COURT OF APPEALS
DECISION
DATED AND RELEASED

November 21, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0022

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

ROBIN C. ACKER, JAMES ACKER and ELIZABETH, STEVEN and DAVID ACKER, minors, by their Guardian ad Litem, VINCENT D. MOSCHELLA,

Plaintiffs-Respondents,

v.

LAWRENCE P. SULLIVAN, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC. and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Lawrence P. Sullivan, M.D., Physicians Insurance Company of Wisconsin, Inc., and Wisconsin Patients Compensation Fund (collectively "Sullivan") appeal from a judgment, following a jury trial, awarding Robin C. Acker, her husband and her children approximately $1,000,000 in a medical malpractice/failure-to-timely-diagnose lawsuit. Sullivan argues that: (1) the trial court should have directed a verdict for the defendants following the close of the plaintiffs' case; (2) public policy precludes imposing liability under the circumstances of this case; (3) a new trial should have been granted because the jury's findings on causation were contrary to the great weight and clear preponderance of the evidence; and (4) the trial court should have excluded the testimony of the plaintiffs' economist regarding Mrs. Acker's loss of earning capacity and household services as lacking a proper foundation because "there was no medical evidence that [she] would have had a normal life or work expectancy." We reject Sullivan's arguments and affirm.

I. FACTS

On September 7, 1991, Mrs. Acker suffered two seizures. She had no history of seizures, was thirty years old, and was thirty-two weeks pregnant with her third child. A CAT scan revealed a brain abnormality, which was identified at that time as either the result of an earlier injury or a tumor. According to Mrs. Acker's medical records, an MRI was recommended but it was suggested that Mrs. Acker wait until after her pregnancy was over. The next day, after Mrs. Acker was transferred to another hospital, she was seen by Dr. Sullivan. On September 23, 1991, Dr. Sullivan saw Mrs. Acker in his office for a follow-up visit. Dr. Sullivan concluded that the seizures and the abnormality revealed by the CAT scan probably resulted from a childhood injury.

Mrs. Acker delivered her child on October 29, 1991. Mrs. Acker continued to periodically see Dr. Sullivan and remained in contact with him by telephone during the time from September 23, 1991, until she suffered another seizure on either October 9 or 10, 1992. By the time of the subsequent seizure, Mrs. Acker's tumor, classified as a grade III anaplastic astrocytoma, had tripled in volume and grew to a point where it could not be completely removed by surgery. Sullivan does not dispute the plaintiffs' statement: "The residual tumor remaining after surgery has again grown in size and invaded new

regions of her brain. There was no argument between the experts on either side of the case that this tumor will result in Mrs. Acker's untimely death."

The plaintiffs alleged that Dr. Sullivan was negligent in failing to diagnose Mrs. Acker's cancerous brain tumor, and that the resulting delay in treatment allowed the tumor to grow to the point where it is expected to result in her death. We set forth additional facts relevant to the issues on appeal in our analysis.

II. SULLIVAN'S MOTION FOR A DIRECTED VERDICT

The standard for granting a motion for a directed verdict is whether there is an absence of material disputed fact and no credible evidence or reasonable inferences in support of the non-movant. ***City of Omro v. Brooks***, 104 Wis.2d 351, 358, 311 N.W.2d 620, 624 (1981); *see also* ***Liebe v. City Finance Co.***, 98 Wis.2d 10, 18-19, 295 N.W.2d 16, 20 (Ct. App. 1980) (directed verdict should be granted only "where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion" or there is an absence of disputed material fact). Our review is *de novo*. *See* ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Co.***, 96 Wis.2d 314, 336-340, 291 N.W.2d 825, 836-837 (1980).

Sullivan claims that the trial court should have directed a verdict for the defendants following the close of the plaintiffs' case because the plaintiffs' evidence failed to satisfy the burden of production standard set forth in ***Ehlinger v. Sipes***, 155 Wis.2d 1, 13-14, 454 N.W.2d 754, 759 (1990), and ***Fischer v Ganju***, 168 Wis.2d 834, 858-859, 485 N.W.2d 10, 19-20 (1992), which requires plaintiffs in failure-to-timely-diagnose cases to show that it is more probable than not that the omitted treatment could have lessened or avoided the harm.[1] In support of this argument, Sullivan contends that the plaintiffs' experts, Dr. Ian Robins, a neuro-oncologist, and Dr. Bryson Smith, a neurosurgeon, agreed that they had "no idea" whether timely treatment would have made a difference in Mrs. Acker's condition. Additionally, Sullivan points to Dr. Robins's testimony that Mrs. Acker's type of tumor is rarely curable—only one to three percent of patients with anaplastic astrocytomas survive. Sullivan also points to Dr. Smith's testimony that even if Mrs. Acker's tumor had been diagnosed and removed in 1991, microscopic particles would have been left behind and Mrs. Acker would have had a zero to ten percent chance of surviving ten years.

