COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-0522

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

AUGUST COLLURA AND MARY COLLURA,

PLAINTIFFS-APPELLANTS,

V.

ST. MARY'S HOSPITAL OF MILWAUKEE AND PATIENTS COMPENSATION FUND, A/K/A WISCONSIN PATIENT COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

UNITED STATES OF AMERICA, MILWAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge**.** *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 DYKMAN, P.J. August and Mary Collura appeal from a judgment which dismissed their complaint against St. Mary's Hospital of Milwaukee and the Wisconsin Patient Compensation Fund, and taxed costs against them. The trial court rendered the judgment because after a trial, the jury found that St. Mary's Hospital was not negligent with regard to the care, supervision and treatment of August Collura while he was at the hospital to have a bone scan. The Colluras assert that the trial court erred at trial in several ways. We disagree, except that we agree that certain items of costs were incorrectly taxed against them. We therefore affirm in part and reverse in part.

¶2 In November of 1992, after undergoing a bone scan and chest x-ray at St. Mary's Hospital, August Collura fell off a stool and broke his hip. He was hospitalized for a considerable time, and later spent time at a nursing home. Prior to his bone scan, Collura had had a considerable medical history, the significance of which was litigated at trial. In brief, Collura asserted that his hospitalization, nursing home care and after care were necessitated by the effects of the broken hip. St. Mary's Hospital claimed that Collura's damages were mainly the result of other medical and psychological problems, and that the technologist who had done a chest x-ray after the bone scan and was nearby when Collura fell, was not negligent in her treatment and care of him. The jury agreed with St. Mary's Hospital, answering a special verdict question inquiring whether St. Mary's was negligent in the negative.

WISCONSIN STAT. § 146.38(2) (1997-98) Confidentiality

¶3 Collura asserts that the trial court erred by holding that WIS. STAT. § 146.38(2) (1997-98)[1] prevented him from examining two hospital employees who investigated Collura's fall.[2] Collura learned of the two employees when the hospital wrote his wife, Mary, in December of 1992. The letter explained that one of the employees assigned to do an investigation of the accident determined that it happened when the technologist doing the bone scan stepped across the room to speak to someone in the hallway.

¶4 Collura moved the trial court permit him to depose the two employees. He argued that though he was not entitled to the conclusions reached by the two employees acting as a peer review committee, he was entitled to the facts the committee knew as a result of conducting the review. The trial court rejected this view of WIS. STAT. § 146.38(2), and so do we.

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

[2] WISCONSIN STAT. § 146.38(2) provides:

> All organizations or evaluators reviewing or evaluating the services of health care providers shall keep a record of their investigations, inquiries, proceedings and conclusions. No such record may be released to any person under s. 804.10 (4) or otherwise except as provided in sub. (3). No such record may be used in any civil action for personal injuries against the health care provider or facility; however, information, documents or records presented during the review or evaluation may not be construed as immune from discovery under s. 804.10 (4) or use in any civil action merely because they were so presented. Any person who testifies during or participates in the review or evaluation may testify in any civil action as to matters within his or her knowledge, but may not testify as to information obtained through his or her participation in the review or evaluation, nor as to any conclusion of such review or evaluation.

¶5 The last sentence of WIS. STAT. § 146.38(2) provides: "Any person … may testify in any civil action as to matters within his or her knowledge, but may not testify as to information obtained through his or her participation in the review or evaluation." Collura does not assert that the two employees saw Collura's accident. He distinguishes between facts gathered in an investigation and conclusions of the investigation. But, § 146.38(2) does not make that distinction. Though Collura was entitled to obtain the same information gathered by the two employees by gathering it from other sources, he was not entitled to obtain it from them.

¶6 St. Mary's Hospital believes that its immunity is necessitated by our holdings in ***Franzen v. Children's Hosp.***, 169 Wis. 2d 366, 485 N.W.2d 603 (Ct. App. 1992) and ***Mallon v. Campbell***, 178 Wis. 2d 278, 504 N.W.2d 357 (Ct. App. 1993). But while those cases discuss WIS. STAT. § 146.38(2) in detail, ***Franzen*** considered whether a hospital's credentials file was discoverable, and ***Mallon*** involved whether a hospital administrator was an organization or evaluator entitled to the protection of § 146.38(2). *See* ***Mallon***, 178 Wis. 2d at 285; ***Franzen***, 169 Wis. 2d at 375. We conclude that the plain language of the statute is more helpful in deciding this case, and that this language prevents Collura from questioning the two employees about information they gathered while investigating Collura's fall.

