COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1007 **Cir. Ct. No. 98CV7583**

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

TAMMY L. TUCCI,

PLAINTIFF-APPELLANT,

V.

RONALD G. RUBIN M.D. AND
PHYSICIANS INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS,

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Tammy L. Tucci appeals the judgment rendered in favor of Dr. Ronald G. Rubin and his insurance company after a jury trial in her

medical malpractice suit. Tucci argues that the trial court: (1) erroneously exercised its discretion in permitting a defense expert witness to testify that Dr. Rubin violated no standard of care when he engaged in a sexual relationship with her; (2) erred in crafting the standard of care jury instruction; and (3) erred in not finding Dr. Rubin negligent as a matter of law. We affirm.

I. BACKGROUND.

¶2 Dr. Rubin, a licensed psychiatrist, was working in Wisconsin on a temporary assignment evaluating nursing home patients when he met Tucci while buying used furniture. The two soon began a social relationship. At trial, Dr. Rubin and Tucci disagreed on the extent of their relationship. However, they both agreed that they had a social relationship that included sexual contact.

¶3 Dr. Rubin prescribed drugs, including some drugs that contained narcotics, for Tucci after she complained of having migraine headaches. Tucci maintained that Dr. Rubin also treated her for her psychiatric problems, but Dr. Rubin denied ever counseling or treating Tucci for her psychiatric problems. Tucci, who previously served time in prison for a drug offense, was a recovering addict. Ultimately, Dr. Rubin became alarmed by Tucci's requests for medications and ended their relationship.

¶4 Tucci sued Dr. Rubin, claiming that he was negligent in the medical care he provided to her and that he sexually exploited her, in violation of WIS. STAT. § 895.70. As a result of Dr. Rubin's acts, Tucci contended that she sustained physical and emotional injuries, including becoming re-addicted to drugs. She sought both compensatory and punitive damages.

¶5 At trial, two expert witnesses offered conflicting testimony. Tucci called Dr. Herzl Spiro, a psychiatrist, who opined that Dr. Rubin and Tucci had maintained a psychiatrist/patient relationship, that Dr. Rubin had engaged in negligent care, and that he had violated the sex exploitation statute by having sex with Tucci. In contrast, Dr. Rubin called Dr. David Benzer, a medical director at a local hospital devoted to the care of recovering professionals. Dr. Benzer testified that, after reviewing the records and depositions, he was of the opinion that Dr. Rubin had not treated Tucci for any psychiatric problem, that Dr. Rubin had not been negligent, and that Dr. Rubin had not violated the sex exploitation statute.

¶6 During the jury instruction conference, the parties disagreed over the standard of care instruction. Tucci argued that because she testified that Dr. Rubin rendered psychiatric care to her, the jury should be instructed that Dr. Rubin was subject to the standard of care for a psychiatrist. Dr. Rubin proposed an instruction that stated he only provided general medical care. Ultimately, the trial court decided to instruct the jury that Dr. Rubin was subject to the standard of care of a "reasonable psychiatrist providing general medical care." The jury found that Dr. Rubin never rendered any "psychotherapy, counseling or other assessment or treatment involving any mental or emotional illness, symptom or condition" to Tucci, and that Dr. Rubin was not negligent in the care and treatment he provided to her. Tucci filed motions after verdict that the trial court denied.

II. ANALYSIS.

A. *Expert testimony*.

¶7 Tucci contends that the trial court erroneously exercised its discretion in permitting the defense expert witness, Dr. Benzer, to testify that Dr. Rubin did not violate any standard of care owed to Tucci. We reverse a trial

court's determination to allow expert testimony only if it is an erroneous exercise of discretion. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 895, 467 N.W.2d 555 (Ct. App. 1991). If the determination manifests a reasoned result based upon the relevant facts and applicable law, we will find no misuse of discretion. ***Id.***

¶8 Under WIS. STAT. § 907.02 (1999-2000),[1] a person may give an opinion within his or her area of expertise as long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education." An expert's competence may be shown by experience or technical and academic training, so long as the witness knows something beyond that which is generally known in the community. *See* ***Hollingsworth***, 160 Wis. 2d at 896. Ordinarily, in medical malpractice cases, a determination of whether the standard of care has been met requires the testimony of an expert witness. *See* ***Thiery v. Bye***, 228 Wis. 2d 231, 245, 597 N.W.2d 449 (Ct. App. 1999).

