COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2008AP3138 **Cir. Ct. No. 2005CV101**

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

MICHAEL MILLER AND MICHELLE MILLER,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

VALLEY ORTHOPAEDICS, LTD. AND ST. CROIX REGIONAL MEDICAL CENTER,

DEFENDANTS,

MARK A. WIKENHEISER, M.D., THE MEDICAL PROTECTIVE COMPANY AND THE WISCONSIN PATIENT COMPENSATION FUND,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from orders[1] of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Reversed in part; affirmed in part and cause remanded with directions.*

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

¶1 PETERSON, J. Dr. Mark Wikenheiser, the Medical Protective Company, and the Wisconsin Patient Compensation Fund (Wikenheiser) appeal an order granting Michael and Michelle Miller's post-trial motions. Wikenheiser argues the trial court erred by (1) finding there was no credible evidence to support the jury's determination that Wikenheiser provided sufficient information for Miller to give informed consent to surgery, and (2) granting a new trial on Miller's negligence claim pursuant to WIS. STAT. § 805.15(1).[2] We agree the trial court erred in both respects. We therefore reverse and remand with directions to enter judgment in accordance with the jury's verdict.

¶2 Wikenheiser also appeals additional nonfinal orders, arguing the trial court improperly instructed the jury on the standard of care, improperly issued a res ipsa loquitur instruction, and improperly admitted evidence of Wikenheiser's relative inexperience performing the surgery at issue in this case. Because we conclude the trial court erred by changing the jury's verdict on informed consent and ordering a new trial on negligence, we need not address these issues.

[1] Leave to appeal nonfinal orders was granted by this court April 2, 2009. Leave to cross-appeal additional nonfinal orders was granted by this court June 5, 2009.

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

¶3 In a cross-appeal, the Millers argue the trial court erred by (1) denying their motion for a directed verdict on negligence and their motion challenging the sufficiency of the evidence supporting the jury's negligence verdict, (2) denying their motion for summary judgment on informed consent, and (3) denying their motion for a mistrial. We affirm on each of these issues.

BACKGROUND

¶4 This is a medical malpractice action concerning an injury Michael Miller sustained during arthroscopic elbow surgery on March 10, 2003. During a routine physical about a month before surgery, Miller reported experiencing pain when he extended his right arm. Miller was referred to Wikenheiser, an orthopedic surgeon, who determined Miller had loose bodies in his elbow. Wikenheiser and Miller discussed arthroscopic surgery to remove the loose bodies, and Miller consented to the procedure.

¶5 During surgery, Wikenheiser severed Miller's radial nerve. Miller detected nerve damage relatively soon afterward, and, as of May 2003, he could not extend his right wrist, thumb, or fingers. He also suffered loss of sensation in his forearm. Doctors at Mayo Clinic performed two subsequent surgeries, attempting to bridge the gap in Miller's radial nerve by grafting another nerve across it. Neither surgery was entirely successful.

¶6 The Millers subsequently filed suit, alleging Wikenheiser failed to obtain Miller's informed consent for, and negligently performed, the arthroscopic surgery. After a fourteen-day trial, the jury returned a special verdict in favor of Wikenheiser on both claims. The first question on the special verdict asked the jury, "Did [Wikenheiser] fail to disclose information about elbow arthroscopy necessary for Michael Miller to make an informed decision?" The jury answered,

"No." Because the jury provided a negative answer to question one, it did not answer the remaining questions on informed consent. The jury also answered "no" to the question, "In providing care and treatment to Michael Miller, was [Wikenheiser] negligent?" As instructed, the jury made findings with regard to damages despite finding no liability. Specifically, the jury determined the Millers suffered damages in the aggregate amount of $617,904.36.

¶7 The Millers moved the court to change the jury's answers to the informed consent and negligence questions on the special verdict, pursuant to WIS. STAT. § 805.14(5)(c).[3] Alternatively, the Millers asked the court to grant a new trial, pursuant to WIS. STAT. § 805.15(1).[4] The court granted the Millers' motion in part, changing the jury's answer to the informed consent question and ordering a new trial on the negligence claim. The court also ordered a new trial on the informed consent questions the jury did not reach and on damages. Wikenheiser appeals these rulings, as well as several other nonfinal orders. The Millers cross-appeal additional nonfinal orders. Further facts will be set forth in the discussion section as necessary.

