COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

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.

No. 00-3201

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

DENIS BERGHAUER, SPECIAL ADMINISTRATOR OF THE ESTATE OF JULIE BERGHAUER, AND MARK BAUMAN, GUARDIAN AND NEXT FRIEND OF ALEC BERGHAUER,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

BRUCE A. HEYL, M.D. AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,

ST. ELIZABETH HOSPITAL AND AMERICAN CONTINENTAL INSURANCE COMPANY,

DEFENDANTS-CO-APPELLANTS-CROSS-RESPONDENTS,

THE WISCONSIN PATIENTS COMPENSATION FUND, DONNA SHALALA, DEPARTMENT OF HEALTH AND HUMAN SERVICES STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES AND COUNTY OF WINNEBAGO,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

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

¶1 PER CURIAM. This appeal arises from a judgment following a jury verdict in a medical malpractice case. Dr. Bruce Heyl, St. Elizabeth Hospital, and their respective insurance companies (collectively, Heyl and St. Elizabeth), argue that (1) insufficient evidence supports the jury's verdict as to cause; (2) insufficient evidence supports the jury's verdict as to liability; (3) the award for loss of society and companionship was not supported by the evidence; (4) the statutory cap on loss of society and companionship awards requires a reduction of the award; (5) the trial court erred when it admitted an alleged suicide note; (6) the award for loss of society and companionship was excessive; and (7) the interests of justice demand a new trial. We disagree with Heyl and St. Elizabeth and affirm the judgment.

¶2 Denis Berghauer, the special administrator of the Estate of Julie Berghauer; and Mark Bauman, Alec's guardian and natural father (collectively, the estate), cross-appeal the judgment and argue that the trial court erroneously exercised its discretion when it precluded their nursing expert from offering the opinion that she believed Julie's suicide could have been prevented if the applicable standard of care had been followed. We affirm the judgment in favor of the estate, and we need not address the cross-appeal because the estate was not prejudiced by the exclusion.

BACKGROUND

¶3 Julie Berghauer was the mother and custodial parent of two-year-old Alec. She struggled with mental illness as early as age thirteen. She was an inpatient several times and made at least one suicide attempt.

¶4 In the summer of 1994, Julie began treatment with Dr. Kenneth Erdmann, an Oshkosh psychiatrist. Erdmann saw Julie on an outpatient basis, conducted therapy and monitored her medications from July 1994 until April 1995, when Julie was admitted to St. Elizabeth. Erdmann testified that on April 26, 1995, Julie told him that she had written a suicide note and not only had suicidal thoughts but had planned her suicide. He said she related to him that she intended to tie a bed sheet to a doorknob and drape the sheet over the top of the door, hanging herself on the other side.

¶5 Erdmann concluded that Julie was a danger to herself and needed to be hospitalized. He recommended that she be admitted to St. Elizabeth so that she could be cared for by Heyl. Erdmann recommended Heyl because he thought Julie might benefit from electroconvulsive therapy, which Heyl could administer while Julie was at St. Elizabeth. Julie was admitted on April 26, 1995.

¶6 Charlene Mitchell, a St. Elizabeth nurse, conducted Julie's intake evaluation. Julie described herself in part as hopeless, angry and depressed. Mitchell attempted to obtain from Julie a "contract for safety," a promise that Julie would contact the staff before attempting to harm herself. Julie would only promise that she would contact the staff if she caught herself.

¶7 Heyl knew about Julie's suicidal thoughts and plans before her admission to St. Elizabeth. He even recorded them in Julie's chart when he

dictated his admitting note. Yet Heyl could not remember whether he told the nurses caring for Julie that she had expressed a plan to commit suicide just before her admission. The nurses caring for Julie, including Pamela Weeks, the nurse assigned to Julie on the morning of May 1, 1995, denied knowing anything about Julie's suicide plan.

¶8 Julie spent five nights at St. Elizabeth, and during that time she received two electroconvulsive therapy treatments. Julie's emotional state during her admission was "labile," or changeable. Nevertheless, she was a general admission to the unit; she was not on any of the suicide precautions that were available at St. Elizabeth.

