COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2025 **Cir. Ct. No. 2006CV17**

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

JASON M. WILSON, BY HIS GUARDIAN AD LITEM, STEVEN B. GOFF, AND RENE HASELMAN,

PLAINTIFFS-RESPONDENTS,

V.

TRADE LAKE MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

GROUP HEALTH COOPERATIVE OF EAU CLAIRE, BADGERCARE/MEDICAID MANAGED CARE PROGRAM, ADMINISTERED BY SECURITY HEALTH PLAN OF WISCONSIN, INC. AND BARRON COUNTY SOCIAL SERVICES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Burnett County: KENNETH L. KUTZ, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. In 2003, ten-year-old Jason Wilson sustained a severe eye injury when a tent stake he was hitting against a tree broke apart. Mary and Earl Wilson, Jason's grandparents, were found causally negligent by a jury for enhanced injuries he sustained because he did not receive prompt medical attention. Trade Lake Mutual Insurance Company, the Wilsons' homeowners' insurer, appeals from the judgment. We conclude that although the jury verdict is supported by credible evidence, public policy bars Jason's recovery because his enhanced injuries are too remote from the Wilsons' negligence and too wholly out of proportion to the Wilsons' culpability. Accordingly, we reverse.

BACKGROUND

¶2 Jessica LaPierre, one of Jason's aunts, hosted a social gathering on a summer weekend in 2003. On Saturday, Nicole Ruez, Jason's other aunt, brought him to LaPierre's home, where he stayed overnight. During the clean-up on Sunday, Jason found a tent stake on the ground and began hitting it against a tree. He tried to break the stake, which he believed would cause it to fly into another tree in the yard. Instead, the broken portion struck him in the eye. The accident occurred between 1 and 1:30 p.m.

¶3 LaPierre and Ruez sought advice from Jason's mother, Rene Haselman. Jason was uncooperative, but LaPierre and Ruez eventually looked at his eye and saw nothing more than a scratch on his eyelid. The eye was not red or bleeding. LaPierre relayed her observations to Haselman, who hung up and called Cumberland Hospital. Haselman described what LaPierre and Ruez had seen to the doctor on call, who told Haselman she should bring Jason in immediately. Haselman, however, decided not to take action until 5:00 p.m., when she was scheduled to pick Jason up. Haselman did not tell LaPierre or Ruez about her

conversation with the medical staff at Cumberland Hospital, nor request that they take Jason to see a medical professional.

¶4 LaPierre and Ruez decided to have Jason's grandparents, Mary and Earl Wilson, look at his eye. Neither of the Wilsons had medical training. Mary was the first to inspect Jason's eye and saw only a cut on his eyelid. She did not pull Jason's eyelids apart because he was uncooperative. Earl Wilson, who was sleeping when Jason arrived, woke up around 3:00 p.m. and was told what happened. Earl briefly looked at Jason's eye, but he too saw only a small cut on the eyelid.

¶5 The true extent of Jason's injury became apparent after Jason left his grandparents' home. Jason vomited as he and Ruez were leaving to meet his mother around 4:30 p.m. Jason's stepfather met Ruez about twenty miles from Haselman's residence and took Jason the rest of the way. When they arrived, Haselman inspected Jason's eye in her driveway. She pulled Jason's lower eyelid down and discovered what "looked like a tongue coming out of his eye."

¶6 Jason spent the next several hours being examined by medical staff and traveling between hospitals. Jason and his mother arrived at Cumberland Hospital at 6:18 p.m. A physician there determined his eye had been lacerated and ruptured, requiring surgery.[1] At 7:05 p.m., Jason left Cumberland Hospital for Children's Hospital in St. Paul, Minnesota. Dr. Gary Schwartz arranged Jason's transfer and met Jason and Haselman at Children's Hospital when they arrived at 9:05 p.m. Surgery began at 10:23 p.m.

[1] Jason's surgeon explained at trial that a laceration is a cut caused by a sharp object, while a rupture is a blunt injury causing the globe to split.

¶7 Schwartz could not fully repair Jason's eye during the surgery. Some of Jason's iris was deposited outside the wound, and Schwartz determined that it had been outside Jason's eye too long. Because of the lapse of time, approximately one-quarter of Jason's iris had become ischemic, or dead, and had to be removed.

