COURT OF APPEALS
DECISION
DATED AND RELEASED

May 2, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3452

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

SCOTT MALLON, SUSAN MALLON AND SUSAN E. MALLON, SPECIAL ADMINISTRATOR FOR THE ESTATE OF ASHLEY MALLON,

Plaintiffs-Appellants,

v.

CRAIG W. CAMPBELL, M.D., WISCONSIN PATIENTS COMPENSATION FUND, COLUMBUS COMMUNITY HOSPITAL, WISCONSIN ASSOCIATION OPTIONAL SEGREGATED ACCOUNT, AND PHYSICIANS INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES W. KARCH, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

GARTZKE, P.J. Scott and Susan Mallon, and Susan Mallon as Special Administrator of the Estate of Ashley Mallon,[1] deceased, appeal from a judgment and order denying their motion for judgment on the verdict and granting a directed verdict for defendants, Dr. Craig W. Campbell, Columbus Community Hospital, Wisconsin Patients Compensation Fund and Wisconsin Hospital Association Optional Segregated Account.

The issues are: (1) whether the trial court erred in granting defendants' motions for a directed verdict on the ground that plaintiffs produced insufficient evidence on the issue of causation; (2) whether the trial court correctly refused to apply the burden of production enunciated in ***Ehlinger v. Sipes***, 155 Wis.2d 1, 454 N.W.2d 754 (1990); and (3) if we reverse the judgment, we must remand for rulings on the defendants' remaining post-trial motions.

We conclude that the trial court did not err when granting defendants' motions for a directed verdict, and it properly applied ***Ehlinger***. Because we affirm the judgment and order, we do not reach the remaining issue.

[1] Ashley Mallon died while this appeal was pending. Susan Mallon, as Special Administrator of Ashley's estate, is substituted for her.

I.

BACKGROUND

On December 12, 1986, Susan Mallon gave birth to a daughter, Ashley. Ashley was born severely brain damaged and required twenty-four-hour care and monitoring. The Mallons brought this action against Columbus Community Hospital, alleging that the hospital negligently rendered care to Susan during the course of her pregnancy and delivery, and against Dr. Craig Campbell, alleging he negligently failed to respond properly when summoned to provide emergency care during Susan's delivery. Plaintiffs' theory is that Dr. Campbell negligently failed to make advance arrangements to have a qualified surgeon available at the Columbus Community Hospital to handle C-section deliveries. The same theory applies to the Beaver Dam Community Hospital. The jury found that Dr. Campbell and the hospital were negligent, and that their negligence was a cause of the damages to Ashley.

The facts are that at 2:15 a.m. on December 12 Susan Mallon arrived at Columbus Community Hospital to give birth. A nurse examined her and found that the fetal heart rate was normal. A hospital chart described the fetus as active at 6:35 a.m.

About 8:30 a.m., Dr. Charles Hansell examined Susan and concluded that she could deliver vaginally. Dr. Hansell does not perform major surgeries, including C-sections. About 11:45 a.m. he checked on Susan after learning that her contractions had become less frequent and were of poor quality. He and the nursing staff monitored the fetal heart rate and tones through a device placed on Susan's uterus. About 12:00 noon he administered Pitocin, a drug to stimulate uterine contractions and augment labor. About 12:30 p.m., Susan was taken to the delivery room. At 12:45 p.m., Dr. Hansell placed a scalp electrode on the fetus and began internal fetal monitoring to track the baby's progress. The fetal monitoring machine produced a graph of its recordings of the baby's heart rate and the mother's contractions.

Between 12:07 p.m. and 1:08 p.m., Dr. Hansell increased Susan's Pitocin. The baby's heart rate fluctuated, and at 1:08 p.m. the fetus showed signs of a lack of oxygen. Its heart rate fell under 100, a condition called bradycardia, and showed sudden dips called decelerations. In response, Dr. Hansell unsuccessfully attempted a forceps delivery. When he applied the forceps, Dr. Hansell believed he had a healthy baby. About 1:15 p.m. he called for Dr. Craig Campbell, the surgeon on call, to perform an emergency C-section. Dr. Hansell instructed one of the nurses to call the surgery crew. A hospital chart contains a notation stating that at approximately 1:23 p.m., "Crew here." However, Dr. Campbell was not. Nor was any other surgeon.

