COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2013

Diane M. Fremgen
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. 2011AP2357 **Cir. Ct. No. 2008CV153**

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

KIM WESTRICH AND ELIZABETH WESTRICH,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

MEMORIAL HEALTH CENTER, INC. AND PHYSICIANS INSURANCE COMPANY OF WI, INC.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Mangerson, J. and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kim Westrich was allegedly injured when he fell while sedated following a colonoscopy procedure. Memorial Health Center, Inc.,

and Physicians Insurance Company of WI, Inc. (collectively, the Hospital) appeal, and Kim and Elizabeth Westrich cross-appeal, from a judgment awarding the Westriches damages on their negligence claims. We conclude a new trial is warranted based on the Hospital's argument that the circuit court erroneously excluded evidence of an alternative cause for some of Kim Westrich's injuries.

¶2 Although we ordinarily consider only dispositive issues, we also address two issues that are likely to arise on remand.

¶3 The first is a hearsay issue involving the Westriches' attempted use of national patient fall statistics at trial. We conclude the court properly excluded the statistics, but used the wrong rationale. We further caution the parties and the court that, should the Westriches attempt to introduce the data on remand, they must find an expert with the requisite personal knowledge, offer the statistics for a purpose other than the truth of the matter asserted, or make use of an available exception to the hearsay rule.

¶4 The second issue, raised in the Westriches' cross-appeal, is whether, as a matter of law, Kim Westrich can be found contributorily negligent. We conclude Westrich was properly included on the verdict form.

BACKGROUND

¶5 Kim Westrich underwent a colonoscopy procedure on August 19, 2005. During the procedure, he was administered Propofol, a sedative. He was given only enough Propofol to make him sleepy and lightly sedated. Propofol wears off quickly, and Westrich's nurse noted that shortly after the procedure he was awake, conversing, and responding appropriately to questions.

¶6 Westrich was transferred to the ambulatory care center where nurse Susan Moretz monitored his recovery. Westrich complained of stomach cramps, and Moretz helped him out of bed and walked him to the bathroom. Before she left, Moretz instructed Westrich not to get up from the toilet until she returned, and pointed out a call light he could use if he needed assistance.

¶7 While on the toilet, Westrich felt a sharp pain that caused him to jump up. He hit his head on the bathroom wall and fell. He stood, opened the bathroom door, and attempted to get back to his bed without assistance. He apparently fell again and was discovered by nurse Pamela Lugo.

¶8 A week after the colonoscopy, Westrich told his physician he had lost his senses of smell and taste. In 2008, he filed this medical malpractice action against the Hospital, alleging he was deprived of those senses by the Hospital's negligence. The case proceeded to trial in 2011. The jury found the Hospital sixty percent negligent and Westrich forty percent negligent.

DISCUSSION

¶9 The Hospital's appeal is based on two alleged evidentiary errors. The Westriches cross-appeal, arguing that, as a matter of law, Westrich cannot be found contributorily negligent, so the trial court erred by including him on the verdict form. The Westriches also argue there was insufficient evidence to support a finding of contributory negligence.

I. The Hospital's Appeal

¶10 The Hospital claims it is entitled to a new trial by virtue of two erroneous evidentiary rulings by the trial court. First, the court prohibited the Hospital's expert witness, Dr. Thomas Hammake, from authenticating entries from

the Physician's Desk Reference (PDR), which would have permitted the Hospital to introduce evidence that taste dysfunction was a potential side effect of a number of Westrich's prescribed medications. Second, the court declined to order a mistrial after the Westriches' counsel, in his opening statement, recited national statistics related to patient falls that were later deemed inadmissible.

¶11 We conclude the Hospital is entitled to a new trial because the court erroneously prohibited Hammake from authenticating the PDR entries discussing taste dysfunction as a potential side-effect of certain medication. The pertinent PDR entries were evidence of a potential alternative cause for a portion of Westrich's injuries; the absence of this evidence affected the Hospital's substantial rights. We also choose to address the matter of the national patient fall statistics.

A. Standard of Review

¶12 We review a decision to admit or exclude evidence under the erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Under that standard, we will uphold the trial court's evidentiary decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational approach, reached a reasonable conclusion. ***Id.*** Although this is a highly deferential standard, we must be satisfied there was a rational basis for the court's decision. ***Id.***, ¶29.