¶9 Tucci's argument, that the trial court erroneously exercised its discretion by allowing Dr. Benzer to testify regarding the standard of care Dr. Rubin owed her, is twofold: the trial court erroneously ruled that Dr. Rubin was not providing psychiatric care to Tucci; and its admission of Dr. Benzer's testimony was also erroneous because it was based on this incorrect standard of care. In other words, Tucci argues that had the trial court correctly ruled that Dr. Rubin had provided psychiatric care, Dr. Benzer should not have been permitted to testify concerning the standard of care owed by Dr. Rubin to Tucci, and Dr. Benzer should not have been permitted to give an opinion concerning whether the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

sexual relationship between the parties violated the standard of care. Tucci misstates the trial court's ruling.[2]

¶10 The trial court never ruled that Dr. Rubin was not engaged in a psychiatrist/patient relationship with Tucci. The question of the type of treatment given by Dr. Rubin to Tucci was the major dispute between the parties. The trial court allowed both experts to testify concerning the issue. In giving his opinion, Dr. Benzer stated that he believed Dr. Rubin never performed any psychiatric assessment or treatment. Dr. Spiro disagreed. The jury resolved this dispute when it answered "No" to a question on the verdict asking: "Did Dr. Rubin render Tammy Tucci psychotherapy, counseling or other assessment or treatment involving any mental or emotional illness, symptom or condition?" Thus, contrary to Tucci's contention, the jury, not the trial court, determined that Dr. Rubin only supplied Tucci with medical care. Indeed, the trial court stated during the instruction conference: "I'm not telling the jury that Rubin was just, as a psychiatrist, was just providing general medical care. I'm not making that finding…." Thus, Tucci is mistaken in her belief that the trial court determined that Dr. Rubin rendered only general medical care to Tucci.

¶11 While an osteopath and not a medical doctor, Dr. Benzer had extensive experience in addiction medicine and treating impaired professionals, including allegations of sexual contact with their patients. He has also taught medical students on these subjects. Thus, Dr. Benzer was qualified to give an opinion, based upon his review of the medical records, as to whether Dr. Rubin

[2] Tucci also fails to give record cites to support her assertions.

gave any psychiatric care to Tucci, and whether Dr. Rubin violated any standard of care.

B. *The trial court's standard of care instruction was harmless error.*

¶12 A trial court has wide discretion as to what instructions to give to a jury. ***Anderson v. Alfa-Laval Agri., Inc.***, 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997). The instructions must fully and fairly inform the jury as to applicable principles of law. ***Id.*** at 345. If an instruction is erroneous or the trial court erroneously refused to give a proper instruction, a new trial will not be ordered unless the trial court's error was prejudicial. ***Id.*** An error is prejudicial only if it appears that the result would have been different had the error not occurred. ***Id.***

¶13 Tucci submits that the trial court gave an erroneous jury instruction concerning the standard of care to be applied to Dr. Rubin's actions. The trial court instructed the jury:

> In treating Tammy Tucci's condition, Dr. Rubin was required to use the degree of care, skill and judgment which reasonable psychiatrists providing general medical care would exercise in the same or similar circumstances, having due regard for the state of medical science at the time Tammy Tucci was treated.

The record reflects that, during the instruction conference, the two attorneys strongly differed on the correct standard of care. As noted, Tucci argued that Dr. Rubin should be held to the standard of care of a "reasonable psychiatrist[]," while Dr. Rubin argued that he should be held to the standard of care of "a reasonable

psychiatrist providing general medical care."[3] The trial court elected to give Dr. Rubin's proposed instruction.

¶14 We agree with Tucci that the instruction given by the trial court was incomplete because it failed to account for Tucci's version of the events; i.e., that Dr. Rubin gave her psychiatric care. In instructing that Dr. Rubin would be held to the standard of care of "reasonable psychiatrists providing general medical care," the trial court did not address Tucci's contention that Dr. Rubin also provided her with psychiatric care. Thus, giving only the one instruction concerning the standard of care was erroneous because other evidence supported a different standard of care.

¶15 Here, however, the error is harmless. When answering the special verdict "No" as to whether Dr. Rubin rendered "any psychotherapy, counseling or other assessment or treatment involving any mental or emotional illness, symptom or condition," the jury determined that the standard of care owed by Dr. Rubin was that of a "psychiatrist providing only general medical care." In light of the jury's decision, any error in giving only one standard of care instruction was harmless. Had the trial court correctly instructed the jury on the alternative standard of care incorporating Tucci's allegations of psychiatric care, the jury would not have had an occasion to use it as the factual underpinnings for its use were not present. Thus, the error here was not prejudicial because a different result was not likely. *See* ***State v. Dyess***, 124 Wis. 2d 525, 547, 370 N.W.2d 222 (1985) (stating that an error is harmless in a criminal case if there is no reasonable possibility that the

[3] Although Tucci's pleadings only alleged ordinary negligence of a doctor, the trial court allowed Tucci to amend her pleadings to read "psychiatrist."

error contributed to the outcome of the case); *see also* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986) (applying the ***Dyess*** prejudice formulation to civil cases).

C. *The trial court correctly refused to find Dr. Rubin negligent as a matter of law.*

¶16 Finally, Tucci submits that the trial court erred in denying her motion after verdict by failing to find that Dr. Rubin was negligent as a matter of law. As support for her contention, Tucci looks to what she terms the "implicit conclusion" in ***L.L. v. Medical Protective Co.***, 122 Wis. 2d 455, 362 N.W.2d 174 (Ct. App. 1984), that a doctor is negligent whenever the doctor is a psychiatrist and engages in sexual contact with a patient. As a consequence, Tucci contends Dr. Rubin violated WIS. STAT. § 895.70.[4] We disagree.

