COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2009AP1752 **Cir. Ct. No. 2005CV330**

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

AUTUMN L. WORDEN, A MINOR, BY HER GUARDIAN AD LITEM, DAVID P. LOWE, CHARLES G. WORDEN AND NANCY J. WORDEN,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

SECURITY HEALTH PLAN OF WISCONSIN, INC. AND ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANT-RESPONDENT,

SACRED HEART - ST. MARY'S HOSPITALS, INC., SHANMUGHAM VADIVELU, M.D., NORTHWOODS ANESTHESIA SERVICES, S.C., THE MEDICAL PROTECTIVE COMPANY AND MINISTRY HEALTH CARE, INC.,

DEFENDANTS,

DEBRA A. STOCKWELL, M.D., MINISTRY MEDICAL GROUP, INC. AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Oneida County: DOUGLAS T. FOX, Judge. *Reversed in part; affirmed in part, and cause remanded with directions.*

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

¶1 HOOVER, P.J. Autumn Worden and her parents (Worden) appeal a judgment awarding them damages in a medical malpractice action and an order denying their postverdict motions. Worden argues the jury awarded inadequate damages for her (1) past and future pain and suffering and loss of enjoyment of life, (2) future lost earnings, and (3) parents' past and future loss of society and companionship. We agree and remand for a new trial on those items of damages. Worden also argues that not all of her "future life care plan expenses" constituted medical expenses subject to the WIS. STAT. § 655.015 requirement that the funds be held in trust in the Injured Patients and Families Compensation Fund.[1] We disagree and affirm the court's order in this respect.

¶2 In a cross-appeal, Dr. Debra Stockwell, Ministry Medical Group, and Physicians Insurance Company of Wisconsin (Stockwell) argue the trial court

[1] Worden also presents an issue regarding the timeliness of taxing costs. Because we remand for a new damages trial, this issue is moot and we need not address it.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

erred by granting the jury's request to view certain documents and by limiting voir dire. Stockwell also argues the evidence did not support the jury's verdict regarding causation. We affirm on each of these issues.

BACKGROUND

¶3 This is a medical malpractice action concerning Worden's injuries following her birth on November 2, 2002. Worden alleged Stockwell, the anesthesiologist and a nurse were negligent in failing to properly monitor and manage the labor, resulting in a delayed cesarean delivery of Worden. Worden claimed there was an unreasonable delay in recognizing and responding to signs of fetal distress and in performing the cesarean delivery. She asserted this delay caused her severe and permanent neurological injury due to oxygen deprivation.

¶4 Worden was six years old at the time of trial. Her mother testified Worden cannot crawl, walk, speak, or feed herself, will be in diapers her entire life, and has a cognitive age of two to three months. Worden can wiggle and kick her legs, but can only partially roll over. She has toys, but can only swat at them with her hands. She rarely makes eye contact. Worden's parents feed and give her medication primarily via a tube in her stomach. Worden wears hearing aids and must wear ankle and leg orthotics for stretching and exercises. At about age one, Worden suffered hip dislocations where her muscles were tight, requiring multiple surgeries. She needed subsequent surgery to remove the plates and screws in her hips and also required hernia surgery.

¶5 Dr. Garrett Burris, a pediatric neurologist, testified Worden is unable to perform any daily living activities on her own. He stated Worden suffers from a condition called "static encephalopathy," which includes microcephaly (small head size), developmental retardation, cerebral palsy, and spastic quadriplegia,

needs a tube for much of her feeding, and has hearing impairments and seizures. He indicated Worden's visual impairments do not allow her to respond to light and she is unable to track objects. Burris opined, "[T]he child is permanently impaired and I see no chance that there will be significant improvement from this point." He estimated Worden's life expectancy was twenty-six to twenty-eight years. A defense pediatric neurologist, Dr. Stephen Glass, confirmed the permanence and severity of Worden's injuries and estimated her life expectancy at twenty years.

¶6 Worden's experts testified her injuries were solely the result of oxygen deprivation in the half-hour preceding delivery. Stockwell's experts, on the other hand, testified Worden's condition was entirely the product of some prior event, such that an earlier delivery would not have resulted in a different outcome.