¶13 Evidentiary error does not necessarily lead to a new trial; it is subject to a harmless error analysis. ***Id.***, ¶30. The party demonstrating error must also show that the error affected one or more of its substantial rights. ***Id.*** An error affects a party's substantial rights if there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Id.***, ¶32 (citing ***State v. Dyess***, 124 Wis. 2d 525, 547, 370 N.W.2d 222 (1985)).

B. PDR Authentication

¶14 Hammake's ability to authenticate the PDR entries was disputed before trial. At a pretrial hearing, the Westriches' counsel recited deposition testimony in which Hammake acknowledged he was not an expert in the loss of taste. This testimony formed "the whole crux" of the Westriches' motion to limit Hammake's trial testimony. The Hospital countered that the PDR was admissible as a learned treatise under WIS. STAT. § 908.03(18).[1] The court ruled Hammake would be permitted to testify that the PDR indicated some of Westrich's medications can cause loss of taste as a side effect:

> So, although Dr. Hammake can't say to a reasonable degree of medical certainty that the medications that the plaintiff was on could have caused his loss, if he can say to a reasonable degree of possibility, he should not be precluded from doing that … and as long as he also can testify that the ***Physician's Desk Reference*** is something that is relied upon by experts in his field, by the medical community, … and it lists in there that a possible side effect of the medication could be a loss … of taste, the sense of taste, then I will allow that kind of testimony to come in, but that's the extent of it for Dr. Hammake in terms of this sense of taste.

¶15 At trial, the court reversed its position and prohibited Hammake from testifying about the PDR entries related to taste dysfunction. Outside the presence of the jury, the Westriches' counsel objected to Hammake's expected testimony on the ground that "he's not an expert on taste and all he's doing is trying to back door an opinion about whether the drugs have a possible [effect] on taste …." The court apparently accepted that position, concluding Hammake

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

"can't render an opinion" about whether medication affected Westrich's sense of taste. In the trial court's view, that was the end of the story: "He's not an expert in the sense of taste, ergo, [WIS. STAT. § 908.03(18)] doesn't apply, so the Court is not going to allow the admission of the Physician's Desk Reference or any reference to it in this witness'[s] testimony here."

¶16 The circuit court read WIS. STAT. § 908.03(18) far too narrowly. Subsection (18) is an exception to WIS. STAT. § 908.02's general prohibition on hearsay evidence. Under subsection (18), a published treatise, periodical, or pamphlet "on a subject of history, science or art" is admissible if the judge takes judicial notice, or a "witness expert in the subject testifies," that the author is recognized in the writer's profession as an expert in the subject. The trial court believed subsection (18) required that Hammake be an expert in the loss of taste. We disagree.

¶17 The PDR is a publication meeting the general criteria under WIS. STAT. § 908.03(18) as a work on a scientific subject. The PDR is a "compendium often relied upon by physicians to obtain knowledge of the proper uses and hazards of drugs." ***State v. Stank***, 2005 WI App 236, ¶43, 288 Wis. 2d 414, 708 N.W.2d 43. It is a well-known method by which pharmaceutical manufacturers apprise the medical profession of the dangers of a drug. ***Id.*** It is sufficiently authoritative that our supreme court has independently called upon it to describe

the side-effects of certain prescription medications.[2] *See* ***State v. Hubbard***, 2008 WI 92, ¶6 n.3, 313 Wis. 2d 1, 752 N.W.2d 839.

¶18 Hammake was capable of testifying to the authoritativeness of the PDR and the expertise of its authors. WISCONSIN STAT. § 908.03(18) requires the testimony of a "witness expert in the subject" of the published work. It does not require an expert on the plaintiff's particular dysfunction. Thus, Hammake needed only to establish that he was a medical expert and that the PDR's authors are recognized as experts in medicine.

