COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1626 **Cir. Ct. No. 98CV4670**

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

BARBARA GARDNER, CHARLES GARDNER,
AND KIRA GARDNER, A MINOR,
BY HER GUARDIAN AD LITEM,
PAUL J. SCOPTUR,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT,

SINAI SAMARITAN MEDICAL CENTER, INC.,

DEFENDANT-APPELLANT,

RICHARD PANISH, M.D., AND
ABC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from judgments of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Sinai Samaritan Medical Center, Inc. (Sinai) appeals the judgments entered against it following a jury trial in a medical malpractice action brought by Kira Gardner and her parents against Sinai and Dr. Richard Panish. Sinai argues that it is entitled to a new trial because the special verdict failed to list Kira's mother, Barbara Gardner, in the comparative fault question. Because sufficient evidence was admitted into evidence which, if believed by the jury, established Kira's mother's causal negligence and the inclusion of Barbara on the verdict may have resulted in a different verdict, we reverse and remand for a new trial.

I. BACKGROUND.

¶2 Kira was ten years old when she fell off her bicycle in early June 1995. Her mother, Barbara, placed some ice on her leg because of Kira's complaints of pain, but later that day Kira recovered sufficiently to go back outside to play. However, Kira continued to complain of leg pain later that day and in the days that followed. On June 20, 1995, approximately two to three weeks after the bicycle accident, Barbara took Kira to see her doctor, Violeta Singson, for "an annual well-child or check-up visit." According to the medical history taken by Dr. Singson's assistant on June 20, 1995, Barbara reported that Kira had "right leg pain … two to three weeks," but "no history of trauma." Nowhere do these records indicate that Dr. Singson was informed about Kira's bicycle accident. At trial, Barbara disputed the medical records, contending that she had reported the bike accident to Dr. Singson's assistant. In any event, Dr. Singson ordered an x-ray of Kira's right hip and femur. Kira went to Sinai Samaritan Medical Center for the x-ray. There, the x-ray technician failed to take

what is called a special oblique or "frog leg" view of Kira's leg. The x-ray was read by Dr. Richard Panish, who determined that Kira's leg was normal. Dr. Singson then advised Kira's mother of the result.

¶3 After the x-ray, Kira continued to complain of leg pain every day, frequently limped, and often requested to be taken back to the doctor. Despite Kira's complaints, her mother did not take her back to the doctor until October 1995, at which time Kira was diagnosed with a slipped capitol femoral epiphysis (SCFE). In order to fix the injury, a pin was placed in Kira's hip, leaving her with one leg shorter than the other. She also showed signs of early degenerative arthritis.

¶4 Kira, by her guardian ad litem and her parents, sued Dr. Panish and Sinai. Expert medical witnesses called by Kira testified that SCFE is a progressive injury and, had it been addressed immediately, Kira would have been left with only a 10% disability. The delay in treatment resulted in her sustaining a 40% disability.

¶5 At the jury instruction conference, the attorneys for Dr. Panish and Sinai requested that the comparative negligence verdict question include Barbara so that her negligence could be compared directly with any negligence attributed to Dr. Panish and Sinai. Although the trial court originally agreed to the request, the trial court changed its mind, ruling that: (1) the failure to file a counterclaim against Barbara Gardner prevented the court from including her in the comparative negligence question; (2) there was no evidence that Barbara Gardner's negligence was causal; and (3) no medical expert testified to a reasonable degree of medical certainty to the effect of Barbara's negligence on Kira's injury.

¶6 The jury found that Dr. Panish was not negligent and, because Sinai had stipulated to liability, Sinai was ordered to pay the $335,000 in compensatory damages that the jury awarded to Kira.[1]

¶7 At the post-trial motion hearing, the trial court conceded that it erred in ruling that a counterclaim was needed before Kira's mother could be included on the verdict, but the trial court confirmed its belief that insufficient evidence was submitted to permit the jury to compare Barbara's negligence with that of Sinai or Dr. Panish because: (1) no expert witness testified to a "reasonable degree of medical probability" when discussing Barbara's negligence; and (2) no expert testified to the percentage of harm that Barbara caused by her delay. Additionally, the trial court ruled that Barbara was not negligent for failing to take Kira to the doctor for two to three weeks following the accident and in failing to reveal the bike accident because these acts were "explained away." The trial court also concluded that Barbara was not negligent for her delay in taking Kira back to the doctor after the x-ray because Barbara was "unsophisticated." Finally, the trial court opined that had Barbara been negligent, she was a successive tortfeasor and, therefore, should not have been on the comparative negligence questionnaire with Dr. Panish and Sinai.

