COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1996

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

NOTICE

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

No. 95-2078

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

LAURALYNN STAHNKE,

Plaintiff-Appellant,

v.

EMILIO LONTOK, M.D., GYNECOLOGY ASSOCIATES, S.C., d/b/a BREAD AND ROSES WOMENS HEALTH CARE CLINIC, THOMAS DIAZ, M.D., and WISCONSIN HEALTH CARE LIABILITY INS. CO.,

Defendants-Respondents,

WISCONSIN PATIENT COMPENSATION FUND,

Defendant.

APPEAL from judgments of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and LaRocque, JJ.

PER CURIAM. Lauralynn Stahnke appeals from the judgments, following a jury trial, dismissing her negligence action against the defendants. Stahnke raises numerous arguments on appeal, all of which we reject. We affirm.

The facts relevant to resolution of this appeal are undisputed. Sixteen-year-old Lauralynn Stahnke learned that she was pregnant during an examination by her physician, Dr. Thomas Diaz. When Stahnke told Dr. Diaz that she wanted an abortion, he referred her to Bread and Roses Women's Health Center where, on February 16, 1988, Dr. Emilio Lontok performed an abortion procedure. The procedure, however, failed to terminate the pregnancy, but neither Dr. Lontok nor Bread and Roses advised Stahnke of that. Stahnke did not learn that she still was pregnant until May 2, 1988, when she again was examined by Dr. Diaz. Stahnke then failed to follow Dr. Diaz's advice for prenatal care. On June 8, 1988, her baby was born prematurely and, three weeks later, died.

Stahnke sued for damages resulting from the post-traumatic stress disorder she allegedly suffered from what her expert witness described as the interaction of the "various factors and the events" including the failed abortion, the discovery of the continued pregnancy, the premature birth, the baby's death, and Stahnke's guilt over failing to follow directions for prenatal care. The jury found that Dr. Diaz and Dr. Lontok were not negligent, that Bread and Roses was 40% negligent, and that Stahnke was 60% negligent.

Stahnke first argues that the trial court erred in denying her motion for judgment notwithstanding the verdict with respect to Bread and Roses. She contends that there was no evidence of her causal negligence and, further, that the supreme court's decision in ***Schultz v. Tasche***, 166 Wis. 561, 165 N.W. 292 (1917), should have precluded jury consideration of her alleged contributory negligence.

Section 805.14(5)(b), STATS., sets forth the legal basis on which a party may seek judgment notwithstanding the verdict:

> A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment.

Recently, this court summarized our standard of reviewing a trial court's denial of a motion for judgment notwithstanding the verdict:

> We review a trial court's denial of a motion for judgment notwithstanding the verdict (JNOV) de novo, applying the same standards as the trial court. A motion for JNOV may be granted when "'the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment.'" *A motion for JNOV does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law*.

Logterman v. Dawson, 190 Wis.2d 90, 101, 526 N.W.2d 768, 771 (Ct. App. 1994) (citations omitted; emphasis added). Thus, Bread and Roses correctly argues that Stahnke, in appealing the trial court's denial of her motion for JNOV, has failed to preserve her intended challenge to the sufficiency of the evidence.

Under JNOV standards, however, Stahnke has preserved her challenge to the legal viability of the jury's findings. Invoking ***Schultz***, she argues that Bread and Roses's negligence harmed her before May 2, 1988, the day on which she learned she still was pregnant, and that her negligence "which then may have commenced ... did not *synchronize* with that of Bread and Roses to allow for any comparison." (Emphasis in original.) Although Stahnke's argument is intriguing, it fails upon a careful comparison of her claim and that in ***Schultz***.

