COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1626

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

JANET M. EVANS,

PLAINTIFF-APPELLANT,

V.

TIMOTHY D. HEITMAN, M.D., ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Janet M. Evans appeals from a judgment entered, following a bench trial, in favor of Timothy D. Heitman, M.D., St. Paul Fire and

Marine Insurance Company, and the Wisconsin Patients Compensation Fund.[1] She argues that the trial court erred in concluding that Dr. Heitman did not commit medical malpractice. Evans also appeals from an order enlarging the time for perfection of the judgment. She argues that the trial court erred in granting the enlargement because Dr. Heitman failed to establish good cause for the enlargement. We affirm.[2]

BACKGROUND

¶2 On March 1, 1993, Dr. Heitman performed on Evans a laparoscopically-assisted vaginal hysterectomy with a bilateral salpingo-oophorectomy, thereby removing Evans's uterus, fallopian tubes and ovaries. After the operation, Dr. Heitman discovered that he had unintentionally stapled Evans's right ureter, slightly below the uterine artery. Dr. Heitman had not seen Evans's right ureter within the jaws of the stapler during the operation. Dr. Heitman did not attempt to locate Evans's ureter during the operation, but instead stayed close to the uterine wall when discharging the stapler. Evans had to have additional surgery to correct the problems caused by the stapling of her ureter.

¶3 Thereafter, Evans filed a medical malpractice claim against Dr. Heitman, asserting that he was negligent in discharging the stapler without first locating and identifying her ureters. After a bench trial, the trial court found that Dr. Heitman was not negligent in performing the laparoscopically-assisted vaginal

[1] Throughout this opinion, Timothy D. Heitman, M.D., St. Paul Fire and Marine Insurance Company, and the Wisconsin Patients Compensation Fund will be collectively referred to as Dr. Heitman.

[2] Dr. Heitman asserts in his brief that this appeal is frivolous and he requests that we impose sanctions pursuant to § 809.25(3), STATS. We conclude that the appeal is not frivolous, and, accordingly, we deny the request for sanctions.

hysterectomy without visualizing Evans's ureters. Specifically, the trial court concluded:

> 1. Plaintiff has failed to sustain her burden of proof, to a reasonable certainty by the greater weight of the credible evidence that Heitman failed to exercise that degree of care, skill and judgment usually exercised by a reasonable physician taking into consideration the state of medical science at the time he performed the [laparoscopically-assisted vaginal hysterectomy] on Evans in 1993.
>
> 2. Performance of the [laparoscopically-assisted vaginal hysterectomy] procedure without visualizing the ureter was within the standard of care in 1993 based upon the state of medical knowledge at that time.

¶4 Accordingly, the trial court ordered the clerk to enter judgment in Dr. Heitman's favor, along with costs. On April 22, 1998, the clerk entered the judgment. Before the time for perfecting the judgment had expired, Dr. Heitman filed a motion to extend the time within which to perfect the judgment.[3] Counsel for Dr. Heitman explained, by affidavit, that they had inadvertently closed their case file and thus had not yet made an appointment with the judgment clerk for perfection of the judgment. Counsel for Dr. Heitman averred that they had

[3] Section 806.06(4), STATS., provides:

> A judgment may be rendered and entered at the instance of any party either before or after perfection. If the party in whose favor the judgment is rendered causes it to be entered, the party shall perfect the judgment within 30 days of entry or forfeit the right to recover costs. If the party against whom the judgment is rendered causes it to be entered, the party in whose favor the judgment is rendered shall perfect it within 30 days of service of notice of entry of judgment or forfeit the right to recover costs. If proceedings are stayed under s. 806.08, judgment may be perfected at any time within 30 days after the expiration of the stay. If the parties agree to settle all issues but fail to file a notice of dismissal, the judge may direct the clerk to draft an order dismissing the action. No execution shall issue until the judgment is perfected or until the expiration of the time for perfection, unless the party seeking execution shall file a written waiver of entitlement to costs.

attempted to make an appointment with the judgment clerk for May 22, 1998, but the clerk refused to schedule an appointment on that date because she mistakenly believed it was beyond the thirty-day statutory period for perfection of the judgment.

¶5 After a hearing, the trial court determined that Dr. Heitman had established cause to extend the time for perfection of the judgment, and entered an order accordingly. Thereafter, Dr. Heitman perfected the judgment.

DISCUSSION

¶6 Evans argues that the trial court erred in entering judgment in favor of Dr. Heitman on her medical malpractice claim. She asserts that the trial court's conclusion that Dr. Heitman did not commit medical malpractice is clearly erroneous. We disagree.

¶7 The plaintiff has the burden of proof on a medical malpractice claim. *See* WIS J I–CIVIL 1023. The defendant need not present evidence showing a lack of negligence in order to prevail; rather, the defendant prevails if the plaintiff does not convince the trier of fact, to a reasonable certainty, by the greater weight of the credible evidence, that the defendant was negligent. *See* WIS J I–CIVIL 200. Thus, when a plaintiff asserts on appeal that the defendant should have been found negligent, the issue is not whether the evidence is sufficient to support the fact-finder's conclusion that the defendant was not negligent. Rather, we will reverse a judgment in favor of the defendant only if the evidence establishing the defendant's negligence is so clear that no reasonable trier of fact could find in favor of the defendant. *See* ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 230, 270 N.W.2d 205, 211 (1978); *see also* ***Kull v. Sears, Roebuck & Co.***, 49 Wis.2d 1,

12, 181 N.W.2d 393, 399 (1970) (the party bearing the burden of proof cannot prevail based on an absence of evidence in favor of the opposing party).

