COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP849 Cir. Ct. No. 1999CV360

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

SEAN KAUL, A MINOR, BY HIS GUARDIAN AD LITEM, ATTORNEY DON PRACHTHAUSER, TIMOTHY KAUL, AND SUSAN KAUL,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

ST. MARY'S HOSPITAL – OZAUKEE, D/B/A CEDAR MILLS MEDICAL GROUP, AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed in part, reversed in part and cause remanded with directions*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. St. Mary's Hospital-Ozaukee, d/b/a Cedar Mills Medical Group, appeals from a medical malpractice judgment in favor of Timothy and Susan Kaul, and their son, Sean Kaul. The first jury trial resulted in a no causation verdict. Cedar Mills claims that the circuit court erred in granting the Kauls a new trial on the issue of causation because of confusion caused by the jury instructions and verdict direction. Cedar Mills also contends that the amount of past medical expenses paid by a collateral source should not be included in the judgment. The Kauls cross-appeal and challenge the amount of postverdict interest, the constitutionality of the cap on noneconomic damages under WIS. STAT. §§ 655.017 and 893.55(4) (2003-04),[1] and the constitutionality of the requirement in WIS. STAT. § 655.015 that future medical expense damages in excess of $100,000 be paid to the Wisconsin Patients Compensation Fund and paid out in periodic payments. We affirm the circuit court's ruling that a new trial was warranted and conclude that the new trial on causation did not violate the five-sixths verdict rule. In accordance with ***Lagerstrom v. Myrtle Werth Hospital-Mayo Health System***, 2005 WI 124, ___ Wis. 2d ___, 700 N.W.2d 201, we uphold the inclusion of the subrogated past medical expenses in the judgment. We also conclude that postverdict interest runs from the first jury verdict and

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

reverse that portion of the judgment. We also reverse that portion of the judgment reducing noneconomic damages by the statutory cap in § 655.017 because the cap was held unconstitutional in ***Ferdon v. Wisconsin Patients Compensation Fund***, 2005 WI 125, ¶187, ___ Wis. 2d ___, 701 N.W.2d 440. No relief is afforded on the other issue raised in the cross-appeal.

¶2 Sean was born on January 3, 1997, at St. Mary's Hospital-Ozaukee. On the morning of January 6, 1997, the Kauls contacted the Cedar Mills clinic to report concerns they had about a change in Sean's feeding. At 12:30 p.m. that same day, the Kauls again contacted the clinic about Sean's condition. The clinic's triage nurse made an appointment for Sean to be seen later that afternoon. When Sean was examined later that day he was lethargic and hypoglycemic (abnormally low blood glucose). He was immediately transported to the Children's Hospital of Wisconsin in Milwaukee. It was determined that Sean had suffered a brain hemorrhage. Sean was rendered profoundly mentally and physically disabled as a result of the brain injury.

¶3 The Kauls commenced this action against Cedar Mills alleging that the clinic's nursing staff was negligent in not arranging for Sean to be seen immediately for examination in response to the Kauls' phone calls on January 6, 1997. At trial, the Kauls' experts testified that Sean developed hypoglycemia and hypovolemia (decreased volume of circulating blood) during the morning of January 6 and that had Sean been evaluated for treatment earlier in the day, he would not have suffered devastating brain damage. The defense experts opined that Sean's brain injury occurred prior to January 6, possibly in utero.

¶4 The special verdict asked the jury to determine if Cedar Mills was negligent and, if so, whether such negligence was a substantial factor in causing

Sean's injuries. The verdict directed the jury to answer the damage questions regardless of how the negligence and causation questions were answered.[2] During deliberations the jury asked the circuit court whether the answers to the damage questions should reflect the percentage of liability for which Cedar Mills is responsible or the total amount of damages sustained by the Kauls. The jury wrote that "confusion stems from contradictory interpretations" of portions of the jury instructions. The jury attached to its question portions of the instructions it believed to be contradictory with these passages highlighted:

> The amount of damages, if any, found by you should in no way be influenced or affected by any of your previous answers to questions in the verdict.
>
> ….
>
> … nor should you make any deductions because of a doubt in your minds as to liability of any party to this action.
>
> ….
>
> If you are satisfied that Sean Kaul will require health care or treatment for injuries sustained *as a result of the care and treatment rendered by Cedar Mills Medical Group*, you will insert as your answer to this question the sum of money you find will reasonably and necessarily be expended in the future for that care and treatment.
>
> ….
>
> If you are satisfied that Sean Kaul has suffered a loss of future earning capacity as a result of the injuries sustained *as a result of the care and treatment rendered by Cedar Mills Medical Group*, your answer to this question will be the difference between what Sean Kaul will reasonably be able to earn in the future in view of the injuries sustained and what he would have been able to earn had he not been injured. (Emphasis added.)