¶7 Dr. Burris testified Worden will never be able to become gainfully employed. Worden's expert economist, J. Finley Lee, Jr., testified her future earning loss amounts to a minimum of $870,749.00. Stockwell's expert economist, David Saxowsky, agreed Worden suffered a future loss of earning capacity. He testified Worden's future loss of earning capacity is $81,727.00. Saxowsky explained his methodology accounted for personal consumption or "maintenance costs" throughout Worden's lifetime. Worden objected, contending the consideration of "maintenance costs" is not permissible given the facts and nature of the case, and moved to strike. The court denied the motion.

¶8 Worden's father stated he loves Worden as much with or without her handicap. However, there are aspects of his relationship with Worden that he knows they cannot share together. He testified he wishes he could go "romping through the woods with her, show her how to dig angleworms to go fishing, go

camping, crawl on the ground ….” He wishes he could “do the things parents do with their children.”

¶9 The jury found Stockwell negligent, but not the anesthesiologist or the nurse. The jury also found Stockwell’s negligence was a substantial factor causing Worden’s injuries. It awarded Worden $3,807,832 for “future life care plan” expenses, nothing for her future loss of earning capacity, and $150,000 for her past and future pain, suffering, disability, and loss of enjoyment of life. The jury awarded her parents $527,284 for past medical and related care expenses and $150,000 for past and future loss of Worden’s society and companionship. Following motions after verdict, Worden appeals and Stockwell cross-appeals.

DISCUSSION

I. Worden’s appeal

¶10 “In reviewing jury awards, we may not substitute our judgment for that of the jury but, rather, we determine whether the awards are within reasonable limits.” ***Brain v. Mann***, 129 Wis. 2d 447, 455, 385 N.W.2d 227 (Ct. App. 1986) (citing ***Cords v. Anderson***, 80 Wis. 2d 525, 552-53, 259 N.W.2d 672 (1977)). When the verdict has the approval of the trial court, if there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, we will not disturb the finding unless the award is so unreasonably low that it shocks the judicial conscience or there is an evident erroneous exercise of discretion. ***Id.*** (citations omitted).

A. Damages awarded for pain and suffering and loss of enjoyment of life

¶11 Worden argues the jury's award of $150,000 for her past and future pain, suffering, disability, and loss of enjoyment of life is unreasonably low. We agree. While the trial court reviewed and approved the award, it relied on two improper bases for the jury's determination. Moreover, we conclude the award is so unreasonably low as to shock our conscience.

¶12 Addressing the award, the court indicated:

> The evidence that I recall includes that the injured child ... appears to be happy and suffers minimal pain and discomfort. She appears to relate positively to parents and caregivers, appears to enjoy activities and stimuli consistent with her reduced level of mental development. She suffers from arrested development to the extent that she likely cannot appreciate her circumstances or the degree of her loss.

The court's latter observation, that Worden is so extremely disabled that she lacks the mental capacity to comprehend the extent and impact of her injuries, is an improper basis on which to confirm a low award. Such a reduction would improperly reward a tortfeasor for causing harm.

¶13 Furthermore, as the verdict question explicitly stated, the present item of damages is meant to compensate not only for conscious pain and suffering, but also for the loss of enjoyment of life. Thus, instead of supporting a reduced award, Worden is to be additionally compensated for her inability to appreciate a fulfilling life. *See* ***Benson v. Superior Mfg. Co.***, 147 Wis. 20, 30, 132 N.W. 633 (1911) ("Juries are frequently and correctly charged that a plaintiff in a personal injury action may be awarded damages because of 'diminished capacity for enjoying life.'"); *see also* WIS. STAT. § 893.55(4)(a) (noneconomic damages in medical malpractice cases include the "noneconomic effects of disability including

loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well−being or bodily functions"). Worden is essentially frozen at the physical and mental capacity of an infant. She has been so dramatically deprived of a complete life that a $150,000 award shocks our conscience.

¶14 Stockwell argues the jury's award should nonetheless be upheld because, as the trial court recognized, there was competing causation evidence that would permit the jury to discount Worden's damages by that percentage attributed to other causes. The court stated:

> There was evidence in the record ... propounded by the Defendants in respect to this issue of microcephaly. That was a – certainly a hotly contested issue, but the Defendants had presented evidence which if accepted by the jury I believe would support a jury's conclusion that [Worden] suffered from microcephaly at birth and that that was unrelated to any claim of negligence against Dr. Stockwell ...."