¶8 We conclude that the evidence that Dr. Heitman was negligent was not so clear that no reasonable trier of fact could find in Dr. Heitman's favor. Indeed, there was conflicting evidence on the issue of whether Dr. Heitman was negligent in his treatment of Evans. Dr. Heitman testified that he did not visualize Evans's ureters during the operation because he had reviewed a preoperative intravenous pyelogram of her pelvic anatomy and a videotape of a prior laparoscopic surgery within her pelvis, and determined that her pelvic anatomy was normal. Dr. Heitman testified that he knew where Evans's ureters should be, and that he stayed close to the uterine wall with the stapler in order to prevent injury to Evans's ureters. Significantly, expert witness Dr. Brian Bear testified that Dr. Heitman was not negligent in performing the laparoscopically-assisted vaginal hysterectomy on Evans without visualizing her ureters. Dr. Bear testified that Dr. Heitman acted reasonably and within the standard of care in attempting to avoid injury to Evans's ureters by staying near the uterine wall with the stapler. Moreover, Dr. Steven Johnson, an expert witness for Evans, testified that the laparoscopically-assisted vaginal hysterectomy was a relatively new procedure at the time Dr. Heitman operated on Evans, and that it was possible for a patient's ureters to be injured during the procedure in the absence of negligence by the doctor. In light of the foregoing testimony, the evidence that Dr. Heitman was negligent was not so clear that no reasonable trier of fact could find in Dr. Heitman's favor. The trial court did not err in concluding that Dr. Heitman did not commit medical malpractice.

¶9 Evans also argues that the trial court erred in enlarging the time for perfection of the judgment. Evans asserts that Dr. Heitman failed to establish good cause for the enlargement.

¶10 The trial court granted the enlargement pursuant to § 801.15(2)(a), STATS., which provides:

> When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. The 90 day period under s. 801.02 may not be enlarged. If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect. The order of enlargement shall recite by its terms or by reference to an affidavit in the record the grounds for granting the motion.

Counsel for Dr. Heitman requested the enlargement before the expiration of the time within which the judgment had to be perfected. Therefore, the trial court had discretion to grant the enlargement "for cause shown and upon just terms." *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 467–468, 326 N.W.2d 727, 730–731 (1982). Evans does not argue that the terms of the order enlarging the time for perfection of judgment were unjust. She argues only that counsel for Dr. Heitman failed to establish cause for the enlargement of time.[4]

[4] Evans also argues that the trial court erred in enlarging the time for perfection of the judgment because counsel for Dr. Heitman violated § 801.14(4), STATS., in filing the bill of costs. Section 801.14(4), STATS., provides:

> All papers after the summons required to be served upon a party, except as provided in s. 804.01 (6), shall be filed with the court within a reasonable time after service. The filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served, except as the person effecting the filing may otherwise stipulate in writing.

(continued)

¶11 At the hearing on the motion to enlarge the time for perfection of the judgment, counsel for Dr. Heitman explained that there was a long delay between the conclusion of the trial and the entry of judgment in favor of Dr. Heitman. Counsel further explained that, during that delay, the attorney who was handling the case file went on maternity leave, and thereafter left the firm, and the firm prematurely closed the case file. Therefore, when the firm received its copy of the judgment, counsel did not promptly make an appointment with the judgment clerk for perfection of the judgment. Counsel recognized the oversight before the expiration of the time for perfection of the judgment, and attempted to make an appointment with the judgment clerk. The judgment clerk, however, had a full schedule until May 22, 1998. The judgment clerk refused to set an appointment for May 22, 1998, because she mistakenly believed that it was outside the statutory period for perfection of the judgment.[5] Counsel for Dr. Heitman therefore sought and obtained an enlargement of the time in which to perfect the judgment.

Evans asserts that, prior to making their motion for an enlargement of time, counsel for Dr. Heitman violated § 801.14(4), STATS., by sending their proposed bill of costs to the trial court without serving a copy upon Evans. Evans does not explain how this alleged violation relates to the requirements for granting an enlargement of time under § 801.15(2)(a), STATS. We therefore decline to address this argument. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments).

[5] The judgment was entered on April 22, 1998. Counsel for Dr. Heitman therefore had to perfect the judgment on or before May 22, 1998, the thirtieth day after the entry of judgment. *See* § 806.06(4), STATS. ("If the party in whose favor the judgment is rendered causes it to be entered, the party shall perfect the judgment within 30 days of entry or forfeit the right to recover costs."); § 801.15(1)(b), STATS. ("[I]n computing any period of time prescribed or allowed by chs. 801 to 847, by any other statute governing actions and special proceedings, or by order of court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a day the clerk of courts office is closed.").

¶12 The foregoing explanation is sufficient to establish cause for the enlargement of time to perfect the judgment. The trial court did not err in ordering the enlargement of time.

By the Court.—Judgment and order affirmed.

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