Calls were made to three other area physicians, all of whom were unavailable to come to the Columbus Community Hospital. One of the called physicians, Dr. H. Ahmed Ali, was willing to help, but he was in surgery at a hospital in Beaver Dam, a community near Columbus.

About 1:55 p.m., Dr. Hansell accompanied Susan by ambulance to the Beaver Dam hospital. Before boarding the ambulance, the internal fetal monitoring device was disconnected. During the trip to Beaver Dam, Dr. Hansell attempted to monitor the baby's heart rate, but whether the baby's heart rate was monitored continuously is disputed. At 2:15 p.m. Susan was admitted to the operating room of Beaver Dam Hospital. Dr. Ali performed the C-section, and Ashley was delivered at 2:38 p.m.

When Ashley was delivered, her heart rate was low, her color was bad and her muscle tone was flaccid. She was transferred to the neonatal intensive care unit at Madison General Hospital, and she was later diagnosed as having permanent brain damage, profound mental retardation, and severe cerebral palsy. On February 24, 1994, she died.

The Mallons tried their case on the theory that Dr. Campbell and the hospital had negligently failed to arrange for a surgeon to be on call during Susan's delivery. They asserted that the negligence of those defendants had been a substantial factor in causing Ashley's injuries.

At this point we need not review the testimony of the expert witnesses on the causation issue. The trial court instructed the jury that it could find causal negligence only if the jury was convinced that Ashley suffered injury following the time "when Dr. Hansell sought the assistance of a surgeon and for a reasonable response time thereafter ...." The Mallons did not object to the instruction.

As we have said, the jury found both the hospital and Dr. Campbell negligent. The jury awarded Scott and Susan Mallon $267,124.75 for past medical and home care expenses, $468,000.00 for future medical and home care expenses; and $1.5 million for loss of society and companionship. The jury awarded nothing to Ashley.

After the verdict, the defendants renewed their motions for a directed verdict on the ground that the plaintiffs had failed to prove a causal connection between the alleged negligence and the brain damage that Ashley sustained. The trial court granted defendants' motion and the Mallons appealed.

II.

SUFFICIENCY OF THE EVIDENCE

A trial court may not grant a motion for directed verdict challenging the sufficiency of the evidence 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 a party." Section 805.14(1), STATS. We may not reverse a trial court's decision to dismiss for insufficient evidence unless the record shows that the court was clearly wrong. ***Weiss v. United Fire and Casualty Co.***, 197 Wis.2d 365, 389, 541 N.W.2d 753, 761 (1995).

When granting the defendants' motion to dismiss for insufficient evidence, the court stated two reasons why it concluded that the plaintiffs had

not proven that the defendants' negligence caused Ashley's injuries. First, the court said, had Dr. Campbell and the hospital met the appropriate standard of care, Ashley would have been injured in any event. Second, no credible evidence showed that she suffered injuries during the period immediately preceding her delivery and after the lapse of the response time from when Dr. Hansell called for Dr. Campbell.

Viewing the evidence most favorable to the plaintiff, the trial court defined a reasonable response time as thirty minutes to prepare for surgery and three minutes from incision to delivery.

A. Inevitable Result

The trial court ruled that had Dr. Campbell arranged for Dr. Ali to take his place as the on-call surgeon at Columbus Community Hospital,

> the same sequence of events would have ensured. Dr. Ali is called. He is in surgery, and he performs the C-section at his first opportunity in accord with the determination of Dr. Hansell to transport Mrs. Mallon to Beaver Dam. There is absolutely no difference in the result.