In the abstract, this apportionment theory might appear plausible. However, given the facts of this case and the verdict questions utilized, it would be impermissible for the jury to reduce the damages awards in this manner.

¶15 Importantly, the jury was not asked whether Stockwell's, the anesthesiologist's, or the nurse's negligence, if any, caused less than one-hundred percent of Worden's damages.[2] Rather, the jury was asked only whether Stockwell was "negligent in her management of the labor and delivery," whether "any such negligence [was] a substantial factor in causing ... Worden's injuries,"

[2] The jury was asked, however, to individually apportion the percentage of total negligence attributed to Stockwell, the anesthesiologist, and the nurse. Because only Stockwell was found negligent, the jury did not answer the question.

and "[w]hat sum of money will fairly and reasonably compensate [Worden] as a consequence of her injuries …."

¶16 It is improper for a jury to compute only a partial damage award, reduced by percentages assigned to the parties, *see* ***Schnepf v. Rosenthal***, 53 Wis. 2d 268, 274, 193 N.W.2d 32 (1972), and an instruction requiring the jury to do so would be erroneous, *see* ***Nimmer v. Purtell***, 69 Wis. 2d 21, 37-38, 230 N.W.2d 258 (1975) ("the instruction to the jury to compute not all of the damages that the plaintiff suffered but only that portion caused by the defendant's negligence was error"). Rather, "[t]he damages allowed are to correspond to 100 percent of the plaintiff's damages and then are to be reduced by the amount of negligence attributable to the person recovering." ***Id.*** Thus, we cannot properly accept the jury's award based upon speculation that the jury reduced the damages amount by some unknown proportion.

¶17 Moreover, it appears both Worden and Stockwell made the strategic decision to not request a verdict question asking the jury to apportion the amount of damages between any innocent pre-existing injuries and any caused by negligence. Rather than inviting a compromise verdict, both undertook an all-or-nothing trial strategy. Worden's position was that *all* of her injuries were the result of negligence, while Stockwell's was that *none* of the injuries were caused by negligence.[3] Consistent with these positions, Worden's medical experts all

[3] Indeed, Stockwell's brief emphasizes:

(continued)

testified her injuries resulted from oxygen deprivation during late-labor, while each of Stockwell's medical experts testified that all of the damage was pre-existing. Each side's experts wholly dismissed the causes proffered by the other's experts. Thus, Stockwell cannot now argue the jury might have apportioned damages between what her negligence caused and what resulted from prior causes.

¶18 Further, citing ***Ehlinger v. Sipes***, 155 Wis. 2d 1, 18-19, 454 N.W.2d 754 (1990), and ***Sumnicht v. Toyota Motor Sales, U.S.A.***, 121 Wis. 2d 338, 360 N.W.2d 2 (1984), Worden argues her injuries are indivisible, rendering Stockwell liable for the entire amount of damages. In ***Sumnicht***, the court explained:

> Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes.

Id. at 352-53 (quoting PROSSER & KEETON ON THE LAW OF TORTS § 52 at 345 (W. Page Keeton 5th ed. 1984)). The court also recited the RESTATEMENT (SECOND) OF TORTS § 433A (1965),[4] which reads:

> The plaintiffs claim that an earlier c-section (with delivery before 9:00 a.m.) would have led to [Worden]'s birth without any permanent residual disabilities. It is their contention via their experts (*without exception or qualification*) that up until 9:00 a.m. [that day], there was no indication of any harm to the fetus and between 9:00 a.m. and 9:30 a.m. the injury to ... Worden occurred. (Emphasis added.)

[4] Comment a. to Section 433A explains:

(continued)

> Section 433A. Apportionment of Harm to Causes
>
> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Sumnicht, 121 Wis. 2d at 353 n.9; *see also* ***Foley v. West Allis***, 113 Wis. 2d 475, 485-87 n.7, 335 N.W.2d 824 (1983) (citing § 433A of the RESTATEMENT).

