

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1398-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CLEUZA SCHUH AND ROLF SCHUH,

PLAINTIFFS-APPELLANTS,

V.

**PHYSICIANS INSURANCE COMPANY OF WISCONSIN,
INC., MICHAEL E. WEST, M.D. AND WISCONSIN
PATIENTS COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Cleuza and Rolf Schuh appeal a judgment dismissing their malpractice claim against Dr. Michael West and his insurers.¹

¹ This is an expedited appeal under RULE 809.17, STATS.

The Schuhs contend that the trial court erred by assigning plaintiffs an improper burden of proof. The Schuhs maintain that the court erroneously required the plaintiffs to prove precisely where West attached a right-side fallope ring while performing a tubal ligation on Cleuza in addition to requiring plaintiffs prove that West departed from the standard of care by failing to place the ring on Cleuza's right fallopian tube. The Schuhs further contend that the trial court erred by refusing to grant their motion for a new trial based on newly discovered evidence. The newly discovered evidence consisted of a post-trial test conducted by their expert physician to establish whether a fallope ring could be placed on the mesosalpinx as the Schuhs have contended.² Because we conclude that the trial court applied the proper burden of proof, that the record supports the trial court's determination that the Schuhs failed to meet that burden, and that their expert's post-trial testing is not newly-discovered evidence, we affirm the judgment.

West performed a tubal sterilization procedure on Cleuza requiring placement of fallope rings on both her right and left fallopian tubes. Proper placement of the fallope rings, by looping a section of the fallopian tube up through the ring, results in blockage of the fallopian tubes, a resultant loss of blood supply and death of an approximately one-inch portion of the tube. Subsequent to this surgery, Cleuza became pregnant and gave birth to a daughter. Doctor Daniel Friday performed a follow-up tubal sterilization. He testified that the fallopian tube on the right side looked perfectly normal and showed no scarring or narrowing. Friday also testified that a dye injected in the tube flowed freely through the tube indicating no narrowing of the tube. Friday observed a fallopian

² According to the testimony, the mesosalpinx is a membrane-like structure which contains blood vessels and is near the fallopian tubes. The mesosalpinx provides support for reproductive organs so they can go through the massive changes required by pregnancy.

ring on Cleuza's right side but, it was located on top of the mesosalpinx and was not attached to the fallopian tube. Friday also indicated that he did not know if the ring was placed on a vein or the mesosalpinx or elsewhere, but expressed the opinion it had not been placed on the right fallopian tube.

After considering the evidence, the trial court concluded that the Schuhs failed to meet their burden of proving West's negligence and granted judgment to the defendants dismissing the Schuhs' complaint on the merits.

This case was tried to the court without a jury. When the trial court acts as finder of fact, it is responsible for making findings on the ultimate facts and separately stating its conclusions of law. Section 805.17(2), STATS. The trial court's findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the trial court's opportunity to judge the credibility of witnesses. *Id.* Such factual findings will be upheld as long as they are supported by any credible evidence or reasonable inferences that can be drawn therefrom. *Meyer v. Classified Ins. Corp.*, 179 Wis.2d 386, 396, 507 N.W.2d 149, 153 (Ct. App. 1993). The court will search the record for evidence to support the trial court's findings of fact. *In re Becker*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). We must accept any reasonable inferences the factfinder makes from the evidence. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). Conflicts in the testimony are resolved in favor of the trial court's findings of fact. *Sumnicht v. Toyota Motor Sales*, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). The trial court's conclusions of law, however, are entitled to no deference, and are reviewed de novo. *Ball v District No. 4 Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Contrary to the Schuhs' assertion, we conclude the trial court only and properly required the Schuhs to carry the burden of proving that the fallope ring was not placed on the fallopian tube. Furthermore, we conclude that the record supports the trial court's determination that the Schuhs failed in this burden.

To support their contention that the trial court assigned plaintiffs an improper burden of proof, the Schuhs place significant reliance upon the following statement by the trial court: "So the burden is on the plaintiffs to have proven that the ring was not placed on the tube; it was placed elsewhere."

This reliance is misplaced. The trial court clearly articulated the burden of proof just before this comment when it said:

On the evidence in this case, the question largely is this: Was the fallope tube [sic] placed on the fallopian tube or not? If it can be proven that it was not, then Doctor West was negligent. If it is not so proven, then the burden of proof has not been met and this action must be dismissed. I know that that might seem obvious, but I think it's important for the record that I explain that there is no other basis in the evidence for a finding of negligence.

Moreover, the Schuhs' citation of the court's statement of the burden of proof is incomplete. A careful reading of the statement relied upon by the Schuhs indicates that the court again properly identified the burden of proof. The entirety of that portion of the trial court's statement of the plaintiff's burden of proof is:

So the burden is on the plaintiffs to have proven that the ring was not placed on the tube; it was placed elsewhere. *They must prove to a reasonable certainty, by the greater weight of the credible evidence, that Doctor West did not apply the fallope ring to Mrs. Schuh's right fallopian tube*

during the laparoscopic procedure May 10th of 1994.
(Emphasis added.)

Accordingly, we conclude the record establishes that the trial court did not impose an improper burden of proof on plaintiffs to show specifically where West erroneously placed the fallope ring. The trial court correctly identified plaintiffs' burden as proving that the fallope ring was not placed on the right-side fallopian tube.

