COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2937

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

KIMBERLY D. ERKKILA-MILLER AND ERIK J. MILLER,

PLAINTIFFS-RESPONDENTS,

V.

JAMES E. STOLL, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC. AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-APPELLANTS,

KING COUNTY MEDICAL BLUE SHIELD AND UNIFORM MEDICAL PLAN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Affirmed.*

Before Fine, Curley and Hoover, JJ.

PER CURIAM. James E. Stoll, M.D., Physicians Insurance Company of Wisconsin, Incorporated, and the Wisconsin Patients Compensation Fund appeal from a judgment in favor of Kimberly D. Erkkila-Miller, on her medical malpractice claim against Stoll.[1] Stoll argues: (1) that the trial court erred in instructing the jury; and (2) that the evidence is insufficient to support the jury's award of future damages. We affirm.

BACKGROUND

Erkkila-Miller was referred to Stoll for removal of a portion of her eleventh rib, which had been causing her pain. On August 10, 1990, Stoll examined Erkkila-Miller and advised her that he was going to remove part of her eleventh rib, in a procedure called a rib resection. Stoll informed Erkkila-Miller that the rib resection might not relieve her pain, and that she might need to undergo a nerve block to relieve the pain. On September 4, 1990, Stoll operated on Erkkila-Miller and removed a portion of one of her ribs that appeared to him to be visually abnormal. Stoll told Erkkila-Miller's husband, and wrote in Erkkila-Miller's medical records, that he had resected Erkkila-Miller's eleventh rib.

About a year after the surgery, after Erkkila-Miller recovered from what she characterized as pain caused by the surgical procedure, she continued to experience the same pain about which she had complained prior to the surgery. She did not consult a doctor about her continued pain until August of 1994. On August 18, 1994, an X-ray of Erkkila-Miller's ribcage revealed that Stoll had resected her twelfth rib rather than her eleventh rib. Thereafter, Erkkila-Miller

[1] Throughout this opinion we will refer to James E. Stoll, M.D., Physicians Insurance Company of Wisconsin, Incorporated, and the Wisconsin Patients Compensation Fund collectively as Stoll.

again underwent surgery to resect her eleventh rib on May 5, 1995. Dr. Ralph Aye operated on Erkkila-Miller, and resected what he believed to be her eleventh rib. Dr. Aye took an X-ray immediately after the surgery, however, and discovered that he had actually resected Erkkila-Miller's tenth rib. Dr. Aye, therefore, took Erkkila-Miller back into the operating room and resected her eleventh rib.

The 1995 operation relieved the pain that Erkkila-Miller had been feeling from her eleventh rib. She then experienced different pain, however, because the incisions from her multiple rib resections had damaged the nerves in her muscle tissue.

Erkkila-Miller sued Stoll based on his failure to resect her eleventh rib during the 1990 operation. Pursuant to § 655.44, STATS., Erkkila-Miller first made a request for mediation of her claim, on June 8, 1995.[2] She filed her

[2] Section 655.44, STATS., provides:

> **Request for mediation prior to court action.**
> **(1)** REQUEST AND FEE. Beginning September 1, 1986, any person listed in s. 655.007 having a claim or a derivative claim under this chapter for bodily injury or death because of a tort or breach of contract based on professional services rendered or that should have been rendered by a health care provider may file a request for mediation and shall pay the fee under s. 655.54.
> **(2)** CONTENT OF REQUEST. The request for mediation shall be in writing and shall include all of the following information:
> (a) The claimant's name and city, village or town, county and state of residence.
> (b) The name of the patient.
> (c) The name and address of the health care provider alleged to have been negligent in treating the patient.
> (d) The condition or disease for which the health care provider was treating the patient when the alleged negligence occurred and the dates of treatment.
> (e) A brief description of the injury alleged to have been caused by the health care provider's negligence.
> **(3)** DELIVERY OR REGISTERED MAIL. The request for mediation shall be delivered in person or sent by registered mail to the director of state courts.

(continued)

complaint on September 14, 1995. On April 21, 1997, a jury entered a verdict in favor of Erkkila-Miller, finding that she was injured by Stoll's negligent care and treatment, and that she exercised reasonable diligence in discovering her injury. The jury awarded Erkkila-Miller damages for past and future medical and hospital expenses, past loss of earnings, and past and future pain, suffering and disability. The trial court entered judgment accordingly.