II. ANALYSIS.

¶8 Sinai argues that the trial court erred in failing to include Barbara Gardner on the verdict's comparative negligence question. Sinai seeks a new trial pursuant to WIS. STAT. § 805.15(1) (1999-2000), which provides, "A party may

[1] The jury awarded nothing to Barbara for her claim seeking compensation for the loss of aid, comfort, society and companionship of her daughter.

move to set aside a verdict and for a new trial because of errors in the trial … or in the interest of justice."

¶9 The determination of whether the special verdict should have inquired as to the alleged negligence of a party not being sued is a question of law which we review *de novo*. *See* ***Zintek v. Perchik***, 163 Wis. 2d 439, 454, 471 N.W.2d 522 (Ct. App. 1991). When a party to a lawsuit seeks a new trial based upon an alleged error of the court in determining whether to include a party's negligence on the special verdict, the inquiry focuses on whether the claimed error resulted in prejudice to the defendant. *See* ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 83-84, 443 N.W.2d 50 (Ct. App. 1989). Prejudice occurs if the errors "have affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." *See* ***Douglas-Hanson Co., Inc. v. B.F. Goodrich Co.***, 229 Wis. 2d 132, 150-51, 598 N.W.2d 262 (Ct. App. 1999). For an error "to affect the substantial rights" of a party and thus warrant reversal, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue; for these purposes, a reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. ***Martindale v. Ripp***, 2001 WI 113, ¶71, 246 Wis. 2d 67, 629 N.W.2d 698; *see also* WIS. STAT. ANN. § 805.18(2).

¶10 Sinai contends that whenever evidence is admitted showing that a person is negligent, and his or her negligence contributed to the injury, then that person must be included on the verdict. Sinai states that it objected to the trial court's refusal to include Barbara on the special verdict's comparative negligence question because evidence in the record supported its position that Barbara was negligent and her negligence contributed to Kira's injury. Sinai points to both Dr. Singson's medical records, which contained no notation that Barbara ever advised

Dr. Singson of the bike accident, and Barbara's own testimony that she waited four months before taking Kira back to the doctor, despite Kira's persistent complaints of pain and requests to see a doctor, as evidence of negligence. Further, Sinai notes that because it established, through Kira's expert witness, that the delay in treatment caused Kira's injury to escalate from a 10% disability rating to a 40% disability rating, there was ample evidence for the jury to determine Barbara's negligence percentage. Thus, Sinai concludes that adding Barbara to the comparative negligence verdict questionnaire could very well have produced a different result. Finally, Sinai argues that Barbara was a joint, not a successive, tortfeasor. We agree with all of Sinai's contentions.

¶11 We first address the trial court's ruling that insufficient evidence exists in the record to prove Barbara's negligence because the expert witness, testifying on cross-examination, never stated that his answers were to "a reasonable degree of medical probability"; rather, he testified that he "believe[d]" that Barbara's actions, or lack thereof, contributed to her daughter's injury.

¶12 The following exchange occurred between counsel for Dr. Panish and Dr. Wilbur Smith, a radiologist:

> Q. And I want you to assume that the testimony that this jury heard was that the pain not only persisted but that the little girl could not use her leg, couldn't walk, couldn't basically do anything with that right leg and to stay off the right leg, and that she told her mother on multiple occasions during the day, please take me back to a doctor for over four months. You'd agree with me that under those circumstances you'd certainly expect the parent to take the child back to the doctor?
>
> A. I would expect it, yes.
>
> Q. And you would agree that the delay in getting this child to a doctor to have this injury looked at when

> the symptoms persisted did substantial damage to this joint?
>
> A. I believe that the delay in repairing this lesion and failure to recognize it ended up in substantial damage, yes, sir.

¶13 The trial court acknowledged that the magic words, "a reasonable degree of medical probability," need not always preface a question in order to fulfill the requirements that an expert witness give answers which meet the standard. However, the trial court stated that a different rule applied on cross-examination. The trial court failed to cite any cases for this proposition, and we can find none.

¶14 The supreme court has long held that an expert opinion expressed in terms of "I feel" or "I believe" is clearly sufficient, regardless of whether the testimony is elicited by questions that call for an opinion to a reasonable degree of medical certainty or probability. *See* ***Powers v. Allstate Ins. Co.***, 10 Wis. 2d 78, 83-84, 86, 102 N.W.2d 393 (1960) (rejecting defendant's argument that expert's statement "I don't believe the knee is going to change" was insufficient because it was not preceded by a question calling for an opinion to a reasonable degree of medical certainty). Further, ***Powers*** instructs that a trial court commits reversible error in ignoring expert testimony simply because the expert did not use the words "reasonable degree of medical probability." ***Id.***, 10 Wis. 2d at 86. Contrary to the trial court's ruling, the record contained evidence that Barbara was negligent and that her negligence was a factor in increasing Kira's disability.