---

[4] WISCONSIN STAT. § 895.70 provides:

> **Sexual exploitation by a therapist.**
>
> **(1)** DEFINITIONS. In this section:
>
> (a) "Physician" has the meaning designated in s. 448.01 (5).
>
> (b) "Psychologist" means a person who practices psychology, as described in s. 455.01 (5).
>
> (c) "Psychotherapy" has the meaning designated in s. 455.01 (6).
>
> (d) "Sexual contact" has the meaning designated in s. 940.225 (5) (b).
>
> (e) "Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.

(continued)

(2) CAUSE OF ACTION. (a) Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, counseling or other assessment or treatment of or involving any mental or emotional illness, symptom or condition has a civil cause of action against the psychotherapist for all damages resulting from, an sing out of or caused by that sexual contact. Consent is not an issue in an action under this section, unless the sexual contact that is the subject of the action occurred more than 6 months after the psychotherapy counseling, assessment or treatment ended.

(b) Notwithstanding ss. 801.09 (1), 801.095, 802.04 (1) and 815.05 (1g) (a), in an action brought under this section, the plaintiff may substitute his or her initials, or fictitious initials, and his or her age and county of residence for his or her name and address on the summons and complaint. The plaintiff's attorney shall supply the court the name and other necessary identifying information of the plaintiff. The court shall maintain the name and other identifying information, and supply the information to other parties to the action, in a manner that reasonably protects the information from being disclosed to the public.

(c) Upon motion by the plaintiff, and for good cause shown, or upon its own motion, the court may make any order that justice requires to protect:

1. A plaintiff who is using initials in an action under this section from annoyance, embarrassment, oppression or undue burden that would arise if any information identifying the plaintiff were made public.

2. A plaintiff in an action under this section from unreasonably long, repetitive or burdensome physical or mental examinations.

3. The confidentiality of information which under law is confidential, until the information is provided in open court in an action under this section,

(3) PUNITIVE DAMAGES. A court or jury may award punitive damages to a person bringing an action under this section,

(4) CALCULATION OF STATUTE OF LIMITATIONS. An action under this section is subject to s. 893.585.

(continued)

¶17 The test to be applied following a jury trial is found in WIS. STAT. § 805.14. It reads:

> **Motions challenging sufficiency of evidence; motions after verdict.**
>
> **(1)** TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

¶18 Here, credible evidence supports the jury's verdict. Dr. Rubin disputed Tucci's version. He argued that he only provided general medical care to Tucci in prescribing medication for her migraine headaches. As Dr. Benzer explained, there are circumstances when a doctor, even a psychiatrist, may have sexual contact with a patient without committing a negligent act or running afoul of WIS. STAT. § 895.70:

> I'll give you another example, which is something that I would say concerns the absolute majority of physicians in practice, and that is that as physicians we have significant others, girlfriends, and boyfriends, and we have husbands and we have wives. The majority of us prescribe for those people during the course of our life. And of course, most of us have sexual relationships with those people as well.

> **(5)** SILENCE AGREEMENTS. Any provision in a contract or agreement relating to the settlement of any claim by a patient against a therapist that limits or eliminates the right of the patient to disclose sexual contact by the therapist to a subsequent therapist, the department of regulation and licensing, the department of health and family services, the patients compensation fund peer review council or a district attorney is void.

> So if we're going to say that one can never treat an individual and have a sexual relationship with that individual, that that is an offense that for which we need to take medical licenses away, you're going to have very few doctors left in this state to treat you if that's the standard that you're going to hold to.

Thus, Dr. Benzer opined that not all patient sexual contact with a psychiatrist is forbidden.

¶19 In asserting that, as a matter of law, Dr. Rubin had to be found negligent, Tucci fails to separate the doctor's specialty from the type of medical care he actually rendered. The question of whether there was a negligent act by Dr. Rubin or whether he fell within the ambit of § 875.70 required the jury to decide the type of care he gave Tucci. The jury concluded that Dr. Rubin never rendered any psychiatric care to Tucci. Contrary to Tucci's argument, Dr. Rubin's status as a psychiatrist did not automatically make him negligent for having sexual contact with Tucci. Therefore, he did not violate the statute forbidding sexual contact between psychiatrists and their psychiatric patients and, further, he was not negligent *per se* for having sexual contact with her. Thus, the trial court properly ruled that Dr. Rubin was not negligent as a matter of law. As the trial court correctly noted: "Looking at the evidence in the very best light to support the jury's verdict, would there be evidence to support it, and there certainly would be evidence to support the verdict, [be]cause the case went on credibility."

¶20 Moreover, ***L.L. v. Medical Protective*** is inapposite. There, no dispute existed as to the type of care rendered. The parties agreed that the patient had received psychiatric care. In the instant case, however, the jury determined that Dr. Rubin had not rendered psychiatric care. Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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