DISCUSSION

1. Jury Instructions

"[T]he trial court has wide discretion in choosing the language of jury instructions and if the instructions given adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language requested by [a party]." ***State v. Herriges***, 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990). Although the trial court must provide the legal framework for a party's arguments, it need not iterate the party's contentions. *See* ***State v. Davidson***, 44 Wis.2d 177, 191–192, 170 N.W.2d 755, 763 (1969). Moreover, a trial court should not instruct the jury on a

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> **(4)** STATUTE OF LIMITATIONS. Any applicable statute of limitations is tolled on the date the director of state courts receives the request for mediation if delivered in person or on the date of mailing if sent by registered mail. The statute remains tolled until 30 days after the last day of the mediation period under s. 655.465 (7).
>
> **(5)** NO COURT ACTION COMMENCED BEFORE MEDIATION. Except as provided in s. 655.445, no court action may be commenced unless a request for mediation has been filed under this section and until the expiration of the mediation period under s. 655.465 (7).
>
> **(6)** NOTICE OF COURT ACTION TO DIRECTOR OF STATE COURTS. A claimant who files a request for mediation under this section and who commences a court action after the expiration of the mediation period under s. 655.465 (7) shall send notice of the court action by 1st class mail to the director of state courts.

particular issue unless that issue is fairly raised by the evidence. *See* ***D.L. v. Huebner***, 110 Wis.2d 581, 624, 329 N.W.2d 890, 910 (1983).

Stoll argues that the trial court erred in refusing to give his requested jury instruction defining reasonable diligence. Stoll's requested instruction provided:

> Reasonable diligence is defined as such diligence as the great majority of persons would use in the same or similar circumstances. A plaintiff need not take extra-ordinary steps to secure a full medical analysis. However, a plaintiff may not close his or her eyes to means of information reasonably accessible to himself or herself and must in good faith apply his or her attention to those particulars which may be inferred to be within his or her reach.

The trial court instructed the jury as follows: "Reasonable diligence is defined as such diligence as the great majority of persons would use in the same or similar circumstances." The trial court's instruction was an accurate statement of the law, and provided the jury with the legal framework necessary to decide whether Erkkila-Miller exercised reasonable diligence in discovering her injury; the additional language Stoll requested is surplusage that merely illustrates the principle set out in the trial court's instruction. The trial court, therefore, did not err in refusing to give Stoll's requested language. *See* ***Herriges***, 155 Wis.2d at 300, 455 N.W.2d at 637; ***Davidson***, 44 Wis.2d at 191–192, 170 N.W.2d at 763.

Stoll also argues that the trial court erred in omitting the following paragraph from his proposed negligence instruction:

> If you find from the evidence that more than one method of treatment for Kimberly D. Erkkila-Miller's condition was recognized as reasonable given the state of medical knowledge at that time, then Dr. Stoll was at liberty to select any of the recognized methods. Dr. Stoll was not negligent because he chose to use one of these recognized treatment methods rather than another recognized method if

> he used reasonable care, skill and judgment in administering the method.

Stoll argues that an instruction regarding alternate treatment methods was appropriate because the experts testified that there are several acceptable methods for determining where to operate to resect a painful rib. Specifically, Stoll asserts that using a pre-operative or an intra-operative X-ray, using a bone scan and using palpitation of the ribs to locate the painful rib were all identified as appropriate methods to determine where to operate. Therefore, Stoll asserts, the jury should have been instructed that Stoll was not negligent for choosing palpitation to determine where to operate.

The trial court instructed the jury:

> In diagnosing and treating Kimberly Erkkila-Miller's condition, James Stoll, M.D., was required to use the degree of care, skill and judgment which reasonable specialists who practice the specialty which Dr. Stoll practices, [*sic*] would exercise in the same or similar circumstances, having due regard for the state of medical science at the time Kimberly Erkkila-Miller was diagnosed and treated. A doctor who fails to conform to this standard is negligent. The burden is on Kimberly Erkkila-Miller to prove that Dr. Stoll was negligent.
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> A doctor is not negligent, however, for failing to use the highest degree of care, skill and judgment, or solely because a bad result may have followed his diagnosis and surgical procedure. The standard you must apply in determining if Dr. Stoll was negligent is whether Dr. Stoll failed to use the degree of care, skill and judgment which reasonable specialists would exercise, given the state of medical knowledge at the time of the diagnosis and surgery in issue.
>
> You have heard testimony during this trial from doctors who have testified as expert witnesses. The reason for this is because the degree of care, skill and judgment which a reasonable doctor would exercise, is not a matter within the common knowledge of lay persons. The standard is within the special knowledge of experts within the field of medicine and can only be established by testimony of experts. You therefore may not speculate or

> guess what the standard of care, skill and reasonable judgment is in deciding this case, but rather must attempt to determine it from the expert testimony that you have heard during this trial.

The trial court's negligence instruction adequately informed the jury of the applicable law. Although the trial court's instruction did not specifically mention alternate treatment methods, as did Stoll's proposed instruction, the jury was adequately informed that Stoll was not negligent if the method of treatment or diagnosis he used was reasonable given the state of medical knowledge at that time. Thus, the trial court did not err in refusing Stoll's proposed instruction. *See* ***Herriges***, 155 Wis.2d at 300, 455 N.W.2d at 637; ***Davidson***, 44 Wis.2d at 191–192, 170 N.W.2d at 763.