[3] WISCONSIN STAT. § 805.14(5)(c) states, "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."

[4] WISCONSIN STAT. § 805.15(1) states, "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."

DISCUSSION

I. Wikenheiser's appeal

A. Informed consent

¶8 The trial court changed the jury's answer to the first informed consent question to "yes," finding there was no credible evidence to support the jury's "no" answer. When "considering a motion to change the jury's answers to the questions on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence." ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). "In reviewing the evidence, the trial court is guided by the proposition that '[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence,' the trial court must accept the inference drawn by the jury." ***Id.*** (quoting ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 706, 348 N.W.2d 540 (1984)).

¶9 This court, while acknowledging that the trial court is in a better position to assess the evidence, applies the same standard. *See* ***id.*** at 670. It is our duty to look for credible evidence to sustain the jury's verdict, not to search the record for evidence to sustain a verdict that the jury could have reached, but did not. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450-51, 280 N.W.2d 156 (1979).

¶10 In finding there was no credible evidence to support the jury's answer on informed consent, the trial court purported to quote from Wikenheiser's deposition transcript, which was read in at trial, as follows:

> I did not discuss with him my experience in doing elbow arthroscopies. I did not discuss with him the possibility of having his radial nerve severed or some other nerve severed. I did not explain any risk of the procedure to him. I did not discuss alternate treatments with him at all. I did not discuss possible outcomes other than when he might be able to go back to work. I did not discuss risk of complications with him.

This "quote" is actually a narrative summary of Wikenheiser's deposition testimony from the Millers' brief in support of their post-trial motions, as the Millers acknowledge. The narrative summary mischaracterizes Wikenheiser's testimony, in that he actually testified:

> Q: Did you discuss your experience in doing elbow arthroscopies with him at that time?
>
> A: No.
>
> Q: Did you discuss with him the possibility of having his radial nerve severed or some other nerve severed?
>
> A: No.
>
> Q: Did you explain any risk of the procedure to him at that time?
>
> A: **Not that I recall.**
>
> ….
>
> Q: Did you discuss alternative treatments with him at all **that you recall**?
>
> A: No.
>
> Q: Discuss possible outcomes that you recall, other than when he might be able to go back to work?
>
> A: **Not that I recall.**
>
> Q: Discuss risk of complications **that you recall**?
>
> A: No.

> Q: Discuss nerve injury or severance at all **that you recall**?
>
> A: No.
>
> Q: Did you discuss at all with him that there are others who just specialize in doing elbow surgery?
>
> A: No.

(Emphasis added.) Similarly, Wikenheiser testified at trial that he did not have a specific recollection of his pre-surgery meeting with Miller.

¶11 Based in large part on the misquoted testimony from Wikenheiser's deposition, the trial court concluded there was no credible evidence that Wikenheiser informed Miller: (1) of the availability of an "open" procedure instead of arthroscopic surgery; (2) of the risk that Miller's radial nerve could be severed during surgery; (3) that foregoing surgery or "doing nothing" was an option; and (4) that Wikenheiser had limited experience performing elbow arthroscopies. Based on these four conclusions, the court ruled there was no credible evidence to support the jury's finding that Wikenheiser disclosed the information necessary for Miller to give informed consent.

¶12 The trial court's ruling is erroneous because there was credible evidence to support the jury's answer. First, there was credible evidence that Wikenheiser informed Miller about the availability of an alternate "open" procedure, as opposed to the arthroscopic procedure that Wikenheiser actually performed. While Wikenheiser testified he could not recall whether he informed Miller of the "open" procedure during their pre-surgery meeting, Miller testified he remembered discussing that option with Wikenheiser at some point. Miller specifically recalled Wikenheiser comparing the two procedures and noting that the "open" procedure would produce more scarring.

