COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1138 **Cir. Ct. No. 00-CV-6**

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

HELEN E. COOK,

PLAINTIFF-APPELLANT,

V.

THOMAS V. RANKIN, M.D., THE MEDICAL PROTECTIVE COMPANY, AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

SACRED HEART HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS AND OHIC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Helen Cook appeals a judgment on a jury verdict finding Dr. Thomas Rankin did not engage in medical malpractice and an order denying her postverdict motion for a new trial. Specifically, Cook contends the circuit court erred when it refused to instruct the jury on the doctrine of *res ipsa loquitur*. We disagree with Cook and affirm the judgment and order.

Background

¶2 The facts of the case are undisputed. On August 27, 1997, Rankin performed back surgery on Cook, who was then seventy-nine years old. Following the surgery, Cook suffered from cauda equina syndrome and arachnoiditis.[1] Although Cook lived independently before the surgery, the resulting symptoms forced her into a nursing home. Cook filed suit against Rankin and argued three theories of negligence: Rankin was negligent for performing any surgery at all; Rankin was negligent in his performance of the surgery; and Rankin was negligent for failing to obtain Cook's informed consent before the surgery.

¶3 At trial, Cook presented two experts who testified that cauda equina syndrome and arachnoiditis do not occur following surgery absent negligence. At

[1] To our understanding, cauda equina syndrome is a collection of symptoms that arise as a result of damage to the cauda equina, a group of nerve roots at the end of the spinal cord. The symptoms include loss of sensation and strength in the lower extremities and incontinence.

Arachnoiditis is the inflammation of the arachnoid, a membrane that surrounds spinal fluid. Inflammation of the arachnoid causes it to change consistency, which can scar surrounding tissue and tether nearby nerves. Tethering the nerves prevents them from moving freely, resulting in irritation and chronic back pain.

the jury instruction conference, the court declined to instruct on *res ipsa loquitur*.[2] The case was submitted to the jury with WIS JI—CIVIL 1023: Medical Malpractice. The jury returned a verdict for Rankin. Cook filed a postverdict motion asking for a new a trial on several grounds, including the court's failure to give the *res ipsa loquitur* instruction, while Rankin moved for judgment on the verdict. The court denied Cook's motion and entered judgment for Rankin. Cook limits her appeal to the sole issue of the jury instructions.

Discussion

¶4 A *res ipsa loquitur* instruction should be given when

> (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which has occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

Lecander v. Billmeyer, 171 Wis. 2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992). The first two requirements necessary to instruct the jury on *res ipsa loquitur* are mixed questions of fact and law. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 19, 531 N.W.2d 597 (1995). Thus, we must first consider whether

[2] Cook apparently requested the *res ipsa loquitur* instruction, but Rankin objected. There is no transcript of the conference included in the record. Rankin contends the failure to include the transcript of the jury instruction conference precludes Cook's ability to raise this issue here. *See, e.g.*, ***Jocius v. Jocius***, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998) ("lack of a transcript limits review to those parts of the record available to the appellate court"). We decline to address this waiver argument.

the circuit court's factual findings were clearly erroneous. ***Id.*** Then we must consider whether the facts found fulfill the applicable legal standard. ***Id.***

¶5 Cook's case, however, hinges on the third element, which requires the circuit court to make a determination after it carefully considers the evidence before it. ***Id.*** at 20. Because the circuit court is in a better position to weigh the evidence, the sufficiency of the evidence question should be reviewed using an erroneous exercise of discretion standard. ***Id.*** Under this standard, we will uphold the circuit court's determination if it is reasonable and based on the appropriate law and facts on the record. ***Id.***

A. Occurrence in the Absence of Negligence

¶6 Both of Cook's experts testified that her resulting maladies should not occur following surgery absent negligence. Dr. Allan Levin was asked:

> Q: Do you have an opinion that you hold to a reasonable degree of medical certainty as to whether or not this injury to Helen Cook could occur without a doctor being negligent?
>
> A: Yes.
>
> ….
>
> A. … if one uses adequate care, this injury should not occur.