¶8 Jason and Haselman brought suit against the Wilsons' homeowners' insurer, Trade Lake, on the theory that the Wilsons' failure to discover the serious nature of his injury and procure immediate medical attention enhanced the injury Jason suffered in the initial accident. A jury allocated thirty percent of Jason's total damages to the initial accident and seventy percent to the failure to procure timely professional medical treatment. The jury then apportioned responsibility for the latter amount as follows: a total of twenty-five percent to Jason's aunts, thirty-five percent to his mother, thirty percent to Mary Wilson, and ten percent to Earl Wilson. Thus, the jury found the Wilsons, in total, responsible for forty percent of Jason's enhanced injuries.

DISCUSSION

¶9 Trade Lake first challenges the sufficiency of the evidence supporting the jury's negligence finding. Our standards of review are highly deferential to jury verdicts. We will affirm the verdict if there is any credible evidence to support it. ***Roehl Transp., Inc. v. Liberty Mut. Ins. Co.***, 2010 WI 49, ¶118, 325 Wis. 2d 56, 784 N.W.2d 542. Indeed, we will uphold the verdict even if there is contradictory evidence that appears stronger and more convincing. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995). We view all evidence in the light most favorable to the verdict, and we accept all

reasonable inferences the jury may have drawn from that evidence. ***Roehl Transp.***, 325 Wis. 2d 56, ¶118.

¶10 Not all elements of Jason's negligence claim are in dispute. To recover for a defendant's negligence, the plaintiff must establish four elements: "(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." ***Rockweit v. Senecal***, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995). Here, Trade Lake attacks only the sufficiency of the evidence supporting the duty and causation elements.

¶11 Wisconsin broadly defines the concept of duty. ***Schuster v. Altenberg***, 144 Wis. 2d 223, 238 n.3, 424 N.W.2d 159 (1988). Put simply, every person has a duty to exercise ordinary care in all of his or her activities. ***Gritzner v. Michael R.***, 2000 WI 68, ¶20, 235 Wis. 2d 781, 611 N.W.2d 906. Thus, we do not usually preclude a defendant's liability by finding that he or she had no duty. *See* ***Smaxwell v. Bayard***, 2004 WI 101, ¶33, 274 Wis. 2d 278, 682 N.W.2d 923 (determination to deny liability essentially one of public policy rather than duty). The plaintiff's burden is minimal: a plaintiff must show only that the defendant's act or omission may have caused foreseeable harm to someone. ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 260, 580 N.W.2d 233 (1998).

¶12 This formulation of the duty element is consistent with the jury instruction given in this case, WIS JI—CIVIL 1397. That instruction recites the "Good Samaritan" rule adopted by our supreme court in ***American Mutual Liability Insurance Co. v. St. Paul Fire & Marine Insurance Co.***, 48 Wis. 2d 305, 313, 179 N.W.2d 864 (1970) (citing RESTATEMENT (SECOND) OF TORTS § 324A (1965)). "Essentially, [the Good Samaritan] rule requires one who

voluntarily assumes a duty that is necessary for the protection of another to exercise ordinary care in the performance of the duty, if the circumstances are such that the failure to do so increases the risk of harm to another." ***Dixson v. Wisconsin Health Org. Ins. Corp.***, 2000 WI 95, ¶22, 237 Wis. 2d 149, 612 N.W.2d 721.

¶13 Based on the evidence presented, the jury could reasonably conclude that the Wilsons owed a duty of care. Jason's aunts requested the Wilsons' opinions on his injury, which they agreed to provide. When the Wilsons agreed to provide advice, they assumed an obligation to use ordinary care when making their recommendations. The delay in obtaining necessary medical treatment, and corresponding increase in the risk of harm to Jason, could be viewed as a foreseeable consequence of their failure to exercise ordinary care.

¶14 Trade Lake next claims there was insufficient evidence of a causal connection between the Wilsons' conduct and Jason's injury. The causation element requires the plaintiff to show that an "unbroken sequence of events" was the cause-in-fact of the accident producing the injury. ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 227-28, 270 N.W.2d 205 (1978). In other words, we assess "whether the negligence was a substantial factor in producing the injury." ***Miller***, 219 Wis. 2d at 261-62.