[2] The Kauls objected to this direction in the special verdict.

¶5 The jury was reinstructed to follow the statement that the damage determination "should in no way be influenced or affected by any of your previous answers to questions in the verdict." The jury was also told, "To the extent that you believe that the other highlighted material … conflicts with that statement, follow that statement." On November 18, 2002, the jury returned a verdict finding that Cedar Mills was negligent but that the negligence was not a substantial factor in causing Sean's injuries. The answers to the damage questions totaled more than $7 million in damages.

¶6 The Kauls moved for a new trial under WIS. STAT. § 805.15(1)[3] on two grounds. They first asserted that the instruction on causation failed to include the paragraph of the standard jury instruction relating to causation and whether

[3] WISCONSIN STAT. § 805.15(1) provides:

> A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

negligence is a substantial factor in producing the injury.[4] They further claimed that the jury instructions and verdict direction to answer the damage questions regardless of how the negligence and causation questions were answered were contradictory, created jury confusion, and resulted in an inconsistent verdict. The circuit court found that the manner in which the damage questions were framed resulted in conflicting instructions to the jury such that it could not determine if the jury properly followed the law. It granted a new trial only on the issue of causation.

¶7 Nearly a year after the first verdict, the trial on causation commenced. The sole verdict question was: "Was the absence of treatment between 11:30 a.m. and 3:15 p.m. on January 6, 1997 a substantial factor in bringing about Sean Kaul's injuries?" The jury's November 14, 2003 verdict answered "yes." By its motion after verdict, Cedar Mills sought judgment on the original 2002 verdict on the grounds that the order for a new trial was error, the second verdict violated the five-sixths verdict rule because the same jurors had not agreed on negligence and causation, and there were other errors committed prior

[4] The missing portion is found at WIS JI—CIVIL 1023 and provides in relevant part:

> The cause question asks whether there was a causal connection between negligence on the part of (doctor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition) or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).

to and during the second trial. The Kauls moved for judgment on the 2003 verdict and for reconsideration of the circuit court's earlier determination that they had waived the omission of the causation portion of the jury instruction in the first trial. The circuit court granted those portions of the Kauls' motions. It found that the omission of the causation paragraph of the jury instruction undermined the fundamental fairness of the trial and required a new trial in the interests of justice. It was an additional reason for granting a new trial on causation. Judgment was entered and postverdict interest allowed from the date of the verdict on November 14, 2003. The taxation of costs and interest was based on the whole amount of the judgment.

¶8 We review the circuit court's order granting a new trial under WIS. STAT. § 805.15(1) for a proper exercise of discretion. *See* ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 476, 543 N.W.2d 277 (1996). Cedar Mills contends that we need only examine whether the jury instructions correctly reflect the law and since the instructions here pass legal muster, no further inquiry is needed. *See* ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 750-51, 235 N.W.2d 426 (1975). However, the instructions need not be legally incorrect to support the granting of a new trial. "Misleading instructions and verdict questions which may cause jury confusion are a sufficient basis for a new trial." ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis. 2d 594, 603, 541 N.W.2d 173 (Ct. App. 1995).

¶9 ***Runjo*** illustrates how legally correct instructions, when viewed in light of the direction on the special verdict, can result in jury confusion supporting a new trial. *See* ***id.*** at 604 ("The fact, however, that each instruction *alone* was not erroneous does not salvage the reversible error."). In ***Runjo***, a new trial was ordered because of a very similar juxtaposition of the special verdict direction and the jury instructions at issue here—the jury was directed to answer the damage

questions regardless of how other questions on the verdict were answered and yet the jury was instructed that damages were to be related to the harm caused by the defendant's medical malpractice. *Cf.* ***id.*** at 603-04. Here, the jury found that Cedar Mills' negligence was not causal but then entered damages caused by Cedar Mills' treatment. It was inconsistent.[5] As in ***Runjo***, the result could only have arisen from confusion. ***Id.*** at 605.