JURY VERDICT ON HOSPITAL'S NEGLIGENCE

¶7 Collura concedes that we must affirm a jury's finding as to negligence if there is any credible evidence to support it, and that we are to view the evidence in the light most favorable to the verdict. And if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding. *See* ***Morden v. Continental AG***,

2000 WI 51, ¶¶ 38-39, ___Wis. 2d ___, 611 N.W.2d 659. This narrow standard of review becomes even more stringent where, as here, the circuit court has approved the jury's verdict. *See* ***id.*** at ¶40. We are to search the record for credible evidence to sustain the jury's verdict. *See* ***id.*** at ¶39.

¶8 Collura asserts that the record is devoid of any evidence supporting a finding of non-negligence, and that the evidence is so strongly in his favor that negligence could have been determined as a matter of law. He points out that he is elderly, weak, hard of hearing, a stroke victim, partially paralyzed, uses a wheelchair and when walking, uses a cane. He asserts that he had prostate cancer and was taking seven or eight different medications, and that he had difficulty with mobility and walking. He concludes that the technologist who did his bone scan knew from another hospital employee that he was paralyzed and that the technologist knew from a history sheet that he had many medical and physical conditions. In spite of this knowledge, he argues, the technologist left him on a "small, spinning stool with no support."

¶9 But this is hardly the state of the record. Collura admits as much by acknowledging the technologist's testimony that she had observed Collura and did not believe that he was unstable based on what she observed. We see no reason why the jury had to discount the technologist's testimony. Nor did the trial court, who concluded that credible evidence existed to support the jury verdict. We are to use a "stringent" and "narrow" standard under these circumstances. ***Morden***, 2000 WI 51 at ¶¶39-40.

¶10 Reviewing the record in a light most favorable to the jury's determination, we see evidence that on November 19, 1992, Collura's medical records show that his ambulation status was "up ad-lib with cane." A person who

is paralyzed would not be allowed to be "up ad-lib." There was no indication from the "up ad-lib" entries that Collura was someone who needed constant attention from a person who needed to be within eyesight of Collura. A physical therapy evaluation on November 17, 1992, concluded that Collura's short sitting balance was good/normal static, and good/normal dynamic. The evaluation showed that Collura could ambulate sixty feet. The stool from which he fell bore his entire weight, and did not have wheels. Far from being a "small, spinning stool," the stool's seat was "[n]ot very easy at all" to move. Behind the stool was a camera head twenty-four inches wide, which appears in a photograph both parties have appended in their briefs to be several times the size of the stool, and fully capable of providing support to lean against.

¶11 The technologist performing the chest x-ray and another technologist performing the bone scan had six opportunities to assess Collura before his fall, and would have observed him holding still while on the stool for thirty to forty-five minutes. They would have observed his ability to follow instructions, his balance and coordination, and gotten a sense of his muscular strength. No-one told the chest x-ray technologist that Collura had trouble with balance, strength and coordination. She had no indication from observing Collura that he had any difficulty whatsoever with stability. She felt that Collura was "steady on the stool." Though she put her hand on Collura's shoulder, she did so to prevent him from slouching and ruining the picture. The technologist concluded that because of the multiple times that she and her co-workers assessed Collura's situation and stability, he was steady enough to stay on the stool, and she did nothing unreasonable .

¶12 The jury heard Collura's witnesses, including himself and his wife, and the hospital's witnesses. It was able to make credibility determinations that

we cannot do. Keeping in mind that our review is stringent and narrow, and that the trial court approved the jury's verdict in which it concluded that St. Mary's was not negligent, we conclude that there is credible evidence to sustain the jury's verdict.

REVERSAL IN THE INTEREST OF JUSTICE

¶13 WISCONSIN STAT. § 752.35 permits us to reverse a judgment if it appears that the real controversy has not been fully tried, or that it is probable that justice has miscarried. Collura asks us to use our discretionary power to reverse the judgment against him. Two situations can contribute to the real controversy not being tried: if the jury was not given the opportunity to hear important testimony that bore on an important issue in the case or if the jury heard testimony which had been improperly admitted. *See* ***State v. Ward***, 228 Wis. 2d 301, 306, 596 N.W.2d 887 (Ct. App. 1999). Collura points out that the jury was prevented from hearing testimony from the two hospital employees who did the peer review, and from an unidentified person in the hallway. While that may be true, we have concluded that the trial court properly prevented Collura from obtaining evidence from the employees. Collura was not precluded from calling the unidentified person as a witness. He did not do so because he was unable to find the witness. That is a hazard of litigation, not a reason for us to grant a new trial because the real controversy was not tried.

¶14 Collura argues that the jury heard improperly admitted evidence from one of the persons conducting the peer review because the trial court permitted her to testify as to conclusions she reached from her investigation, but prohibited him from examining her about her findings and conclusions. This is factually incorrect. St. Mary's Hospital's direct examination of the investigator

consisted only of rebuttal testimony to the effect that she did not tell Collura's daughter that the hospital was totally responsible for Collura's fall, as his daughter had testified. On redirect examination, only one question and answer pertained to the investigation:

> Q. Based on your investigation, did you determine whether anyone ever left the room, meaning Room 3, at the time that Mr. Collura was there.
>
> A. Yes, we did determine that no one had left the room.