The trial court ruled that had the hospital arranged for another surgeon to be on-call, no guarantee existed that the other surgeon would have been available to render timely assistance. The court reasoned

> In fact it cannot be expected that in any hospital a surgeon is always available, not otherwise occupied, prepared to respond upon demand. The real world is just not like that. On this day Dr. Campbell, for example, could have been in surgery himself and not immediately available. No one I suggest would argue that would be a deviation from any standard of care. Another expert cause witness of the plaintiffs, Jesse Hayes, specifically so testified. He

> also testified that he was not surprised to have only one surgeon in a small town. That that was a fact of life....And even if [a hospital had a surgeon available continuously for C-sections], that surgeon could be called to perform an emergency C-section and have there be a simultaneous need for another C-section by a different patient....Whether Dr. Ali was designated or not is of no consequence. He was called, agreed to assist and was available to come. Although not immediately available....Liability depends on violations of standards of care. And in this case adherence to those standards of care would have produced the same tragic results.

The Mallons argue that the trial court ignored key aspects of Dr. Ali's testimony, and we agree.

Dr. Ali is a member of the full-time staff at Beaver Dam Community Hospital, and he is a "consulting physician" at Columbus Community Hospital. As a consulting physician, Dr. Ali could treat patients, perform surgery and consult with physicians at Columbus Community Hospital. He was "on-call" at Beaver Dam Community Hospital on December 12, 1986, meaning that he had to be available to attend any surgical emergency arising at that hospital. Dr. Ali had never served as an on-call physician for Columbus Community Hospital with respect to emergency C-sections. He seldom agrees to do consulting work on the days on which he is on-call.

The Mallons argue that had Dr. Campbell called Dr. Ali and learned of Dr. Ali's unavailability, Dr. Campbell would have been available at Columbus Community Hospital. Instead, Dr. Campbell went Christmas shopping. Dr. Campbell testified that had he known an obstetrics patient was in the Columbus Community Hospital, he would not have gone shopping, "Or I might have made sure that someone would be available ... to make sure they weren't in surgery ... but I am sure what I would have done is not gone."

Thus, we conclude that credible evidence exists to support the jury's verdict that Dr. Campbell and Columbus Community Hospital

negligently failed to have a physician qualified to perform C-section operations on an emergency basis at the hospital when Susan was there.

B. Reasonable Response

The trial court ruled that only damages occurring to Ashley after 1:48 p.m. could be compensated. The court reasoned as follows: the call for a C-section was made at 1:15 p.m. The minimum response time is a total of thirty-three minutes, consisting of twenty minutes for the surgeon to appear, ten minutes for scrubbing, prepping, administering an anesthetic, and three minutes from incision to delivery. Having established the reasonable response time, the court concluded that no part of Ashley's damages were compensable that occurred before 1:48 p.m., and the court found that no credible evidence existed in the record that any portion of her damages occurred after that time.

The Mallons contend that, assuming the trial court properly established the reasonable response time, the record contains credible evidence from which the jury could find that Ashley's damages occurred after 1:48 p.m. and before her birth at 2:38 p.m. They also contend that the trial court mistakenly limited damages to those occurring after 1:48 p.m. We agree with the court that the jury had insufficient evidence from which it could reasonably find that Ashley's injuries occurred after 1:48 p.m., and we agree that only damages occurring after 1:48 p.m. are compensable.

Our review of a trial court's ruling on a motion to dismiss for insufficiency of evidence is both deferential to the trial court's better ability to assess the evidence and non-deferential as to whether the record contains any credible evidence to sustain a finding in favor of the party against whom the motion is made. The trial court must not grant the motion to dismiss unless as a matter of law no jury could disagree on the facts or the reasonable inferences to be drawn from the facts and no credible evidence exists to support a verdict for the plaintiff. ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d at 388, 541 N.W.2d at 761, *citing* ***American Family Mut. Ins. Co. v. Dobrzynski***, 88 Wis.2d 617, 624-25, 277 N.W.2d 749, 752 (1979), *quoting* ***Household Util. Inc. v. Andrews Co.***, 71 Wis.2d 17, 24, 236 N.W.2d 663, 667 (1976).