We further conclude that the record supports the trial court's determination that the Schuhs failed to meet their burden. The Schuhs' theory of the case was that West incorrectly attached the fallope ring to the mesosalpinx or to an enlarged vein rather than on the fallopian tube. In support of this claim they introduced the opinion of Friday who concluded that, in the absence of scarring on the tube and because of the free flow of the dye injected in the tube, the ring had not been placed upon the tube during the initial sterilization procedure. While Friday was unable to state where the ring had been placed with any degree of certainty, he expressed the opinion that the ring had not been placed upon the fallopian tube and therefore the right tube remained open permitting conception to occur. In further support of their theory, Cleuza testified that she experienced significant bleeding immediately following the surgical procedure.

West, on the other hand, introduced evidence that this particular surgical procedure can fail in the absence of any negligence. West testified that failure can result either because the tube reconnects (recanalization) or because muscular contractions of the tube cause the ring to be sloughed off the tube. West indicated that it was his opinion that the failure to achieve sterilization was the result of a small percentage of failures that occur in this procedure without negligence. West further testified that he followed his standard procedure for this

type of surgery which included not proceeding until he made certain by careful observation that he could identify the fallopian tube and that it was the fallopian tube that had been pulled through the fallope ring. West testified that he was certain to a reasonable degree of medical probability that he placed the fallope rings on both the left and right fallopian tubes. Doctor James Dolan, defendant's expert witness, indicated that he disagreed with Friday's contention that the ring had not been placed upon the fallopian tube and expressed the opinion to a reasonable degree of medical probability that the fallope ring was properly placed upon the tube when West performed the surgery on Schuh. Dolan indicated that upon viewing the videotape of Friday's follow-up sterilization procedure, he observed evidence of the ring's placement on the right-side tube. Dolan also confirmed that this procedure can fail in the absence of any negligence. Dolan indicated to a reasonable degree of medical probability that West exercised the proper degree of care in performing this sterilization procedure upon Schuh, and that recanalization explained Schuh's subsequent fertilization.

In this case, the trial court was faced with different medical opinions and was required to determine which opinion to accept. The trial court detailed its assessment of the evidence and made credibility determinations. Faced with this conflicting evidence, the trial court concluded that the Schuhs failed to carry their burden of proving that the fallope ring had not been placed upon the fallopian tube. While there is evidence that would have supported a factual finding either way, the trial court was unpersuaded that the Schuhs had demonstrated by the degree of proof required that West failed to place the ring upon the fallopian tube. Accordingly, the court found in favor of West and ordered the complaint be dismissed.

Because the record supports the trial court's conclusion that the Schuhs failed to prove that West had not placed the fallope ring upon the fallopian tube we are required to affirm the verdict rendered by the court sitting as a trier of fact. We examine the record for any credible evidence upon which the court could have based its decision and we are required to review the evidence in the light most favorable to sustaining the factfinder. *Sumnicht*, 121 Wis.2d at 360, 360 N.W.2d at 12. The trial court's findings were not clearly erroneous and were supported by the record. There is little question on this record that a trier of fact could be persuaded that West placed the ring upon the fallopian tube. We hold the trial court properly concluded that the Schuhs had not proven West's negligence in performing this sterilization procedure.

The Schuhs next contend that the court erred by not ordering a new trial based upon newly discovered evidence pursuant to § 805.15(3), STATS. That statute states in relevant part:

- (3) NEWLY-DISCOVERED EVIDENCE. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:
- (a) The evidence has come to the moving party's notice after trial; and
 - (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
 - (c) The evidence is material and not cumulative; and
 - (d) The new evidence would probably change the result.

A party seeking a new trial on the grounds of newly-discovered evidence must satisfy each of the four elements set forth in the statute. *Ritt v. Dental Care Assocs.*, 199 Wis.2d 48, 79, 543 N.W.2d 852, 864 (Ct. App. 1995).

In this case, the newly discovered evidence consists of experiments done by Friday concerning the feasibility of misapplying the fallope ring on the mesosalpinx rather than the fallopian tube. The record reflects that the issue of whether a fallope ring could be placed on the mesosalpinx was raised during discovery at the deposition of defendants' expert, Dolan. Dolan's ultimate opinion on this issue was inconclusive. To the extent, however, that Dolan contended that the ring could not be placed on the mesosalpinx, we conclude that such testimony during discovery was sufficient to have alerted plaintiffs that the feasibility of misplacing the ring on the mesosalpinx was an issue. Any experiments demonstrating that the ring could have been placed on the mesosalpinx should have been conducted prior to trial and the results introduced in plaintiffs' case-in-chief or in response to Dolan's opinion that this specific placement was not possible. To the extent, however, that Dolan asserted that the ring could be placed on the mesosalpinx albeit with inherent complications, any further experiments plaintiffs conduct to prove this proposition would be irrelevant. Accordingly, we conclude that any scientific testing that was to be done on this issue should have been done during trial preparation and does not qualify as newly discovered evidence.

There must be some reasonable end to litigation. The scientific testing that should have been done in support of the Schuhs' theory of the case cannot be done following an adverse trial result and then be submitted as newly discovered evidence. Scientific testing must be done during the preparation of the case itself and not held back for some later claim in support of a demand for a new trial. Because we conclude that the scientific testing does not qualify as newly discovered evidence, the trial court properly denied the Schuhs' motion for a new trial.

In sum, we conclude that the trial court applied the proper burden of proof, that there was sufficient evidence in the record to support the trial court's determination that the Schuhs failed to meet that burden, and that their expert's post-trial testing is not newly-discovered evidence. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

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