In ***Schultz***, the plaintiff suffered a broken leg and sued the defendant physicians and surgeons for damages resulting from negligent care and treatment. The jury found that the defendants were negligent, but also

found that the plaintiff's failure to use ordinary care contributed to her injury. ***Schultz***, 166 Wis. at 562-563, 165 N.W. at 292. The supreme court explained:

> In the present case it is established by the verdict that defendants were negligent in the treatment of plaintiff before she left the hospital and that damage resulted to her from such negligent treatment. Plaintiff's want of care consisted chiefly, if not entirely, in conduct by her after she left the hospital, and perhaps in her leaving prematurely. At any rate, all these acts of hers took place after defendants' negligent treatment was administered. It is not strictly correct to call such later negligence on the part of a patient contributory negligence, though it has been so styled in the books. It is rather subsequent or supervening negligence that aggravates the improper condition due to the physician's prior negligence. The two do not synchronize in producing the injury as they usually do in the ordinary negligence case. The cause of action for the physician's negligence may be complete and accrue before the negligence of the patient comes in to aggravate the result. When it does occur its consequences go in mitigation of damages, not in bar of the action.

Id. at 564-565, 165 N.W. at 293.

In ***Schultz***, the defendants' negligence caused damage to the plaintiff's leg—an injury for which the plaintiff sued. By contrast, in this case, Bread and Roses's negligence resulted in Stahnke's continued pregnancy and her failure to be informed that the abortion procedure had failed. Stahnke, however, did not claim that her continued pregnancy was her injury. She sued for the post-traumatic stress disorder she allegedly suffered as a result of several circumstances and actions, including her own. Her expert, Dr. Basil Jackson, testified that "the interaction of the various factors" including her own failure to follow Dr. Diaz's advice for pre-natal care, "was sufficient to produce the condition of posttraumatic stress disorder." Therefore, as the trial court explained:

The evidence in this record is devoid of any injury still on May 3.

> In fact, Dr. Jackson's testimony ... in essence supported the emotional distress, which is the only claim for damages here. We're not talking about anything physically done to her. It's emotional distress. And I think that's important. Did not come into play until the premature birth of the child. Because that's when Dr. Jackson testified as to how upset she was seeing the child, being helpless to do anything to help the child. This malpractice [allegation] encompasses the entire pregnancy.
>
> ....
>
> ... And, therefore, because the malpractice isn't over until the birth of the child, anything that happened before then is either negligence or it's contributory negligence. That's why in this particular case [***Schultz v. Tasche***] is inapplicable.

Thus, unlike the situation in ***Schultz*** where the defendants' and plaintiff's actions "do not synchronize in producing the injury," ***id.***, here they do. Accordingly, we conclude that the trial court correctly distinguished ***Schultz*** and denied Stahnke's motion for JNOV.

Stahnke next argues that the trial court erred in concluding that the defendants had a duty to inform her parents of the failed abortion procedure. Stahnke first refers to all the defendants in this regard but then limits her argument to Dr. Diaz, stating:

Plaintiff's sole argument here is that there ought to be imposed on

> the defendant Dr. Diaz under the facts of this case, a duty to merely advise the parents what is medically, going on with their minor unemancipated child, including her undergoing the surgery which a pregnancy termination procedure entails.

Stahnke fails to clarify the relief she seeks in her challenge on this issue. All the defendants argue that Stahnke waived this issue.

Although Stahnke's position is somewhat unclear, and although the defendants' waiver arguments may be correct, we most directly resolve this issue, as did the trial court in denying Stahnke's post verdict motions, under § 146.78(5)(d), STATS. (1987-88), which provided:

> No hospital, clinic or other facility in which abortions are performed and no person affiliated with the hospital, clinic or facility may notify the parent or guardian of a minor concerning an abortion performed or to be performed on a minor without written consent of the minor.

It is undisputed that Stahnke never gave written consent for such notification.

Stahnke argues that this court "should enunciate the duty to be imposed to advise the parents or a parent of the child's health status" by interpreting this statute's interaction with others. Alternatively, under § 146.78(5)(d), STATS. (1987-88), she argues that a failed abortion is not "an abortion performed" and/or that Dr. Diaz was not "affiliated" with Bread and Roses.

Stahnke offers no authority to support her arguments. The statute clearly established written consent as a prerequisite to notification. If a failed abortion were not encompassed by "concerning an abortion performed," or if a referring physician were not deemed to be "affiliated," the apparent purpose of the statute would be thwarted in many cases. We decline to reach such an interpretation. *See* ***State v. West***, 181 Wis.2d 792, 796, 512 N.W.2d 207, 209 (Ct. App. 1993) (appellate court must reject unreasonable or absurd interpretation of a statute).

