COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 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. 94-1905

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

GREGG MILLER,

Plaintiff-Respondent,

v.

NATIONAL CHIROPRACTIC MUTUAL INSURANCE COMPANY and MARK BOHL, D.C.,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Dr. Mark Bohl, a chiropractor, and his insurer, National Chiropractic Mutual Insurance Company, appeal from a judgment awarding damages on Gregg Miller's malpractice claim. The issues are whether the trial court erred by giving a *res ipsa loquitur* instruction and by excluding certain expert testimony, whether credible evidence supported the jury's

findings of causal negligence, whether the jury's damage award was excessive and whether a new trial should be granted in the interests of justice. We reject Dr. Bohl's arguments on these issues and affirm.

In December 1991, Dr. Bohl treated Miller for neck pain and headaches. At the third and last treatment session, Miller heard a loud popping noise while Dr. Bohl was working on his neck. A few minutes later, he suffered a stroke caused by a torn artery in his neck. Dr. Bohl concedes that the tear was linked to something that occurred during the treatment session. Neither he nor Miller could testify, however, to exactly when the tear occurred and what Dr. Bohl was doing to Miller at the time.

At trial, the jury heard a physician, Dr. Charles Miley, testify that the artery was probably torn by an unreasonably forceful neck rotation. Dr. Bohl countered with an expert chiropractic witness, Dr. Joseph Ferezy, who testified that the injury was probably not caused in that manner because there was no other tissue damage and because Miller did not experience the pain one would expect from an unreasonable use of force. Having ruled out excessive force, Dr. Ferezy concluded that Miller had a preexisting weakness such that the tear would have occurred even with the use of normal, reasonable chiropractic manipulation. The court did not allow Dr. Ferezy to present that conclusion, however, on the grounds that no foundation existed. The court only allowed Dr. Ferezy to testify that a preexisting condition was a possible, not a probable, cause.

In contrast to Dr. Ferezy, Miller's expert chiropractor, Dr. Patrick Sullivan, testified that Miller would not have suffered his injury if properly treated. Over Dr. Bohl's objection, the court instructed the jury that

> if you further find from the expert testimony in this case that the injury to Greg Miller is of the kind that does not ordinarily occur if a chiropractor exercises proper care and skill, then you may infer, from the fact of the testing and manipulation that Dr. Bohl failed to exercise that degree of care and skill which chiropractors usually exercise. This rule will not apply if the evidence satisfies you that the injury did

> not occur through any failure on Dr. Bohl's part to exercise due care and skill.

The jury found Dr. Bohl causally negligent and awarded damages including $500,000 for past and future pain, suffering and disability. The trial court upheld the verdict on postverdict motions, resulting in this appeal.

The trial court properly instructed the jury. The court should give an instruction like the one quoted above, known as a *res ipsa loquitur* instruction, if, by common knowledge or expert testimony, the jury can conclude that (1) the result does not ordinarily occur in the absence of negligence; (2) the defendant exclusively controlled the agent or instrumentality causing the harm; and (3) the evidence on causation removes it from the realm of conjecture, but is not so substantial as to provide "a full and complete explanation of the event." ***Lecander v. Billmeyer***, 171 Wis.2d 593, 601-02, 492 N.W.2d 167, 170-71 (Ct. App. 1992). Here, Dr. Bohl argues, alternatively, that Miller proved either too little or too much to justify the instruction. We disagree. Dr. Sullivan went through each mode of treatment Dr. Bohl used or might have used on Miller, and concluded that none would produce a torn artery unless negligently performed. That testimony, if believed, established the occurrence of a result not ordinarily occurring in the absence of negligence. Otherwise, Dr. Bohl conceded that something in his treatment methods triggered the tear, and the instrumentality of the treatment was plainly within his exclusive control.

Additionally, although Miller also offered Dr. Miley's opinion that the specific cause of the injury was an unusually forceful rotation, that opinion was undercut by the lack of evidence that an unusually forceful rotation actually occurred. It was not, therefore, evidence so substantial or direct that it provided a full and complete explanation of the event. "The introduction of some evidence which tends to show specific acts of negligence, but does not purport to directly furnish a complete and full explanation of the occurrence, does not deprive the plaintiff of the benefit of *res ipsa loquitur*...." ***Knief v. Sargent***, 40 Wis.2d 4, 9, 161 N.W.2d 232, 234 (1968). Neither too much nor too little evidence was presented to remove the trial court's discretion on giving the *res ipsa loquitur* instruction.

Dr. Bohl suffered no prejudice from the decision to limit Dr. Ferezy's testimony. Dr. Ferezy testified that Miller was not injured by a forceful neck rotation. He wanted to, but could not, testify that if a forceful movement was not the cause, then a preexisting weakness necessarily was. For purposes of Dr. Bohl's case, both statements made essentially the same points: Dr. Miley was wrong and Dr. Bohl was not negligent. Because Dr. Ferezy was allowed to make those points, limiting his subsequent testimony was harmless, even if it was error. A party who relies on trial court error to obtain reversal must show that the error complained of affected his or her substantial rights. § 805.18(2), STATS.

Miller introduced sufficient evidence to support the verdict. On review of a verdict, sufficient evidence is any credible evidence. ***Foseid v. State Bank***, 197 Wis.2d 772, 783, 541 N.W.2d 203, 207 (Ct. App. 1995). Dr. Bohl never disputed that his treatment caused the torn artery and subsequent stroke, and consequently, whether he was negligent was the only liability issue. Miller introduced evidence that reasonable, non-negligent chiropractic procedures would not have caused Miller's injury, but that negligent procedures would have. Although Dr. Bohl disputed that evidence, the jury was free to accept it and find negligence.

The trial court properly refused to set aside the verdict as excessive. Dr. Bohl contends that the upper limit on a reasonable verdict, based on the evidence, would have been $100,000. He maintains that the jury's award of $500,000 demonstrates that it considered inappropriate factors. We disagree. The test is whether the verdict on damages exceeds what is reasonable as a matter of law. § 805.15(6), STATS. Put another way, the issue is whether the award shocks the judicial conscience. ***Johnson v. Misericordia Community Hosp.***, 97 Wis.2d 521, 566, 294 N.W.2d 501, 524 (Ct. App. 1980), *aff'd*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). Here, Miller had residual effects from the stroke, including voice impairment, balance problems, fatigue, numbness on one side and a tingling sensation in his arm. He testified how these problems detrimentally affect his daily life and will restrict his activities for the rest of his life. Given that evidence, we cannot say that the award was shocking, or unreasonable as a matter of law.

Finally, Dr. Bohl contends that we should exercise our authority under § 752.35, STATS., to grant a new trial in the interests of justice. Under §

752.35, we may reverse if we conclude that the real controversy has not been fully tried, or it is probable that justice has for any reason miscarried. We are not persuaded that a new trial is necessary under either standard.

By the Court.—Judgment affirmed.

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