¶15 The trial court ruled that an expert witness was required to testify to the percentage that Barbara's negligence caused. We disagree. While an expert witness is needed to establish that medical malpractice has occurred, testimony is

not always required to calculate the percentages between or among joint tortfeasors.

¶16 The courts consider apportionment questions under WIS. STAT. § 895.045 to be peculiarly within the province of the jury, and only in an unusual case will a court upset the jury's apportionment. ***Cirillo v. City of Milwaukee***, 34 Wis. 2d 705, 150 N.W.2d 460 (1967); ***Rewolinski v. Harley-Davidson Motor Co.***, 32 Wis. 2d 680, 146 N.W.2d 485 (1966). This is particularly true where, as in the present case, the negligence of each party is not of the same kind and character. ***Mix v. Farmers Mut. Auto. Ins. Co.***, 6 Wis. 2d 38, 93 N.W.2d 869 (1959). As stated in ***Huss v. Yale Materials Handling Corp.***, 196 Wis. 2d 515, 538 N.W.2d 630 (Ct. App. 1995):

> The apportionment of negligence is ordinarily a question for the jury…. The apportionment of negligence is a matter that rests within the sound discretion of a jury based upon the inferences it draws from the evidence presented, together with its determination as to the standard of care required by the parties.

Id. at 534-35.

¶17 While the trial court may depart from this general rule and require expert testimony on the negligence issue when convinced that it is necessary to aid the jury to reach an intelligent verdict, such a requirement is an extraordinary one and is to be applied by the trial court only when unusually complex or esoteric issues are before the jury. ***Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.***, 33 Wis. 2d 560, 567, 148 N.W.2d 13 (1967). However, expert testimony is inappropriate where the presence or absence of negligence may be reasonably comprehensible to the jury even though it involves the use of inferences. ***Netzel v. State Sand & Gravel Co.***, 51 Wis. 2d 1, 6-7, 186 N.W.2d

258 (1971); *see, e.g.*, WIS JI—CIVIL 1580. We conclude that this is not such an extraordinary situation and that the issue should have been presented to the jury to apportion the negligence in this case.[2]

¶18 Next, the plaintiffs argue that Barbara cannot be on the verdict because she was immune from suit. This is not the law. In determining who should be included on a comparative negligence question, a trial court, at the special verdict stage of a lawsuit, must answer only one question: Is there evidence of conduct, which if believed by the jury, would constitute negligence on the part of the person inquired about? ***Connar v. West Shore Equip., Inc.***, 68 Wis. 2d 42, 45, 227 N.W.2d 660 (1975). It is immaterial that the entity is not a party or is immune from further liability. ***Id.*** The rationale behind this rule is that "a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law because of a prior release." ***Id.*** at 44-45.

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[2] The respondents also claim, "Sinai Samaritan never raised Mom's pre-misdiagnosis fault during trial, motions concerning the verdict form or in motions after the verdict." Our review of the record indicates that this is false. During motions concerning the special verdict form, the court and counsel for Sinai had the following exchange:

> [THE COURT]: So you're suggesting when we craft the instruction that Dr. Panish, Mount Sinai and Barbara Gardner be listed on the verdict form, correct?
>
> [COUNSEL FOR SINAI]: I think that's correct. Barbara Gardner is the parent. Plaintiff obviously herself can't be negligent, but the parent stands in her shoes and has a duty to look out for the daughter's health care.

The parties and the court continued to discuss placing Barbara Gardner on the verdict form. Thus, Sinai clearly raised Barbara's fault during discussions about the verdict form.

¶19 The trial court also concluded that, in its opinion, Barbara's delay of two to three weeks following the accident before taking Kira to the doctor or telling the doctor about the accident was insufficient evidence of negligence, and that Barbara was not negligent for her delay in taking Kira back to the doctor following the x-ray because Barbara was an "unsophisticated woman." The trial court erred in so finding.

¶20 To hold that a person is not negligent as a matter of law, the court must be able to say that no properly instructed, reasonable jury could find, based upon the facts presented, that the a defendant failed to exercise ordinary care. ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976). In actions for injuries caused by negligence, it is only where there is an entire absence of evidence tending to establish the cause, or where the negligence of the party injured is affirmatively and clearly proved by the plaintiff, so as to admit of no doubt or controversy, that a nonsuit may properly be ordered. ***Langhoff v. Milwaukee & Prairie DuChien Ry. Co.***, 19 Wis. 489, 497 (1865). Such was not the case here.

¶21 Every parent owes a duty of care to his or her child to protect that child's health and well-being and to ensure that the child receives needed medical care. *See* ***Cole v. Sears, Roebuck & Co.***, 47 Wis. 2d 629, 634, 177 N.W.2d 866, 869 (1970).

> It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary.

Id. (citation omitted).