¶10 Cedar Mills charges that the circuit court engaged in mere speculation in theorizing that the jury was confused. It equates the circuit court's ruling with that made by the circuit court in ***Burch***, 198 Wis. 2d at 472, that "the jury either didn't understand or didn't listen to the 1021 jury instruction ... which I gave them and they may or may not have been sidetracked by [defense counsel's closing] argument." (Alteration in original.) In ***Burch***, the circuit court's order granting a new trial was reversed because the circuit court's rationale was "purely speculative." ***Id.*** at 477. Here, the circuit court's ruling cannot be characterized as speculative as that in ***Burch***. The circuit court pointed out that the jury itself exhibited confusion and that it was unable to assess whether the jury properly followed the law. That the circuit court made reference to being able to only "speculate" on the effect of the supplemental instruction does not detract from its conclusion that the jury instructions and verdict direction conflicted. The circuit court was not confident that the supplemental instruction actually cured the jury's confusion. It certainly did not correct the conflict between the instructions and the verdict direction. The circuit court stated adequate grounds for granting a new

[5] The inconsistency is further highlighted by Cedar Mills' argument to the jury that the damage questions should be answered "$0" on the ground that Cedar Mills did not cause any of Sean's injuries.

trial in the interests of justice and we defer to that determination.[6] *See* ***Krolikowski v. Chicago & Nw. Transp. Co.***, 89 Wis. 2d 573, 581, 278 N.W.2d 865 (1979); ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995).

¶11 We also conclude that the Kauls did not waive their right to seek a new trial based on the confusion created by the instructions and direction in the verdict. Cedar Mills contends that the potential confusion issue was waived when the Kauls agreed to the supplemental instruction. *See* ***Olson v. Williams***, 270 Wis. 57, 69-70, 70 N.W.2d 10 (1955) ("By participating with the court in formulating the written statement and consenting to such means of communication with the jury, the counsel waived possible error with respect to the procedure employed in so further instructing the jury."). The Kauls had earlier raised their contention that confusion would exist. The issue was preserved for further review. They were not required to reassert the same argument. *See* ***Peil v. Kohnke***, 50 Wis. 2d 168, 211, 184 N.W.2d 433 (1971); ***State v. Bustamante***, 201 Wis. 2d 562, 571, 549 N.W.2d 746 (Ct. App. 1996). ***Olson*** does not apply here because the Kauls are not objecting to the supplemental instruction. Also, the failure to object does not

[6] We reject Cedar Mills' contention that the circuit court was required to determine that different instructions probably would have produced a different result. That determination is related to whether an erroneous jury instruction probably misled the jury. *See* ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 751, 235 N.W.2d 426 (1975). Here we are not concerned with erroneous instructions but with the conflict between the instructions and the verdict direction. Neither ***Runjo v. St. Paul Fire & Marine Insurance Co.***, 197 Wis. 2d 594, 541 N.W.2d 173 (Ct. App. 1995), nor its predecessor, ***Behning v. Star Fireworks Manufacturing Co.***, 57 Wis. 2d 183, 203 N.W.2d 655 (1973), imposed a requirement that the circuit court find a probability of a different result on retrial. We read the circuit court's decision to grant a new trial in the interests of justice for the reason that the real controversy was not fully tried. The circuit court need not find a substantial likelihood of a different result on retrial when it orders a new trial on the ground that the real controversy was not fully tried. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991).

preclude the circuit court from granting a new trial in the interests of justice. *See* ***Richards v. Gruen***, 62 Wis. 2d 99, 110-11, 214 N.W.2d 309 (1974) ("It does not follow [from the lack of objection] that a trial court cannot grant a new trial in the interest of justice when it is of the opinion that justice has miscarried or a verdict is returned based upon erroneous instructions [of] law."); ***Behning v. Star Fireworks Mfg. Co.***, 57 Wis. 2d 183, 188, 203 N.W.2d 655 (1973) (circuit court judge may, sua sponte, order a new trial).

¶12 Because the circuit court's order granting a new trial is affirmed on the ground of jury confusion and the conflict between the verdict direction and the jury instructions, we need not fully address the circuit court's determination that omission of the causation portion of the negligence instruction also necessitated a new trial. *See* ***Runjo***, 197 Wis. 2d at 596 n.1 (only dispositive issues need be addressed). We summarily reject Cedar Mills' contention that the circuit court lacked competency to reconsider its decision that the Kauls waived the error in omitting a portion of the instruction and that the omission was not of sufficient import to support a new trial. Causation was a critical inquiry in this case because of the progressive development of Sean's condition and the possibility that it developed in utero. The omitted causation paragraph would have provided the jury with critical information on that inquiry.

¶13 WISCONSIN STAT. § 805.09(2) provides: "A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions." Cedar Mills argues that judgment on the 2003 verdict violates this five-sixths rule because the causation question was not answered by the same jurors who answered the negligence and damage questions in the 2002 verdict. We first observe that Cedar Mills waived this issue.