¶9 At 1:50 p.m. on May 1, 1995, Weeks saw Julie walking toward her room. Apparently, Julie tied a bed sheet to the bathroom doorknob and hung herself from the door, successfully accomplishing the plan that she had described to Erdmann before her admission. At approximately 2:05 p.m., another patient discovered Julie, who was still alive but had sustained significant brain damage. Julie was cared for in an extended care facility for six months before she died.

¶10 The estate brought this medical malpractice suit alleging that the failure to put Julie on suicide precautions was negligent. The estate sought pecuniary damages, an award for loss of society and companionship for Alec and damages for Julie's pain and suffering following her suicide attempt and prior to her death. The defendants involved in this appeal are Heyl, St. Elizabeth, and their respective insurers.

¶11 The jury returned a verdict of $546,228 against both defendants after a jury trial. It awarded $86,228 in pecuniary damages and $460,000 to Alec for loss of society and companionship. The jury apportioned fault 55% to Heyl and

45% to St. Elizabeth. It rejected the estate's claim that Julie experienced conscious pain and suffering while she was in the extended care facility. The trial court denied post-verdict motions and entered judgment on the verdict. Heyl and St. Elizabeth now appeal, and the estate cross-appeals.

DISCUSSION

I. SUFFICIENCY OF EVIDENCE: CAUSE

¶12 Heyl and St. Elizabeth argue that the record contains insufficient evidence to sustain the jury's finding of cause. We will not overturn a jury verdict for insufficiency of the evidence unless there is no credible evidence to support the jury verdict when we consider all the evidence and draw all reasonable inferences in the light most favorable to the verdict. ***Ehlinger v. Sipes***, 155 Wis. 2d 1, 14, 454 N.W.2d 754 (1990). Credible evidence supports the jury's verdict and we therefore affirm.

¶13 To establish causation, the plaintiff bears the burden of proving that the defendant's negligence was a substantial factor in producing the plaintiff's harm. ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978). To be a substantial factor, the defendant's conduct must have such an effect in producing the harm that a reasonable trier of fact could regard it as a cause of the harm. ***Id.*** at 458-59.

¶14 Prior to ***Ehlinger***, a plaintiff generally was required to produce evidence that the defendant's negligence more probably than not caused the injury. ***Fischer v. Ganju***, 168 Wis. 2d 834, 858, 485 N.W.2d 10 (1992). The rule, however, is different in omitted treatment medical malpractice cases. In ***Ehlinger***, our supreme court addressed the sufficiency of causation proof in medical

malpractice cases where it cannot be reasonably certain that the omitted treatment would have been successful. The court "refuse[d] to place upon an injured plaintiff the burden of proving what more probably than not *would* have happened had the defendant not been negligent." ***Id.*** at 18.

¶15 The plaintiff carries a twofold burden of proving causation. Initially, "the plaintiff has the burden of producing evidence, satisfactory to the judge, from which a jury could reasonably find a causal nexus between the negligent act and the resulting injury." ***Fischer***, 168 Wis. 2d at 857. Once the court has decided that the causation proof is sufficient to let the jury deliberate, cause is a question of fact for the jury and the plaintiff has the burden of persuading the jury. ***Id.***

¶16 It is, of course, impossible to know whether Julie's suicide would have been either avoided or thwarted if the hospital had complied with the standard of care. Therefore,

> to satisfy his or her burden of production on causation, the plaintiff need only show that the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not the treatment *could* have lessened or avoided the plaintiff's injury had it been rendered. It then is for the trier of fact to determine whether the defendant's negligence was a substantial factor in causing the plaintiff's harm.

Ehlinger, 155 Wis. 2d at 13-14.

