COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0216

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

KEN SCHEMENAUER,

PLAINTIFF-APPELLANT,

V.

DR. R.H. ROBERTSON, M.D., WISCONSIN EMERGENCY MEDICAL SERVICES ASSOCIATES, S.C., ST. PAUL FIRE & MARINE INSURANCE COMPANY AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded with directions.*

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

CANE, C.J. Ken Schemenauer appeals a nonfinal order granting defendants R.H. Robertson, M.D., Wisconsin Emergency Medical Services Associates, S.C., St. Paul Fire and Marine Insurance Company and Wisconsin

Patients Compensation Fund's[1] motion for a new trial.[2] A jury determined that Robertson's negligence caused Schemenauer's injuries and thus awarded him damages for medical expenses; lost earnings; and past and future pain, suffering, and disability. Schemenauer requests that we reverse the trial court's order granting a new trial and remand for reinstatement of the jury's verdict.

First, Schemenauer argues that the trial court's oral and written decisions conflict and that the oral decision therefore controls. Based on this premise, he contends that because credible evidence supports the verdict, the trial court erroneously exercised its discretion when it granted a new trial under § 805.15(1), STATS., on the grounds that the jury's findings were contrary to the great weight and clear preponderance of the evidence. Alternatively, he claims that if the written decision controls, the trial court erroneously exercised its discretion when it granted a new trial in the interest of justice on grounds that the real controversy was not fully and fairly tried. Second, he requests that if we reinstate the jury's verdict, we should "give the trial court direction" that Robertson's motion for a new trial is frivolous. Third, in the interest of judicial economy, he requests that we also "give direction" to the trial court regarding Robertson's motion to change the jury's award for future pain, suffering, and disability.

We first conclude that the oral and written decisions are unambiguous and both grant a new trial in the interest of justice even though each offers a different basis for granting the new trial in the interest of justice. Second,

[1] For purposes of this opinion, we refer to the defendants as "Robertson."

[2] We granted Schemenauer's petition for leave to appeal the trial court's order on February 12, 1998.

we hold that, on either basis, the trial court erroneously exercised its discretion by granting a new trial in the interest of justice because its decision was based on an erroneous view of the facts. Third, we decline Schemenauer's request to give the trial court directions regarding frivolous costs because his argument is wholly undeveloped. Finally, because the trial court did not address Robertson's request to set aside the jury's award for future pain, suffering, and disability, we also decline Schemenauer's invitation to decide the issue in anticipation of the trial court's ruling. Accordingly, we reverse the order granting a new trial and remand with directions to reinstate the verdict.

I. FACTS

On January 11, 1993, twenty-four-year-old Ken Schemenauer presented to Wausau Hospital's emergency room complaining of abdominal pain of two days' duration. Robertson, board certified in both internal medicine and emergency room medicine, was his treating physician. Robertson conducted a physical examination; ordered laboratory studies; administered Toradol, a pain medication, intravenously; watched Schemenauer for four hours; and discharged him with a Toradol prescription. No surgical consultation was obtained. On discharge, Robertson's diagnosis was viral gastroenteritis, a condition commonly known as "the flu."

Schemenauer returned to the emergency room on January 14 and was diagnosed with appendicitis by another physician. When Schemenauer underwent surgery on January 14, the surgeon, Dr. Charles Alden, discovered that the appendix had ruptured; therefore, Alden converted from a laproscopic procedure to a more invasive open procedure so that abscesses and free intraabdominal pus could be drained and removed. Alden's postoperative

diagnosis was peritonitis. On January 28, Schemenauer was discharged from Wausau Hospital. In February, he was rehospitalized and underwent additional surgery because of a persistent intraabdominal abscess. Then in July 1995, he suffered a bowel obstruction, which expert testimony indicated was a result of the previous abscess.

At trial, Schemenauer alleged that Robertson was negligent in three respects: failing to serially observe him for more than four hours; failing to obtain a surgical consultation; and administering and prescribing Toradol. The jury found that Robertson was negligent and that the negligence caused Schemenauer's injuries; it also awarded him $201,000 in damages, including $50,000 in future pain, suffering, and disability. Robertson filed three motions after verdict, asking the trial court to: (1) change the jury answers under § 805.14(5)(c), STATS.,[3] because no credible evidence supported any of the negligence theories; or, alternatively, (2) grant a new trial under § 805.15(1), STATS., because the jury's findings were contrary to the great weight and clear preponderance of the evidence; or, alternatively, (3) change the jury's answer regarding future pain, suffering, and disability from $50,000 to zero pursuant to § 805.14(5)(c).

