COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2002

Cornelia G. Clark
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. 01-1855 Cir. Ct. No. 98 CV 1230

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

EMERSON PLANTICO, A MINOR BY JULIE J. FLESSAS, GUARDIAN AD LITEM, PETER PLANTICO, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF PATRICIA PLANTICO,

PLAINTIFFS-APPELLANTS,

V.

FROEDTERT MEMORIAL LUTHERAN HOSPITAL, BLUE CROSS/BLUE SHIELD, AND UNITED HEALTH CARE INSURANCE COMPANY,

DEFENDANTS,

PATIENTS COMPENSATION FUND, DENNIS MAIMAN, M.D., AND MEDICAL COLLEGE OF WISCONSIN,

DEFENDANTS-RESPONDENTS,

OHIO HOSPITAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Patricia Plantico's Estate appeals from a judgment entered on a jury verdict dismissing its medical malpractice claim against Dennis Maiman, M.D., and the Medical College of Wisconsin. Plantico's Estate claims that the trial court erred when it denied the Estate's motions after the verdict because the jury verdict was not supported by any credible evidence. The Estate also claims that the trial court erred when it declined to grant a new trial in the interest of justice because the verdict was contrary to the great weight and clear preponderance of the evidence and the real controversy was not fully tried. We affirm.

I.

¶2 Patricia Plantico had surgery at Froedtert Memorial Lutheran Hospital to relieve chronic back pain. After the surgery, Plantico's doctor, Dennis Maiman, prescribed morphine to alleviate Plantico's pain. Plantico's pain was not adequately relieved by the morphine, so Maiman prescribed eighty milligrams of OxyContin, a timed-release narcotic, to be given every twelve hours. Plantico received her first dose of OxyContin at midnight.

¶3 The next morning, Plantico complained to the nurses that she felt shaky, nauseous, and overmedicated. A nurse gave Plantico a second dose of OxyContin at 9:25 in the morning, approximately two and one-half hours earlier than ordered. Plantico pressed her call button between one o'clock and two o'clock in the afternoon. Around two o'clock, a nurse found Plantico

unresponsive in bed. Froedtert's code team performed CPR on Plantico and she was transferred to the Intensive Care Unit. Plantico was on life support for five days. She died without regaining consciousness.

¶4 Plantico's Estate brought a medical malpractice suit against Dr. Maiman and Froedtert alleging that Maiman's negligence and the negligence of Froedtert's employees caused Plantico's death. Froedtert settled with the Estate and was dismissed from the case before trial.[1] At trial, the Estate's theory was that Dr. Maiman was negligent because the dose of OxyContin was too large. The Estate claimed that this alleged overdose caused Plantico to become "intoxicated," choke on her own vomit, and die.

¶5 Two expert witnesses testified for the Estate. Curtis Johnson, Ph.D., testified that eighty milligrams of OxyContin was "far too large a dose for a woman of [Plantico's] size" and that a high dose of OxyContin, such as the dose

[1] After the parties were notified that this case was taken under submission, the Patients Compensation Fund moved for summary disposition pursuant to WIS. STAT. RULE 809.21 (1999-2000). The Fund contends that there was no allegation that it provided coverage to Dr. Maiman or the Medical College, and that this court has no jurisdiction because the judgment "does not name the … Fund as a party." The Estate opposes the motion. The Estate repeatedly alleged that the Fund "is a risk-sharing pool created under Chapter 655, Wis. Stats., the interests of which must be determined in this action." The record also establishes that the Fund's stipulated dismissal was limited to its interests as they related to Froedtert. The notice of appearance filed by the Fund's successor counsel subsequent to its stipulated dismissal demonstrates its continued participation in this case as its interests related to Dr. Maiman and the Medical College.

We reject the Fund's belated, hypertechnical argument that the Estate's failure to include the Fund in the texts of the judgment and the notice of appeal to identify its interests, derivative to Dr. Maiman and the Medical College, is a jurisdictional defect. Significantly, the Fund is named in the caption of both the order for judgment and the judgment. Prior to its March 20, 2002 motion, the Fund's conduct was consistent with defending its interests deriving from Dr. Maiman and the Medical College, and inconsistent with its recent position that we lack jurisdiction. We deny the Fund's motion for summary disposition and award the Estate's counsel $200 motion costs for being compelled to respond.

administered to Plantico, could cause "profound respiratory depression, nausea, vomiting, [and] an inability to walk easily or normally."[2]

¶6 Mark Boswell, M.D., testified that eighty milligrams of OxyContin "was totally inappropriate" because "[i]t was a humongous dose." Boswell testified that the OxyContin "caused [Plantico's] arrest"—"[Plantico] vomited, choked on her own vomit and died." Dr. Boswell also testified that the nurse who administered the second dose of OxyContin too early "elevated the contribution to [Plantico's] arrest by 20 percent."

