COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-0872

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

JON D. WILLIAMS, DARCY E. WILLIAMS, AND DANIELLE BEATRICE WILLIAMS, BY HER GUARDIAN AD LITEM,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

WISCONSIN PATIENTS COMPENSATION FUND, DR. STEVEN L. ORECK, AND PHYSICIANS PLUS MEDICAL GROUP,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. The Wisconsin Patients Compensation Fund, Dr. Steven L. Oreck, and Physicians Plus Medical Group appeal from a medical malpractice verdict and judgment. The issues are whether, at various points in the protracted proceedings, the complaint should have been dismissed as a sanction for the plaintiffs' attorney's misconduct, and, alternatively, whether a new trial should be ordered. Oreck also attacks the damage verdict as excessive. The plaintiffs filed a cross-appeal seeking reversal of that portion of the judgment dismissing their "informed-consent" claim against Oreck and Physicians Plus. We affirm the judgment in all respects.

I. Background

¶2 In 1991, Jon Williams, a truck driver, slipped and fell, striking his elbow, while on the job. After developing numbness and tingling in his fingers, he consulted Dr. Steven Oreck, who told him that he had a pinched nerve which could be relieved by a simple operation. The surgery was performed by Oreck on August 17, 1993. Afterwards, Williams began experiencing severe pain in his arm. On October 15, after further testing, Oreck referred Williams to Dr. Jonathan Kay, a chronic pain specialist. Kay consulted with Dr. Lewis Chamoy, a hand surgeon, who performed a second operation on Williams's ulnar nerve on November 17, 1993.

¶3 During the second surgery, Chamoy discovered that a fibrous band in Williams's arm had compressed a nerve, causing significant damage. He released the band and moved the nerve to a submuscular location. While Williams continues his treatment with Kay, he remains in pain and continues to take narcotic medication for relief. He suffers from severe depression and is no longer able to work.

¶4 Williams and members of his family sued Oreck (and his insurer), claiming he had been negligent in performing the first surgery and in post-operative care, and that he had failed to comply with the informed-consent law. In addition to damages for Williams's lost wages, medical expenses and pain and suffering, his wife and daughter sued for loss of consortium, society and companionship.

¶5 The first trial ended in a mistrial due to the misconduct of plaintiffs' counsel. The second trial ended with a verdict for Williams on all claims except those based on lack of informed consent. Both trials featured numerous evidentiary disputes and inconsistent testimony. At several points in the proceedings, Oreck moved for dismissal of the complaint as a sanction for Williams's counsel's continuing misconduct. He made a similar motion at the trial's conclusion, based on a reported death threat to Oreck's attorney. The circuit court denied the motions. On appeal, Oreck argues that the court's failure to either dismiss the complaint or declare a second mistrial was an erroneous exercise of discretion.

II. Motion to Dismiss the Complaint as a Sanction for Counsel's Misconduct at the First Trial

¶6 A circuit court's decision on a motion to dismiss is discretionary, and will not be disturbed on appeal unless it is established that the court abused its discretion. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). The decision will be sustained if the court has "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** Dismissal is considered to be "a particularly harsh sanction;" and if the motion is based on the egregious conduct of counsel or a party, it will not be granted if the party shows a

"clear and justifiable excuse" for the conduct. ***Id.*** at 274, 276. We will sustain a circuit court's decision in this regard if there is a reasonable basis for its determination. *See* ***id.*** at 276.

¶7 Oreck argues first that the circuit court should have dismissed Williams's complaint, rather than declare a mistrial, as a sanction for his attorney's misconduct at the first trial. Specifically, Oreck contends that Williams's attorney intentionally (and repeatedly) violated rulings and orders of the trial court with respect to various witness's testimony.