[1] Sullivan has conceded the other criteria necessary to satisfy the plaintiffs' burden of production standard—that the plaintiffs show that the omitted treatment was intended to prevent the type of harm that resulted and that Mrs. Acker would have submitted to the treatment. *See* ***Ehlinger v. Sipes***, 155 Wis.2d 1, 13-14, 454 N.W.2d 754, 759 (1990); ***Fischer v Ganju***, 168 Wis.2d 834, 858-859, 485 N.W.2d 10, 19-20 (1992).

We conclude that the record supports the trial court's decision that the plaintiffs produced sufficient evidence to present a jury question of whether Dr. Sullivan's negligence was a substantial factor in causing Mrs. Acker's injuries. The plaintiffs' experts testified that in 1991 Mrs. Acker fell into the category of patients with a good chance of cure because of her age, location of the tumor, the small size and resectability of the tumor in 1991, her neurologic status, and the fact that her tumor was radio-sensitive, which would have allowed for radiation therapy to "mop up" any stray cancer cells remaining after resection. The plaintiffs' experts further testified that because of the delay in diagnosis and treatment as a result of Dr. Sullivan's negligence, Mrs. Acker fell into the category of patients with a poor chance of cure or longer survival. Dr. Smith testified that it was his opinion "to a reasonable degree of medical certainty ... that the negligent care of Dr. Sullivan was a substantial factor causal of injury to Robin Acker," and that her tumor was curable in 1991. Dr. Robins also testified that it was his opinion "to a reasonable degree of medical certainty" that Mrs. Acker "had the opportunity for a cure" in 1991. Dr. Robins affirmed that even if Mrs. Acker would not have been cured had the diagnosis been made in 1991, her "life and quality of life would have been substantially increased." In sum, the testimony of Drs. Robins and Smith more than satisfied the required burden of production for sending to the jury the issue of whether it was more probable than not that the omitted treatment could have lessened or avoided the harm suffered by Mrs. Acker. *See* ***Ehlinger***, 155 Wis.2d at 13-14, 454 N.W.2d at 759; ***Fischer***, 168 Wis.2d at 858-859, 485 N.W.2d at 19-20.

Citing ***Daubert v. Merrill Dow Pharmaceuticals, Inc.***, 113 S. Ct. 2786 (1993), Sullivan also argues that the trial court never should have allowed Drs. Robins and Smith to testify that the opportunity for a cure was lost because of Dr. Sullivan's failure to diagnose Mrs. Acker's tumor. Sullivan claims: "As Doctors Robins and Smith offered an unproven hypotheses [sic] rather than actual factual research, their testimony cannot support the verdict. The plaintiffs' experts lacked any reliable foundation for their opinions that Ms. Acker could have been cured or her survival prolonged if her tumor had been timely diagnosed."

In ***State v. Peters***, 192 Wis.2d 674, 534 N.W.2d 867 (Ct. App. 1995), however, we rejected the request to replace the "relevancy test" set forth in ***State v. Walstad***, 119 Wis.2d 483, 351 N.W.2d 469 (1972), with the criteria announced in ***Daubert***, *see* ***Daubert***, 113 S. Ct. at 2796-2797, for determining the admissibility of scientific evidence.

> [T]he rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability. Rather, scientific evidence is admissible if: (1) it is relevant; (2) the witness is qualified as an expert; and (3) the evidence will assist the trier of fact in determining an issue of fact. If these requirements are satisfied, the evidence will be admitted.
>
> Moreover, scientific evidence is admissible under the relevancy test regardless of the scientific principle that underlies the evidence. As our supreme court noted in ***Walstad***:
>
> > The fundamental determination of admissibility comes at the time the witness is "qualified" as an expert. In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.

Peters, 192 Wis.2d at 687-688, 534 N.W.2d at 872 (citations and footnotes omitted).

The testimony of Drs. Robins and Smith satisfied the ***Walstad*** standard for admissibility of scientific evidence. Here, Sullivan did not challenge the qualifications of Drs. Robins and Smith. Further, their testimony met the definition of "relevant." *See* § 904.01, STATS. Finally, the evidence assisted the jury in determining an issue of fact. *See* § 907.02, STATS.

III. PUBLIC POLICY PRECLUSION OF LIABILITY

Sullivan argues that public policy precludes imposing liability here, claiming that there was a one percent lost chance of survival. A court can refuse to impose liability where:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Beacon Bowl, Inc. v. Wis. Elec. Power Co., 176 Wis.2d 740, 761, 501 N.W.2d 788, 796 (1993) (citation omitted). "The question of whether to deny recovery because of public policy considerations is a question of law." ***Id.***

Sullivan's argument that Mrs. Acker lost only a one percent chance of a cure, however, does not jibe with the evidence. The testimony was that in 1991 Mrs. Acker was in the category of patients with a good chance of survival. Additionally, none of the other public policy reasons for declining to impose liability is present. Therefore, we reject Sullivan's public policy argument.