Dr. Peter Ihle also testified. Cook asked him:

> Q: And I'm asking you today: Is that complication, the arachnoiditis in this surgery, could it occur without negligence?
>
> A: No.

¶7 The trial court made no explicit findings regarding either factor (a) or (b). *See* ***Lecander***, 171 Wis. 2d at 601-02. We may, however, assume that a

missing finding was determined in such a manner that supports the final decision. ***State v. Pallone,*** 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568. The record clearly establishes that the testimony of Levin and Ihle satisfies factor (a) for the *res ipsa loquitur* instruction.

B. Instrumentality of the Injury

¶8 Cook argues that the instrumentality of injury is unknown. The record indicates only Rankin and his physician's assistant performed the surgery that Cook alleges caused her injury. Logically, Rankin would have supervised the assistant to such a degree that the assistant's performance, as well as Rankin's, would be considered to be in Rankin's exclusive control, regardless who or what specifically caused the injury. Thus factor (b) is also satisfied for the *res ipsa loquitur* instruction.

C. Sufficiency of the Evidence

¶9 This third element was explained in ***Turtenwald v. Aetna Cas. & Surety Co.***, 55 Wis. 2d 659, 201 N.W.2d 1 (1972):

> [W]hen both parties have rested and a negligence case is ready for the jury, either of two conditions may exist which would render it error to give the *res ipsa loquitur* instruction. The first occurs when the plaintiff has proved too little—that is, if there has been no evidence which would remove the causation question from the realm of conjecture and placed it within the realm of permissible inferences. The second situation where it is also error occurs when the plaintiff's evidence in a given case has been so substantial that it provided a full and complete explanation of the event if the jury chooses to accept it. [That is, when the plaintiff proves too much.]

Id. at 668; *see also* ***Peplinski***, 193 Wis. 2d at 17.

¶10 Here, the circuit court determined that Cook "proved too much." The court noted that both Levin and Ihle testified that the surgery itself was improper. The doctors explained this theory to the jury by opining surgery should not have been performed because of Cook's age, the physical therapy options available to her, and the medication she could take instead. Also, the doctors believed she should have been informed of the success rate, and Ihle testified that surgery would not have remedied the problems Cook complained of before Rankin's procedure. The court noted the jury could have considered this as a complete explanation but chose not to.

¶11 The court also noted that Ihle testified in his deposition that some of Cook's injuries could have occurred in surgery even if Rankin was not negligent.[3] This court will look for reasons to sustain the circuit court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Although the court does not further explain the effect of Ihle's deposition, the court also referred to "the facts that were put forth in this particular case" in reaching its final decision. Ihle testified at trial that the "surgery did cause the arachnoiditis …." Coupled with his deposition testimony, the jury could reasonably accept a second explanation for Cook's injuries—Rankin may have performed the surgery with the appropriate standard of care and Cook still would have been injured.[4]

[3] Rankin's attorney used the deposition testimony to impeach Ihle after Ihle testified at trial that the injury could not occur in the absence of negligence. The attorney then offered the questions and answers as read, and the court received them into the record.

[4] We acknowledge that Ihle testified that "the *unnecessary* surgery" caused the arachnoiditis. (Emphasis added.) However, the jury was free to reject the argument that the surgery was unneeded but still accept that the surgery caused the injury.