At a January 6, 1998, motion hearing, the trial court granted the motion for a new trial under § 805.15(1), STATS., because it determined that the verdict was contrary to the great weight and clear preponderance of the evidence. However, it rejected Schemenauer's contention that no credible evidence supported any of the negligence theories. Further, the trial court did not address

[3] Section 805.14(5)(c), STATS., provides: "*Motion to change answer.* Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer."

the motion to change the jury's answers regarding future damages because it granted a new trial. On January 12, the trial court issued a written decision and granted a new trial in the interest of justice under § 805.15(1), on the grounds that the real controversy at issue had not been fully and fairly tried. We granted Schemenauer's petition for leave to appeal the trial court's nonfinal order granting a new trial. This appeal followed. Additional facts will be discussed as needed.

II. ANALYSIS

Schemenauer argues that the trial court erred by granting a new trial under § 805.15(1), STATS., which allows a trial court to order a new trial on the following grounds: (1) errors in the trial; (2) the verdict is contrary to law or the weight of the evidence; (3) the damages are excessive or inadequate; (4) newly discovered evidence exists; and (5) in the interest of justice. ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 400-01, 331 N.W.2d 585, 590 (1983). Significantly, the appellate standard for reviewing a trial court's order for a new trial varies depending upon the basis the trial court relied in ordering the new trial. ***Weber v. Chicago & N.W. Transp. Co.***, 191 Wis.2d 626, 631, 530 N.W.2d 25, 28 (Ct. App. 1995).

When the trial court grants a new trial on the statutory ground that the verdict is contrary to the weight of the evidence, we must uphold the verdict if any credible evidence supports it. *See* ***Giese***, 111 Wis.2d at 400-01, 331 N.W.2d at 590. In addition, we must view the evidence in the light most favorable to the verdict. *See* ***Weber***, 191 Wis.2d at 631-32, 530 N.W.2d at 28. A trial court may not grant a new trial because it does not concur in the jury's verdict or because a different jury might reach a different result. *See* ***id***.

However, a different standard of review applies when the trial court grants a new trial in the interest of justice. ***Giese***, 111 Wis.2d at 407-08, 331 N.W.2d at 593. We will sustain a trial court's order for a new trial in the interest of justice unless a trial court's erroneous exercise of discretion is clear. ***Krolikowski v. Chicago & N.W. Transp. Co.***, 89 Wis.2d 573, 579-80, 278 N.W.2d 865, 868 (1979). A trial court may grant a new trial in the interest of justice when the jury's findings are against the great weight and clear preponderance of the evidence, even though credible evidence supports the findings. ***Sievert v. American Family Mut. Ins. Co***., 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995); *see also* ***Krolikowski***, 89 Wis.2d at 580, 278 N.W.2d at 867-68. Additionally, a trial court may grant a new trial in the interest of justice if the real controversy has not been fully tried. *See* ***State v. Harp***, 161 Wis.2d 773, 776, 469 N.W.2d 210, 211 (Ct. App. 1991).

1. Oral Ruling Versus Written Decision

The trial court ruled orally on Robertson's motions after verdict, but later issued a written memorandum of decision. In its oral decision granting Robertson's motion for a new trial, the trial court stated: "The Court, I guess, in considering the briefs of the parties and the arguments presented here will be granting a new trial because I find the jury findings are contrary to the greater weight and clear preponderance of the evidence." The trial court also reviewed the three negligence theories Schemenauer presented at trial. It found that Robertson's failure to observe Schemenauer for more than four hours was not causal and that the surgical consult was unnecessary. Regarding Toradol administration, the trial court first pointed out that according to expert testimony, there were two acceptable standards of care. It then expressed concern that it did not instruct the

jury that when there are two standards of care, the physician can select either one. Finally, the trial court explained that

> there may be very well a legitimate question regarding the dosage, because I remember there [were] some questions regarding the amount of the dosage, and whether that might have been too much because under ordinary circumstances, … the newer medical science and standards seem to take the position that as long as they still feel some pain but you are mitigating the pain they still should be able to feel the migration of the pain. However, if one is over medicated, too much pain being taken away, there may be a question … whether ... a person could observe and be aware of that migration of pain because of the over medication.
>
> … I know the plaintiffs thought they had a very strong case … I did not share that same position – and when I go through it and look at the issues … they could argue that but it really isn't causal, and then I go through and look at the issues … [and say] boy, this is contrary to the greater weight, the clear preponderance of the evidence, I don't know if I can really go through and say that there is absolutely no credible evidence, but certainly to me, after listening to the trial and the reasons and comments I have given here, it's clear to me that the jury findings appear to be contrary to the greater weight and clear preponderance of the evidence.
>
> I, for those reasons then, as indicated, the Court will be granting a new trial under Section 805.15(1) of the statutes.