¶8 One of Williams's medical witnesses, Dr. Jonathan Kay, had testified in a discovery deposition that he had no opinions regarding Oreck's actions. At trial, when Williams's counsel began to question him on that subject, the court ruled that Kay was not to be asked any questions "which relate to either informed consent and/or medical malpractice." Plaintiffs' counsel, Pamela Schmelzer, went on to ask Kay whether he had come to any conclusions as to how Williams's condition had arisen and, in his response, Kay related a hearsay statement of another physician on the subject—a physician whom counsel knew was also subject to the court's orders barring testimony on the two subjects.

¶9 After Kay's answer to the prohibited question, Oreck moved to dismiss, or, in the alternative, for a mistrial. The trial court, noting counsel's repeated "flaunt[ing]" of its orders throughout the entire course of the trial, concluded that, while she had negligently failed to discuss those orders with either Kay or the other physician, and while her conduct sometimes approached "reckless[ness]," the court could not say that counsel intentionally elicited Kay's hearsay response, or that her conduct in this regard was so egregious as to warrant

dismissal.[1] The court's explanation of its reasons for the ruling are extensive in the record and satisfy us that discretion was appropriately exercised in ordering a mistrial rather than dismissal.[2]

III. Motion to Dismiss as a Sanction for Counsel's Misconduct at the Second Trial

¶10 Oreck also argues that the court should have dismissed Williams's action for his attorney's continued misconduct during the second trial. Specifically, he claims that one of Williams's expert witnesses, Dr. Moulton Johnson, changed his testimony at the second trial, and that this was contrary to the following express order of the court declaring a mistrial in the first trial:

> [W]e are frozen in time as to previous court orders. The only new date I'm going to give is going to be for trial. There will be no additional discovery. There will be no supplementation of expert witness lists, et cetera. Everything is set in stone. To rule otherwise, I think, again, would be rewarding [Williams's counsel] for the fact that she caused a mistrial.

¶11 Because Johnson altered his opinion on several points in his testimony between the first and second trials, and because he admitted to having undergone substantial trial preparation with Schmelzer prior to testifying for the second time, Oreck claims that Williams's counsel "transformed" Dr. Johnson into a "new expert" without notifying the defense, and that this directly contravened the court's "set-in-stone" order, requiring dismissal of Williams's complaint. We are not persuaded.

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[1] The court noted, for example, that Williams's counsel was unaware of the conversation between Kay and the other physician that gave rise to the hearsay response, and that her question did not appear to be expressly designed to elicit such a response.

[2] We note in this regard that Williams's attorney did not go unpunished, for she was required to pay the expenses of Oreck's attorneys' attendance at the five-day-long first trial.

¶12 The court's remarks must be taken in context. After denying Oreck's motion to dismiss and granting the mistrial, the court and counsel discussed the manner in which the retrial would be conducted. It was then that the court made its "set-in-stone" remark. Then, when Oreck's attorney asked about facts that may "be taken as established," the court explained its position in greater detail, stating:

> If somebody's testimony changes at the time of trial from what it was during discovery, you're an experienced attorney, you can use proper impeachment in cross-examination, … but I'm very uncomfortable telling witnesses, that as of this point in time, their testimony is set in stone, so I appreciate what you're raising related to the fact that it may be more difficult for you to have as effective cross-examination of Dr. … Johnson, as you did the first time around … but what you can obtain, obviously, is a transcript of his prior testimony, which is set in stone, and impeach him.
>
> So I'm not unsympathetic to that, but I'm very hesitant to impose those types of orders because I think it's contrary to the fact-finding process.

¶13 In other words, the court anticipated that the testimony of witnesses—specifically naming Dr. Johnson—might change between the two trials. Indeed, in its decision denying Oreck's motion for dismissal and/or a mistrial after the second trial (again, based on Williams's counsel's alleged "misconduct" in violating the court's orders), the court expressly noted that it had raised and discussed the very possibility of Johnson's testimony changing at the earlier hearing, and the court quoted its earlier remarks as they appear immediately above. The court went on to state that, at the second trial, it didn't recall placing any restrictions on defense counsel's cross-examination of Johnson, and noted that one of the purposes of cross-examination is to explore and attack a witness's contradictory or differing statements. The court then concluded that there was

nothing "nefarious" about the manner in which Williams's counsel had "prepared" Johnson for his testimony at the second trial. Again, Oreck has not persuaded us that the court erroneously exercised its discretion in denying his motions.