¶19 Section 434, in turn, explains that while it is "the function of the jury to determine … the apportionment of the harm to two or more causes," it is "the function of the court to determine *whether* the harm is capable of apportionment among two or more causes." RESTATEMENT (SECOND) OF TORTS § 434, (1)(b), (2)(b) (1965) (emphasis added). We need not determine here whether Worden's injuries are indivisible or are, in fact, capable of apportionment. It is sufficient merely to observe that no expert on either side testified Worden suffered damage from both innocent prior causes and late-labor causes, no expert offered any testimony indicating what parts of her total injury could be attributed to each

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> The rules stated in this Section apply whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor in producing harm .... The rules stated apply also where one or more of the contributing causes is an innocent one, as where the negligence of a defendant combines with the innocent conduct of another person, or with the operation of a force of nature, or with a pre-existing condition which the defendant has not caused, to bring about the harm to the plaintiff.

RESTATEMENT (SECOND) OF TORTS § 433A, cmt a. (1965).

cause—or how that might be determined, and Stockwell never asked the trial court for an apportionment verdict question. Stockwell has thus forfeited her right to argue the damages can be, or properly were, apportioned between those she caused and those that might have resulted from pre-existing injuries. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727.

B. Damages awarded for future lost earnings

¶20 Although they disagreed as to the amount, Worden's and Stockwell's experts both testified Worden suffered a loss of future earnings. Nonetheless, the jury awarded zero damages. The trial court gave two reasons for accepting the jury's verdict. First, the court reasoned the jury might have concluded there was pre-existing damage so significant that Worden would never have entered the workforce, regardless of any causal negligence by Stockwell. We reject this rationale for the reasons stated above.

¶21 Second, the court explained the jury might have accepted Stockwell's personal consumption theory—that Worden's personal maintenance costs that would have been incurred in the years beyond her reduced life expectancy should be subtracted from her earning potential. That wrongful-death-action theory, however, is inappropriate in a personal injury case and the court should not have permitted it. *See* ***Overly v. Ingalls Shipbuilding***, 74 Cal. App. 4th 164, 173-75, 87 Cal. Rptr. 2d 626 (1999).

¶22 Furthermore, the personal consumption theory would afford Stockwell an undeserved financial benefit from the very harm she caused, and is contrary to the theory of recovery for earning losses caused by the tortfeasor. *See* WIS JI—CIVIL 1762 (2003) (lost earnings are computed as "the difference between what [Worden] will reasonably be able to earn in the future in view of the

injuries sustained and what [she] would have been able to earn had [she] not been injured."); ***Hall v. Rodricks***, 774 A.2d 551, 558 (N.J. Super. 2001) ("The majority rule in this country is that a tort victim suing for damages for permanent injuries is permitted to recover loss of earnings based on life expectancy at the time of injury, undiminished by any shortening of that expectancy as a result of the injury.").

¶23 Moreover, the jury's zero award for lost earnings has no basis in the record. Even Stockwell's expert, who employed the personal consumption theory in his computations, testified Worden experienced a substantial loss of future earnings. The evidence established Worden will never enter the workforce, and she is entitled to recovery for that loss.

C. Damages awarded for loss of society and companionship

¶24 The jury awarded Worden's parents $150,000 for the past and future loss of Worden's society and companionship until her eighteenth birthday. In its approval of the award, the trial court cited Stockwell's pre-existing injury evidence. We have already determined that is an improper basis on which to uphold the jury's awards.

¶25 While not quite low enough to shock our conscience, given Worden's extreme disabilities, we conclude the loss of society and companionship award is unreasonably low. Worden's parents have suffered a near-total loss of her society and companionship. Worden and her parents cannot even communicate, much less do those normal things that parents and their children do together. In light of the other shockingly low noneconomic damages award and the factually unsupported lost earnings award, we are not satisfied that the jury's award in this respect was not the result of improper considerations. Therefore, Worden is entitled to a new damages trial on past and future pain and suffering

and loss of enjoyment of life, future lost earnings, and her parents' past and future loss of society and companionship.