¶22 There was conflicting evidence presented at trial surrounding the issue of what Dr. Singson was told regarding Kira's injury. Dr. Singson's medical records revealed no entry concerning a report of the bike accident, but Barbara testified that she had told Dr. Singson's assistant about the accident. Testimony was also adduced that a failure to accurately recount the accident may have hindered the diagnosis of Dr. Panish. One of the expert witnesses suggested that had Dr. Panish known of the bike accident, he would have been certain to look for a hip injury. As to the delay in returning to the doctor, Barbara explained that her failure in taking Kira back to the doctor after Kira complained of pain for four months was due to her confidence in Dr. Panish's medical opinion. Rather than being judged by the trial court, Barbara's acts should have been judged by the jury against the standard of what a reasonable parent would do under the facts and circumstances that existed here. Thus, it was the jury's prerogative, not the court's, to decide what evidence was worthy of belief and to compare the negligence of the people or entities found to be negligent. The jury is the sole judge of the credibility and the weight to give each witness. *See* WIS JI—CIVIL 215. The jury was entitled to assess this information about Barbara along with the evidence against Sinai and Dr. Panish when determining the comparative fault question. The trial court invaded the province of the jury when it weighed the evidence and decided that Barbara was not negligent.

¶23 Additionally, the trial court was mistaken in its finding that if Barbara was negligent, she was a successive tortfeasor, not a joint tortfeasor, and, therefore, would not have been included in the comparative negligence question in any event. "[A] single cause of action arises from a continuum of negligent treatment, whether by a single actor or by successive actors, that results in personal injury." ***Robinson v. Mount Sinai Med. Ctr.***, 137 Wis. 2d 1, 10, 402

N.W.2d 711 (1987) (citation omitted); *see also* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 558, 327 N.W.2d 55 (1982) (holding that there was but a single unit of negligent treatment in a situation where the plaintiff claimed injury as a result of both an operation and the treatment that followed in the hospital). Here, there was evidence of a continuum of separate negligent acts which caused Kira's injury.

¶24 Although the facts in this case are not on all fours with the referenced cases, the negligence of Barbara, if indeed there was any, coupled with the negligence of Sinai and the possible negligence of Dr. Panish, all fell within a continuum of care. This scenario is unlike that of a successive tortfeasor, where separate injuries occur as the result of negligent acts. Here, the series of delays resulted in one condition. Further support for this conclusion comes by analogy. The delay caused by Barbara and her failure to advise the doctor of the accident, coupled with the x-ray technician's error and Dr. Panish's mistaken conclusion that the leg was normal, all contributed to Kira's injury. Had Kira been an adult and failed to tell her doctor of her bike accident, or delayed going to a doctor after her accident, or delayed going back to her doctor after being told an x-ray was normal while she was still experiencing pain, she would have been subject to a contributory negligence claim. Thus, her negligence would have been compared to that of Sinai and Dr. Panish.

¶25 The law requires every person to exercise ordinary care.

> Every person in all situations has a duty to exercise ordinary care for his or her own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to himself or herself.

WIS JI—CIVIL 1007.

> A patient is usually the primary source of information about the patient's material personal, family and medical histories. If a doctor is to provide a patient with the information required by Wis. Stat. § 448.30, it is imperative that in response to a doctor's material questions a patient provide information that is as complete and accurate as possible under the circumstances. We therefore conclude that for patients to exercise ordinary care, they must tell the truth and give complete and accurate information about personal, family and medical histories to a doctor to the extent possible in response to the doctor's requests for information when the requested information is material to a doctor's duty as prescribed by § 448.30 and that a patient's breach of that duty might, under certain circumstances, constitute contributory negligence.

Brown v. Dibbell, 227 Wis. 2d 28, 48-49, 595 N.W.2d 358 (1999).

¶26 Here, the information provided to the doctor and the control over the timing of trips to the doctor were in Barbara's hands, not Kira's. Thus, just as we know that Kira would have been subject to a claim of contributory negligence had she made the decisions, we must conclude that evidence of her mother's decision could lead a jury to find that her mother was a joint tortfeasor, not a successive tortfeasor.

¶27 Finally, we also determine that the addition of Barbara on the comparative fault question may have altered the outcome of the case. Delay in seeking and getting treatment for Kira played a significant role in causing Kira's injury. The evidence suggested that her mother was primarily responsible for

some of that delay.[3] Thus, we must reverse and remand this matter to the trial court for a new trial against all the parties.

By the Court.—Judgments reversed and cause remanded.

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

[3] As explained by the trial court, the jury's actions may suggest it believed Barbara was responsible for Kira's injury: "There was a question from the jury, in fact, that may even support that contention where they said, and I'm paraphrasing … is Kira going to get the money or is the money going to go to her mother? [W]hich would raise the inference that the jury wanted to penalize the mother in some way since they couldn't due to the verdict form."