Collura made no objection to the question or the answer. Failure to object constitutes waiver. *See* ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 790, 501 N.W.2d 788 (1993). Regardless of waiver, this one question and answer could hardly be described as the trial court allowing one of the peer review members "to testify as to conclusions she reached from her investigation and knowledge of the accident." We conclude that there is no reason for a WIS. STAT. § 752.35 reversal on grounds that the real controversy was not tried.

¶15 Collura also argues that a miscarriage of justice occurred because the jury's verdict was against the great weight of evidence. And, a jury's inadequate damages increases the likelihood of a reversal. *See* ***Mainz v. Lund***, 18 Wis. 2d 633, 645, 119 N.W.2d 334 (1963). But before granting a new trial because of a miscarriage of justice, there must be a substantial probablility that a different result would be likely on retrial. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). We cannot reach that conclusion. Collura views the evidence at trial through an advocate's eyes. In fact, though Collura's fall was undisputed, Collura's physical condition at the time of the bone scan was hotly contested, with conflicting evidence produced by both sides. Were another

trial held, the jury might again find that the hospital was not negligent. A new trial might produce a different result, but that is not the test. We decline to grant a new trial pursuant to WIS. STAT. § 752.35.

COSTS

¶16 Collura next argues that the trial court erred by awarding costs for delivery charges against both him and his wife. St. Mary's hospital asked that a schedule entitled "Deliveries" totalling $619.34 be taxed against the Colluras. An example of one of the thirty-one items reads:

06/27/97 Deliveries of materials – *Dr. Gita Baruah 25.00

¶17 In ***Rhiel v. Wisconsin County Mut. Ins. Corp.***, 212 Wis. 2d 46, 57, 568 N.W.2d 4 (Ct. App. 1997), we concluded that WIS. STAT. § 814.04(2), which authorizes the prevailing party to tax costs for "postage, telegraphing, telephoning and express," permits a prevailing party to tax the costs of sending an item by express mail. But that does not answer whether "Deliveries" are the same as express mail. ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis. 2d 138, 149, 549 N.W.2d 714 (1996), holds that a trial court may not award costs not specifically authorized by statute. While WIS. STAT. § 814.036 permits a court to award costs in its discretion, that statute gives the court discretion only as to when costs may be allowed, not as to what costs may be allowed. *See* ***id.*** While "Deliveries" might include express mail, there is nothing to show that they were express mail. "Deliveries" are not authorized by § 814.04, and are therefore not taxable. We therefore reverse the trial court's judgment in this respect, and remand for taxation of costs, excluding "Deliveries."

¶18 Next, the Colluras assert that because Mary Collura's claim was only for loss of consortium, only St. Mary's Hospital's costs which pertain to that claim should be taxed against her. Their only authority for this argument is ***Gorman v. Wausau Ins. Cos.***, 175 Wis. 2d 320, 499 N.W.2d 245 (Ct. App. 1993). In ***Gorman***, a plaintiff husband in a personal injury action prevailed, while his wife did not prevail on her claim for loss of consortium. *See* ***id.*** at 326. We concluded that although the defendant was entitled to tax statutory attorneys fees, it could not tax disbursements without a showing that the disbursements were incurred in defending against the wife's claim. *See* ***id.*** at 327. But ***Gorman*** is not dispositive here. Where only one of two plaintiffs prevail, it is necessary to separate the disbursements to prevent a losing party from recovering disbursements against a winning party. In ***Gorman***, had we permitted the defendant to tax all disbursements against the plaintiff wife, it could have taxed disbursements against the wife incurred in defending itself from the prevailing husband.

¶19 The Colluras are in a different position. Both lost their cases against St. Mary's Hospital. Disbursements spent to defeat August's claim would help to defeat Mary's claim. And, as the trial court noted, it would be an unreasonable burden to require a successful defendant to allocate and defend its allocation of about $6,000 of costs. We conclude that ***Gorman*** is inapposite here, and since the Colluras have provided no other authority for their allocation argument, we will not pursue the matter further. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶20 The Colluras argue that the collateral source rule permitted them to present evidence of the customary value of hospital, medical and related expenses, and that the trial court erred by allowing them to present evidence only of the actual amount they paid for those bills. They also argue that the jury's award of

damages was grossly inadequate. We do not address these issues because, in any event, the Colluras cannot recover since the jury found that St. Mary's Hospital was not negligent with respect to the care, treatment and supervision of August Collura.

¶21 St. Mary's Hospital to recover two-thirds of its costs on appeal.

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

Not recommended for publication in the official reports.