D. Future life care plan expenses

¶26 At trial, Worden sought a bifurcated determination of her "future life care plan" expenses. The Injured Patients and Families Compensation Fund (Fund) objected to separating these damages; however, the trial court submitted the special verdict to the jury with two sub-questions. The verdict question provided for separate award amounts for "medical expenses" and for "home health care and other expenses of the life care plan." The jury awarded Worden approximately $1.2 million for medical expenses and $2.6 million for other expenses.

¶27 Following the jury's verdict, Worden moved for an order precluding placement of the "other expenses" into the Fund pursuant to WIS. STAT. § 655.015. The Fund, in turn, requested that the entire future life care plan award, excepting $100,000 and attorney fees and costs, be placed in the Fund for future disbursement as costs are incurred. The court denied Worden's motion, concluding the other expenses were also subject to the § 655.015 requirement that awards for future medical expenses be placed in the Fund. In doing so, the court relied on WIS. ADMIN. CODE § INS 17.26(3)(c) (Mar. 2010), which defines medical expenses as medical services, nursing services, medical supplies, drugs, and rehabilitative services. Additionally, the court observed Worden had failed in her response to address application of that administrative code provision. Instead, she raised a number of challenges to the validity of both the statute and the code provision.

¶28 On appeal, Worden fails to develop any argument that the "other expenses" do not fall within the administrative code definition. Rather, she merely asserts, without citation, that the Fund should be required to identify each of the expenses that it wants subjected to the WIS. STAT. § 655.015 hold-back provision. The Fund states it best: this contention "confuses the roles of appellant and respondent." Worden has also not developed any argument concerning her challenges to the statute or code provision, asserting merely that she will bring those constitutional challenges in a separate action pursuant to WIS. STAT. § 227.40. Because Worden fails to sufficiently develop any legal arguments, we affirm the court's order requiring that all of the future care plan expenses be subjected to the WIS. STAT. § 655.015 hold-back provision. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

II. Stockwell's cross-appeal

¶29 Stockwell first argues the trial court erred by granting the jury's request to view fetal monitor printouts. "It is well settled that '[a] trial court is vested with broad discretion in the matter of allowing the jury to take to its room written instruments admitted into evidence.'" ***Schnepf***, 53 Wis. 2d at 272 (citation omitted). To sustain a discretionary ruling, an appellate court need only find that the trial court examined the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). "Factors that a circuit court considers in determining whether an exhibit should be sent into the jury room include 'whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibit, and whether the exhibit could be subjected to improper use by the jury.'" ***State v.***

Anderson, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74 (quoting ***State v. Jensen***, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988)).

¶30 Stockwell's counsel objected to sending the jury the fetal monitor strips based on his concerns that "somebody on the jury could be giving an opinion, and this would be extraneous evidence." The trial court disagreed with counsel's objection, and allowed the strips to go to the jury, stating:

> I think the one thing we did agree upon was the entirety of the fetal monitor strips had been displayed to the jury.
>
> ….
>
> I sure would have a hard time articulating why it is proper for the jury to spend hours having those strips shown to them and explained to them by experts but then they can't look at them up close. I just have a lot of trouble articulating that. If the basis for that articulation is going to be, well, they might speculate about something about it, one member of the jury might profess to have an opinion about it, what is there about them having the physical exhibit that makes that any more likely that that's going to happen than if they don't have the physical exhibit? ... We tell them that the opinion of experts is offered to aid you and you are not bound by the opinion of any expert.

¶31 The trial court addressed the issue again after Stockwell raised it in a postverdict motion. The court observed the fetal monitor strips "had been displayed in their entirety, accompanied by contemporaneous explanatory expert testimony, at least two times." Further, the court stated:

> It was only after a specific request by the jury that the Court sent them to the jury room; therefore, I don't think it could seriously be argued that the jury could have concluded that the Court was singling out or highlighting any evidence. There's no reasonable possibility in my estimation that the jury could have used them for any improper purpose, and the jury at least must have felt that their ability to view those strips yet one more time was helpful to them.

We are satisfied the court properly considered the question and came to a reasonable conclusion, especially given that the fetal monitor strips were extensively discussed and relied upon by the medical experts over the course of a twelve-day trial.