Stahnke next argues that the trial court interpreted certain case law too narrowly and thus did not allow her proper cross examination of Dr. David Grimes, an expert called by Dr. Lontok, regarding "possibilities and theories of causation that were consistent with plaintiff's theory and proofs." Stahnke fails,

however, to complain of any consequence from or remedy for this alleged error, and, further, fails to develop this argument. Thus, we will not address it. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

Finally, Stahnke argues that she is entitled to a new trial with respect to Dr. Diaz and/or Dr. Lontok because of six instances of alleged misconduct by jurors and defense attorneys: (1) jurors' communication with a witness while counsel were in chambers with the trial judge; (2) a juror's concealment of familiarity with and dislike for one of Stahnke's expert witnesses; (3) a juror's sleeping during the trial; (4) a juror's communication with Dr. Diaz's attorney in an elevator; (5) Dr. Diaz's attorney's non-verbal communication with jurors; and (6) Dr. Lontok's attorney's non-verbal communication with jurors. The trial court considered the jurors' affidavits and counsel's arguments offered in support each claim and denied Stahnke's motion for a new trial.

Stahnke first contends that Dr. Akes, one of Dr. Diaz's expert witnesses, communicated with the jury while the trial judge and counsel were in chambers. It is undisputed, however, that when the trial court learned of this allegation, it conducted an evidentiary hearing and, as summarized in its decision denying Stahnke's post-verdict motions, determined that "[t]here was apparently some jocularity going on," but that "there was no discussion of this case." The trial court then admonished the jury. Denying the post-verdict motions, the trial court stated that it "was satisfied based on the colloquy with the jury, that there was no prejudice that attended any of that communication." Stahnke's counsel agreed with the trial court's resolution of this problem and did not move for a mistrial. Thus, we conclude that Stahnke waived her challenge on this issue. *See* ***Milwaukee & Suburban Transp. Corp. v. Milwaukee County***, 82 Wis.2d 420, 432, 263 N.W.2d 503, 510-511 (1978) ("[C]ounsel cannot simply interpose an objection, then remain silent and be heard to complain only after an adverse verdict is returned; failure to move for a mistrial will result in a waiver of the right to assert prejudice later.").

Stahnke next argues for a new trial, only with respect to Dr. Lontok, because a juror knew and disliked Dr. John Brennan, one of her (Stahnke's) expert witnesses, but did not disclose that until after the trial. In her affidavit, the juror stated:

> I know Dr. John Brennan. I was in his office twice. I did not realize he was a named witness until I saw him on the stand. I disagree with his position in refusing to give patients contraceptives. I was not his patient but I accompanied a friend who was his patient to this office.

There is no dispute that the juror did not realize during *voir dire* that Dr. Brennan would be a witness whom she knew.

In ***State v. Wyss***, 124 Wis.2d 681, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990), the supreme court explained that in order to require a new trial based on lack of juror candor during *voir dire*:

> a litigant must demonstrate: (1) that the juror incorrectly or incompletely responded to a material question on *voir dire;* and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party.

Id., 124 Wis.2d at 726, 370 N.W.2d at 766. Clearly, in the instant case, as the trial court correctly concluded, Stahnke satisfied neither criterion.

Stahnke also argues for a new trial based on a different juror's affidavit stating that she fell asleep three times during the trial because of medications she was taking. She contends that the trial court should have ordered an evidentiary hearing.

When evaluating a challenge to a jury verdict based on the assertion that a juror could not "comprehend testimony," "we review underlying findings of fact by the trial court deferentially, and reverse only if they are clearly erroneous." ***State v. Turner***, 186 Wis.2d 277, 284, 521 N.W.2d 148, 151 (Ct. App. 1994). Here, the trial court offered factual findings and conclusions based on those findings:

I would note obviously I'm in the best position to see the jurors. I specifically watched them as I've indicated in multiple cases to see if they're sleeping. I saw her with her eyes closed for very brief moments of time. But nothing at all extensive. However, even if I hadn't seen that, this affidavit doesn't reach a threshold that I need to go beyond this affidavit.... In this case, there's no evidence, not even an iota or scintilla of evidence that material evidence was missed by that [juror].