At the final pretrial conference before the second trial, Cedar Mills raised a concern that the five-sixths rule would be violated. However, its concern was limited to having the second jury informed of the first jury's finding of negligence.[7] When the circuit court explored whether everything but damages should be retried, counsel for Cedar Mills replied, "I see that problem arising only if we tell this jury that there was a prior finding of negligence. If we don't tell them that, we don't have the problem ...." The pretrial conference ended with the parties agreeing to work on what to tell the jury. Upon the parties' agreement, the jury was not told that a prior negligence finding had been made. The basis for Cedar Mills' objection regarding the five-sixths rule did not come to fruition.

¶14 Cedar Mills asserts that the circuit court improperly bifurcated the negligence and causation issues, thereby ensuring that the essential elements of the case would not be decided by the same jurors. This is a nonissue. "The power of the court, trial and appellate, to limit the issues to be retried is generally recognized." ***Leonard v. Employers Mut. Liab. Ins. Co.***, 265 Wis. 464, 470, 62 N.W.2d 10 (1953). Although the circuit court may not from the outset bifurcate the issues of liability and damages to be heard by different juries, ***Waters v.***

[7] Counsel for Cedar Mills explained:

> I think right out of the box tell[ing] this jury that there was a prior trial and a prior finding of negligence puts us behind in a way that is unfair.... [W]e don't know what the prior jury determined was a negligent act and how that intertwines then with causation because as the court knows, this whole thing was a continuum of progressing events … and if the prior jury made the determination that the negligent act occurred early at the time of the first phone call, say, versus making a finding on the other hand that it occurred during the second phone call, that affects the whole causation issue and what was causal, and then that translates into do we have unanimity between these two juries, do we truly have a five-sixths verdict.

Pertzborn, 2001 WI 62, ¶27, 243 Wis. 2d 703, 627 N.W.2d 497, it is not precluded from ordering a retrial on a limited issue. The five-sixths rule applies to the issues that are the subject of a particular trial.

¶15 The final issue in Cedar Mills' appeal is whether the amount of the subrogation lien for past medical expenses ($259,876.83) should be excluded from the judgment under WIS. STAT. § 893.55(7), which in a medical malpractice trial permits evidence of compensation received from other sources.[8] Cedar Mills suggests that by enacting § 893.55(7), the legislature intended to exempt medical malpractice cases from the collateral source rule. It contends that recovery of sums paid by collateral sources, particularly where, as here, the subrogated party has waived the subrogation lien, is a windfall.

¶16 In ***Lagerstrom***, 700 N.W.2d 201, ¶22, the Wisconsin Supreme Court held that the correct interpretation of WIS. STAT. § 893.55(7) does not give rise to constitutional infirmities.[9] The supreme court held that § 893.55(7) simply modifies the evidentiary aspect and not the substantive aspect of the collateral source rule. ***Lagerstrom***, 700 N.W.2d 201, ¶46. The substantive aspect of the

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[8] WISCONSIN STAT. § 893.55(7), provides:

> Evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice. This section does not limit the substantive or procedural rights of persons who have claims based upon subrogation.

[9] ***Lagerstrom v. Myrtle Werth Hospital-Mayo Health System***, 2005 WI 124, ___ Wis. 2d ___, 700 N.W.2d 201, was pending when Cedar Mills filed its appellant's brief. In its brief, Cedar Mills asks this court to stay the appeal pending the ***Lagerstrom*** decision and for an opportunity for each party to present its respective arguments on the issue after the decision. We do not need additional submissions from the parties on the issue.

collateral source rule precludes crediting against damages the compensation the plaintiff receives from collateral sources. ***Id.***, ¶56. Section 893.55(7) "does not require an offset or reduction of any malpractice award by the amount of collateral source payments." ***Lagerstrom***, 700 N.W.2d 201, ¶69. Indeed, the court held that the jury must be instructed to consider collateral source payments only in determining the reasonable value of the medical services rendered and that it must not reduce the reasonable value of medical services on the basis of the collateral source payments. *See* ***id.***, ¶¶72, 74. The jury cannot make discretionary offsets. ***Id.***, ¶73.

¶17 Thus, because the jury did not exclude the past medical expenses paid by collateral sources, the Kauls are entitled to judgment for those sums. This is consistent with the holding in ***Anderson v. Garber***, 160 Wis. 2d 389, 402, 466 N.W.2d 221 (Ct. App. 1991), that medical expenses paid by an insurer are properly awarded even when the insurer waives its subrogation rights.