¶14 In so ruling, however, we must note our agreement with Oreck—and with the trial court—that the conduct of Williams's counsel throughout the circuit court proceedings was inconsistent with an attorney's role as an officer of the court. Her repeated attempts to circumvent the court's orders—sometimes reaching the point of apparent disregard of the court's authority—have made reading the record of these trials an exceedingly uncomfortable task. The circuit court was extraordinarily patient in dealing with counsel's conduct. And although, viewing the case independently, we might not be able to come up with that same degree of patience—and might disagree with the court's rulings on one or more of Oreck's motions—that is not our function on appeal. We are bound to uphold a trial court's discretionary determinations—regardless of whether we agree with them—if they are supported by the record, consistent with applicable law, and reflect a result a reasonable judge could reach. And that is the case here.

IV. Motion to Dismiss as a Sanction for an Alleged "Death Threat" to Defense Counsel at Second Trial

¶15 Finally, Oreck argues that the court erred in failing to dismiss Williams's action as a sanction "for the death threat made by plaintiff Jon Williams against defense counsel during the closing argument of the second trial."

¶16 Defense counsel's closing argument at the second trial was interrupted by news that Williams had undergone some kind of violent breakdown. In the words of his attorney, Williams had "lost control of himself and … was apparently headed out of his house into a vehicle with a gun and was coming, we

believe, towards the courthouse." The jurors, having been excused from the courtroom, were unaware that anything out of the ordinary was going on. After the court assured itself that the area was secure, it inquired whether counsel wished an adjournment.

> THE COURT: ... Mr. Weir [defense counsel], I'm going to leave it up to you. If you feel up to going ahead, we'll go ahead. And if you don't, you don't have to give a reason why and we won't.
>
> MR. WEIR: Well, I think I've got to go ahead.
>
> THE COURT: It's up to you.
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> MR. WEIR: I just think we ought to finish. I'm not going to try to seize some advantage of this.
>
> THE COURT: I'm not implying that. I'm indicating, based upon what happened, if you're telling me you're not ready to go, I understand.
>
> MR. WEIR: No, let's go.

¶17 Oreck cites ***U.S. v. Moss-American, Inc.***, 78 F.R.D. 214, 216 (E.D. Wis. 1978) for the proposition that dismissal of an action is appropriate when "a just determination of the action has been seriously thwarted by a plaintiff's willful misconduct." First, we are not bound by decisions of the federal courts—particularly federal trial courts. *See* ***Thompson v. Village of Hales Corners***, 115 Wis. 2d 289, 307, 340 N.W.2d 704 (1983). Even so, the incident here took place at the very end of the trial, after all the evidence was in—and the jury was unaware that it had taken place at all.

¶18 As we have indicated above, dismissal as a sanction should only be imposed under "extraordinary circumstances." ***Chevron Chemical Co. v. Deloitte & Touche***, 176 Wis. 2d 935, 947, 501 N.W.2d 15 (1993). The trial court concluded that such circumstances were not present here, and we agree. Williams

did not make any specific threat which appears on the record, and never in fact appeared at the courthouse. We see no erroneous exercise of discretion.

V. New Trial in the Interest of Justice

¶19 Oreck next argues that "a new trial in the interest of justice is required" as a result of several evidentiary errors made by the trial court.[3] While he does not refer to the statute, we assume he is asking us to proceed under WIS. STAT. § 752.35 (1997-98),[4] which authorizes us, in the exercise of our discretion, to order a new trial in the interest of justice where it is apparent that justice has miscarried or we are satisfied that the real controversy was not tried.