¶19 Hammake's testimony provided the requisite foundation. Hammake is a board-certified clinical neuropsychologist, a full professor at the Medical College of Wisconsin, co-director of the College's head trauma clinic, and has treated patients experiencing both taste and smell dysfunction. In addition, Hammake testified that the information in the PDR is supplied by drug manufacturers under the auspices of the federal Food and Drug Administration:

> Q. As part of your care and treatment of patients, is it important for you to know what medications those patients are on?
>
> A. Yes.
>
> Q. And why is it important for you to know what medications they're on?
>
> A. Because medications often, in fact, almost invariably have side effects that influence symptoms that might

[2] Given this treatment of the PDR in our case law, the circuit court could plainly have taken judicial notice that the PDR is an authoritative resource whose authors are widely recognized as experts regarding the proper use and potential dangers of a drug. *See* WIS. STAT. § 902.01 (judicial notice proper for facts not subject to reasonable dispute). Judicial notice would have obviated the need for an expert witness to lay a foundation for admission of the reference manual.

> present that color how an individual perceives their problems and that may or may not adequately treat the conditions that they have.
>
> Q. All right. And is one of the sources that you reasonably rely upon within your field of practice in determining what are possible risks and side effects of medications, a document called the Physician's Desk Reference?
>
> A. Yes, sort of the bible of medications .... [T]he FDA requires that all approved medications in this country be listed in the PDR … and they be listed in such a way that it describes what the medication is approved for, what are approved dosages, what are known side effects of the medications.

¶20 Notably, the trial court did not completely bar Hammake from testifying about the PDR's contents. Apparently without recognizing the contradiction, the trial court deemed Hammake sufficiently qualified to testify that the PDR designated smell dysfunction as a potential side effect of some of Westrich's medication. There is no rational basis for conditioning the admissibility of the PDR entries on the type of side effect involved. Under WIS. STAT. § 908.03(18), Hammake was either qualified to lay a foundation for admission of *all* relevant PDR entries, or he was not. The trial court erroneously exercised its discretion by prohibiting the introduction of the entries related to taste dysfunction.

¶21 The court's error was not harmless. The central issue at trial was the Hospital's negligence. Negligence requires proof of "a causal connection between the defendant's breach of the duty of care and the plaintiff's injury ...." ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶23, 291 Wis. 2d 283, 717 N.W.2d 17. The excluded PDR entries establish a potential alternative cause for Kim's loss of taste. They represent evidence on a key issue that was withheld from the jury.

Based on the PDR entries, the jury could have reasonably concluded that Kim's taste dysfunction was caused not by head trauma, but by his medications.

¶22 The absence of alternative causation evidence was highlighted by the Westriches' counsel at trial. In closing, counsel dismissed the possibility of an alternative cause for Westrich's inability to taste and smell. Counsel claimed that, by suggesting other causes for Westrich's injuries, the Hospital was "making excuses" and attempting to mislead the jury by "bring[ing] in stuff that's not science." Counsel's argument, coupled with the erroneous exclusion of the PDR entries related to taste loss, sufficiently undermines our confidence in the outcome of the trial. *See* ***Martindale***, 246 Wis. 2d 67, ¶72 (erroneous exclusion of witness testimony on causation, coupled with closing argument stressing the absence of causation evidence, affected the plaintiff's substantial rights). Accordingly, we reverse and remand for a new trial.

C. National Patient Fall Statistics

¶23 The Hospital also alleges it is entitled to a new trial based on purportedly improper references to national patient fall statistics during the Westriches' opening statement. Having already determined that the Hospital is entitled to a new trial, we ordinarily would not address this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court should decide cases on narrowest possible grounds). However, we deem it necessary to address the matter of the statistics in the event they are a component of the Westriches' case on remand.

¶24 Early, and often, in the Westriches' opening statement, counsel cited national patient fall statistics, presumably to emphasize that patient falls are a known danger requiring written hospital policies. Among the statistics cited were:

patient falls "are the most frequently recorded cause of injury in patients while being hospitalized for other reasons;" up to three percent of all patients fall during hospitalizations nationally; as many as one million patient falls occur per year nationally; of these, 90,000 cause serious injury, and 11,000 people die. Counsel stated serious injuries included "head injuries and brain injuries, and other serious injuries, broken bones, hips, arms, legs."

¶25 From these national statistics, counsel extrapolated Wisconsin's share of patient falls and injuries based on this state's 1.8% of the national population. According to counsel, "that's about 1,600 serious falls every year in Wisconsin and about 200 deaths due to falls in the hospital."