Because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court

> "must also give substantial deference to the trial court's better ability to assess the evidence." ***James v. Heintz***, 165 Wis.2d 572, 577, 478 N.W.2d 31 (Ct. App. 1991). An appellate court should not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong." ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 110, 362 N.W.2d 118 (1985). *See also*, ***James***, 165 Wis.2d at 577; ***Olfe***, 93 Wis.2d at 186., 286 N.W.2d 573.

Weiss, 197 Wis.2d at 388-89, 541 N.W.2d at 761.

The case-law "clearly wrong" standard and the statutory "no credible evidence" standard must be read together.

When a circuit court overturns a verdict supported by "any credible evidence," then the circuit court is "clearly wrong" in doing so. When there is *any* credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand." ***Macherey***, 184 Wis.2d at 7-8 (*quoting* ***Bergman v. Insurance Company of North America***, 49 Wis.2d 85, 88, 181 N.W.2d 348 (1970)). *See also* ***Leatherman v. Garza***, 39 Wis.2d 378, 387, 159 N.W.2d 18 (1968).

Weiss, 197 Wis.2d at 389-90, 541 N.W.2d at 761-62.

The Mallons contend that Dr. Kitzmiller's testimony on redirect examination establishes the factual basis from which the jury could conclude Ashley's injuries occurred after 1:48 p.m. We first review the trial court's reasoning when it disregarded this testimony because, in the court's view, it contradicted Kitzmiller's earlier testimony on direct examination. We conclude that the court erred but the error was harmless.

On direct examination Dr. Kitzmiller, an obstetrician who directs a high-risk pregnancy service, testified on the basis of the fetal heart monitoring strips that brain damage occurred to Ashley "after that deceleration that we saw that went down to stay at 13:02. And I think it most likely occurred during that prolonged time that the fetal heart rate was down, which was twenty, thirty minutes." However, on redirect examination, referring to the deceleration and bradycardia shown on the monitoring strips, Dr. Kitzmiller was asked if he had an opinion if the deceleration and bradycardia shown on the strips "indicate at the point in time they are occurring and charted that brain damage is actually happening to Ashley." He responded, "No, that is not what I testified. They don't indicate when the brain damage is happening. They suggest the events that are occurring inside the uterus when this could happen." He was then asked, "All right. And again, looking at that record, what is more likely? That they happened at or about the time of her birth or at some time back in uterine and earlier on in the pregnancy?" Dr. Kitzmiller answered, "I believe they happened sometime between 13:02 and the time of birth [2:38 p.m.]."

The trial court ruled that Dr. Kitzmiller's single statement that the damage to Ashley happened between 13:02 and the time of birth "simply is not credible evidence to support the verdict based on the damage having occurred after 13:48." The court based its ruling on the difference between Dr. Kitzmiller's earlier testimony on direct and his later testimony on redirect. Except to point out that Dr. Kitzmiller's direct and redirect testimony differed, the court did not explain why his testimony on redirect that the damage to Ashley happened between 13:02 and her birth was not credible evidence. The court erred. As the ***Weiss*** court said, when *any* credible evidence exists to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand." ***Weiss***, 197 Wis.2d at 389-90, 541 N.W.2d at 761-62.

However, the trial court's error was harmless. On redirect Dr. Kitzmiller did state that Ashley's damage "happened sometime between 13:02 and the time of birth." He did not state her brain damage occurred between 1:48 p.m. and her birth. The jury could only speculate as to when, within the confines of the unobjected-to reasonable response instructions, Ashley's injuries occurred.