By contrast, in its written decision, the trial court granted a new trial in the interest of justice because it determined that the "real controversy at issue was not fully and fairly tried":

> Sufficient credible evidence was presented that Dr. Robertson may have been causally negligent with respect to the dosage of the pain medication given to Schemenauer and that it may have been causal to the resulting injuries. However, that specific issue was clearly overshadowed in the evidence and arguments by other allegations of medical negligence that [were] not causal to the injuries. The court cannot confidentially state that these other areas of non-causal negligence did not play a role in

> the outcome of the case. Instead, the court upon observing the trial and arguments for the reasons given believes that the real controversy at issue was not fully and fairly tried.

Because the trial court's oral ruling and written decision differ, the parties disagree as to which ground in § 805.15(1), STATS., the trial court based its decision. Thus, they disagree about which decision controls and which standard of review we should apply. We are satisfied that the trial court, in both its oral and written decisions, unambiguously granted a new trial in the interest of justice even though it used different bases: "great weight and clear preponderance" in the oral decision and "real controversy not fully tried" in the written decision. In this situation, we would normally then have to determine: (1) whether the decisions conflict because they offer different bases for granting a new trial in the interest of justice; and (2) if so, which decision controls. However, because we conclude that both decisions reflect an erroneous exercise of discretion, we need not decide whether they conflict and, if they conflict, which decision controls. Thus, we turn to the case's principle issue, whether the trial court erroneously exercised its discretion by granting a new trial in the interest of justice.

2. New Trial in the Interest of Justice

As we have already stated, we review a trial court's order granting a new trial under the erroneous exercise of discretion standard. ***Krolikowski***, 89 Wis.2d at 579-80, 278 N.W.2d at 868. We owe great deference to the trial court's decision to grant a new trial because the decision is discretionary, and the trial court is in the best position to observe and evaluate the evidence. *See* ***Sievert***, 180 Wis.2d at 431, 509 Wis.2d at 78. Further, we look for reasons to sustain the trial court's determination. However, the trial court erroneously exercises its discretion if it grounds its decision on a mistaken view of the evidence or an erroneous view

of the law. *See* ***id***. Moreover, the order granting a new trial in the interest of justice must contain the reasons and bases for the trial court's decision. ***Krolikowski***, 89 Wis.2d at 580, 278 N.W.2d at 868. Our review of the trial court's decision is ordinarily limited to the reasons specified in the order. ***Id***.

A trial court may grant a new trial in the interest of justice under § 805.15(1), STATS., for several reasons. As mentioned previously, the trial court may grant a new trial in the interest of justice if the verdict is contrary to the great weight and clear preponderance of the evidence, even if credible evidence supports it. ***Krolikowski***, 89 Wis.2d at 580, 278 N.W.2d at 868. If the trial court sets forth a reasonable basis for its determination that one or more material answers in the verdict are against the great weight and clear preponderance of the evidence, it has not erroneously exercised its discretion. ***Id***. at 581, 278 N.W.2d at 868.

Additionally, the trial court may also grant a new trial in the interest of justice if the real controversy has not been fully tried or it is probable that justice has for any reason miscarried. *See* ***Harp***, 161 Wis.2d at 776, 469 N.W.2d at 211. The trial court need not find a substantial likelihood of a different result on retrial when it orders a new trial on grounds that the real controversy was not fully tried. *See* ***id***. On review, we examine the evidence and compare it to the evidence the trial court gave to support its decision to grant a new trial. *See, e.g.,* ***Sievert***, 180 Wis.2d at 431, 509 N.W.2d at 78; *see also* ***Krolikowski***, 89 Wis.2d at 580-81, 278 N.W.2d at 868.

Based on our review of the record, we conclude that the trial court erroneously exercised its discretion when granting a new trial in the interest of justice in both its oral and written decisions because its reasons are not warranted

by the evidence. First, the trial court erroneously exercised its discretion by concluding that the verdict was against the great weight and clear preponderance of the evidence because the evidence supported a finding for either side. Further, one basis for its oral decision was that it did not instruct the jury that when there are two standards of care, a physician can select either one. The trial court, however, indeed gave such an instruction.[4]

Second, the trial court stated that because there was expert testimony that Toradol administration does not affect migration of pain, the jury's findings were contrary to the great weight and clear preponderance of the evidence. This notwithstanding, the trial court also stated there was expert testimony that overmedication could affect patients' ability to assess whether their pain has migrated.