¶26 The Hospital objected to this argument, noting that "the opening statement must conform to what the evidence will be ...." The Hospital, assuming the Westriches would attempt to introduce the statistics through the learned treatise hearsay exception, noted that their counsel had not disclosed the source of the statistics prior to trial as required by WIS. STAT. § 908.03(18)(a). The Hospital also interposed relevance and prejudice objections, noting that the Westriches' use of death statistics was likely to inflame the jury and had no application to the facts of the case.

¶27 The Westriches' counsel responded that the learned treatise exception was not at issue. Instead, counsel stated the Westriches' expert, nurse Yolanda Smith, would "testify as to her knowledge with respect to these issues." Based on this assurance, the trial court permitted counsel to proceed with his opening statement.

¶28 When Smith took the stand, the Westriches' counsel asked about her knowledge of the patient fall statistics:

> Q. Were you here for … Attorney Stombaugh's opening statement?
>
> A. Yes.
>
> Q. And were his statements about the statistics of the number of the patient falls per year accurate?
>
> A. Yes.

The Hospital objected to this testimony, and the jury was excused. The Hospital argued Smith's testimony should have been excluded because Smith lacked personal knowledge of the statistics, which she gathered from books and government publications, and the learned treatise exception to the hearsay rule did not apply. The Westriches' counsel and the circuit court, alternatively, viewed the statistics as the basis for an expert opinion under WIS. STAT. § 907.03. After a brief voir dire, the court concluded the statistics were "not going to be coming into evidence" because they were not disclosed during two prior depositions and would unfairly prejudice the defense, who could not adequately prepare for cross-examination.

¶29 The circuit court was ultimately correct to exclude the statistics. Smith's knowledge of the statistics was based not on her personal observation, knowledge, or experience, but on the assertions of others. *See* ***Grunwald v. Halron***, 33 Wis. 2d 433, 439, 147 N.W.2d 543 (1967). Because the statistics were offered to prove the truth of the matter asserted, they were hearsay. ***Id.***; *see also* WIS. STAT. § 908.01(3). Hearsay is generally inadmissible in the absence of an exception. *See* WIS. STAT. § 908.02. The Westriches do not challenge the Hospital's assertion that they did not comply with the learned treatise exception's notice requirements. *See* WIS. STAT. § 908.03(18)(a).

¶30 Nor were the statistics admissible under WIS. STAT. § 907.03. Under that statute, the facts or data upon which expert witnesses rely in forming their opinions are admissible if the court determines that "their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect." ***Id.*** However, § 907.03 does not trump the hearsay rule. *See* ***State v. Watson***, 227 Wis. 2d 167, 198, 595 N.W.2d 403 (1999). "Section 907.03 does not transform inadmissible hearsay into admissible hearsay. It does not permit hearsay evidence to come in through the front door of direct examination." ***Id.*** at 199.

¶31 Our analysis should sound a cautionary note for the parties and court on remand. If the Westriches again seek to use the statistics at trial, they must offer an expert with the requisite personal knowledge, offer the statistics for a purpose other than the truth of the matter asserted, or make use of an available exception to the hearsay rule. Their argument before the trial court—that the hearsay statistics were admissible by virtue of WIS. STAT. § 907.03—is contrary to black-letter law. *See* ***State v. Weber***, 174 Wis. 2d 98, 107, 496 N.W.2d 762 (Ct. App. 1993) ("Hearsay data upon which the expert's opinion is predicated may not be automatically admitted into evidence by the proponent and used for the truth of the matter asserted unless the data are otherwise admissible under a recognized exception to the hearsay rule.").

II. The Westriches' Cross-Appeal

¶32 We also choose to address the Westriches' cross-appeal because they will likely reprise the issue on remand. They assert the jury is precluded, as a matter of law, from finding Westrich contributorily negligent. Accordingly, they

claim the circuit court erred by denying a postverdict motion to change the jury's answers to the verdict questions regarding Westrich's negligence.

¶33 As support for this argument, the Westriches cite ***Gould v. American Family Mutual Insurance Co.***, 198 Wis. 2d 450, 543 N.W.2d 282 (1996). In that case, an institutionalized Alzheimer's patient struck the head nurse, who pursued a negligence claim. Ordinarily, a mentally disabled person is responsible for his or her torts, ***id.*** at 463, but the court recognized an exception for an institutionalized individual with a mental disability who lacks the capacity to control or appreciate his or her conduct and injures a caregiver, ***id.*** at 453. This conclusion was grounded in public policy, with the court recognizing that imposing liability in such cases would serve no purpose and would place an unreasonable burden on the negligent mentally disabled individual. ***Id.*** at 460-63.

