure the pain, he will pursue injection therapy. These statements are not inconsistent. We thus conclude the jury heard sufficient credible evidence to conclude that Timothy suffered permanent injuries requiring future medical treatment.

¶10 With respect to the cost of future medical treatment, the law does not require mathematical certainty to determine future medical expenses. As long as the decision is based on probability and not possibility, the jury can make such an award. *Bleyer v. Gross*, 19 Wis. 2d 305, 312, 120 N.W.2d 156 (1963). Moreover, it is appropriate to determine the cost of future medical expenses based on the cost of past medical treatments. *Id.* Under this standard, Timothy provided credible evidence of the cost of his future medical expenses. Messerly and Owens verified the costs of his past and current treatment and additionally predicted Timothy’s life expectancy through use of a life expectancy table.

¶11 Because we are satisfied there is sufficient credible evidence to support the jury’s award of \$20,000 for future medical expenses, we reverse that part of the judgment reducing this award and remand the matter to the trial court to reinstate the damage award.

By the Court.—Judgment reversed in part and remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04)