The testimony was such that whether Ashley's brain damage occurred before or after a reasonable response time--before or after 1:48 p.m.--

was equally possible. Either choice is conjectural and speculative. *See* ***Jackson v. Wenzel***, 282 F.Supp. 357, 360 (E.D. Wis. 1968) ("if testimony leads reasonably to one hypothesis as to another, it tends to establish neither"). A jury cannot base its findings on conjecture and speculation. ***Herbst v. Wuennenberg***, 83 Wis.2d 768, 774, 266 N.W.2d 391, 394 (1978). "[W]hen the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." W. PAGE KEETON, PROSSER AND KEETON ON TORTS, § 41 at 269 (5th ed., Lawyer's Edition, 1984) (citations omitted).

The trial court also reviewed Dr. Kitzmiller's testimony that "there was causal negligence on the part of each defendant, the hospital and Dr. Campbell." The court concluded that "those opinions do not have support in his own conclusions and cannot be used to sustain the verdict." Asked for his opinion as to "whether or not that [the hospital's inability to have a surgeon in the hospital to perform the C-section when called for] was a substantial factor in producing the damage to the baby," Dr. Kitzmiller answered, "Yes, it was." Asked whether Dr. Campbell's deviations from the standard of care ["with respect to the emergency C-section call schedule"] was a substantial factor in causing Ashley's brain damage, Dr. Kitzmiller answered, "Yes, it was." We agree with the court that these answers do not establish whether Ashley's injuries occurred after 1:48 p.m., the expiration of the response time calculated by the court.

Dr. Kitzmiller was later asked whether he had "an opinion to a reasonable likelihood as to whether or not there is a causal relationship between the length of time that fetal distress occurs and persists until the time of delivery of the baby?" Kitzmiller answered as follows:

It makes common sense that if there is a lack of oxygen, the longer that goes on the worse it may be for the baby. Animal studies clearly show that. Clinical experience shows that. The question I believe is the recovery of fetal heart rate sufficient to show that this level of oxygenation problem in this baby has recovered and the unknown period of time when someone was just listening occasionally to the fetal heart rate in the ambulance and I am not reassured that time period that this fetus was in good shape

> and had recovered. So I think the answer to your question is yes, I think the length of time is a factor making it more likely for the brain damage to occur.

But Dr. Kitzmiller's testimony as understood most favorably to the plaintiff does not establish that injury occurred after 1:48 p.m.

The Mallons argue that Dr. Hansell's testimony establishes that Ashley's injuries occurred after 1:48 p.m. Asked if he was satisfied to a reasonable degree of medical likelihood that Ashley suffered from fetal distress prior to delivery, Dr. Hansell testified that she "had suffered and was suffering from fetal distress." The jury heard testimony that "fetal distress" is a term used to describe sudden changes to a fetal heart rate, indicating the fetus is getting insufficient oxygen and if not delivered quickly, could die or suffer brain damage. When asked if Ashley suffered from hypoxia, a lack of oxygen, when she was delivered, Dr. Hansell testified, "Awful close to that."

But Dr. Hansell said when Ashley's fetal distress began was beyond his expertise. A jury could not infer Ashley's fetal distress at birth was of sufficient duration or severity to cause her injuries in the time period after 1:48 p.m.

On appeal, citing her APGAR score, Columbus Community Hospital concedes Ashley suffered from fetal distress at birth. APGAR tests are administered one and five minutes after birth. Scores measure heart rate, respiration, muscle tone, reflex, color. A "2" for each is a perfect score. One minute after birth, Ashley received a one for heart rate, one for respiration and nothing for the others. A defense witness clarified that "In terms of color, if the baby is blue all over it is zero." Dr. Hansell testified that after an anesthesiologist attached a respirator to Ashley, "her color improved. When one is low on oxygen, they are kind of pale bluey color and when their oxygen level comes back more towards normal, they become a little pinker." While the jury could infer that at birth, Ashley suffered from a lack of oxygen, her APGAR scores do not establish her brain damage occurred after 1:48 p.m.

The Mallons contend that testimony from other experts supports a jury finding that Ashley's injuries occurred after 1:48 p.m., that "Ashley's injury was ongoing even after the fetal monitoring device was turned off." However,

none of the other experts testified that her injuries occurred, at least in part, after 1:48 p.m.