¶13 At trial, Miller testified that the discussion about the "open" procedure occurred after surgery. However, he conceded he had testified at his deposition that he was unsure when the discussion took place. Miller could not explain why Wikenheiser would have been comparing the two procedures after Miller had already undergone the arthroscopic surgery. Accordingly, one reasonable view of Miller's testimony is that the discussion about the "open" procedure occurred during Miller's pre-surgery appointment, as there would have been no reason for Miller and Wikenheiser to have the discussion after surgery. The jury could have reasonably concluded that Miller's newfound certainty at trial that the discussion occurred after surgery was self-serving. It could have concluded that Miller's deposition testimony was more credible and that he was, in fact, unsure when the discussion about the "open" procedure occurred. If the jury so concluded, it could then reasonably infer that the discussion occurred before surgery.

¶14 Admittedly, there are other reasonable views of the evidence. For instance, the jury could have believed Miller's trial testimony that the discussion about the "open" procedure took place after surgery. However, while that is one reasonable view of the evidence, it is not the only reasonable view. The trial court therefore erred by finding there was no credible evidence that Wikenheiser informed Miller of the alternate "open" procedure.

¶15 Second, there was credible evidence that Wikenheiser was not required to inform Miller of the risk that his radial nerve could be severed during surgery. While a physician is required to inform a patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of those treatments, *see* WIS. STAT. § 448.30, a physician is not required to disclose "[e]xtremely remote possibilities that might falsely or detrimentally alarm the

patient[,]" *see* WIS. STAT. § 448.30(4). The touchstone of the informed consent test is "what the reasonable person in the position of the patient would want to know." ***Schreiber v. Physicians Ins. Co.***, 223 Wis. 2d 417, 427, 588 N.W.2d 26 (1999). There is no bright-line rule dictating what must be disclosed to a patient. ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 639, 545 N.W.2d 495 (1996). Rather, what is necessary will vary from case to case. ***Martin v. Richards***, 192 Wis. 2d 156, 174-75, 531 N.W.2d 70 (1995). As such, what a reasonable person in the patient's position would want to know is quintessentially a question for the jury to decide. ***Id.*** at 172-73.

¶16 Here, Miller testified that Wikenheiser did not inform him of the risk of damage to his radial nerve. Wikenheiser testified he would not have discussed that risk with Miller because he believed it was very remote. At trial, the jury heard evidence that supported Wikenheiser's assessment. For instance, in one study introduced into evidence, the authors found "no permanent neurovascular injuries" in 473 elbow arthroscopies. Elsewhere in the same study, the authors reported that "[o]f the 1648 elbow arthroscopies in [the Arthroscopy Association of North America's] two surveys, only one was reportedly followed by nerve injury." This represents a complication rate of well under one percent. Based on these statistics, the jury could have reasonably concluded the risk of radial nerve damage was remote enough that Wikenheiser did not need to disclose it.

¶17 The Millers attempt to analogize this case to ***Martin***, which involved a physician's failure to inform parents of a one to three percent chance their fourteen-year-old daughter could be rendered quadriplegic. ***Id.*** at 163-67. The supreme court held this was not an "extremely remote possibility," given the potentially catastrophic consequences. ***Id.*** at 181-82. ***Martin*** is distinguishable for several reasons. First, there was evidence in this case that the risk of nerve

damage was less than one percent, which is smaller than the risk at issue in ***Martin***. Second, the potential consequences in ***Martin*** were far more serious than those in this case. Third, and most importantly, the ***Martin*** court did not conclude, as a matter of law, that the defendant physician had failed to provide the information necessary for the patient to give informed consent. Rather, the court recognized that "whenever the determination of what a reasonable person would want to know is open to debate by reasonable people, the issue is one for the jury." ***Id.*** at 172-73. Accordingly, the court analyzed whether any credible evidence supported the jury's informed consent verdict and concluded it did. ***Id.*** at 168, 181-82. Likewise, there was credible evidence to support the jury's decision on informed consent in this case, and the trial court erred by changing the jury's verdict.

¶18 Third, there was credible evidence that Wikenheiser informed Miller that foregoing surgery or "doing nothing" was an option. While Wikenheiser did not specifically recall his pre-surgery meeting with Miller, he testified as to what he typically tells patients who are considering elective surgery:

> Well, I always tell patients … I'll arrange for doing [the surgery] if they want to schedule, then they can. I'm a conservative surgeon; I don't say we've got to schedule you right now. If they want to think about it, they can stick with what they have been doing, they don't have to do surgery; it's an option. It's never something that you have to do.