¶7 In response, two expert witnesses testified for Dr. Maiman. Julianne Whipple, M.D., testified that eighty milligrams of OxyContin was appropriate and that the OxyContin did not cause Plantico's death. Stephen Abrahm, M.D., testified that "80 milligrams of OxyContin was a reasonable choice for [Plantico] at that time" and that the OxyContin did not cause her death.

¶8 The jury was asked to fill out a special verdict form:

> Question 1: Was Froedtert Memorial Lutheran Hospital through its employees negligent with respect to its care and treatment of Patricia Plantico?
>
> ANSWER: Yes
>
> (Yes/No)
>
> Question 2: Was the negligence of Froedtert Memorial Lutheran Hospital though its employees a cause of Patricia Plantico's injury and death?
>
> ANSWER: _____
>
> (Yes/No)

[2] Curtis Johnson had a Doctor of Pharmacy degree.

> Question 3: Was Dennis Maiman, M.D. negligent with respect to his care and treatment of Patricia Plantico?
>
> ANSWER: _____
>
> (Yes/No)
>
> Question 4: If you have answered Question No. 3 "yes," then answer this question:
>
> Was the negligence of Dennis Maiman, M.D. a cause of Patricia Plantico's injury and death?
>
> ANSWER: _____
>
> (Yes/No)
>
> Question 5: If you answered Question Nos. 2 and 4 "yes," then answer this question:
>
> Assuming the total negligence which combined to cause Patricia Plantico's injury and death is 100%, what percentage of the negligence do you attribute to:
>
> (a) Froedtert Memorial Luthern Hospital
> Answer:_____%
>
> (b) Dennis Maiman, M.D.
> Answer:_____%

The parties stipulated that Froedtert was negligent in its treatment of Plantico. Thus, the trial court filled in "Yes" for question one before it gave the form to the jury. The trial court also instructed the jury:

> Question No. 2 asks whether there was a causal connection between negligence on the part of the employees of Froedtert Memorial Lutheran Hospital and Patricia Plantico's injury and death.
>
> I have answered that question "yes" because it's not contested and I have found that "yes" is the proper answer.

The attorney for Plantico's Estate told the trial court that she did not have any objections to the jury instructions or the manner in which the court read them.

¶9 The jury found that Dr. Maiman was not negligent in his care and treatment of Plantico. The jury also found that the negligence of Froedtert's employees was a cause of Plantico's death. The jury properly left question four, Maiman's causal negligence, and question five, the apportionment of negligence question, blank.

¶10 The Estate filed motions after the verdict asking the trial court to enter an order for a judgment in its favor notwithstanding the verdict. The Estate claimed that the verdict was not supported by credible evidence and asked the trial court to reapportion the jury's finding of causal negligence. The Estate also asked the trial court to grant a new trial in the interest of justice because it claimed that the verdict was against the great weight and clear preponderance of the credible evidence. The trial court denied the motion.

II.

¶11 First, Plantico's Estate alleges that the trial court erred because the jury's verdicts were not supported by any credible evidence. The Estate claims that there was no evidence at trial that the negligence of Froedtert's staff caused Plantico's death. The Estate argues that the evidence only supports one finding—that Dr. Maiman was negligent and his negligence caused Plantico's death. Thus, the Estate argues that the jury's verdict was improperly based on speculation and asks this court to change the jury's answer to question two of the special verdict (Froedtert's causal negligence) to "No," and to change the answer to question three (Maiman's negligence) to "Yes." The Estate also asks this court to find that Dr. Maiman was 100% causally negligent and Froedtert was 0% causally negligent. We disagree and decline to do so.

¶12 A jury verdict will be sustained if there is any credible evidence to support it. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450, 280 N.W.2d 156, 162 (1979). We consider the evidence in a light most favorable to the jury's determination. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Thus, we search the record for credible evidence to support the jury's verdict, not for evidence to sustain a verdict that the jury could have reached, but did not. ***Id.*** Accordingly, if the evidence gives rise to more than one reasonable inference, we must accept the inference reached by the jury, "even though [the evidence] be contradicted and the contradictory evidence be stronger and more convincing." ***Id.*** (quoted source omitted).

