COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3339 **Cir. Ct. No. 99-CV-359**

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

KATHRINE I. BARBER,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ANNE SCHMITZ ARNESEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD B. ARNESEN, M.D.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 DYKMAN, J. This is a medical malpractice action. Kathrine Barber appeals from a judgment dismissing all of her claims against Dr. Richard Arnesen.[1] After the close of Barber's evidence at trial, the court dismissed her complaint for failure to present sufficient evidence as to the cause of her injuries.

¶2 Barber raises three issues: First, she contends that her evidence was sufficient because she did not need expert testimony to show that Dr. Arnesen's treatment caused her injuries. She asserts in the alternative that her expert, Dr. Bernard Katz, did testify that Dr. Arnesen's alleged negligence caused her injuries. Second, she contends that if Dr. Katz did not testify to causation, that failure was the result of the trial court's erroneous rulings on objections during Dr. Katz's direct examination. Third, she contends that Dr. Arnesen's alleged negligence exceeded any negligence attributable to her. We conclude that Barber's claims are without merit. We need not decide Dr. Arnesen's cross-appeal because it only asserts other reasons for affirming the judgment.

FACTS

¶3 Barber has a long history of mental illness which includes several suicide attempts. On November 30, 1995, she felt suicidal and sped down East Washington Avenue in Madison in her car while drunk, hoping to be stopped by police and jailed. The police responded and a chase ensued. Eventually, Barber pulled into a gas station and exited her car pointing a gun at her head. Despite pleas from the police, she refused to drop her gun. At trial, she testified about what occurred before the police shot her six times:

[1] Dr. Arnesen died prior to these proceedings. Anne Arnesen is the personal representative of his estate. Wisconsin Patients Compensation Fund is also a defendant.

> And so I started to put [the gun] down to my right. And the next thing I saw, were somebody's boot heels. And there was an officer that came toward me, pretty fast, and he was yelling at me.
>
> And I saw him fall backwards. I saw him – his boot heels go up in the air, and then his gun went off. And that is when [the officers] started shooting me.

She testified that she suffered permanent physical injuries and emotional distress from the incident.

¶4 Dr. Arnesen, a psychiatrist, was treating Barber for her mental illness when she was shot. Barber sued Dr. Arnesen for medical malpractice, alleging that his treatment caused her injuries. The details of Barber's mental illness and Dr. Arnesen's treatment are not relevant to the issues on appeal. The dispute, which we have described, focuses on the cause of her injuries.

DISCUSSION

Sufficiency of the evidence

¶5 We first address whether Barber produced sufficient evidence at trial to survive a motion to dismiss at the close of her case. Because this is a medical malpractice case, Barber bore the burden of proving that Dr. Arnesen failed to exercise the degree of care and skill usually employed by the average practioner under similar circumstances. ***Ande v. Rock***, 2002 WI App 136, ¶10, 256 Wis. 2d 365, 647 N.W.2d 265, *review denied*, 2002 WI 111, 256 Wis. 2d 64, 650 N.W.2d 840 (Wis. Jul. 30, 2002) (No. 01-1009), *cert. denied*, 527 U.S. 1107 (2003) (No. 02-640). Dr. Arnesen does not dispute that Barber met this test, but asserts that proof of causation is lacking. Barber contends that she does not need expert testimony to show causation. She argues that the jury could determine whether Dr. Arnesen's alleged negligence caused her conduct which resulted in her

injuries. Both respondents assert that causation in a medical malpractice action is beyond a juror's common knowledge or experience. Thus, they claim that a lack of expert testimony regarding causation is fatal to Barber's claim.

¶6 We review motions challenging evidence sufficiency de novo. ***Seraphine v. Hardiman***, 44 Wis. 2d 60, 65, 170 N.W.2d 739 (1969). We agree with respondents that "[a] plaintiff must supply an expert witness to testify as to causation and standard of care in medical malpractice actions involving matters beyond [] jurors' knowledge as laypersons." ***Glenn v. Plante***, 2003 WI App 96, ¶10, 264 Wis. 2d 361, 663 N.W.2d 375, *overruled on other grounds*, 2004 WI 24, __ Wis. 2d __, 676 N.W.2d 413 (Wis. Mar. 24, 2004) (No. 02-1426). Here, however, the dispute lies in whether a juror can rely on his or her common knowledge or experience to determine whether Dr. Arnesen's psychiatric treatment caused Barber's injuries. "A defendant's negligence is 'a cause' of a plaintiff's injury or damage if it was a substantial factor in producing the injury or damage." ***Alvarado v. Sersch***, 2003 WI 55, ¶34 n.2, 262 Wis. 2d 74, 662 N.W.2d 350 (citation omitted).

¶7 The supreme court has clarified the necessity of providing expert causation testimony:

> There may be cases where the issue of causation, like the issue of negligence, involves technical, scientific or medical matters which are beyond the common knowledge or experience of jurors and without the aid of expert testimony the jury could only speculate as to what inferences to draw if it were left to determine the issue. The lack of expert testimony in such cases results in an insufficiency of proof. See *Kreyer v. Farmers' Co-operative Lumber Co.* (1962), 18 Wis. (2d) 67, 117 N.W. (2d) 646 (cause of a barn fire); *Peterson v. Greenway* (1964), 25 Wis. (2d) 493, 131 N.W. (2d) 343 (cause of death of heifers).