¶20 Oreck's first argument in support of his request for a new trial is that the court erred in failing to strike testimony of Dr. Johnson relating to the "informed consent" issue.[5]

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[3] He also says that opposing counsel's misconduct during the two trials, and the "death threat" to counsel at the conclusion of the second, provide additional reasons for granting a new trial in the interest of justice. We have held above that the court did not err in any of its rulings on those subjects, and we need not revisit those holdings here.

[4] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[5] According to Oreck, Johnson's testimony discussed "alternative modes of treatment" which "would not have been within the standard of care for Mr. Williams." He doesn't elaborate, but he appears to be arguing that Johnson was permitted to testify as to alternative treatment methods which were not "viable" within the meaning of the informed consent law, WIS. STAT. § 448.30, which requires physicians to inform patients of "the availability of all alternative, viable medical modes of treatment and about the benefits and risks of those treatments." He says that the three "modes of treatment" discussed by Johnson were not pinpointed to, or recommended for, Williams's particular condition. The trial court refused to strike the testimony, ruling that, under the law, "viable" treatments are those treatments relating to the patient's condition—even if the physician in a particular case would not recommend that mode of treatment for the particular patient.

¶21 First, as we note below in discussing Williams's cross-appeal, the jury found in Oreck's favor on the informed consent issue, declaring that he was not negligent in that regard; and we thus have difficulty seeing how he may be said to have suffered as a result. Even so, Oreck has not persuaded us that the court was laboring under an erroneous view of the law and we consider its ruling to have been an appropriate exercise of discretion. *See* ***Martin v. Richards***, 192 Wis. 2d 156, 181, 531 N.W.2d 70 (1995).

¶22 Oreck next argues that the trial court erred by not striking Dr. Johnson's testimony on "compartment syndrome." Johnson had testified at the first trial that that condition was a "theoretical consideration, rather than a real one" with respect to Williams's condition. At the second trial, Johnson stated that he understood that Oreck, in treating Williams, was concerned about compartment syndrome, and went on to discuss the appropriate standard of care for treating that condition. (app.Br. at 43) Oreck argues that because, even according to Johnson, compartment syndrome "was not present and shouldn't have been entertained as a potential ailment," admission of the challenged testimony could only "appeal to the jury's sympathy, arouse its sense of horror by the potential consequences of this ailment, or promote a desire to punish Dr. Oreck."

¶23 The trial court denied the motion to strike the testimony, concluding that Oreck had been able to adequately explore and challenge Johnson's testimony on cross-examination. In so ruling, the court remarked that, in its opinion, the cross-examination had been quite effective, and that the weight to be accorded Johnson's testimony was properly left to the jury. Additionally, as Williams points out, Oreck himself, together with another defense witness, discussed compartment syndrome in their pre-trial discovery depositions, and we agree with Williams that he should not have to "wait until after [the defense witnesses]

testified at trial on the subject" in order to discuss it. As Williams suggests, it is difficult to find error "in allowing an expert to anticipate an opposing expert's opinion."

¶24 Oreck next challenges the admission of several medical treatises during Johnson's testimony. He says that while Johnson testified that the text's authors were experts in the field, it was revealed on cross-examination that he was personally unfamiliar with many of them. As a result, Oreck says, admission of the treatises violated WIS. STAT. § 908.03(18), which requires that, in order for learned treatises to be admitted into evidence, there must be testimony that the author is a recognized expert in the field. The trial court did not think that, given the manner in which Johnson was asked about the treatises' authors,[6] his failure to identify them on a name-by-name basis provided a sufficient basis for striking that portion of Johnson's testimony. Additionally, the court noted that, in its view, it was unlikely that the treatises had been unduly relied on by the jury.

¶25 Oreck also claims the court erred in allowing certain rebuttal testimony. When Williams called an expert, Dr. Jeffrey Hilburn, as a rebuttal witness, Oreck objected, claiming that Hilburn's testimony at trial differed from that in his discovery deposition and, further, that his testimony was not proper rebuttal. As to the first point, we agree with Williams that any inconsistencies in

[6] In its ruling, the court stated:

> If you were to ask me, the way Mr. Weir asked Dr. Johnson the names of certain people in the legal field, [if] you asked me in that manner, it may be that I would not recognize some of them. I think you [must] put it in context. It's one thing to have the article in front of you, indicating what journal it's in, who authored it, et cetera; it's another to have nothing in front you and [be] asked, "do you recognize this name?"