¶17 The estate's expert, Dr. Phillip McCullough, testified that Julie's suicide was preventable and that suicide precautions would have made it less likely. We reject Heyl and St. Elizabeth's argument that testifying that precautions would have made the suicide less likely does not prove cause to a reasonable certainty. Although he could not testify that it was more likely than not

that precautions would have prevented the suicide, McCullough's testimony provides all the certainty that these facts permit.[1]

¶18 The expert's opinion was sufficient to satisfy the burden of production so as to permit the jury to determine cause. That there is no evidence that the result would have been different had suicide precautions been in place is precisely the problem that ***Ehlinger*** and ***Fisher*** address in omitted treatment cases. The trial court correctly decided that McCullough's testimony was sufficient to permit the jury to consider the issue.

II. SUFFICIENCY OF EVIDENCE: LIABILITY

¶19 Heyl and St. Elizabeth highlight the evidence that they hoped would sway the jury to support their contention that the jury's liability verdict was contrary to the great weight of the evidence. For example, they argue that the jury could not reasonably infer that suicide precautions would have prompted different conduct by the nurses and an altered outcome. Specifically, they contend that if suicide precautions had been utilized, nurses would have checked on Julie every fifteen minutes, but she accomplished her plan in less time than that. Moreover, Heyl and St. Elizabeth maintain that Julie's words and actions during her time at St. Elizabeth did not justify suicide precautions. Julie did not attempt suicide for four and one-half days after admission to the hospital, her behavior was controlled during that time, and she did not tell anyone that she continued to think about suicide.

[1] Heyl and St. Elizabeth devote substantial argument attempting to show why the jury should have rejected McCullough's opinion. This approach, however, does not comport with the applicable standard of review.

¶20 Heyl and St. Elizabeth ignore both the testimony and the inferences the jury heard that might support the verdict. This is contrary to the applicable standard of review that a jury's verdict will be sustained if any credible evidence supports it. WIS. STAT. § 805.14(1).[2] The credibility of witnesses and the weight to be accorded to their testimony are among the matters appropriately left to the jury's judgment, and where more than one inference is possible, the inference drawn by the jury must be accepted. ***Roach v. Keane***, 73 Wis. 2d 524, 534, 243 N.W.2d 508 (1976). Here, there was substantial evidence from which the jury might have assessed liability against one or both defendants.

¶21 Evidence supporting the verdict includes (1) McCullough's expert testimony that Heyl departed from the standard of care by not placing Julie on suicide precautions and not being sure whether he informed the nursing staff of Julie's suicidal ideations and plan; (2) Julie managed to accomplish the very suicide plan she shared with Erdmann the day of her admission to St. Elizabeth; (3) the nurses caring for Julie did not know that she had suicidal tendencies and a plan; and (4) the nurses would have expected to know if a patient like Julie had a suicide plan, especially when it could be accomplished on the floor at the hospital. The jury verdict on liability was firmly and appropriately rooted in the evidence.

III. SUFFICIENCY OF EVIDENCE: LOSS OF SOCIETY AND COMPANIONSHIP AWARD

¶22 Heyl and St. Elizabeth argue there is insufficient evidence to support the jury's award for loss of society and companionship because a child must have an actual ability to appreciate the loss of a parent in order to be awarded damages.

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

They point to no authority for this assertion. We are unaware of any authority requiring that a minor plaintiff must "actually have the ability to appreciate" the loss of society that will occur as a result of the death of a parent. If this were so, recovery for this type of injury would be denied entirely to the very young and those suffering from mental disabilities that interfere with their ability to "appreciate" the loss. We affirm the award to Alec for loss of society and companionship.

¶23 A claim for loss of society and companionship is an intangible that is extremely difficult to measure in dollars and cents. ***Jensen v. Heritage Mut. Ins. Co.***, 23 Wis. 2d 344, 355, 127 N.W.2d 228 (1964). The amount of the award lies peculiarly within the discretion of the jury. ***Mertens v. Lundquist***, 15 Wis. 2d 540, 545, 113 N.W.2d 149 (1962). A most unusual fact situation would have to be present to warrant a court's disturbing a jury award of loss of society and companionship. ***Id.***

¶24 A minor child may recover for the loss of a parent's society and companionship. ***Theama v. City of Kenosha***, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). Where the wrongful death plaintiff is a surviving child, the claim for loss of society and companionship compensates for the general losses of love and affection common to claims for loss of society and companionship when the loss arises from personal injury. ***Id.*** It is a claim for deprivation for shared experiences and for loss of parental guidance, love and protection during the child's minority. ***Id.***