Dr. Stephen R. Bates, a pediatric neurologist, testified Ashley's condition was consistent with a severe hypoxic episode during labor and delivery. Referring to the fetal monitoring strips, Bates testified, "I think there is evidence of hypoxia from 13:06 through 13:18. That to me doesn't seem to be long enough really to account for this total brain devastation." Dr. Kenneth J. Poskitt, an expert pediatric neuroradiologist, testified that "an episode of asphyxia at or near the time of birth" caused Ashley's brain damage. Poskitt testified in his opinion the most reasonable explanation for Ashley's injuries was an event that took place over fifteen to twenty minutes up to one hour. Dr. Edelman, Ashley's treating pediatric neurologist, testified that Ashley's injury "probably occurred within hours before delivery." But we repeat, none of these experts testified that Ashley's injuries occurred after 1:48 p.m.

The Mallons argue that the trial court erred when it established thirty-three minutes as the reasonable response time. They cite testimony by the nurse in charge of the Columbus Community Hospital operating room, that had a doctor been present, a C-section could have gone forward within ten minutes from 1:23 p.m. because by that time a surgical team was assembled. Dr. Campbell and the Columbus Community Hospital respond that the nurse's testimony does not establish that the standard of care required a ten-minute response time and the jury could not set the standard without the benefit of expert testimony. The Mallons' reply brief does not dispute these contentions. *See* ***Madison Teachers v. Madison Metro. Sch. Dist.***, 197 Wis.2d 731, 751, 541 N.W.2d 786, 794 (Ct. App. 1995) ("A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted."). The Mallons cite no expert testimony impeaching the response times established by the trial court.

III. ***EHLINGER*** CORRECTLY APPLIED

For an alternative ground to reinstate the verdict, the Mallons assert that the trial court erred in refusing to apply the lesser burden of production described in ***Ehlinger v. Sipes***, 155 Wis.2d 1, 454 N.W.2d 754 (1990). They specifically assert that the trial court should have allowed Dr. Kitzmiller to testify that had a caesarian operation been performed at about 1:45 p.m., in all

likelihood Ashley's injury would have been lessened or avoided. The court excluded that testimony because this is not a medical omission or a misdiagnosis case, and Dr. Kitzmiller had earlier provided his opinion bearing directly on the question of cause. We agree with the ruling.

In ***Fischer v. Ganju***, 168 Wis.2d 834, 858, 485 N.W.2d 10, 19-20 (1992), Chief Justice Heffernan explained that the ***Ehlinger*** court

recognized that application of the ordinary burden of production and negligent misdiagnosis or omission cases produced harsh results because it required plaintiffs to prove as more probable than not a fact that was often unprovable--whether the omitted treatment would have prevented the harm. We held [in ***Ehlinger***] that where the defendant's negligence involves omitted treatment, the plaintiff need only *produce* evidence that the omitted treatment was intended to prevent the type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not that the omitted treatment could have lessened or avoided the harm. At this point, a prima facie issue of causation exists and the question must be submitted to the trier of fact, which then must decide whether the plaintiff met its burden of *persuasion* that the negligence was a substantial factor in producing the injury. (Emphasis added.)

Thus ***Ehlinger***

allows plaintiffs in negligent misdiagnosis and omission cases more easily to survive motions to dismiss for insufficiency of the evidence, and has nothing to do with the plaintiffs ultimate burden of *persuasion* regarding causation. It is merely the minimal quantum of evidence which must be *produced* from which a jury reasonably could infer that the

> negligence was a substantial factor in producing the injury.

Id. at 861, 485 N.W.2d at 21. (Emphasis added.)

