

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2010

David R. Schanker
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. 2009AP381

Cir. Ct. No. 2004CV481

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TAMMY FORBES,

PLAINTIFF-APPELLANT,

V.

**CLEMENS K. STOECKL, D/B/A STOECKL FAMILY DENTISTRY AND
PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., A/K/A XYZ
INSURANCE Co.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Tammy Forbes appeals the judgment entered upon a unanimous jury verdict dismissing her dental malpractice claim against Clemens

K. Stoeckl, D.D.S., d/b/a Stoeckl Family Dentistry. Forbes contends she is entitled to a new trial in the interest of justice because the verdict is contrary to the great weight of the evidence, and because the jury's failure to award her any damages renders the verdict perverse. We disagree and affirm.

¶2 Forbes' claims against Dr. Stoeckl, a general dentist, arise from the extensive crown work, bridge work and root canals he performed between 1985 and 2001. The parties presented divergent views of the facts at trial. Forbes alleged that Dr. Stoeckl's treatment was unnecessarily and negligently performed. She claimed Dr. Stoeckl misdiagnosed her as having temporomandibular joint (TMJ) dysfunction when she had no symptoms and that dentist Dr. Mary Karkow, a TMJ disorder specialist, told her in 2002 that Forbes did not have it. Forbes contended Dr. Stoeckl "scared" her into believing that without the treatment her TMJ would "crumble" and she "would end up with [her] jaws ... wired shut ... not be able to talk and ... would eat through a straw." Forbes saw a series of other dentists after she allegedly developed painful infections and her bridgework fell out. In 2004, Dr. Gerald Ziebert gave her an estimate to replace all of her crowns. In 2006 he told her that he could not restore her crowns or salvage her teeth. Forbes eventually had all of her teeth extracted. At the time of trial, she faced additional dental reconstruction at a claimed cost of \$85,000.

¶3 Dr. Stoeckl's version was that Forbes had significant dental problems when she came to him in 1985. He said she presented with short clinical crowns from prior dental work which were further worn down from bruxism, or teeth grinding. In the prior six years her last dentist had performed a root canal, three crowns and at least twenty large fillings, several of which now were failing or in decaying teeth. Forbes also had a malocclusion preventing her back teeth from touching when she closed her mouth. Dr. Stoeckl testified that Forbes

indicated in a questionnaire dated August 1986 that she had headaches and TMJ pain, popping and grating. When a series of orthotics failed to correct her bite after two years, Dr. Stoeckl said he gave her the options of wearing one permanently, having orthodontics, or building up her bite with crowns, and that Forbes chose the latter. Dr. Stoeckl agreed that Forbes needs more dental work, but presented evidence it would cost between \$12,000 and \$42,000.

¶4 After a three-day trial, the jury returned a unanimous verdict. It assigned no liability to Dr. Stoeckl but found Forbes herself negligent for failing to maintain her own dental health. Despite undisputed evidence that Forbes had incurred \$5,787 in past expenses and required further treatment, the jury awarded her nothing for past or future dental expenses, pain, suffering or disability. Forbes moved for a new trial on grounds that the verdict was contrary to the great weight of the evidence and that the answers to the verdict questions regarding her causal negligence and damages showed perversity and an ulterior motive. The court denied the motion and ordered judgment on the verdict. Forbes filed this appeal.

¶5 A new trial may be granted in the interest of justice only when the jury findings are contrary to the great weight and clear preponderance of the evidence. *Krolkowski v. Chicago & Northwestern Transp. Co.*, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). We owe great deference to the trial court's decision on this question, *Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), due to the trial court's opportunity to observe the trial and evaluate the evidence, *Krolkowski*, 89 Wis. 2d at 581. We limit our review to the reasons specified in the trial court's order and look for reasons to sustain the court's findings and order. *See id.* at 580. Absent a clear showing of an erroneous exercise of discretion, we leave undisturbed the trial court's decision

not to grant a new trial. *See Larry v. Commercial Union Ins. Co.*, 88 Wis. 2d 728, 733, 277 N.W.2d 821 (1979).

¶6 The trial court's written decision denying Forbes' motion noted that the parties' versions of the facts stood in stark contrast to each other. Forbes testified she was coerced into submitting to an unnecessary course of treatment; Dr. Stoeckl said Forbes elected to undergo it to avoid wearing a corrective device for the rest of her life. The court found that the testimony of their expert witnesses likewise diverged: Forbes' expert opined that Dr. Stoeckl negligently misdiagnosed a nonexistent TMJ problem and rendered improper care, while Dr. Stoeckl's expert opined that the diagnosis and treatment were within acceptable norms for a general dentist. The court concluded that "ample evidence" supported the unanimous verdict that Dr. Stoeckl was not negligent and that Forbes was.

¶7 We agree. Forbes claimed Dr. Stoeckl initiated the full-mouth restoration in 1989 even though she had no symptoms of TMJ dysfunction. Evidence was presented, however, that besides her August 1986 questionnaire to the contrary, Forbes also reported a history of jaw clenching and joint popping to dentists who treated her after she left Dr. Stoeckl's care. Forbes said she told the dentists she had those symptoms only because Dr. Stoeckl said she did. Forbes explained the questionnaire evidence by saying she entered only the date and her name and address in August 1986. She said she answered the actual questions sometime after a May 1987 car accident, checking whatever symptoms Dr. Stoeckl told her to because "he said even if you don't feel [the symptoms] now, you're going to feel them later," testimony Dr. Stoeckl called "completely false" and "ridiculous." In addition, evidence was introduced that Forbes also claimed TMJ problems and treatment in the lawsuit she filed after her car accident.