¶15 Here again, we conclude Jason presented credible evidence that the Wilsons' failure to fully examine his eye and get professional medical care was a substantial factor in producing the enhanced injuries. At trial, Dr. Schwartz repeatedly stated that he probably could have saved Jason's iris tissue if Jason had been in the operating room three hours earlier. Schwartz clarified that meant he had a "greater than 50 percent chance of saving it." When asked about the

likelihood of saving the iris tissue at two-and-one-half hours earlier, Schwarz replied, "Then we're probably less than 50 percent. … [T]hree hours is probably the important line. If you're forcing me to draw a line, three hours is probably it."[2] According to Schwartz, Jason would have needed to be in surgery by 7:30 p.m.

¶16 Consequently, Jason attempted to show that it was possible for him to have been in surgery by 7:30 p.m. Both Mary and Earl Wilson had evaluated Jason's eye shortly after 3:00 p.m. Jason elicited testimony that the nearest hospital to the Wilsons' residence was Grantsburg Hospital, which was

[2] Schwartz was not unequivocal in his testimony. Schwartz repeatedly testified that he could not say how long Jason's iris tissue could have survived outside his eye before it needed to be removed. He stated that each case will differ depending on "[h]ow much iris is out, whether the iris root is involved, [and] how tight the incision is." He continued, "I just think you can't just say, well, under two hours you're safe, over two hours you're not. I wish I could give you that type of number, but it just doesn't exist." Schwartz then confirmed that he could not say with any specificity when Jason's iris became unsalvageable:

> There's—there's a spectrum, but there's a threshold in that spectrum somewhere. And in Jason's case, if we got him into the operating room 20 minutes after his injury, there is in all likelihood nearly 100 percent chance we could have saved all his iris. If we got to Jason 10 hours after the injury, there's pretty close to a zero percent chance that we could have saved … the three clock hours that we lost. … [S]omewhere [between 20 minutes and 10 hours] there's a line … you cross that … you probably realistically can't save any of it and it's all going to go …. Other than that, I can't tell you what the spectrum really looks like. I can tell you what he looked like at 10:30 at night, but that's really all that I can comment on.

Nonetheless, Jason's counsel suggested a three hour "window of opportunity" in which Jason's iris could have been saved, and eventually Schwartz went along with that point on the spectrum. Although we agree with Trade Lake that causation in this case is "tissue paper thin," our standard of review requires that we accept the jury verdict if it is supported by any credible evidence. Where people could come to different conclusions about the cause-in-fact, the question is particularly susceptible to resolution by a jury. ***Cefalu v. Continental W. Ins. Co.***, 2005 WI App 187, ¶9, 285 Wis. 2d 766, 703 N.W.2d 743.

approximately twenty-five minutes away.[3] Jason assumed he would have spent the same amount of time at Grantsburg Hospital as at Cumberland, about forty-seven minutes, before leaving for Children's Hospital in Minnesota. That would have placed Jason's departure time from Grantsburg at about 4:30 p.m. The trial court took judicial notice of the driving time between Grantsburg and Children's Hospital, one hour and nineteen minutes, which would have placed Jason's arrival at Children's Hospital at 5:49 p.m. Jason assumed a static examination and preparatory period at Children's Hospital—seventy-eight minutes—with Jason entering surgery at about 7:07 p.m. Thus, we agree the jury had before it credible evidence that the Wilsons' failure was a "substantial factor" in producing Jason's enhanced injuries.

¶17 It does not follow, however, that the Wilsons are automatically liable. Even when a plaintiff has proven cause-in-fact, we may still conclude that cause is not legally sufficient to allow recovery. ***Fandrey v. American Fam. Mut. Ins. Co.***, 2004 WI 62, ¶13, 272 Wis. 2d 46, 680 N.W.2d 345. When we deny liability in that manner, we do so under the guise of "public policy," but the inquiry is "inexorably tied to legal cause." ***Id.***, ¶15. In other words, "'because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.'" ***Tesar v. Anderson***, 2010 WI App 116, ¶11, 329 Wis. 2d 240, 789 N.W.2d 351 (quoting ***Palsgraf v. Long Island R. Co.***, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

[3] Earl Wilson testified he would have taken Jason for emergency medical care if he had seen the globe rupture, but did not state what hospital he would have gone to. Mary Wilson stated she would not have taken Jason to the doctor herself, but would have called Jason's mother to pick him up.