> … [I]t may be essential to have expert testimony in some cases on the issue of causation and, consequently, the lack of it may prevent a jury from considering the issue.

City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co., 33 Wis. 2d 560, 568a-68b, 148 N.W.2d 661(1967).

¶8 Barber asserts that ***City of Cedarburg*** does not apply here. She argues that ***Ehlinger v. Sipes***, 155 Wis. 2d 1, 454 N.W.2d 754 (1990) and ***Fischer v. Ganju***, 168 Wis. 2d 834, 485 N.W.2d 10 (1992) "explicitly pull this case out of the realm of the ***City of Cedarburg*** exception." But she provides no citations to support her argument. We examine ***Ehlinger*** and ***Fischer*** to determine whether this is correct.

¶9 ***Ehlinger*** was a medical malpractice case. As in Barber's case, the trial court in ***Ehlinger*** dismissed the plaintiffs' complaint at the close of their case for failure to show that the defendant doctor's negligence was a cause of plaintiffs' injuries. ***Ehlinger***, 155 Wis. 2d at 8. The supreme court reviewed the evidence presented and concluded: "We conclude that the Ehlingers produced sufficient evidence to present to the trier of fact the question of whether Dr. Sipes' alleged negligence was a substantial factor in causing [plaintiffs'] injuries." ***Id.*** at 9. ***Ehlinger*** was a "lost chance" case, and the court concluded:

> In a case such as presented here, we conclude that by showing that the omitted treatment was intended to prevent the very harm which resulted, that the plaintiff would have submitted to the treatment, and that the treatment *could* have lessened or avoided the harm, the plaintiff establishes a sufficient nexus between the alleged negligence and harm to allow the trier of fact to determine whether the alleged negligence was a substantial factor in causing the harm.

Id. at 20.

¶10 Barber's case is not a "lost chance" case, but a mine run medical malpractice case in which the question was whether Dr. Arnesen's alleged negligence caused the sequence of events leading up to Barber being shot. Barber is incorrect that ***Ehlinger*** changed the law to permit a lesser standard for causation. We raised that very question when we certified ***Fischer***, 168 Wis. 2d 834. The supreme court responded: "Because the jury instructions submitted to the jury in this case adequately stated the law of causation, and because [***Ehlinger***] did not substantively change that law, we affirm the circuit court." ***Fischer***, 168 Wis. 2d at 842-43.

¶11 The jury instruction which was validated in ***Fisher*** was WIS JI—CIVIL 1023. ***Id.*** at 844. We need not quote that instruction because it is unremarkable, and requires the jury to consider whether the negligence of a defendant was a substantial factor in producing an injury. Therefore, ***Ehlinger*** did not change the law of causation as it was earlier explained in ***City of Cedarburg***. ***Fischer*** repeats long held Wisconsin law regarding causation and holds that ***Ehlinger*** had not changed that law. Barber is therefore incorrect in her assertion that "the ***Ehlinger*** rule, specifically applicable to Barber's case, trumps the less specific exception to the rule in ***City of Cedarburg***."

¶12 Barber also contends that ***City of Cedarburg*** does not control because the level of complexity in her case is unlike the barn fire and death of heifers cited as examples of complex cases by the supreme court. She argues that a barn fire and heifer deaths are "well beyond that which a jury could be expected to understand *regarding causation* without the assistance of expert testimony." She claims that it is reasonable to expect jurors to understand the nexus between Arnesen's alleged negligence and Barber's injuries.

¶13 Both respondents assert that a jury needs the aid of an expert to help evaluate whether Arnesen's treatment of Barber was a substantial factor in causing Barber's injuries. Respondent, Wisconsin Patient's Compensation Fund, also notes that this is not a *res ipsa loquitor* case; rather, numerous factors having nothing to do with Arnesen's treatment may have affected Barber's behavior that evening.

¶14 We conclude that this is a complex case requiring expertise regarding whether Dr. Arnesen's alleged malpractice caused Barber to initiate a high-speed car chase while driving drunk and then aim a gun at her head during a police confrontation. The jury would have to evaluate whether Barber was acting of her own volition and why she was feeling suicidal. Other factors, such as Barber's consumption of alcohol, her use of the antidepressant Luvox and her underlying mental illness might or might not be a cause of her escapade, in addition to Dr. Arnesen's alleged negligence. Without expert testimony, a jury would have no way to determine whether any of these were substantial factors in causing Barber's injuries. Expert testimony regarding causation was essential to submit Barber's case to a jury.