Based on Wikenheiser's testimony, the jury could have reasonably concluded Wikenheiser informed Miller that foregoing surgery was an option.

¶19 Alternatively, the jury could have reasonably concluded Miller was aware that foregoing surgery was an option, regardless of whether Wikenheiser explicitly discussed it with him. Miller's surgery was a purely elective procedure.[5] In the case of an elective procedure, the patient necessarily knows that foregoing surgery is an option. An informed consent claim hinges on what a reasonable person in the patient's position would want to know, *see* ***Schreiber***, 223 Wis. 2d at 427, and a reasonable person would not expect to be told something he or she already knew. Thus, the jury could have concluded that because Miller knew foregoing elective surgery was an option, Wikenheiser was not required to inform him of that alternative.

¶20 Fourth, there was credible evidence that Wikenheiser was not required to inform Miller about his limited experience performing elbow arthroscopies. At the time of Miller's surgery, Wikenheiser had performed over a thousand arthroscopic surgeries on joints other than the elbow, but had performed only a small number of elbow arthroscopies. The Millers contend Wikenheiser should have informed Miller of that fact.

¶21 However, despite Wikenheiser's relative inexperience performing elbow arthroscopies, there was expert testimony at trial that Wikenheiser was sufficiently experienced and qualified to perform Miller's surgery. Furthermore, the Millers did not introduce any statistical evidence that the complication rate for elbow arthroscopies differs significantly depending on the experience level of the surgeon. Based on the evidence adduced at trial, particularly Wikenheiser's

[5] At trial, Miller testified the biggest complaint he had regarding his elbow pre-surgery was that it bothered him when he took jump shots during his weekly pick-up basketball game.

extensive experience performing other arthroscopic surgeries, the jury could have concluded that a reasonable person would not want to know about Wikenheiser's relative lack of elbow arthroscopy experience before consenting to surgery.

¶22 We conclude that the trial court erred by determining there was no credible evidence to support the jury's informed consent verdict. However, the Millers argue that, even if the trial court erred, a new trial on the issue of informed consent is required in the interest of justice because the jury's verdict is contrary to the great weight of the evidence. *See* WIS. STAT. § 805.15(1). The Millers point out that the standard for granting a new trial in the interest of justice is less demanding than the standard for changing a jury's verdict. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993) ("A new trial may be granted in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence."). They also note that an appellate court may conclude a trial court erred by changing a verdict answer under WIS. STAT. § 805.14, but nonetheless find that the verdict is contrary to the great weight of the evidence under § 805.15. *See* ***Burling v. Schroeder Hotel Co.***, 235 Wis. 403, 407, 291 N.W. 810 (1940).

¶23 The Millers' argument fails because it is fundamentally inconsistent with the "reasonable person" standard that is the touchstone of informed consent determinations. As our supreme court has repeatedly noted, "[W]henever the determination of what a reasonable person would want to know is open to debate by reasonable people, the issue is one for the jury." ***Martin***, 192 Wis. 2d at 172-73; *see also* ***Bubb v. Brusky***, 2009 WI 91, ¶62 n.17, 321 Wis. 2d 1, 768 N.W.2d 903. Credible evidence supports the jury's informed consent verdict in this case, so the verdict should stand. While a different jury might reach a different result,

that fact does not warrant a new trial under WIS. STAT. § 805.15(1). ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 477, 543 N.W.2d 277 (1996).

B. Negligence

¶24 In their postverdict motion, the Millers argued there was no credible evidence to support the jury's finding that Wikenheiser was not negligent. They therefore moved the court to change the jury's answer on negligence or, alternatively, moved the court for a new trial on negligence pursuant to WIS. STAT. § 805.15(1). The court refused to change the jury's negligence verdict but granted the Millers' motion for a new trial.

