

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 15, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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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. 00-0282**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**CANDICE C. SHEPPARD,**

**PLAINTIFF-APPELLANT-CROSS-  
RESPONDENT,**

**V.**

**THOMAS A. STARKEY, M.D., AND WISCONSIN PATIENTS  
COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS-CROSS-  
APPELLANTS,**

**BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,  
AND UNITED WISCONSIN GROUP,**

**NOMINAL-DEFENDANTS.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court  
for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Candice Sheppard appeals from a judgment which reduced the amount of damages for past and future pain and suffering awarded to her by a jury on an informed consent claim against her gynecologist, Dr. Thomas Starkey, and the Wisconsin Patients Compensation Fund (collectively, Starkey). Starkey cross-appeals from the denial of his motion for a new trial. For the reasons discussed below, we conclude that the trial court properly reduced the amount of noneconomic damages pursuant to WIS. STAT. § 893.55(4) (1999-2000),<sup>1</sup> and that Starkey has failed to demonstrate that the instructions given to the jury misstated the law or that the interest of justice otherwise requires a new trial. Accordingly, we affirm.

## BACKGROUND

¶2 Sheppard developed a cyst on or near the Bartholin's gland on the left side of her vagina. When the cyst began to make intercourse uncomfortable, Sheppard sought treatment from Starkey. Starkey recommended that the cyst be surgically removed by excision, a procedure which the doctor described as having minimal risk based on his own success rate. He gave Sheppard a standard explanation of the risks of surgery, which he categorized as anesthesia, bleeding, infection, injury to adjacent tissue, and death. Starkey also informed Sheppard of an alternate treatment called marsupialization, in which the tissue around the Bartholin's gland is sewn into a pocket to provide drainage. Starkey did not discuss with Sheppard less invasive measures for treating the cyst, such as sitz

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

baths, needling and draining, or inserting a Word catheter, because he did not feel they were appropriate for the size and non-infected status of the cyst.

¶3 Sheppard agreed to have the surgery with the understanding that it would be performed on an outpatient basis on a Friday and that she could return to work on the Monday following the Friday on which the surgery was performed. As it turned out, however, Sheppard experienced an unusual amount of post-operative pain and nausea following the surgery and missed a considerable amount of work. She called to arrange an unscheduled follow-up appointment when she noticed bruising in an area extending from above her mons along the left side of her vagina and buttocks and down her left thigh. Starkey examined her and noted some bruising, which he termed ecchymosis, in her vaginal and thigh area, but deemed it nothing out of the ordinary.

¶4 Sheppard continued to experience shooting pain near the surgical site, as well as secondary pain in a wide radius around it. As a result, she was unable to have intercourse, could not comfortably insert tampons, could not wear jeans or tight-fitting clothing without pain, and could not sit for prolonged periods of time without cushions or ice packs. She also experienced depression and sleep impairment due to chronic pain. She sought additional opinions and treatment from several sources with very little success, and eventually sued Starkey for negligence and a violation of her right to informed consent.

¶5 The parties presented several experts during a four-day trial. Dr. Harland Giles testified for Sheppard. Giles had examined Sheppard and found, in addition to some deformation of the left labia where the cyst had been, that scar tissue severely restricted her vaginal opening. Giles concluded that Sheppard's condition, which he diagnosed as pudendal neuralgia, was clearly

related to the excision surgery and complications from it. He offered several theories to explain what was causing the pain sensations to extend beyond the surgical site. One possibility he suggested was that entrapment of nerve endings in the scar tissue could be sending referred pain along the entire pudendal nerve system. Giles indicated that a neuroma, or abnormal healing of nerve endings cut during the surgery, could have a similar result. He also speculated that a hematoma, or internal pooling of blood following the surgery, could have caused the bruising that Sheppard experienced and could have irritated nerve roots throughout the region. Finally, he noted that the surgery could have triggered vulvar vestibulitis, a term used for otherwise unexplained multiple tissue pain. Giles concurred with another doctor's opinion that additional surgery could make the situation worse rather than better, and concluded that Sheppard's pain was most likely permanent.

¶6 Starkey's experts challenged Giles' conclusions on several grounds. Among other things, they claimed that the pain Sheppard had complained about could not have been caused by the excision because it extended beyond the boundaries of the pudendal nerve system; that if the pain were being caused by a neuroma or nerve entrapment, Sheppard should have (but had not) experienced relief from a pudendal nerve block injection; that any referred pain would only have traveled up, not back down the nerves extending to the right side; that Giles had misused the term "nerve roots" to describe sensory nerve endings; and that if Sheppard had developed a significant hematoma, her hematocrit level at her follow-up examination would have been lower than it was on the day of surgery rather than higher. They offered alternate explanations for Sheppard's condition, including vulvar vestibulitis unrelated to the surgery and somatization (the expression of psychological conflict through physical symptoms), possibly

generated in order to obtain special treatment at work or to avoid intimate relationships after having been raped in college.