The trial court properly refused to allow the ***Ehlinger***-type questioning of Dr. Kitzmiller. The Mallons had met their burden of producing evidence that oxygen deprivation caused Ashley's injury. They failed to meet their burden to produce evidence as to when the injury occurred. That failure is critical to the causation issue, because the trial court instructed the jury that it could find causal negligence only if the jury was convinced that Ashley suffered injury following the time "when Dr. Hansell sought the assistance of a surgeon and for a reasonable response time thereafter...." The Mallons did not object to the instruction, and its propriety is not at issue. Taking into account the evidence most favorable to the Mallons, the trial court ruled that the reasonable response time expired at 1:48 p.m.

Ehlinger, as explained in ***Ganju***, does not justify the application of the lesser burden of production. ***Ehlinger*** deals with the problem of proving a negative: that harm would not have occurred had there been no misdiagnosis or omission. Neither circumstance is present. This is neither a negligent misdiagnosis case nor an omitted treatment case. That Ashley's need for a prompt delivery was properly diagnosed is undisputed. She and her mother were treated. Treatment was delayed, and there is no question but that the delay caused harm to her. The factual issue is whether the delay beyond the reasonable response time caused her harm.

We conclude the trial court did not err in its application of ***Ehlinger v. Sipes***, 155 Wis.2d 1, 454 N.W.2d 754 (1990).

IV. CONCLUSION

Because we affirm the judgment and order before us on appeal, we do not reach the questions raised regarding a remand for rulings on the defendants' post-trial motions.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 93-3452(D)

SUNDBY, J. (*dissenting*). On December 12, 1986, the surgeon "on call," defendant Craig Campbell, M.D., was Christmas shopping when unborn Ashley Mallon exhibited fetal distress requiring an emergency cesarean section. The Columbus Community Hospital could not reach Dr. Campbell. Neither he nor the Hospital had arranged for a surgeon to "cover" for Dr. Campbell. It was necessary to transport the mother, Susan Mallon, to Beaver Dam Community Hospital where Dr. H. Ahmed Ali delivered Ashley by cesarean section. As a result of the delay, Ashley suffered permanent brain damage, profound mental retardation, and severe cerebral palsy. She died February 24, 1994, after over seven years of twenty-four- hour-a-day monitoring and care. After a three-week trial, the jury awarded the Mallons damages and costs of $2,235,124.75. On motions after verdict, the trial court set aside the verdict because "there was no causal connection between any negligence of either defendant and the injuries sustained by Ashley."

Defendants' claim that they were not negligent in failing to provide emergency medical care for Susan and Ashley is frivolous. The trial court's conclusion that there was no causal connection between defendants' negligence and Ashley's injuries defies common sense. I therefore dissent.

The majority has gotten hung up on the trial court's erroneous jury instruction that only damages occurring to Ashley after 1:48 p.m. could be compensated. The court computed this time from when the attending physician, Dr. Charles Hansell, a family practitioner but not a surgeon, concluded at 1:15 p.m., after an attempted forceps delivery, that emergency surgery was necessary. The trial court allowed defendants a "response" time of thirty-three minutes: twenty minutes for the surgeon to appear, ten minutes for scrubbing, prepping, administering the anesthetic, and three minutes from incision to delivery.

The first error made by the trial court was creating the Dr. Ali scenario. The court assumed that Dr. Ali was the only surgeon who could have performed the needed surgery. The facts are, however, that the hospital tried to call two other surgeons in Beaver Dam, who were unavailable. The court also assumed that if Dr. Campbell or the Hospital had arranged with Dr. Ali to "cover" for him, "the same sequence of events would have ensued"; Dr. Ali would have been in surgery and unavailable. While the trial court was manufacturing a scenario, it should also have included that Dr. Ali could have arranged his schedule to be available in an emergency.

The second error made by the trial court was to conclude that Dr. Campbell would have satisfied his obligation to the hospital and its patients by arranging for Dr. Ali to stand in for him. As the trial court observed, life in a small town is different. A witness testified that "he was not surprised to have only one surgeon in a small town." All the more reason to be able to reach that surgeon if an emergency arises. I have been annoyed by enough "beepers" in darkened theaters to know that emergency personnel in many occupations are instantly available to be summoned to put out fires or save persons' lives. The trial court observed: "Unfortunately for the plaintiffs the timing was bad." It is chilling to excuse the loss of a child on bad timing.