¶25 WISCONSIN STAT. § 805.15(1) allows a court to grant a new trial "because the verdict is contrary … to the great weight of the evidence, or because of excessive or inadequate damages … or in the interest of justice." We review a trial court's decision to grant a new trial pursuant to § 805.15(1) under the erroneous exercise of discretion standard. ***Sievert***, 180 Wis. 2d at 431. A trial court properly exercises its discretion when it sets forth a reasonable basis for its determination that at least one material answer in the verdict is against the great weight of the evidence. ***Id.*** The court cannot merely substitute its judgment for that of the jury or determine that another jury might reach a different result. ***Burch***, 198 Wis. 2d at 477. Additionally, an order granting a new trial is not effective unless it specifies the reasons for the order. WIS. STAT. § 805.15(2); ***Burch***, 198 Wis. 2d at 477.

¶26 In this case, the trial court identified two reasons for granting a new trial on the Millers' negligence claim: (1) the jury's verdict was "contrary to the great weight and clear preponderance of the evidence" and (2) two elements of the

jury's damage award were unreasonably low. We conclude neither of these grounds warrants a new trial.

¶27 First, a trial court's mere statement that a jury's verdict is contrary to the great weight of the evidence, without more, is an ultimate conclusion and is insufficient to support the court's decision to grant a new trial. ***DeGroff v. Schmude***, 71 Wis. 2d 554, 564, 238 N.W.2d 730 (1976). In this case, the trial court did not identify any reasons for its conclusion that the jury's negligence verdict was contrary to the great weight of the evidence. Rather, the court recognized that the evidence was relatively balanced and indicated it was not going to conduct its own weighing of the evidence. The court noted:

> The jury heard from six physicians on the standard of care. Not surprisingly, plaintiffs' experts … testified that reasonable care had not been exercised, and defense witnesses … testified otherwise. In addition, numerous learned [treatises] were admitted all on the issue of standard of care. There was detailed and complex testimony on whether or not Dr. Wikenheiser deviated from the requisite standard. The experts who testified have diverse and impressive credentials and the jury was instructed that they were the sole judges of the credibility of the witnesses and the weight to be given their testimony.
>
> ….
>
> [The negligence issue] really came down to anterolateral portal placement and the jury may have decided the negligence question on Dr. House's testimony …. Plaintiffs' experts disputed this … however, the jury was free to put whatever weight they felt appropriate on all the evidence in the record and they obviously found [the defense experts] to be more persuasive.

Since the court conceded it was not engaging in its own weighing of the evidence, it could not, by definition, order a new trial on the basis that the verdict was contrary to the great weight of the evidence.

¶28 Furthermore, as in nearly all medical malpractice cases, the negligence question in this case hinged on the competing testimony of the parties' experts. Accordingly, for the trial court to find that the verdict was contrary to the great weight of the evidence, it would necessarily have to find that the defense experts were not credible or, at a minimum, were significantly less credible than the Millers' experts. The court did not make such a finding. To the contrary, it indicated that all the experts had "impressive credentials" and that it was deferring to the jury's assessment of their credibility. Because the trial court did not set forth any reason for its determination that the negligence verdict was contrary to the great weight of the evidence, we conclude it erred by ordering a new trial on this basis.

¶29 Second, the trial court erred by ordering a new trial based on its conclusion that two elements of the plaintiffs' damages were too low. The court found the jury's award of $32,000 for Miller's past personal injuries "absurd" and also questioned the jury's "minimal awards for future damages." However, regardless of what the court thought of the damage award, as a matter of law it could not order a new trial based solely on inadequate damages in a case where the jury did not find negligence. *See* ***Mainz v. Lund***, 18 Wis. 2d 633, 645, 119 N.W.2d 334 (1963) (citing ***Sell v. Milwaukee Auto. Ins. Co.***, 17 Wis. 2d 510, 519-20, 117 N.W.2d 719 (1962)). The court's belief that the jury's damage award was inadequate was not a proper basis for ordering a new trial on the Millers' negligence claim.

C. Wikenheiser's other appellate issues

¶30 Wikenheiser appeals additional nonfinal orders, arguing the trial court improperly: instructed the jury on the standard of care; issued a res ipsa

loquitur instruction; and admitted evidence of Wikenheiser's relative inexperience performing arthroscopic elbow surgery. Because we remand with directions to enter judgment in accordance with the jury's verdict, we need not address these issues.