One of the plaintiff's experts, Dr. Frank Baker, board certified in both emergency and internal medicine, testified that Toradol, which is used as a painkiller, is one of the strongest nonsteroidal anti-inflammatory agents. Baker testified that Robertson deviated from the standard of care by giving Schemenauer a substantial dose of intravenous Toradol that "would make it difficult for another observer to appreciate the severity of the patient's pain." Baker explained that:

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[4] Regarding alternate standards of care, the trial court instructed the jury in part as follows:

> **Alternate Methods of Treatment**: If you find from the evidence that more than one method of diagnosing or treatment for KEN SCHEMENAUER's condition was recognized as reasonable given the state of medical knowledge at that time, then DR. R.H. ROBERTSON was at liberty to select any of the recognized methods. DR. R.H. ROBERTSON was not negligent because he chose to use one of these recognized diagnostic and treatment methods rather than another recognized method if he used reasonable care, skill, and judgment in administering the method.

> The problem with abdominal pain is that … since [the pain medication] change[s] your perception of pain and indeed may relieve the pain, you can't tell whether your pain is getting worse or getting better until the pain medicine wears off. So when pain medicine wears off, then you can tell, but while you are under their effect, you really can't tell what is going on.

Baker further offered the opinion that an emergency room physician needs information about the pain's severity because

> *both the severity and location of the pain* are the factors that will determine exactly what we do about it. When the pain is severe and it's in the right lower quadrant, there is no question but that the patient goes to surgery to have his abdomen explored for appendicitis. If the pain is very mild and the patient … can't describe a location for you, that is not the kind of abdomen that someone is going to operate on.

Robertson's expert, Dr. Louis Ling, board certified in medical toxicology and emergency medicine, also testified that the Toradol administration impacted Schemenauer's ability to feel pain. Indeed, after Schemenauer was given Toradol, his pain lessened from an eight to a five on a scale of one to ten, with ten being the highest.

Robertson argues that because Schemenauer continued to suffer pain after he was given Toradol, the Toradol did not mask the migration or sensation of pain within his abdomen. Further, he contends that while the plaintiff "theorized" that the use and dosage of the medication may have disguised the amount of pain, there was no testimony that Toradol interfered with the localization or migration of the pain. Indeed, contrary to the trial court's assertion, Baker agreed that the Toradol did not affect the presence or the migration of the pain. Baker, however, also testified that the severity of the pain, not only its location, is important in diagnosing appendicitis.

Experts testified regarding the standard of care and causation. The jury listened to the evidence and determined the witnesses' credibility and weight to be given their testimony; these are matters wholly within the jury's province. *See* ***Thompson v. Village of Hales Corners***, 115 Wis.2d 289, 318, 340 N.W.2d 704, 718 (1983). Here, there was contradictory evidence whether Robertson deviated from the standard of care and whether such deviation caused Schemenauer's injuries. The jury resolved the issues in Schemenauer's favor. Evidence would support a finding for either party; therefore, the verdict is not against the great weight and clear preponderance of the evidence. Because the trial court's decision was based upon a mistaken view of the evidence as well as a mistaken view of the jury instructions, its bases for granting a new trial were insufficient to conclude that the verdict was against the great weight and clear preponderance of the evidence. *See* ***Krolikowski***, 89 Wis.2d at 580, 278 N.W.2d at 868.

Next, we consider whether the trial court erroneously exercised its discretion by granting Robertson's motion for a new trial in the interest of justice on grounds that the real controversy was not fully and fairly tried. Wisconsin cases have set forth examples of when the real controversy has not been fully tried: (1) when evidence has been erroneously allowed or excluded; (2) instructional errors on significant issues were not objected to; (3) the record was incomplete or insufficient; (4) the conduct of the parties' attorneys prevented the

jury from fairly considering a crucial issue; or (5) the evidence "was confusing to the jury." *See* ***Harp***, 161 Wis.2d at 781-82, 469 N.W.2d at 213-14.[5]

In its written decision, the trial court concluded that the real controversy was not fully and fairly tried because the evidence was confusing to the jury and incomplete. It noted that arguments regarding the first two theories of negligence (serial observation and surgical consultation) "overshadowed" and "obscured" the third theory (Toradol administration). The trial court further commented on the "prejudicial effect of so many allegations of deviation from the standard of care even though they were not causal." In addition, the trial court stated that the testimony regarding Toradol was "there but incomplete." It stated that a plaintiff's expert offered the opinion that the dosage was too great but did not know Schemenauer's weight, "an important consideration in the equation." Further, the trial court stated that while Schemenauer's medical records contained "the answers," and while the records were admitted as evidence, it was "unrealistic to believe that the jury read the record concerning these issues."