The court also criticized the plaintiffs for arguing a number of "what ifs." It said: "This is not a case for what ifs." Yet the court found defendants' negligence not causal by assuming a number of speculative "what ifs" not supported by the evidence. In the process, it usurped the fact-finding prerogative of the jury.

Finally, the ultimate error made by the trial court, and approved by the majority, was that there was no evidence that Ashley suffered any damage after 1:48 p.m. Ashley was delivered at 2:38 p.m. In the intervening fifty minutes, was there any credible evidence to support the jury's finding of cause? The trial court concluded that there was none, and the majority agrees: "We agree with the court that the jury had insufficient evidence from which it could reasonably find that Ashley's injuries occurred after 1:48 p.m." Maj. op. at 11. "Insufficient evidence" is "no credible evidence." *See* ***Macherey v. Home Insurance Co.***, 184 Wis.2d 1, 7, 516 N.W.2d 434, 436 (Ct. App. 1994).

We must assume that the jury followed the trial court's instructions. ***Johnson v. Pearson Agri-Systems, Inc.***, 119 Wis.2d 766, 776, 350 N.W.2d 127, 132 (1984). Therefore, the jury found that Ashley suffered injuries

after Dr. Hansell sought the assistance of Dr. Ali, and for a reasonable response time thereafter.[2]

The jury heard that at 11:30 a.m., Susan's contractions were becoming less frequent and were of a poor quality. It also heard that Dr. Hansell tried to induce delivery by administering Pitocin and that the fetal monitor was showing that Ashley was not getting adequate oxygen.

Dr. John Kitzmiller was asked the following questions and gave the following answers:

> Q... Do you have an opinion to a reasonable likelihood as to whether or not there is a causal relationship between the length of time that fetal distress occurs and persists until the time of delivery of the baby?
>
> AYes, I understand the question.
>
> ....

---

[2] The trial court instructed the jury:

> Before you can find that the alleged negligence of any party was a cause of Ashley Mallon's present condition, you must find that it was a substantial factor in producing her present condition....
>
> ... Any neurologic injury to Ashley Mallon up to the time when Dr. Hansell sought the assistance of a surgeon and for a reasonable response time thereafter cannot be regarded by you in any way as having been caused or contributed to by an alleged negligence.

QWhat is your answer, please?

AThe key word is persist.

QYes.

A*It makes common sense that if there is a lack of oxygen, the longer that goes on the worse it may be for the baby*. Animal studies clearly show that. Clinical experience shows that. The question I believe is the recovery of the fetal heart rate sufficient to show that this level of oxygenation problem in this baby has recovered and the unknown period of time when someone was just listening occasionally to the fetal heart rate in the ambulance and I am not reassured that that time period that this fetus was in good shape and had recovered. So I think the answer to your question is yes, I think the length of time is a factor making it more likely for the brain damage to occur.

(Emphasis added.)

This case is remarkably similar to ***Martin v. Richards***, 176 Wis.2d 339, 347-48, 500 N.W.2d 691, 696 (Ct. App. 1993), *aff'd in part and rev'd in part*, 192 Wis.2d 156, 531 N.W.2d 70 (1995), in the respect that defendants there made the same argument defendants make here, *i.e.,* that their negligence was not causal. In ***Martin***, we concluded that the hospital was negligent in not

informing the injured child's parents that a neurosurgeon was not available if the child developed epidural hematoma. We concluded that the jury heard sufficient evidence from which it could have concluded that surgical intervention at an earlier time would have lessened the child's injuries. That is the case here. I do not believe expert testimony was necessary in this case for the jury to reach the same conclusion. All the jury had to do was use its common sense to conclude that the longer Ashley went without oxygen, the more she would be injured. I do not believe common sense has yet been exiled from the judicial process.