¶25 Heyl and St. Elizabeth also argue, without meaningful citation, that the jury's award to seven-year-old Alec was based on speculation and was the product of emotion. They contend that because Alec is loved, well cared for, and

lives with his father in a two-parent home, Julie's death did not produce a compensable injury. Heyl and St. Elizabeth argue that the jury could only speculate (1) when, if ever, Alec would learn that someone other than Bauman's wife was his mother and (2) what Alec's reaction would be if he learned that a woman he does not remember was his mother.

¶26 The evidence at trial established that, aside from her psychiatric problems, Julie was a loving, attentive, capable single parent to Alec. Julie involved Alec in her family's life, constantly had him with her and managed to provide a stable, appropriate, nurturing home for him despite her mental illness. When Julie was admitted to St. Elizabeth, Alec went to live with his natural father, Mark Bauman. Since Julie's death, Alec has continued to live with Bauman and his wife Kecia. Alec, who was seven at the time of trial, calls Kecia his mother. Bauman testified at trial that he intends to tell Alec about his mother. He explained to the jury the reasons for this plan but testified that he was not sure when he was going to tell Alec.

¶27 There is no easy formula for determining loss of society and companionship damages, but juries commonly determine future damages in tort cases. Here, the jury's award was not based on speculation and was supported by the evidence.

¶28 While it is true that at the time of trial Alec did not yet know that Julie was his biological mother or that she committed suicide, Bauman told the jury that he intends to tell Alec because he thinks Alec has a right to know. The jury reasonably believed Bauman would tell his son about Julie someday. Undisputed evidence shows that Julie was Alec's primary caregiver for his entire life until she became incapacitated and that she was a loving, attentive and

concerned mother who provided for Alec both in terms of his day-to-day needs and his emotional needs, despite her illness. The jury also learned that Alec spends substantial time with Julie's parents and calls them grandma and grandpa.

¶29 The verdict itself undermines the argument that the jury was influenced by emotion. The jury's decision that Julie suffered no conscious pain and suffering showed its ability to absorb the court's instructions and apply them to the facts without emotion. It rejected the family's testimony that Julie recoiled in pain, cried and suffered horribly between the date she hanged herself and her death six months later, arguably the most emotion laden part of the plaintiff's case.

¶30 Alec was seven at the time of trial and was entitled to be compensated for his loss through age eighteen. The jury determined the appropriate compensation for Alec's loss. Its award of $460,000 to Alec for loss of society and companionship was properly based on the evidence and permissible inferences from the evidence, and we therefore do not disturb it.

IV. WHETHER CAP ON LOSS OF SOCIETY AND COMPANIONSHIP AWARDS APPLIES

¶31 Heyl and St. Elizabeth argue that the award for loss of society and companionship should be reduced pursuant to WIS. STAT. §§ 893.55 and 895.04. Neither statute applies to this case. Nevertheless, Heyl and St. Elizabeth urge us to retroactively apply the statutes. We review de novo their plea for retroactive application of the damage cap, and we affirm the jury's award for loss of society and companionship. ***Neiman v. American Nat'l Prop. & Cas Co.***, 2000 WI 83, ¶8, 236 Wis. 2d 411, 613 N.W.2d 160.

¶32 WISCONSIN STAT. § 895.04(4) limits the recovery for loss of society and companionship in wrongful death actions. In ***Rineck v. Johnson***, 155 Wis. 2d

659, 668, 456 N.W.2d 336 (1990), our supreme court concluded that the wrongful death limit on non-economic damages did not apply to medical malpractice claims. The legislature overruled ***Rineck*** when it enacted 1995 Wis. Act 10, effective May 25, 1995. WISCONSIN STAT. § 893.55(4)(f), part of the Act, provides that the limits established by the legislature for loss of society and companionship in wrongful death actions apply in medical malpractice cases.