The three theories of liability were not confusing or complex.[6] The trial court could only speculate that the first two theories of negligence somehow confused the jury with regard to the third theory. Notably, Robertson never

[5] A trial court's authority to grant a new trial in the interest of justice is comparable to our authority to grant a discretionary reversal under § 752.35, STATS., which provides that we may grant a new trial in the interest of justice if the real controversy was not fully tried or for any reason justice has miscarried. *See* ***State v. Harp***, 161 Wis.2d 773, 776, 469 N.W.2d 210, 211 (Ct. App. 1991).

[6] The verdict was general and did not separate the negligence, causation, and damage questions on each separate theory of liability. However, when one of several theories is sufficient to sustain the verdict, it is immaterial that we cannot determine which theory the jury accepted. *See* ***Luke v. Northwestern Nat'l Cas. Co***., 31 Wis.2d 530, 536, 143 N.W.2d 482, 485 (1966). We therefore need only determine if the evidence supports any of the three negligence theories, and we focus, as did the trial court, on the third theory, Toradol administration.

argued at trial or in his post-trial motions that allowing Schemenauer to proceed on these three theories of negligence would confuse the jury so as to prevent the real controversy from being fully and fairly tried. The trial court's written decision reflects that the trial court was weighing the evidence to draw its own conclusion about the real controversy at issue; the trial court's reasoning does not serve as a basis to conclude that the real issue was not fully tried. Based on the evidence set forth above, we do not view the evidence regarding Toradol administration as confusing or complex. The testimony was that to diagnose appendicitis, the severity and location of the patient's pain are important. Both Baker and Ling testified that Toradol could interfere with the patient's perception of pain. There is nothing confusing or complex about that testimony. The real controversy was fully and fairly tried.

Accordingly, the trial court's oral ruling and written decision granting Robertson's motion for a new trial in the interest of justice constitute an erroneous exercise of discretion. Therefore, we reverse the order and remand for reinstatement of the jury's verdict.

3. Frivolous Costs and Damages for Future Pain, Suffering and Disability

Schemenauer also argues that reversal of the trial court's order granting a new trial entitles him to frivolous costs. He explains that he "feels so strongly about the nature and amount/shear weight of the proofs" that Robertson's motion for a new trial was "out of line and potentially frivolous." Without citation to the applicable statute, § 814.025, STATS., or the case law interpreting it, he claims that under ***WED v. PSC***, 84 Wis.2d 504, 267 N.W.2d 609 (1978), we may give the trial court direction regarding whether to award him costs. We decline to address this argument because we would first have to develop it. *See* ***Barakat v.***

DHSS, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) ("amorphous and insufficiently" developed arguments need not be considered).

Finally, Schemenauer asks us to address an issue in anticipation of the trial court's ruling. In the "interest of judicial economy," he requests that we give the trial court direction regarding the issue of setting aside the jury's damage award for future pain, suffering, and disability. Schemenauer provides no authority for this court to give the trial court such direction, and, in any event, we can conceive no reason to do so. This argument is likewise insufficiently developed and without citation to legal authority, so we need not consider it. *See* ***id***.

By the Court—Order reversed and cause remanded with directions. Costs denied to the appellant.[7]

Not recommended for publication in the official reports.

[7] Without citation to authority, Schemenauer also argues that we may "prefer" the oral decision over the written because the "trial court's oral decision is definitely from the trial court," as the judge rules in front of the parties and their attorneys and because the court reporter "records it for the record." He suggests that the potential for abuse exists when the "trial court is allowed to reflect on its decision and create a written ruling with a more difficult standard of review." Further, he declares that a trial court's written decision may not "actually or accurately reflect the trial court's ruling" because the judge's law clerk or one of the party's attorney's might draft it. This line of argument is offensive, unsupported, incorrect and highly inappropriate. Accordingly, we deny costs to the appellant on appeal. *See* RULE 809.83(2), STATS.