¶13 In this case, the standard of review is even more stringent because the trial court approved the jury's finding when it denied the motions after the verdict. *See* ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). Thus, we will not disturb the jury's verdict unless "there is such a complete failure of proof that the verdict must be based on speculation." ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723, 726 (1979).

¶14 Here, there is credible evidence to support the jury's finding that Dr. Maiman was not negligent. Two expert witnesses testified that Maiman was not negligent when he ordered eighty milligrams of OxyContin to relieve Plantico's pain. Dr. Whipple testified that eighty milligrams of OxyContin was an appropriate dose for Plantico based upon the amount of Plantico's pain, her body size, her renal function, and the type of surgery. Dr. Whipple opined that the OxyContin was not the cause of Plantico's death. She testified that the peak concentration of the OxyContin in Plantico's blood would have been around 11:30 a.m., approximately two hours after the second dose was administered. Whipple testified that, according to Plantico's medical records, Plantico did not appear to

experience problems associated with a drug overdose, such as extreme drowsiness or a decrease in respiratory function, at or around 11:30 a.m.

¶15 Moreover, Dr. Abrahm testified that "80 milligrams of OxyContin was a reasonable choice for [Plaintico] at that time" based upon the amount of morphine that Plantico received and the fact that her pain was not adequately relieved by the morphine. Abrahm further testified that the OxyContin did not cause Plantico's death because Plantico's blood pressure and respiratory rate were normal in the hours leading up to her death, while death from an overdose of OxyContin would have been preceded by a comatose state and respiratory arrest.

¶16 Furthermore, there is credible evidence to support the jury's finding that the negligence of Froedtert's employees was a cause of Plantico's death. Dr. Boswell testified that the administration of the second dose of OxyContin two and one-half hours early was a cause of Plantico's death:

> Q. And in your opinion, what was the--how much of the early dose of the drug was a contributing factor in Mrs. Plantico's death?
>
> A. I think it raised the subsequent dose by 20 percent because the doses were stacked. Levels are supposed to be like this. This level is predicated on the previous level. Now, if you stack like this, you are going to get this little bit of extra and it's going to kick the subsequent level up. Other thing you have to remember is that steady state levels with OxyContin aren't achieved until 24 to 36 hours, so you are going to see a level here and next one is going to be here. Next one is going to be here. Then they are out. You are going to see steady levels after 24 to 36 hours.

> Q. So as I understand your answer. *You thought the nurses providing this drug earlier to Mrs. Plantico elevated the contribution to her arrest by 20 percent?*
>
> A. *Yes, yes.*

(Emphasis added.)

¶17 Accordingly, there is ample evidence to support the jury's verdict. The testimony of Dr. Whipple and Dr. Abrahm supports the jury's finding that Dr. Maiman was not negligent. Moreover, the testimony of Dr. Boswell supports the jury's finding that the negligence of Froedtert's employees in administering the second dose too early was a cause of Plantico's death. Although the Estate correctly points out that there was testimony that Dr. Maiman was negligent, we must accept the inference reached by the jury when the evidence gives rise to more than one reasonable inference. ***Morden***, 2000 WI 51 at ¶39. Thus, in this case, we cannot say that there was "such a complete failure of proof that the verdict must be based on speculation." *See* ***Coryell***, 88 Wis. 2d at 315, 276 N.W.2d at 726.

¶18 The Estate also claims that it is entitled to a new trial in the interest of justice because the jury's findings are contrary to the great weight and clear preponderance of the evidence and because the real controversy was not fully and fairly tried.[3] We disagree.

[3] The Estate also alleges that the jury's verdict was perverse "to the extent that it found that 100% of that causal negligence fell on the shoulders of the nurses employed by the Hospital, and Ms. Plantico's physician, Dennis Maiman, was not negligent in any respect." A jury verdict is perverse when: the jury clearly refuses to follow the instructions of the trial court on a point of law; or where it reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment without any attempt to be fair. ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 223, 291 N.W.2d 516, 522 (1980). The Estate did not address any of these factors in its brief; thus, we will not address the issue here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (continued)

¶19 Under WIS. STAT. § 805.15(1) (1999-2000), a trial court may grant a new trial when the jury's findings are contrary to the great weight and clear preponderance of the evidence, even though credible evidence supports the findings.[4] ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993). A trial court may also grant a new trial in the interest of justice if the real controversy has not been fully tried. ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210, 211 (Ct. App. 1991). The granting of a new trial is reserved for only the most "exceptional case[]," ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797, 802 (1990), and we will not disturb the trial court's decision on a motion for a new trial unless the court erroneously exercised its discretion, ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 663, 279 N.W.2d 227, 236 (1979).