¶34 There are two problems with the Westriches' citation to ***Gould***. First, the cases are factually distinguishable. Second, the Westriches read the opinion far too broadly.

¶35 Unlike the alleged tortfeasor in ***Gould***, Westrich was neither mentally disabled nor institutionalized. His hospitalization was meant to be brief while he recovered from the effects of a mild sedative. He does not have a mental disorder that would cause him to lack the ability to control or appreciate his conduct. We wholeheartedly agree with the circuit court's analysis:

> The present case is distinguished from cases cited by plaintiffs for the proposition that a patient cared for in an institutionalized setting cannot be negligent as a matter of law. Those cases deal with patients with mental disabilities, who are incompetent and did not have the capacity to control or appreciate their behavior, which is not the case with Mr. Westrich ….

> While Mr. Westrich's mental state was altered by a sedative drug, he was not so incapacitated that the court can say as a matter of law that he was not negligent. The extent of his incapacitation and how it factored into his falls was properly a jury question to determine.

¶36 The fact that Westrich is the plaintiff also undermines the Westriches' reliance on ***Gould***. ***Gould*** "addressed the liability of a tortfeasor, not the contributory negligence of a plaintiff." ***Jankee v. Clark Cnty.***, 2000 WI 64, ¶64, 235 Wis. 2d 700, 612 N.W.2d 297. Any notion that Westrich cannot be found contributorily negligent under ***Gould*** is absolutely dispelled by ***Jankee***, in which a patient injured himself trying to escape from a mental health facility. ***Jankee***, 235 Wis. 2d 700, ¶2. The patient was barred from any recovery because our supreme court concluded his negligence exceeded the negligence of any of the defendants as a matter of law. ***Id.***, ¶¶88-90. ***Jankee***'s upshot is that an injured plaintiff cannot wield ***Gould*** as a sword to prevent a jury from considering the degree to which the plaintiff contributed to his or her own injuries.

¶37 Factual distinctions aside, the Westriches would have us expand the ***Gould*** rule well beyond the boundaries established in that case. The ***Gould*** court never intended to relieve all mentally disabled individuals—which, we stress, does not describe Westrich—from liability for their negligence. In fact, the supreme court expressly rejected that formulation of the rule. ***Gould***, 198 Wis. 2d at 459. The court was "wary of establishing a defense to negligence based on indeterminate standards of mental disability given the complexities of the various mental illnesses and the increasing rate at which new illnesses are discovered to explain behavior." ***Id.*** at 460.

¶38 Later, in ***Jankee***, 235 Wis. 2d 700, ¶59, the supreme court reaffirmed that ***Gould*** represented a "narrow" exception to the general rule of

liability. The court did "not design the exception to apply broadly in a variety of settings against a variety of plaintiffs." ***Id.*** The ***Gould*** exception consists of four structured requirements, only one of which *might* apply to the circumstances of this case. *See* ***Jankee***, 235 Wis. 2d 700, ¶60 (***Gould*** exception applies if the person is institutionalized, has a mental disability, lacks the capacity to control his or her conduct, and has committed an injury to a caretaker employed for financial compensation). Again, whether Westrich was lucid is a fact matter for the jury. The ***Gould*** exception "does not apply to more expansive situations in which a person generally is unable to control his or her conduct."[3] ***Jankee***, 235 Wis. 2d 700, ¶61.

¶39 The Westriches also assert there was insufficient evidence to support the jury's finding of causal negligence against Westrich. We decline to reach this issue in light of our conclusion that the Hospital is entitled to a new trial.

¶40 Costs awarded to the Hospital. *See* WIS. STAT. RULE 809.25.

By the Court.—Judgment reversed and cause remanded with directions.

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

[3] Also addressed in ***Jankee v. Clark County***, 2000 WI 64, 235 Wis. 2d 700, 612 N.W.2d 297, but not mentioned by the parties to this appeal, was an alternative theory that would expunge the contributory negligence defense if the plaintiff shows that (1) a special relationship existed, giving rise to a heightened duty of care; and (2) the defendant caregiver could have foreseen the particular injury that is the source of the claim. We will not abandon our neutrality to develop arguments for a party. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.