II. The Millers' cross-appeal

A. Negligence

¶31 The Millers first argue the trial court erred by denying their motion for a directed verdict on negligence and denying their motion to change the jury's answer on negligence. When reviewing the denial of a motion for a directed verdict, we consider whether, viewing all credible evidence and drawing all inferences in the light most favorable to the nonmoving party, there is any credible evidence to sustain a verdict in favor of that party. ***Re/Max Realty 100 v. Basso***, 2003 WI App 146, ¶7, 266 Wis. 2d 224, 667 N.W.2d 857. A directed verdict is appropriate only when "there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion." ***Millonig v. Bakken***, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983). The standard of review for a motion to change an answer in the jury's verdict is similar. We view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. ***Richards***, 200 Wis. 2d at 671.

¶32 The Millers contend their experts' testimony that Wikenheiser deviated from the standard of care is undisputed or indisputable. In actuality, though, the jury heard complex, technical and conflicting expert testimony from six different physicians on the issue of Wikenheiser's negligence. This testimony provided ample evidence for the jury to conclude that Wikenheiser complied with the standard of care.

¶33 For instance, Dr. James House, an orthopedic surgeon on faculty at the University of Minnesota, testified that Wikenheiser's anterolateral portal placement conformed to the standard of care, that the "inside out" technique Wikenheiser used to create the portal is accepted by orthopedists, and that Wikenheiser reasonably performed the "inside out" technique. In House's opinion, Wikenheiser's performance of the operation as a whole met the standard of care.

¶34 The Millers believe their expert witnesses were more credible than the defense experts, but, as the trial court noted, it was the jury's province to assess the various experts' credibility. The defense experts' testimony provided credible evidence to support the jury's finding that Wikenheiser complied with the standard of care. The trial court therefore properly denied the Millers' motion for a directed verdict on negligence and motion to change the jury's negligence verdict.

B. Informed consent

¶35 The Millers next argue the trial court erred by denying their motion for summary judgment on the issue of informed consent. We review a denial of summary judgment independently, applying the same standard as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315. We view all evidence and draw all inferences in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of material fact against the

moving party. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

¶36 Summary judgment on the Millers' informed consent claim would have been improper for the same reasons the trial court's decision to change the jury's informed consent verdict was improper. *See supra*, ¶¶12-22. In short, whether a patient gave informed consent is a quintessential jury question because it depends on what a reasonable person in the patient's position would want to know. *See* ***Martin***, 192 Wis. 2d at 172-73. Although the issue can be taken from the jury if the evidence compels that result as a matter of law, informed consent is fundamentally a question for the jury. ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 330, 552 N.W.2d 869 (Ct. App. 1996).

¶37 The Millers contend the record at the partial summary judgment hearing showed no dispute about what Wikenheiser told Miller prior to surgery. Even if true, this does not resolve the question of what a reasonable person in Miller's position would want to know before consenting to the procedure. Genuine issues of material fact remained regarding what a reasonable person would want to be told about alternative treatment options, the risk of complications, and Wikenheiser's experience level. Because these disputed issues were for the jury to resolve, the trial court properly denied the Millers' motion for summary judgment.

C. Mistrial

¶38 The Millers also contend the trial court erred by denying their motion for a mistrial. The Millers' motion was based on allegedly improper statements made by the Wisconsin Patient Compensation Fund's attorney in his closing argument. During the Millers' case, their attorney asked one of their

expert witnesses to measure the location of the scar on Miller's arm in front of the jury to show that Wikenheiser incorrectly placed the anterolateral portal and was therefore negligent. During the defense case, Wikenheiser's attorney asked one of the defense experts to measure Miller's scar in front of the jury, as the Millers' expert had done. The Millers' attorney entered an objection, which the trial court sustained.