Finally, the jury heard Forbes testify both that she was unhappy with Dr. Stoeckl's treatment yet continued as a patient for sixteen years and had her teenage daughter in Dr. Stoeckl's care from 1998 until 2001.

¶8 Dr. Stoeckl then elicited testimony from Dr. Ziebert, one of Forbes' subsequent treaters, that if Forbes had TMJ dysfunction from 1986 through 1990 and received treatment which alleviated it, she would have been asymptomatic when she saw the TMJ specialist in 2002.¹ Dr. Ziebert also testified that reasons her crowns were nonrestorable in 2006 was because some of the underlying teeth were too short to accept new crowns or had a vertical fracture or nonviable pulp. He acknowledged that bruxism can cause vertical fractures and pulpal death.

¶9 The trial court observed that the evidence presented at trial "gave the jury a choice between two very different versions of the facts." Matters of weight and credibility are left to the jury. *Fraye v. Lovell*, 190 Wis. 2d 794, 810, 529 N.W.2d 236 (Ct. App. 1995). This is true for both lay and expert witnesses, as the jury was instructed. *See* WIS JI—CIVIL 215. The record supports the trial court's conclusion regarding negligence.

¶10 The trial court's written decision also found that no evidence supported the jury's finding that Forbes had "zero" past and future dental expenses. In fact, the parties did not dispute that Forbes' past dental expenses totaled \$5,787 or that she faced further reconstructive treatment although they

¹ Dr. Stoeckl asserts that "it was certainly not lost on the jury" that Dr. Ziebert offered no criticism of the treatment he provided to Forbes. Dr. Ziebert could not. The trial court granted Dr. Stoeckl's motion in limine seeking to preclude Dr. Ziebert from offering opinions regarding negligence or standard-of-care because Forbes named Dr. Ziebert only as a damages witness.

disagreed on its potential cost. Forbes also requested \$2,000,000² for pain, suffering and disability, an amount Dr. Stoeckl derided as “shocking” and an indication of “what’s going on here.”

¶11 Forbes argues the verdict is perverse because it “show[s] a disregard for the facts ... and an ulterior motive on the part of the jury.” A perverse verdict is “clearly contrary to the evidence,” and reflects “highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair.” *Dostal v. Millers Nat’l Ins. Co.*, 137 Wis. 2d 242, 254, 404 N.W.2d 90 (Ct. App. 1987) (citations omitted). The trial court found the damages answers to be “contrary to the evidence and the court’s instruction” but concluded that the verdict was not perverse.

¶12 Denying damages to a plaintiff does not necessarily show prejudice or render the verdict perverse where, as here, the jury’s findings of no liability are properly supported. See *Sell v. Milwaukee Auto. Ins. Co.*, 17 Wis. 2d 510, 519-20, 117 N.W.2d 719 (1962). The trial court acknowledged it did not know why the jury answered the damages questions as it did. It surmised that the jury may have wanted to ensure that Forbes would not receive money when it believed Dr. Stoeckl did nothing wrong, may have reacted negatively to Forbes’ large pain and suffering award request, or may have disbelieved Forbes’ testimony and “wanted to punish her for lying.” It is not objectionable for a court to speculate how a jury arrived at its findings. *Schultz v. Mueller*, 39 Wis. 2d 216, 223, 159 N.W.2d 63 (1968). Nor does it prove that the jury speculated in its fact-finding process. *Id.*

² The written decision on motions after verdict states \$1,000,000.

¶13 Indeed, when, as here, the evidence is conflicting, the jury’s function and duty is “to find where the truth lies.” *See id.* The court invoked the well-established rule that the jury was entitled to judge Forbes’ credibility as a witness, and deduced that the jury “was not favorably impressed with her.” Given the court’s unique vantage point, we defer to its assessment. *See Sievert*, 180 Wis. 2d at 431. “[W]here the jury has answered questions in regard to liability and would deny recovery, it would be pointless to order a new trial merely because the award which the jury has decided the plaintiff will not get anyway is less than it should be.” *Jahnke*, 56 Wis. 2d at 652.

¶14 Finally, the court noted that it was “unaware of anything in the record to support [Forbes’] assertion” that the verdict was motivated by prejudice. There must be something to warrant a finding that the jury was controlled or materially influenced by considerations ulterior to a reasonably fair application of its judgment to the evidence under the court’s instructions. *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 545-46, 173 N.W.2d 619 (1970). As the advocate of findings that Dr. Stoeckl was negligent and therefore liable for the damage award she sought, Forbes had the burden to prove her claims “by the greater weight of the credible evidence, to a reasonable certainty.” WIS JI—CIVIL 200. It also was her burden to show how the trial court’s refusal to order a new trial amounted to an erroneous exercise of discretion. *See Colby v. Colby*, 102 Wis. 2d 198, 207, 306 N.W.2d 57 (1981). She has done neither.

By the Court.—Judgment affirmed.

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