¶12 From the record, we note that Cook's experts offered at least two other specific methods by which Rankin could have caused Cook's injuries, giving a sufficiently full explanation to remove the event from the field of *res ipsa loquitur*. Ihle opined that the speed with which Rankin performed the back surgery did not comport with the applicable standard of care. Thus, Rankin's speed was proffered as a third explanation for how the injury occurred.[5]

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[5] Ihle explained in great detail why he felt the surgery was rushed:

> A: The procedure that Dr. Rankin recommended was a—a six-level laminectomy. … The procedure we're talking about is going down the first, stripping all of the muscles away from the spine, because now this is just the bone. … [T]hese muscles all have to be cut. … [T]here are multiple layers but they all come together on the spine, and the incision is made right down the center of the spine. But these muscles all have to be reflected or moved out of the way. … You have to strip the muscle from here all the way down to the facet and it doesn't look like very far, and in a 200-pound lady, that's a long ways away. … Helen Cook had six levels ….
>
> ….
>
> Q: Now what would be the minimum time of a relatively quick spinal surgeon to prepare her, to open this patient down to the surgical site to get ready to do that site?
>
> A: To adequately excise subperiosteousterly, to take away from the blood supply, and bring all the blood supply under control and get retractors in so that you can do this operation, I think somebody who was very fast would take approximately maybe 45 minutes to an hour.
>
> Q: And what did Dr. Rankin say yesterday in his testimony while you were here is how long it took him?
>
> A: And I believe he said 12 minutes.
>
> ….
>
> Q: Now, how long would it take a quick surgeon to do one laminectomy in a careful manner?

(continued)

A: In a—in a patient that has a lot of stenosis at one level, I would say it would take 45 minutes to an hour.

Q: For one laminectomy?

….

A: One level.

Q: One level. How many levels did Dr. Rankin do?

A: He did six.

….

Q: What if you're doing multiple?

….

A: In multiple levels, I would think it would do at least two hours to do that procedure.

Q: Total?

A: Total.

Q: And this operation, according to the operative report … took a total of an hour and 48 minutes and that included opening and closing the patient. Is that correct?

A: That's correct.

Q: In your opinion, Doctor, can a spinal surgeon do this complete operation in an hour and eight [sic] minutes including opening and closing in a careful manner without injuring neurostructures?

….

A: No, he cannot.

….

Q: Now if you rush through a six-level surgery at this level, what would you expect the consequences to be to the cauda equina area of the spinal column?

A: I would think that there would be trauma to it.

(continued)

¶13 Levin's testimony supports Ihle's criticism that the procedure was rushed. Levin, however, also indicated that Rankin might have used tools too large for the area on which he operated. This testimony established a fourth explanation for Cook's injuries—incorrect instrumentation.[6]

¶14 Cook suggests these explanations are still too vague—that trauma to the nerves is the same as injury to the nerves without explaining how the injury was caused. However, the doctors did not simply testify that "injuries to the nerves occurred but we cannot say how." Rather, the doctors testified that the injuries (1) occurred because the surgery was an inappropriate option for Cook, (2) could have occurred even if Rankin exercised the appropriate standard of care, (3) occurred because Rankin performed the surgery too fast, or (4) occurred because Rankin used the incorrect instruments. These explanations are sufficiently precise to explain the injury if the jury chose to adopt any one of them.

> ….
>
> Q: If the surgery were done … with more time and more carefully, would you still expect to see swelling or damage to the cauda equina?
>
> A: I would not expect to see swelling or damage to the cauda equina.

[6] Levin explained:

> Trauma to the nerve roots secondary usually to instrumentation [caused Cook's injury], in other words, as one starts to remove bone, one has to slide the rongeurs or the instruments to bite bone, part of that has to go under that lamina. The area is very tight. If one does not use care, if one rushes too much and doesn't use small enough instruments that are thin enough, one can traumatize the nerve roots giving rise to cauda equina syndrome as in this case.

¶15 The trial court articulated the correct standard of law to apply when determining whether it should have issued the *res ipsa loquitur* instruction. The court also considered all of the expert testimony given at the trial and other reasons in the record. Given the trial court's articulated reasoning, as well as facts apparent from our review of the record, we conclude that the trial court did not erroneously exercise its discretion when it decided not to instruct the jury on *res ipsa loquitur*. Therefore, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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