....

... There's no evidence here that she lost the capacity or the ability to assess the credibility of any of the witnesses in this particular case. [The court of appeals] said in [***State v.***] ***Turner***, it's critical that jurors hear witnesses' testimony and relate the testimony to the demeanor of witnesses. No where in this affidavit does it say she couldn't do that. Once again, what's important is not what's in this affidavit, but what's not in this affidavit. If, in fact, she missed critical testimony, she missed material items, if, in fact, it prejudiced her as a juror, that could have been in here. It could have been put in here.

....

... There is no clear and convincing evidence whatsoever in this affidavit that [the juror] could not serve as a fair and impartial juror.

....

... [T]he affidavit is woefully insufficient, inadequate, and does not rise to the level that this court believes that the plaintiff is entitled to bring [the juror] into court to ask her any further questions. If the materials necessary were present, they could have been in this affidavit, and they're not.

We agree. As every experienced trial lawyer and judge knows, jurors, among others, occasionally nod off during trials. Able trial judges carefully watch juries and use a variety of techniques to try to assure that jurors remain alert. Inevitably, however, some jurors, including one in this case, may doze for "brief moments" before regaining alertness. The trial court correctly concluded that a juror's affidavit, confirming no more than that obvious proposition, was insufficient to merit a new trial or an evidentiary hearing.

Stahnke next contends that communication between a juror and Dr. Diaz's attorney in an elevator, in which the attorney allegedly identified his daughter who was with him, constituted a "discussion [that] could be used to enhance the persuasiveness of the counsel with the juror." In her one paragraph argument, Stahnke cites ***Rissling v. Milwaukee Electric Railway & Light***, 203 Wis. 554, 234 N.W. 879 (1931). ***Rissling***, however, has nothing to do with this issue, and Stahnke cites no additional authority. Stahnke offers nothing to counter the trial court's conclusion that she failed to show any resulting prejudice. *See* ***Seitz v. Seitz***, 35 Wis.2d 282, 306, 151 N.W.2d 86, 99 (1967) ("communication with the jury is not sufficient to warrant a new trial in the absence of prejudice" in case involving communication between bailiff and jurors), *overruled on other grounds*, ***In re Stromsted's Estate***, 99 Wis.2d 136, 299 N.W.2d 226 (1980).

Stahnke contends that she should be granted a new trial "automatically" because Dr. Diaz's attorney was "snickering" and "gesticulating" during the trial. The trial court agreed that counsel's conduct was inappropriate and, during the trial, admonished him and provided a cautionary jury instruction. Denying Stahnke's post-verdict motion, the trial court commented:

> Because the conduct that I believe was inappropriate was subject to an early admonition during the course of trial, and the admonition was directed to all counsel and to the jurors, and because I stressed their verdict is based on the evidence [and] the law and not the lawyers. If, in fact, the behavior which was inappropriate rose to the level of permeating this trial, my cautionary instruction alleviated and did away with any prejudice type concerns. I'm not satisfied, based on what I saw, and the admonition I gave, that the

> conduct was prejudicial. But I did give a cautionary instruction. I gave the admonition that would have cured any error in that regard.

Stahnke offers no argument to counter the trial court's reasonable conclusion that its cautionary instruction prevented any possible prejudice. *See* ***Sommers v. Friedman***, 172 Wis.2d 459, 467-468, 493 N.W.2d 393, 396 (Ct. App. 1992) (any possible prejudice to defendant is presumptively erased from jury's collective mind by admonitory instructions).

Stahnke argues that she is entitled to a new trial, with respect only to Dr. Lontok, because his lawyer was "nodding and shaking his head while [Dr. Lontok] was adversely examined." Stahnke concedes, however, that she did not raise this issue on motions after verdict, and she has not responded to Dr. Lontok's argument that she waived this issue. We conclude, therefore, that this issue was waived. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted).

Finally, Stahnke contends that she deserves a new trial based on "cumulative error as well as prejudicial error." Having determined, however, that the trial court did not err, we reject this final argument. ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976) ("Zero plus zero equals zero.").

By the Court. – Judgments affirmed.

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