¶33 Heyl and St. Elizabeth contend that, even though the new law was not in effect on the date of Julie's death, it did not matter because the cap was what the legislature initially intended and was already the law. They claim the new legislation simply clarified the error our supreme court made interpreting legislative intent in ***Rineck*** and ***Jelinek***. We reject their contentions.

¶34 Once a construction has been given to a statute by a court, it becomes a part of the statute; and it is within the province of the legislature alone to change the law. ***Zimmerman v. WEPCO***, 38 Wis. 2d 626, 633, 157 N.W.2d 648 (1968). When our supreme court interpreted WIS. STAT. § 895.04, its interpretation became part of the statute. Only when the legislature enacted WIS. STAT. § 893.55 did the wrongful death cap on awards for loss of society and companionship apply.

¶35 Moreover, this issue is squarely controlled by ***Neiman***, where our supreme court concluded that the retroactive application of the damage cap was unconstitutional even in the face of the legislature's express intent. ***Neiman***, 2000 WI at ¶13. Neiman was injured in September of 1995 after the $150,000 damage cap (at issue here) for loss of society and companionship was in place. ***Id.*** at ¶¶3, 5. Several years later, the Wisconsin legislature increased the loss of society and companionship damage cap to $500,000 for a deceased minor and $350,000

for a deceased adult. 1997 WIS. ACT 89, §4. The legislature declared its intention that the cap apply retroactively to "actions commenced on the effective date of this subsection." ***Id.*** "This language indicates that the legislature intended to include within the scope of the amendment those claims in which the events giving rise to a cause of action had already occurred." ***Neiman***, 2000 WI at ¶11.

¶36 In ***Neiman***, the court balanced the public interest served by the retroactive application of the statute with the private interests overturned by it. ***Id.*** at ¶14. No balancing is necessary here because the legislature expressed no intent to retroactively apply the cap on damage awards.

¶37 Even in ***Neiman***, where the legislature specifically declared its intent that the cap be applied retroactively, our supreme court concluded that retroactive application of the cap was unconstitutional because an alteration in damages available is a change in substantive rights. ***Id.*** at ¶13. "When the limit of damages that can be recovered is set by statute, the amount that can be recovered is fixed on the date of injury." ***Id.*** On the date of Julie's suicide, the wrongful death cap on awards for loss of society and companionship did not apply to medical malpractice cases. *See* ***Jelinek v. St. Paul Fire & Cas. Ins. Co.***, 182 Wis. 2d 1, 9, 512 N.W.2d 764 (1994).

V. SUICIDE NOTE

¶38 Heyl and St. Elizabeth argue that the suicide note was hearsay and irrelevant.[3] They cite no legal authority and summarily argue that the note is hearsay and the trial court abused its discretion when it admitted the note. The estate counters that the hearsay exception for state of mind applies to the suicide note. Heyl and St. Elizabeth fail to address this argument in their reply brief, and we therefore deem it admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

¶39 Even if the trial court erred when it admitted the suicide note, the error was harmless. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). At issue in this case was what the doctors and nurses knew at the time they provided care. Although Julie wrote the note before she entered the hospital and mentioned it to Erdmann, its contents were not known and it was not found until after Julie mortally injured herself so it could not have impacted her care.

[3] Heyl and St. Elizabeth also argue (1) that the loss of society and companionship award was excessive and (2) that the trial court should order a new trial in the interest of justice. First, to support their argument that the award was excessive, Heyl and St. Elizabeth merely refer to Section II of their brief. That section, however, does not address why the award was excessive. We will not develop Heyl and St. Elizabeth's amorphous and unsupported arguments for them. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). In ***Calaway v. Brown Cty.***, 202 Wis. 2d 736, 750, 553 N.W.2d 809 (Ct. App. 1996), one party made an argument "For the reasons already stated in Argument #1 of this Brief …." We will not "select and apply cases and arguments from their brief's earlier sections …." ***Id.*** We consider Heyl and St. Elizabeth's similar arguments inadequately briefed. *See* ***id.*** Second, because we affirm the judgment, a new trial is not in the interest of justice.

By the Court.—Judgment affirmed.

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