Hilburn's testimony are for the jury, not this court to resolve. *See* ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993).

¶26 Williams does not respond to Oreck's argument that Hilburn's testimony was improper because it "did not address an issue raised by the defense during the defense case in chief." However, even if we were to deem the point conceded, Oreck has not persuaded us that he was harmed by the error. He states only that rebuttal evidence "can be a tremendous tactical advantage to the plaintiffs." Without further elaboration, we decline to reverse on that basis.

VI. Excessive Damages

¶27 The jury ultimately awarded Williams and his family a multimillion-dollar verdict for Williams's past and future pain, suffering and disability, his past loss of earnings and future loss of earning capacity, and his past and future medical expenses. As indicated, the jury also awarded his wife and daughter substantial damages for loss of consortium, society and companionship. Oreck argues that the damages were excessive and perverse. Where the trial court has reviewed the evidence and approved a damage award, we are reluctant to interfere. *See* ***Herman v. Milwaukee Children's Hosp.***, 121 Wis. 2d 531, 545, 361 N.W.2d 297 (Ct. App. 1984). It is only in cases where the trial court's analysis is inadequate that we will engage in an independent view of the evidence to determine whether it supports the jury's award. *See* ***id.*** While the award in this case is large, to be sure, we find the trial court's reasoning to be thorough and well-considered.

¶28 The court noted that Williams's injuries are "real, sustained, constant, extremely painful, and left him with almost no enjoyment of life." Among the factors considered by the court in upholding the award were

Williams's inability, at the age of fifty, to ever again engage in "his life's work, his vocation." The court also noted that jury determinations of damage awards benefit from the contributions of twelve individuals comparing their impressions of the testimony and the severity of Williams's injuries, and it stated that "a reasonable jury could find that [Williams] is not a malingerer. That he has suffered excruciating pain." Also considered was the fact that Williams was at his professional peak at the time of his injury and would never realize the full benefit of his many years of work. Finally, the court found that the award was within the range of potential permissible jury verdicts.

¶29 This thorough consideration is characteristic of the court's reasoning on all aspects of the damage award in this case. The trial court found that, while the award was large, the suffering of Williams and his family was severe enough that a reduction was not warranted. Because the court's reasoning on this issue was clear, logical, and fully stated on the record,[7] we will not reduce the damage award or order a new trial.

VII. Cross Appeal

¶30 Williams has filed a cross-appeal based on the one aspect of the jury's verdict on which he did not prevail: informed consent. He makes three primary points: (1) the trial court gave an improper jury instruction on informed

[7] Among other things, the court noted that: (a) Williams's injuries are "real, sustained, constant, extremely painful, and [have] left him with almost no enjoyment of life [and nothing] to look forward to"; (b) he is unable to pursue "his life's work, his vocation"; (c) there was evidence from which the jury could find that Williams is "not a malingerer" and "has suffered excruciating pain and … doesn't have a whole lot to live for in his life"; and (d) given his "excruciating pain" and the "narcotic stupor … he finds himself in," his life, and that of his family "goes by without him."

consent; (2) the court erred in numerous evidentiary rulings related to informed consent; and (3) the court failed to direct a verdict for Williams on the issue.

¶31 The jury awarded damages in excess of ten million dollars to Williams and his family; and he offers no explanation as to how, having prevailed on all of the defendants' challenges to the jury's verdict and its generous assessment of damages, he has been in any way affected by the jury's rejection of his informed-consent claim—or by the trial court's evidentiary rulings on the issue. He has not explained how or why the jury would have given him any greater recovery if the challenged rulings and determinations had not been made.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.