¶18 Although the public policy inquiry is necessarily open-ended, *see* ***Tesar***, 789 N.W.2d 351, ¶13, our supreme court has provided guidance in the form of six factors that may limit the tortfeasor's liability. We may bar recovery when:

> (1) the injury is too remote from the negligence; (2) the recovery is wholly out of proportion to the culpability of the negligent tort-feasor; (3) the harm caused is highly extraordinary given the negligent act; (4) recovery would place too unreasonable a burden on the negligent tort-feasor; (5) recovery would be too likely to open the way to fraudulent claims; [or] (6) recovery would enter into a field that has no sensible or just stopping point.

Behrendt v. Gulf Underwriters Ins. Co., 2009 WI 71, ¶29, 318 Wis. 2d 622, 768 N.W.2d 568 (quotations omitted). A determination that any one of the factors applies precludes liability. ***Cole v. Hubanks***, 2004 WI 74, ¶8, 272 Wis. 2d 539, 681 N.W.2d 147. The factors are designed to elicit those circumstances in which "it would shock the conscience of society to impose liability." ***Fandrey***, 272 Wis. 2d 46, ¶15.

¶19 Imposing liability in this case would shock our judicial conscience. Jason's injury is too remote from the Wilsons' negligence and wholly out of proportion to the Wilsons' culpability.

¶20 We first examine the proximity of the Wilsons' negligence to Jason's injury. This public policy factor focuses on the relationship between the negligence and the injury, barring recovery for those injuries that are too remote. "Remote" in this context means "removed or separated from the negligence in time, place, or sequence of events." ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 762, 501 N.W.2d 788 (1993).

¶21 Here, the jury's finding of causal negligence depended on the occurrence and timing of so many independent events that it would shock our

judicial conscience to hold the Wilsons liable for Jason's injuries. Jason's case rested entirely on Dr. Schwartz's testimony that Jason's iris could have been saved if surgery commenced three hours earlier. Although Jason sufficiently showed that he could have been in surgery by 7:30 p.m., his theory required the jury to assume the Wilsons would have obtained immediate medical attention and then speculate about every subsequent event, including: that Jason would have been taken to Grantsburg Hospital instead of Cumberland Hospital, where Jason was actually taken; that Jason would have spent the same amount of time at Grantsburg Hospital as he did at Cumberland; that personnel at Grantsburg would have recommended that Jason be taken to Children's Hospital in St. Paul; that it would have taken approximately an hour and nineteen minutes to arrive in St. Paul by car from Grantsburg; and that Jason would have spent slightly over an hour at Children's Hospital before entering surgery. A slight variance in even the smallest detail of this timeline could have caused Jason's surgery to fall outside the three-hour "window of opportunity" established by Schwartz.[4] Because the jury's verdict hinges on the occurrence and timing of so many uncertain events, we conclude that Jason's injury is too remote from the Wilsons' negligence.

¶22 Jason's recovery is also wholly out of proportion to the Wilsons' culpability. The Wilsons' only conceivable fault was their failure to discover the seriousness of Jason's injury and get him swift medical attention. But Jason's mother—who is also a plaintiff in this suit—had already been advised by medical professionals to bring Jason in immediately. We cannot ignore her disregard for that advice. The omissions she and Jason now complain of might have been

[4] Schwartz conceded that the time spent in a medical facility can vary to a certain extent.

avoided if she had told Jason's relatives about her call with Cumberland Hospital. Permitting the most culpable individual to shift the blame for Jason's enhanced injuries to those who were the most poorly situated to prevent them shocks our judicial conscience. *See* ***Fandrey***, 272 Wis. 2d 46, ¶15.

By the Court.—Judgment reversed.

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