¶15 We turn to the record to search for expert testimony that would satisfy Barber's burden of proof. Barber's only expert witness was Dr. Katz. We have reviewed Dr. Katz's testimony and cannot find any testimony about whether Dr. Arnesen's alleged negligence caused Barber's injuries. Barber's initial brief to this court does not identify which portions of the trial transcript she considers causation testimony. Rather, she refers to twenty pages of trial transcript where she argued against the motion to dismiss. She states that "[c]learly, reasonable jurors could conclude that, 'but for' Dr. Arnesen's negligent diagnosis and treatment of Barber, she would not have been compelled to behave as she did .... "

But that portion of the transcript shows Barber admitting she did not explicitly elicit expert testimony about causation:

> THE COURT: Why not ask the Doctor, "Do you believe then, that your deviation of standard of care, was a cause of her injuries, by being shot by the police on December 1st?"
>
> [BARBER'S ATTORNEY]: Well, I didn't ask him that particular question. And I mean, quite frankly, that day was a difficult day, because I was under a very difficult order, in limine, that was difficult for me to understand and apply.
>
> And I did keep getting objections from the other side, to my going outside the scope of the earlier deposition and so forth. And it was very trying circumstances.
>
> But, none the less, let me continue. I did not ask that very simple question and answer, which I had in mind, probably five times that morning.

¶16 On appeal, Barber argues that Dr. Katz provided sufficient evidence regarding causation. Like the trial court, we have reviewed the trial testimony that Barber claims pertain to causation and conclude that Barber mischaracterizes evidence relating to standard of care as causation evidence. The trial court repeatedly pointed out this mischaracterization to Barber at the hearing. Barber's attorney ignored the court and continued to introduce testimony probative only of standard of care. Testimony about whether Dr. Arnesen properly diagnosed and treated Barber relates to standard of care. Causation testimony would establish that Dr. Arnesen's treatment or diagnosis was a substantial factor in causing Barber's injuries. There was insufficient evidence to support a finding of causation.

Restrictions of testimony

¶17 Next, Barber asserts that if she failed to offer sufficient evidence regarding causation, that result occurred because the trial court improperly limited her direct examination of Dr. Katz. In her brief, she argues that "[t]he court also repeatedly sustained objections to reasonable and proper questions designed to elicit highly relevant testimony on both the standard of care and causation issues." But, her brief in chief fails to identify the questions that were limited. In her reply brief, she purports to identify four trial questions which were "key questions" that the trial court prohibited. Two of those questions were:

> - In your opinion [Dr. Katz], would any reasonable psychiatrist in 1995 have treated Miss Barber in the manner in which Doctor Arnesen did, from October 6th through November 17th?
>
> - Doctor Katz, can you tell us whether or not some kind of danger in the treatment—and perhaps not the specific event that happened on November 30. But, something very dangerous and very unusual, in that class of event—and would it or would it not have been reasonably foreseeable, to a reasonable psychiatrist, in Doctor Arnesen's circumstances?

The trial court sustained objections to both questions; however, neither question purports to elicit testimony probative of causation. This questioning pertains to standard of care. No one has suggested that Barber failed to produce evidence that Dr. Arnesen's treatment fell below the applicable standard.

¶18 The third question posed at trial involved testimony from Dr. Katz's deposition. Respondent's attorney cross-examined Dr. Katz using his deposition that read:

> Q Dr. Katz, the Luvox which Kathrine Barber was taking we presume on the night of November 30/ December 1, 1995, that medication didn't compel

her to get out of her van that night with the gun in her hand, did it?

A Not in my opinion.

Q That was a voluntary decision on her part, right?

A Well, voluntary but under the influence of her mental illness complicated by alcohol. So it's whatever extent her voluntariness was compromised by that, but I don't believe it was the Luvox that had anything to do with that.

Q Well, are you saying that her mental illness that evening somehow compelled her to get out of that minivan with the gun in her hand?

A I think that the, I think her illness very seriously compromised her judgment ....

On redirect examination during trial, Barber's attorney asked Dr. Katz "to explain what [he] intended in [the deposition] answer, please." The court sustained an objection to the question. Barber is correct that this line of questioning pertained to causation, but all it might have established is that Luvox did not cause her to exit her car with a gun in her hand. Neither this specific testimony nor the line of questioning would have helped establish whether Dr. Arnesen's alleged negligence caused her injuries.

¶19 Finally, Barber contends that the court wrongly sustained objections to a line of questioning that attempted "to establish either that [her former therapist] had alerted Dr. Arnesen to the bipolar disorder issue or that Arnesen made no inquiry of [the former therapist] in the process of authorizing the return of the gun to Barber or in the process of discharging Barber from the hospital." Again, whether Dr. Arnesen failed to properly diagnose Barber is probative of standard of care, not causation.

¶20 We reject Barber's contention that the trial court's evidentiary rulings prevented her from presenting expert testimony that Dr. Arnesen's alleged negligence caused her injuries. She has not identified any question that would have elicited expert testimony on causation.

Contributory Negligence

¶21 Barber asserts that reasonable jurors could have concluded that Dr. Arnesen's alleged negligence far exceeded any negligence attributable to her. That may be correct. But because Barber failed to present sufficient causation evidence to submit her case to a jury, we need not reach this issue. Nor do we need to address Dr. Arnesen's cross-appeal because it becomes relevant only if we reverse the trial court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.