¶32 Stockwell next argues the trial court erroneously limited voir dire questioning. She presents her issue as follows:

> The trial court ruled prior to trial that there would be no question of occupations and education levels of the proposed jurors except employment questions relating to healthcare, insurance or legal matters. The issue is whether a party's counsel has the right on voir dire to question jurors about their education and work experience when the judge rules against asking these questions.

Stockwell did not, however, object to the court's ruling or request any voir dire beyond that undertaken by the court as to occupations or education. Because she failed to preserve the issue by objecting, she has forfeited her right to appellate review. *See* ***Huebner***, 235 Wis. 2d 486, ¶¶10-12. Regardless, the circuit court has broad discretion regarding the scope of voir dire. ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979). Were we to resolve the issue, we would likely conclude the circuit court properly exercised its discretion by limiting voir dire to those inquiries it found relevant to the individual case.

¶33 Finally, Stockwell argues Worden failed to present sufficient evidence of causation because there were no fetal monitor strips for the time period during which Worden alleged her injury occurred. Stockwell asserts Worden's experts could do no more than speculate as to what happened during the final half-hour preceding delivery, or what the fetal monitor strips would have shown if Worden's mother had been monitored during that time.

¶34 Stockwell, however, essentially presents a jury argument, ignoring or dismissing the evidence presented by Worden's experts. Each of Worden's experts explained the reasons for their conclusions, including Worden's clinical condition at the time of delivery, her blood gas levels taken an hour after delivery, occasion of seizures during the first six or eight hours after birth, and findings on imaging studies.

¶35 In addition, the plaintiff's burden to demonstrate causation is lessened in a medical malpractice action.[5] In ***Ehlinger***, the court held:

> We disagree that to establish causation the [plaintiffs] must show that proper diagnosis and treatment *would* have been successful. We conclude that in a case of this nature, where the causal relationship between the defendant's alleged negligence and the plaintiff's harm can only be inferred by surmising as to what the plaintiff's condition would have been had the defendant exercised ordinary care, to satisfy his or her burden of production on causation, the plaintiff need only show that the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not the treatment *could* have lessened or avoided the plaintiff's injury had it been rendered. It then is for the trier of fact to determine whether the defendant's negligence was a substantial factor in causing the plaintiff's harm.

Ehlinger, 155 Wis. 2d at 13-14. The court continued:

> We find the rule previously stated in the products liability context that "[t]he law of this state has never required a plaintiff to prove the negative fact of what the injuries

[5] However, it is the burden of production—that quantum of evidence that will withstand a challenge to the sufficiency of the evidence, not the burden of persuasion, that is lessened. ***Beacon Bowl v. Wisconsin Elec.***, 176 Wis. 2d 740, 783-84, 501 N.W.2d 788 (1993); ***Fisher v. Ganju***, 168 Wis. 2d 834, 857-58, 485 N.W.2d 10 (1992). "Once [the burden of production is met and] the causation question is presented to the trier of fact, [then] the substantial factor test applies." ***Fisher***, 168 Wis. 2d at 859-60.

> would have been had there been no defect" equally applicable here.
>
> "A rule of law which requires a plaintiff to prove what portion of indivisible harm was caused by each party and what might have happened in lieu of what did happen requires obvious speculation and proof of the impossible. This approach converts the common law rules governing principles of legal causation into a morass of confusion and uncertainty."

Id. at 18-19 (citation omitted) (quoting ***Sumnicht***, 121 Wis. 2d at 356-57).

¶36 Thus, there was ample evidence on which the jury could properly rely to conclude Stockwell's negligence was a substantial factor causing Worden's injury. And, while Stockwell complains *she* was presented with the problem of proving a negative—that no asphyxial event occurred during the final thirty minutes—it was not Worden who exercised control over the fetal monitoring unit. Worden can hardly be faulted for the absence of monitoring. In any event, Stockwell was not reduced to proving the negative; she could, and, indeed, attempted to, demonstrate some other cause for Worden's condition.

¶37 The Wordens may recover their WIS. STAT. RULE 809.25 appellate costs, except that they shall not recover any costs incurred for the unsuccessful challenge regarding the future life care plan expenses.

By the Court.—Judgment and order reversed in part; affirmed in part, and cause remanded with directions. Costs allowed in part.

Not recommended for publication in the official reports.