¶7 The trial court developed a set of jury instructions after considerable discussion with the parties. The trial court did not explicitly instruct the jury that it had to find causation between any failure to inform Sheppard of alternate treatment options and any injuries Sheppard subsequently suffered. With respect to damages, however, the court told the jurors:

The sum named by you must in each instance be an amount which will fairly and justly compensate the person named in the question for the damages sustained as a natural consequence of the treatment.

If you have determined that a reasonable person in Candice Sheppard's position would not have — would not have consented to the treatment had a reasonable person been fully informed of the possible risks and advantages, you will insert as your answer to Question 5 the amount of money which under the evidence will reasonably and fairly compensate Candice Sheppard for the injuries suffered by Candice Sheppard as a result of the treatment.

The special verdict form asked the jurors what sum of money would fairly and reasonably compensate Sheppard for past medical expenses resulting from the operation, past loss of earnings, and past and future pain, suffering, and disability. Starkey offered no objection to the jury instructions or to the special verdict form.

¶8 The jury found that Starkey had not been negligent in his treatment of Sheppard, but that he had failed to adequately inform her of her options, and that a reasonable person would not have chosen excision if she had been fully informed of the risks and alternatives. The jury awarded Sheppard \$7,863.52 for medical expenses, \$12,609 for lost wages, and \$700,000 for past and future pain and suffering. The trial court reduced the noneconomic damage award to

\$350,000 pursuant to WIS. STAT. § 893.55(4)(d), but refused to order a new trial in the interest of justice. Both parties appeal.

## STANDARD OF REVIEW

¶9 The constitutionality of a statute presents a question of law which we review *de novo*. ***State v. Smith***, 215 Wis. 2d 84, 90, 572 N.W.2d 496 (Ct. App. 1997).

¶10 The trial court's decision whether to grant a new trial under WIS. STAT. § 805.15(1) is discretionary in nature. ***Goff v. Seldera***, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). We give great deference to the trial court's decision because the trial court is in the best position to observe and evaluate whether such relief is appropriate. ***Id.*** Accordingly, we will look for reasons to sustain the trial court's decision and will set it aside only if the trial court fails to provide a reasonable explanation for its decision or if the trial court grounds the decision upon a mistaken view of the evidence or an erroneous view of the law. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). We may also independently consider the record to determine whether to exercise our own discretionary reversal power under WIS. STAT. § 752.35.

## ANALYSIS

### Appeal

#### *Constitutionality of WIS. STAT. § 893.55(4)*

¶11 Sheppard claims the cap on noneconomic damages for medical malpractice set forth in WIS. STAT. § 893.55(4) violates the right to a trial by jury,

the right to a certain remedy, the separation of powers, the right to equal protection, and the right to due process. The statute, however, was recently found constitutional in each of these respects by *Guzman v. St. Francis Hosp.*, 2001 WI App 21, No. 98-2710. *Guzman* controls Sheppard's claims on the appeal. We therefore affirm the trial court's reduction of noneconomic damages to the statutory amount.

### **Cross-Appeal**

#### *Jury Instructions*

¶12 An objection to the sufficiency of the jury instructions is waived if not raised before submission of the case to the jury. WIS. STAT. § 805.13(3). Contrary to Starkey's assertions, we have no authority, outside of our limited discretionary reversal power, to review waived objections to jury instructions. *Gosse v. Navistar Int'l Transp. Corp.*, 2000 WI App 8, ¶19 & n.6, 232 Wis. 2d 163, 605 N.W.2d 896.

#### *Interest of Justice*

¶13 WISCONSIN STAT. § 805.15(1) permits the trial court to grant a new trial in the interest of justice. WISCONSIN STAT. § 752.35 similarly permits this court to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried," although we will exercise our own discretion to grant a new trial in the interest of justice "only in exceptional cases." *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶14 The interest of justice may warrant a new trial when the jury's findings are against the great weight and clear preponderance of the evidence, *Sievert*, 180 Wis. 2d at 431; when the real controversy has not been fully tried, *State v. Harp*, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991); or when there has been a miscarriage of justice, *id.* Findings may be against the great weight and clear preponderance of the evidence even if they are supported by credible evidence. *Sievert*, 180 Wis. 2d at 431. To establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (internal citation omitted). A miscarriage of justice may be found to have occurred when there is "a substantial degree of probability that a new trial would produce a different result." *Id.* (internal citation omitted).