IV. MOTION FOR A NEW TRIAL

Sullivan also argues that he should have been granted a new trial in the interests of justice because the verdict was against the great weight of the evidence. Sullivan points to the testimony of Dr. Shelley Wernick, Mrs. Acker's subsequent treating neurosurgeon, and two defense experts who testified that the natural history of Mrs. Acker's disease would have been the same even if the tumor had been removed in 1991. Sullivan concludes, "When measured against plaintiffs' experts who have 'no idea' what Ms. Acker's chances of survival were in 1991 and who can only testify that there was a potential possibility for longer

survival, the plaintiffs' evidence is insufficient to support the jury's finding of causation."

A motion for a new trial under § 805.15(1), STATS., is within the discretion of the trial court and this court will reverse only where the trial court has erroneously exercised its discretion. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995). Here, the record indicates that Dr. Robins stated that Mrs. Acker was in the one to three percent category of patients who, because of their age, location of the tumor, resectability of the tumor and size of the tumor, could be cured. This is not the same thing as saying she only would have had a one percent chance of a cure. The jury found that Dr. Sullivan's negligence in failing to timely diagnose and begin treatment was a substantial factor in producing her injury or harm. The weight and credibility of witnesses' testimony is a matter for the fact-finder. *See* ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305-306, 347 N.W.2d 595, 598 (1984). Review of the record reveals nothing to indicate that the jury's verdict was contrary to the great weight of the evidence or that a new trial is necessary in the interests of justice. Therefore, the trial court did not erroneously exercise its discretion in denying Sullivan's motion for a new trial.

V. THE TESTIMONY OF THE PLAINTIFFS' ECONOMIST REGARDING LOSS OF EARNING CAPACITY AND HOUSEHOLD SERVICES

Finally, Sullivan argues that the testimony of the plaintiffs' economist, Brian Brush, Ph.D., regarding future loss of earning capacity and household services lacked foundation and was insufficient to support the jury's verdict. We disagree.

Dr. Brush testified that damages for loss of household services would be $373,159[2] when projected to age 70. He also testified that damages for

[2] On page 16 of the transcript of Dr. Brush's testimony, he stated that the discounted value of the loss of household services was $373,159. On the next page, however, Dr. Brush testified that the discounted value was $375,159. Plaintiff's exhibit 33, a table representing the present value of lost future household services, uses the $373,159 figure.

loss of earning capacity would be $365,279 when assuming a work-life expectancy of age 65. The jury awarded $225,000 for loss of household services and $260,000 for loss of earning capacity.

Sullivan argues that "the record is devoid of medical evidence that Ms. Acker, even if diagnosed at the earliest opportunity, would have had a normal or even partial worklife expectancy or ability to perform household services." He further argues that "[e]ven with an early diagnosis, Ms. Acker would have undergone brain surgery and radiation," which he contends would have left her with "physical and mental deficits and reduced her life expectancy."

A trial court will preclude a jury from considering a damages issue only when there is *no* evidence on the issue. *See* ***Sampson v. Laskin***, 66 Wis.2d 318, 334, 224 N.W.2d 594, 602 (1975). Whether to submit a damages issue to the jury is a question of law, which we independently review. *See* ***Walter v. Cessna Aircraft Co.***, 121 Wis.2d 221, 230-231, 358 N.W.2d 816, 821 (Ct. App. 1984). Additionally, when a challenge is made to the sufficiency of the evidence supporting a jury's verdict or when it is alleged that the jury's verdict is a product of speculation, we note that "'[t]he amount of damages awarded is a matter resting largely in the jury's discretion.'" ***Jones v. Tokhi***, 193 Wis.2d 514, 524, 535 N.W.2d 50 (Ct. App. 1995). "[A]lthough the precise basis for the jury's verdict may not be entirely clear, a jury's conclusion may rest on expert testimony and myriad other evidentiary factors." ***Id.***

Contrary to Sullivan's arguments, Dr. Robins testified that Mrs. Acker would have been left with a minimal deficit had the diagnosis been made and surgery performed in 1991. The plaintiffs' experts testified that, in light of the favorable conditions that Mrs. Acker shared with the population of patients with a favorable chance for a cure, had the diagnosis been made in 1991, at minimum she would have had an increase in the quality and length of her life. Therefore, the trial court correctly submitted the issue to the jury, and the testimony of the plaintiffs' experts in combination with the other testimony from trial, formed a sufficient evidentiary foundation for the jury's verdict.

By the Court. – Judgment affirmed.

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