2. Future Damages

Stoll's final argument is that the evidence is insufficient to support the jury's award of future damages to Erkkila-Miller. In support of this argument, Stoll asserts that the only evidence regarding the amount of future damages was a "guess" by one of Erkkila-Miller's experts, and that this evidence is insufficient to support the jury award because the expert did not state his opinion to a reasonable degree of medical certainty. Additionally, Stoll argues that there was insufficient evidence that Erkkila-Miller's future damages were caused by Stoll's negligence; he asserts that there is no evidence that Erkkila-Miller would not have experienced continued pain if Stoll had resected her eleventh rib in 1990.

We will not overturn a verdict unless, after considering all credible evidence, and all reasonable inferences that can be drawn from the evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. *See* ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996); § 805.14(1), STATS. A jury may not, however,

base its findings on conjecture and speculation. *See* ***Oesterle v. Couch***, 10 Wis.2d 293, 296–297, 102 N.W.2d 763, 765 (1960); ***Rodenkirch v. Johnson***, 9 Wis.2d 245, 248, 101 N.W.2d 83, 85 (1960).

Erkkila-Miller offered the following evidence from the deposition of her expert medical witness regarding the amount of her future damages:

> Q: Do you have an opinion to a reasonable degree of medical certainty in your field of expertise as to whether or not those expenses that are enumerated in Exhibit 11 are likely to be incurred by her over her lifetime?
>
> A: Well, I made a very conservative guess. I mean, I was talking in the range of a number of visits to the office, a small number of visits, maybe eight a year. I was talking about medication of approximately $100 a month.
>
> Right now, her medication is much less, but it is because of the pregnancy and she is not taking any because of the effect on the pregnancy.
>
> And we have already discussed the fact that after the pregnancy we will restart the Neurontin, which is expensive. So I tried to keep all of my estimates low, and have, but tried to make them reasonable.
>
> Certainly, we know there may be ongoing therapy required. Message therapy. The biofeedback has been very impressive, and I expect that to be ongoing. And so I think it is very reasonable, based on my experience, of saying $3,500 a year.

Stoll argues that this evidence is insufficient to support the jury's award of future damages because the expert "guessed" at the amount of damages, rather than expressing them to a reasonable degree of medical certainty. When read in context, however, it is clear that the expert was not merely guessing at the amount of damages, and that he expressed his opinion to a reasonable degree of medical certainty. The expert's estimate was given in response to a question asking whether he had an opinion to a reasonable degree of medical certainty regarding

Erkkila-Miller's future medical expenses, and the expert later confirmed that his estimate met this standard:

> Q: Then in summary, sir, with respect to the future costs enumerated in Exhibit 11, do you have an opinion to a reasonable degree of medical certainty in your filed of expertise whether or not those will be costs incurred by Mrs. Miller throughout her lifetime?
>
> A. Yes, that is my opinion, based on my expertise, that these costs will be incurred by her during her lifetime, yes.

Further, the expert based his estimates on what he believed to be reasonable costs of the various treatments that he expected Erkkila-Miller to receive. This expert testimony was sufficient to support the jury's determination of the amount of future medical expenses Erkkila-Miller would incur.

As noted, Stoll also asserts that the evidence is insufficient to establish that his failure to resect Erkkila-Miller's eleventh rib caused her future pain, and consequently, future medical expenses, that she would not have otherwise incurred. Contrary to this assertion, however, Erkkila-Miller presented testimony that after her eleventh rib was resected she no longer experienced the pain that originally compelled her to seek medical treatment, but that because she had to undergo multiple surgeries to get her eleventh rib resected, she was experiencing a different pain, called myofascial pain, as a result of damage to the nerves in her muscle tissue. Erkkila-Miller's expert testified that Erkkilla-Miller may have had some myofascial pain if Stoll had resected her eleventh rib, but that she was experiencing more myofascial pain as a result of the multiple rib resections. Although the expert did not quantify the additional pain Erkkila-Miller was experiencing, the evidence sufficiently supports the jury's finding that Stoll's failure to remove Erkkila-Miller's eleventh rib caused her future pain, and consequently future medical expenses, that she would not have otherwise incurred.

It was within the jury's province to determine what amount of Erkkila-Miller's pain was attributable to Stoll's negligence. *See* ***Rupp v. Travelers Indemnity Co.***, 17 Wis.2d 16, 24, 115 N.W.2d 612, 617 (1962) (where the defendant's negligence exaggerates an existing condition it is "within the province of the jury to evaluate how much of the medical expenses, pain and suffering, loss of wages, and disability existed and was caused by the [defendant's negligence]").

By the Court.—Judgment affirmed.

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