¶18 In their cross-appeal, the Kauls first argue that postverdict interest should have been computed from the time of the first verdict on November 18, 2002. The circuit court determined that postverdict interest would be calculated from the 2003 verdict because damages were not liquidated until that verdict. However, ***Fehrman v. Smirl***, 25 Wis. 2d 645, 659, 131 N.W.2d 314 (1964), holds that the damages determined at a first trial in a medical malpractice action are liquidated even though the same verdict does not impose liability. In so holding the court recognized that

> a defendant, victorious at the first trial, would scarcely contemplate a tender of damages; however, it does not follow that upon an ultimate loss of the case such defendant is protected from the burden of paying interest on the previously ascertained damages. This is especially true

> when, as here, no question of damages was involved upon the second trial.

Id. *See also* ***Nelson v. Travelers Ins. Co.***, 102 Wis. 2d 159, 170, 306 N.W.2d 71 (1981) ("the existence of multiple verdicts does not render [WIS. STAT. § 814.04(4)] inapplicable, provided the final judgment rests in part upon both verdicts"). We are not persuaded that the constitutional challenge the Kauls launched against the application of the cap on noneconomic damages is sufficient to render the damages unliquidated. *See* ***Nelson***, 102 Wis. 2d at 171 ("the resulting 'uncertainty' in the computation of the amount is not sufficient to overcome the plaintiffs' statutory right to interest under sec. 814.04(4)"). The Kauls are entitled to interest commencing with the November 18, 2002 verdict. The portion of the judgment pertaining to postverdict interest is reversed.

¶19 The Kauls argue that the statutory cap on noneconomic damages under WIS. STAT. § 655.017 is unconstitutional because it violates the equal protection guarantees of the Wisconsin Constitution. Recently the Wisconsin Supreme Court held the cap unconstitutional for that very reason. ***Ferdon***, 701 N.W.2d 440, ¶187. ***Ferdon*** controls and, therefore, we reverse the circuit court's ruling that the cap is constitutional and operates to reduce the judgment.[10]

¶20 Existing precedent controls the Kauls' equal protection challenge to WIS. STAT. § 655.015, which requires that future medical expense damages in

[10] In response to the Kauls' submission of additional authorities, Cedar Mills argues that ***Ferdon v. Wisconsin Patients Compensation Fund***, 2005 WI 125, ___ Wis. 2d ___, 701 N.W.2d 440, should not be applied retroactively to this case. We reject that argument because the Kauls raised their constitutional challenge in the circuit court and preserved it for appellate review. *See* ***Olson v. Augsberger***, 18 Wis. 2d 197, 201, 118 N.W.2d 194 (1962) (a judgment under attack at the time the controlling decision was rendered is entitled to receive the benefits of the new rule announced in the decision). We are bound by controlling precedent on an issue properly raised in this court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

excess of $100,000 be paid to the patients compensation fund and paid out in periodic payments. *See* ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 510-11, 261 N.W.2d 434 (1978) (the delayed disbursement of future medical expense awards and annual installment payments under WIS. STAT. ch. 655 do not deny equal protection of the law). We are bound by that controlling precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). The Kauls assert that no court has yet addressed the arguments they make that § 655.015 violates their right to trial by jury, their right to substantive due process, or that it constitutes an unconstitutional taking without just compensation.[11] The circuit court did not address these claims. Because we are primarily an error-correcting court, not a law-declaring court, and because the Kauls assert these claims primarily to preserve them for review by the supreme court, we need not and do not address constitutional challenges to the periodic payments statute. *See* ***Sussex Tool & Supply, Inc. v. Mainline Sewer and Water, Inc.***, 231 Wis. 2d 404, 416 n.4, 605 N.W.2d 620 (Ct. App. 1999) (declining to address the application of the economic loss doctrine because the supreme court is the appropriate body to decide the issue). The supreme court addressed one constitutional challenge to § 655.015 in ***Strykowski***, and it is appropriate to leave other constitutional challenges to the supreme court.

[11] Although the constitutionality of WIS. STAT. § 655.015 and the administrative rule implementing it, WIS. ADMIN. CODE § Ins 17.26, was raised in ***Ferdon***, the supreme court did not address the issue because the parties did not adhere to the procedure in WIS. STAT. § 227.40 before challenging the constitutionality of the rule. ***Ferdon***, 701 N.W.2d 440, ¶12. We do not consider whether the Kauls' challenge implicates the administrative rule so that § 227.40 must be complied with. We note that the Kauls gave the attorney general notice of their constitutional challenges to the statute. *See* WIS. STAT. § 806.04(11).

¶21 We reverse the judgment in part and remand with directions that judgment be entered in an amount not reduced by the application of WIS. STAT. § 655.017, and to include postverdict interest from the November 18, 2002 verdict. Because we affirm on the appeal and reverse on the cross-appeal, the Kauls are entitled to costs under WIS. STAT. RULE 809.25(1).

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

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