¶15 Starkey first argues that the trial court applied the wrong legal standard when it observed that Dr. Giles' testimony was sufficiently credible so that the jury could weigh the value of that testimony. Starkey claims this comment demonstrates that the trial court failed to take into account the fact that a finding may be against the great weight and clear preponderance of the evidence even if it is supported by credible evidence. However, the record shows that Starkey moved for a new trial on the ground that "the special verdict is contrary to the weight of the evidence," as well as on the ground of the interest of justice because "the special verdict is contrary to the great weight and clear preponderance of the evidence." The any-credible-evidence test is the correct standard for the first ground of relief Starkey requested. *Giese v. Montgomery*

**Ward, Inc.**, 111 Wis. 2d 392, 408, 331 N.W.2d 585 (1983). Therefore, the trial court did not err by mentioning that standard in its discussion.

¶16 The trial court subsequently indicated that it understood that the any-credible-evidence test was not the only standard under which it could order a new trial. We infer from the trial court’s earlier comment—to the effect that there were opinions on both sides of the causation issue—that the trial court did not consider the evidence so lopsided that the verdict was against the great weight and clear preponderance of the evidence. We are satisfied that this conclusion represents a reasonable application of the law to the facts of this case.

¶17 Starkey maintains that the verdict is against the great weight and clear preponderance of the evidence because Giles’ theories were “contrary to basic notions of human anatomy and physiology.” He attempts to characterize his argument as “a matter of science” rather than a “matter of credibility.” However, testimony which is “in conflict with the uniform course of nature” is inherently incredible. **Chapman v. State**, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (internal citation omitted). Starkey’s contention that Giles’ opinions were contrary to science is therefore properly construed as an argument that the doctor’s testimony was incredible as a matter of law.

¶18 It is well established that expert testimony is admissible in this state if it is relevant, if the witness is qualified as an expert, and if specialized knowledge will assist the trier of fact. **State v. Walstad**, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984). Once admitted, the reliability of the testimony is a matter of weight and credibility for the fact finder, and any challenges to the reliability must be made through cross-examination or other means of impeachment. **State v. Peters**, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App. 1995). Giles was

qualified as an expert witness, he offered opinions which were relevant to the question of causation, and specialized knowledge was clearly called for on the issue of causation. Therefore, the trial court's decision to leave the reliability or credibility of Giles' opinions to the jury was not an erroneous exercise of the trial court's discretion.

¶19 Moreover, we note it was not necessary for the jury to accept Giles' theories of a significant hematoma or a neuroma, or even Sheppard's assertions about the extent of her pain, in order to find for Sheppard. There was evidence that Sheppard had scar tissue at the surgical site which restricted the vaginal opening, and that such a restriction could make intercourse painful. Given Sheppard's emphasis on the surgical site as the primary source of pain and the impact of the injury on Sheppard's future intimate relationships, this evidence alone could have been sufficient to support the verdict.

¶20 Furthermore, we see nothing in the record which would compel the conclusion that the parties' theories of causation were mutually exclusive. That is, even if it found that Sheppard had a tendency to somatize psychological problems into physical symptoms, the jury could still have found that any psychogenic pain she was experiencing was triggered or compounded by a neuroma or nerve entrapment in the scar tissue at the surgical site. Even the defense experts admitted that a person who was already subject to depression might be more likely to experience chronic pain symptoms upon experiencing real physiological pain. We therefore concur with the trial court's determination that the verdict was not against the great weight and clear preponderance of the evidence.

¶21 We turn next to Starkey's contention that the real controversy has not been tried. Starkey argues that the jury was kept from considering important

evidence on causation by the jury instructions and by the absence of a special verdict question on that issue. We are satisfied, however, that the trial court properly instructed the jury that it should award damages for those injuries which were sustained “as a result” of the treatment which a reasonable person in Sheppard’s position would not have pursued had she been properly informed of her options. In conjunction with the jury instructions, we are persuaded that the special verdict questions were sufficient to allow the jury to consider the question of causation. Furthermore, as the trial court pointed out, the issue of causation was thoroughly litigated and argued to the jury. The trial court’s determination that the real controversy was in fact tried was therefore entirely reasonable.

¶22 Finally, we consider Starkey’s contention that a miscarriage of justice has occurred. Again, however, for the reasons already discussed above, we are in agreement with the trial court that Starkey has failed to demonstrate a substantial probability of a different result on retrial. In sum, we see no misuse of the trial court’s discretion and no extraordinary circumstances sufficient to prompt us to exercise our own discretionary reversal power.

*By the Court.*—Judgment affirmed.

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