¶20 The Estate claims that the jury's verdict is contrary to the great weight and clear preponderance of the evidence because the testimony of Dr. Boswell established that Dr. Maiman's negligent overdose caused Plantico's

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(Ct. App. 1992) (appellate court can decline to address issues "inadequately briefed"); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. WISCONSIN STAT. § 805.15(1) provides:

> **(1)** MOTION. 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.

death and the nurses's negligent administration of the second dose of OxyContin two and one-half hours early contributed to Plantico's arrest by twenty percent. Thus, the estate reasons that the only finding the jury could make, based upon this evidence, was that Dr. Maiman was eighty percent causally negligent and the nurses were twenty percent causally negligent. We disagree.

¶21 In this case, two expert witnesses testified that Dr. Maiman was negligent, and two expert witnesses testified that Dr. Maiman was not negligent. There was enough evidence to support both theories. Thus, it can hardly be said that the jury's finding was against the great weight of the evidence. When there is conflicting evidence, the jury, not a reviewing court, determines the credibility of the witnesses and resolves any conflicts in the evidence. ***Meurer***, 90 Wis. 2d at 450, 280 N.W. 2d at 162. That is what the jury did here and we see no error.

¶22 Moreover, there was also expert testimony that the nurse's negligence contributed to Plantico's death, albeit by twenty percent. The trial court instructed the jury:

> This question [special verdict question 2] does not ask about "the cause" rather "a cause." The reason for this is there can be more than one cause of injury and death. The negligence of one or more persons can cause an injury and death or an injury and death can be the result of the natural progression of a condition. In addition, the injury and death can be caused jointly by a person's negligence and also the natural progression of a condition.

The jury did not have to find that Froedtert's negligence was the only cause of Plantico's death. It simply had to find that Froedtert's negligence was a cause. That it did, and given the evidence supporting its finding that Dr. Maiman was not negligent, its verdict stands.

¶23 Although it is true that the expert witness critical of the early dose indicated that it "elevated the contribution to her arrest by 20 percent," we may not extrapolate that testimony into a finding as a matter of law that the jury's determination that Dr. Maiman was not negligent was not supported by the evidence; as we have seen, it was fully supported by the two expert witnesses who testified on his behalf. Moreover, there was unrefuted evidence that the hospital responded late to Plantico's push of the call button. Although there was no expert testimony in the record that this too was a cause of Plantico's death, the general consequences of late attention to a call button pushed by a patient later found unresponsive and needing CPR is something within the ken of the ordinary jury. *See* ***Kujawski v. Arbor View Health Care Ctr.***, 139 Wis. 2d 455, 463, 407 N.W.2d 249, 252–253 (1987) (expert testimony is not necessary when a determination involves matters within the common knowledge of a jury) (expert testimony is not required to establish the standard of care for nonmedical, administrative, ministerial, or routine nursing care). Accordingly, the trial court did not erroneously exercise its discretion when it denied the Estate's request for a new trial.

¶24 Finally, the Estate claims that the real controversy was not fully and fairly tried when the trial court instructed the jury that it had already answered special verdict question number two, whether Froedtert was causally negligent, "Yes." The Estate claims that this instruction misled the jurors into concluding that Dr. Maiman was not negligent. The Estate further claims that this error was compounded by a motion *in limine* that prevented it from presenting any evidence that the negligence of Froedtert's employees was not causal. We will not consider this claim, however, because it was waived.

¶25 After the instructions were read to the jury, the Estate's trial attorney affirmatively told the trial court that she did not have any objections to the jury instructions or the manner in which the court read them.[5] Moreover, the Estate failed to raise this issue in its motions after the verdict. Accordingly, this issue has been raised for the first time on appeal and we decline to address it here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145 (1980) (generally, an appellate court will not review an issue raised for the first time on appeal), *superseded on other grounds by* WIS. STAT. § 895.52.

By the Court.—Judgment affirmed.

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

[5] The Estate claims that it did not waive its objection to the trial court's instruction because WIS. STAT. § 805.13(4) provides: "[the] [f]ailure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error." The Estate's lawyer, however, affirmatively told the trial court that she did not have any objections to the instructions. This is more than a mere failure to object, and § 805.13(4) does not apply. The issue was waived.