COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1048 **Cir. Ct. No. 2009CV96**

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

SUSAN J. STARK,

PLAINTIFF-APPELLANT,

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

JEFF HAMBLIN, INDIANHEAD COMMUNITY ACTION AGENCY AND ADMIRAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Susan Stark appeals a judgment following a jury verdict. She argues the verdict was perverse and damages were inadequate. She also requests a new trial in the interests of justice. We reject her arguments and affirm.

¶2 Stark was sexually assaulted in her rural Spooner residence by a prisoner named William Baugh. Baugh became acquainted with her while installing energy-efficient appliances in her home for three days under a government program for which Stark qualified. The program was implemented by Indianhead Community Action Agency, Inc. Inmates from Gordon Correctional Center assisted with the installation of appliances and weatherization. Jeff Hamblin was employed by Indianhead to transport, supervise and sometimes work with the prison labor.

¶3 Gordon was a minimum security facility. Inmates with good conduct records who wished to become involved with the program were screened by the Wisconsin Department of Corrections. No sex offenders were interviewed for the program.

¶4 On the day of the assault, Baugh was assigned to Hamblin for transport to an unrelated jobsite. Baugh told Hamblin he left something at Stark's residence when previously working there, and asked Hamblin if he would drive by the home. Hamblin agreed to do so, and Hamblin waited in the van while Baugh went to the door. In approximately five minutes, Baugh returned to the van appearing normal and indicated he had obtained Stark's phone number. During the short time Baugh was in the home, however, he had sexually assaulted Stark. She reported the incident, and Baugh was criminally convicted. Stark subsequently commenced a civil lawsuit against Hamblin and Indianhead.

¶5 Neither Hamblin nor Indianhead knew that Stark had been corresponding with Baugh since they met at her home during the appliance installation. Stark was aware that such correspondence was contrary to prison rules. After Baugh's arrest, letters in his cell from Stark were confiscated. Stark also retained several letters from Baugh, which police took as evidence. The letters were introduced in Baugh's trial.

¶6 At trial, Stark made no claim against Hamblin and Indianhead for any expenses for medical or psychological treatment.[1] Her claim was essentially for psychological pain and suffering.[2] The jury concluded that both Stark and Hamblin were negligent, but answered the verdict questions "no" as to causation. The jury awarded $10,000 for past pain and suffering, and zero for future damages. On motions after verdict, the circuit court changed the jury's causation answer regarding Hamblin,[3] but in all other respects upheld the verdict. This appeal follows.

¶7 Stark argues the jury's verdict was perverse. She claims passion and prejudice affected not only the verdict question concerning causation but damages as well. She also contends the damages the jury awarded were shockingly inadequate.

¶8 A verdict is perverse when the jury "clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict

[1] Stark testified that she was on disability at the time of the incident.

[2] In her closing argument, Stark advocated for $750,000 in "past pain and suffering and disability" and $1,000,000 for future pain, suffering and disability.

[3] There was no cross-appeal and this issue is therefore not before us.

reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning v. Dore***, 56 Wis. 2d 129, 134, 201 N.W.2d 580 (1972) (footnote omitted). Here, the record does not support Stark's contentions regarding a perverse verdict. We conclude the jury merely believed one expert over the other, and did not place great weight on Stark's testimony.

¶9 The credibility of the witnesses and the weight afforded their evidence is in the sole province of the jury. ***In re Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Where more than one reasonable inference may be drawn from the evidence, we must accept the inference drawn by the jury. ***Id.*** We will search the record for evidence to sustain the jury's verdict, and we will sustain a jury verdict if there is any credible evidence to support it. ***Id.*** We are especially reluctant to change a jury's award when it has the approval of the circuit court. ***Lopez v. Prestige Cas. Co.***, 53 Wis. 2d 25, 32, 191 N.W.2d 908 (1971).

¶10 The circuit court noted in its oral ruling on motions after verdict that the jury was presented with a "dramatic and different view of the evidence" from the respective medical experts. Doctor Christopher Babbitt testified for Stark, and opined that her pre-existing conditions were aggravated, and the aggravation would continue for the rest of her life. Defense expert Dr. Paul Caillier testified that Stark had progressed through her trauma and "returned to baseline as he viewed it[,]" and therefore concluded "there should be no future pain, suffering, disability, or severe emotional distress."

¶11 The court concluded, "It's clear that the jury believed Dr. Caillier's explanation and Dr. Caillier's opinion, and that is the basis for the answer of zero

to question 6B." The circuit court also addressed the issue of whether the verdict presented shockingly inadequate damages. The court stated:

> I think the damages were reasonably supported by the jury verdict, given the facts that were there, and the analysis that the jury went through. I've reaffirmed my prior statement that I made twice. A Court may not substitute its view of the evidence and the damages for those as determined by the jury if the facts as presented would support a reasonable analysis by the jury, and those facts do.

¶12 In addition, Stark testified that she had severe and permanent injuries, but she admitted to a long history of pre-existing mental illness including anxiety, depression and agoraphobia. Moreover, she testified that she fought hard to resist Baugh, and asserted she was injured defending herself. The medical records revealed, however, that Stark told nurse Kathleen Olsen that she did not attempt to fight off Baugh, "as she felt she was too weak and didn't want to make it worse." In addition, within a few months after the incident, Stark was assessed by her long-time physician's assistant Tom Nigbor. It was his opinion that Stark's ongoing complaints of physical pain were not due to a physical cause but, rather, the result of her mental conditions. Stark also admitted that she wrote a letter to Nigbor, insisting, "I really have physical pain. You're wrong." Stark testified that she no longer treated with Nigbor.

¶13 In her brief on appeal, Stark essentially re-argues her case. We agree with the circuit court that adequate evidence supported the jury's seemingly low award. The circuit court sufficiently expressed its reasoning for upholding the

jury verdict, and it properly exercised its discretion in concluding the verdict was neither inadequate nor perverse.[4]

¶14 Finally, Stark contends she is entitled to a new trial on damages in the interests of justice.[5] The real controversy was fully tried and we are unpersuaded that Stark was denied a fair trial.[6]

By the Court.—Judgment affirmed.

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

[4] Stark uses the phrase, "abuse of discretion." The terminology used in reviewing a circuit court's discretionary act was changed by our supreme court in 1992 from "abuse of discretion" to "erroneous exercise of discretion." *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

[5] Stark also argues that defense counsel, in closing argument, suggested damages of $25,000. However, the record reveals that defense counsel also suggested $25,000 may be too high, and stated, "To be honest with you, folks, I am really hesitant to mention any number at all …." In any event, the circuit court properly instructed the jury that closing arguments are not evidence and the jury should draw their own conclusions.

[6] Stark's argument in this regard is unclear. The heading of her argument section alleges the circuit court erred "when it failed to order a new trial in the interest of justice …." We note that in the circuit court, Stark sought a new trial in the interest of justice under WIS. STAT. § 805.15(2). On appeal, she does not develop an argument, address the proper standard of review for the denial of a motion under § 805.15(2), or otherwise address the statute.

All references to the Wisconsin Statutes are to the 2009-10 version.