¶39 Subsequently, during his closing argument, the Fund's attorney asked the jury, "Do you believe that the plaintiff is trying to give you true facts when he refuses to allow [the defense expert] to measure the location of his anterolateral condyle?" The Millers' attorney objected and shortly thereafter moved for a mistrial, arguing that the Fund's attorney had improperly commented on a sustained objection. The court denied the Millers' motion for a mistrial, but agreed that the argument was improper. The court therefore issued a curative instruction that provided:

> Ladies and gentlemen, [the Fund's attorney] is an experienced trial lawyer and he knows that [he is] not to comment on objections made by [the Millers' attorney] during the course of this trial that were ultimately sustained by me.
>
> You are not to consider any comment made by [the Fund's attorney] in this closing regarding what the Court did or did not allow to happen, or did or did not allow to be introduced into evidence. It's improper.

¶40 A motion for a mistrial is addressed to the sound discretion of the trial court, and its decision will be reversed only upon a clear showing of an erroneous exercise of discretion. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). In considering a motion for a mistrial, the "trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Sigarroa***, 2004 WI App

16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. Improper argument by counsel is not presumed to be prejudicial. ***Roeske v. Schmitt***, 266 Wis. 557, 572, 64 N.W.2d 394 (1954). Instead, a new trial based on improper argument of counsel is only warranted if it "affirmatively appear[s] that the remarks operated to the prejudice of the complaining party." ***Wagner v. American Family Mut. Ins. Co.***, 65 Wis. 2d 243, 249-50, 222 N.W.2d 652 (1974). In other words, the court must be convinced that the verdict would have been more favorable to the complaining party but for the improper argument. ***Id.*** at 250.

¶41 Here, the trial court properly exercised its discretion by denying the Millers' motion for a mistrial because, even if the argument in question was improper, the court's instruction was sufficient to cure any prejudice to the Millers. There is no erroneous exercise of discretion when potential prejudicial effect is cured by an instruction to the jury to disregard an improper statement. ***Haskins***, 97 Wis. 2d at 420. "Where the trial court gives the jury a curative instruction, [we] may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." ***Sigarroa***, 269 Wis. 2d 234, ¶24. The Millers do not point to any evidence that the jury in this case disregarded the trial court's admonition.

¶42 Instead, the Millers rely on ***Georgeson v. Nielsen***, 218 Wis. 180, 260 N.W. 461 (1935), to support their argument. In ***Georgeson***, an attorney attempted to convince a jury to apportion all the blame for an automobile accident on his client's co-defendant. ***Id.*** at 184, 187. The attorney's client, Dennis, did not have liability insurance, while his co-defendant was insured and the insurer was a named defendant. ***Id.*** at 187. The attorney suggested the plaintiff would only recover if the jury held the insured co-defendant liable:

> I don't want you in view of the testimony in this case to pile one bit of the blame on this boy Dennis. … It may be true members of this Jury that veritable death stalks the steps of [the plaintiff], as told to you by the doctors. I don't want you by your verdict to lay the blame for that on this helpful friend, young Dennis. It may be members of the Jury that [the plaintiff's] life, you might say his active life has been taken, and that he will remain forever a cripple. If you find by your verdict that the boy who was trying to help him out, young Dennis was partly to blame, he can carry it on his shoulders the rest of his life, when he merely tried to help out a friend. You could if you wanted to, bring in a verdict against young Dennis, if it was made up for a million dollars and they wouldn't collect a penny.

Id. at 184. The plaintiff's attorney made a similar argument. The trial court sustained an objection to the arguments, but did not reprimand the attorneys. ***Id.*** The court issued a cursory curative instruction, stating, "Strike it out and the jury instructed to disregard it." ***Id.*** The supreme court held that the improper arguments warranted a new trial, despite the curative instruction. ***Id.*** at 187.

¶43 ***Georgeson*** is distinguishable. In ***Georgeson***, the court was concerned that the plaintiff and one defendant were colluding against another defendant, a concern that is not present here. Moreover, the trial court in ***Georgeson*** did not admonish the offending attorneys and issued only a cursory curative instruction. In contrast, the trial judge in this case reprimanded the Fund's attorney for his improper argument and issued a specific, strongly worded instruction that the jury disregard his remarks. Indeed, the sternness of the court's instruction may even have benefitted the Millers by casting the Fund's attorney in an unflattering light. The court's decision to issue a curative instruction rather than grant the Millers' motion for a mistrial was not an erroneous exercise of discretion.

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

Not recommended for publication in the official reports.