COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2011

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. 2010AP1021 **Cir. Ct. No. 2008CV34**

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

MARIA A. ZAVALA MCDANIEL, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF GUSTAVO ESPINAL-SANTOS, MARIA JOSE ESPINAL ZAVALA, BY HER GUARDIAN AD LITEM, JAMES R. SICKEL AND ANNA SOFIA ESPINAL, BY HER GUARDIAN AD LITEM, JAMES R. SICKEL,

PLAINTIFFS-RESPONDENTS,

V.

PERI L. ALDRICH, M.D.,

DEFENDANT-APPELLANT,

BELLIN HEALTH SYSTEMS, INC.,

DEFENDANT-CO-APPELLANT.

APPEAL from judgments of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Peri Aldrich, M.D., and her employer, Bellin Health Systems, Inc., are co-appellants in this wrongful death medical malpractice case. A jury found them causally negligent in the death of Gustavo Espinal-Santos, who was treated at a Bellin clinic by two Physician Assistants (P.A.s) under Dr. Aldrich's supervision. Dr. Aldrich and Bellin contend the evidence does not support the verdict as to negligence, causation or damages, particularly the $2.7 million pain and suffering award. We disagree and affirm.

¶2 Espinal-Santos immigrated from Honduras in 1999 and found work on a dairy farm. His wife, Maria Zavala, now McDaniel, and their four-month-old daughter, Maria Jose, remained in Honduras with Zavala's mother. In early 2003 Zavala moved to Wisconsin to join her husband. Maria Jose stayed in Honduras with her grandmother, where she still lives. On December 3, 2003, Zavala gave birth to the couple's second child, Anna Sofia.

¶3 On December 12, 2003, Espinal-Santos saw Dr. Darel Angus for a persistent cough and fever. Dr. Angus, whose care is not at issue in this case, tentatively diagnosed pleurisy and bronchitis. He gave Espinal-Santos an antibiotic injection and prescribed two broad-spectrum oral antibiotics.

¶4 On December 15, Espinal-Santos went to the Bellin Health Family Medical Center in Bonduel. P.A. Michael Conard documented that Espinal-Santos was a twenty-five-year-old nonsmoker who presented with an elevated temperature, hot, damp skin and rapid heart and respiratory rates; reported chills, night sweats and a ten-day history of cough and fever; and was on two antibiotics and a nonprescription cough medicine. Conard discontinued the cough medicine,

ordered a prescription cough medicine, instructed Espinal-Santos to continue his antibiotics and ordered a tuberculosis (TB) skin test.

¶5 On December 18, Espinal-Santos returned to the clinic to have his TB test read as directed and with complaints of worsening symptoms. This time he saw P.A. Penny Cornelius. Cornelius documented that Espinal-Santos now had had the cough and elevated temperature for two weeks; that, since his last visit, Espinal-Santos' fever had increased, his respirations were more rapid and his breath sounds were diminished; that he coughed throughout the exam and reported that his cough had intensified and was worse when he reclined; that he complained of bilateral lower lung pain; and that the TB test was negative. Cornelius' assessment was "probable pneumonia." She confirmed at trial that she suspected a serious, atypical pneumonia because Espinal-Santos' symptoms had worsened after nearly a week of antibiotic therapy. Cornelius agreed that a chest x-ray was necessary for diagnosis, but that Espinal-Santos refused one due to cost. She instead gave him a free trial sample of a different antibiotic, wrote him a cough medicine prescription, which he filled that day, ordered him off work until December 23, and told him to be rechecked then if he did not improve.

¶6 Neither Conard nor Cornelius ordered a chest x-ray or a complete blood count (CBC), checked Espinal-Santos' oxygen saturation (O_2 sat.), consulted with Dr. Aldrich, or followed up with Espinal-Santos. They did not discuss the case with each other.

¶7 On December 23, "toxic" in appearance, short of breath and breathing rapidly, Espinal-Santos went to the emergency room at St. Vincent Hospital in Green Bay. A chest x-ray, CBC and O_2 sat. indicated extensive bilateral pneumonia. A bronchoscopy led to a diagnosis of blastomycosis, a rare

and potentially lethal fungal infection. He was admitted to intensive care and doctors discussed the possibility of mechanical ventilation with him and his wife that day. On December 26, he was placed on a respirator. On January 1, 2004, he had a cardiac arrest but was resuscitated. He suffered a second heart attack later that day, and died. The cause of death was acute respiratory distress syndrome from severe diffuse pneumonia due to blastomycosis.

¶8 Dr. Aldrich, the P.A.s' supervising physician, visited the Bellin clinic once a week. Bellin's P.A. Supervisory Standards required timely review of the P.A.s' medical records so as to monitor and evaluate the effectiveness of their services. Dr. Aldrich testified that she typically reviewed Conard's records on her weekly clinic visits and reviewed Cornelius's records electronically because she and Cornelius generally were not at the clinic on the same days.

¶9 The Bellin clinic learned of Espinal-Santos' death on February 11, 2004. When Zavala picked up the clinic records on February 13, the supervising physician signature line on Conard's December 15 medical record still was blank. Cornelius' December 18 record bore Dr. Aldrich's electronic signature, but it was undated. When Bellin Health certified the records on April 18, 2004 the supervising physician signature line on the December 15 record bore Dr. Aldrich's signature. Dr. Aldrich testified at trial that she did not recall reviewing or signing the records, and admitted that she did not speak to either P.A., order any tests, make a referral, request a consult, contact Espinal-Santos or take any other action.

¶10 On behalf of Espinal-Santos' estate, herself and her two daughters, Zavala filed suit against Dr. Aldrich and Bellin. She asserted that Conard's and Cornelius' negligent failure to properly diagnose and treat Espinal-Santos and Dr. Aldrich's negligent supervision of the P.A.s directly led to his hospitalization,

mechanical ventilation and death. The jury agreed. It found Dr. Aldrich thirty-five percent causally negligent and Bellin sixty-five percent causally negligent. The jury awarded the plaintiffs $12,500 for funeral expenses; $350,000 each to Zavala, Maria Jose and Anna Sofia for loss of society and companionship; and $2.7 million to Espinal-Santos' estate for pain and suffering.

¶11 On motions after verdict, the court declined to change the causation question answers to "no"; to delete the damages questions or change the answers to "zero"; to order a new trial based on perversity of the verdict or in the interest of justice; or to grant remittitur. The court did, however, reduce the funeral expenses award to $4338.60 and the loss of society and companionship awards to a total of $350,000. It also let stand the $2.7 million pain and suffering award but entered judgment for $1,000,000 against each defendant as allowed by law. *See* WIS. STAT. § 655.23(5) (2009-10).[1] Dr. Aldrich and Bellin appeal.

Dr. Aldrich's Appellate Issues

¶12 Dr. Aldrich contends no evidence supports the jury's finding that she was negligent in her supervision of Conard and/or Cornelius in regard to Espinal-Santos' care and treatment. We disagree.

¶13 "Our review of a jury's verdict is narrow." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We view the evidence in the light most favorable to the jury's verdict, and we will sustain the verdict if there is any credible evidence that, under any reasonable view, leads to an inference supporting the jury's finding. ***Id.***, ¶¶38-39.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶14 Plaintiffs' expert, pulmonologist Dr. Basil Varkey, testified that the standard of care required Dr. Aldrich to timely review the P.A.s' records and to act on information gained from her review. Dr. Aldrich could not recall reviewing either P.A.'s records and undertook no follow-up. Conard's December 15 records were not yet signed on February 13; Cornelius' were signed but not dated. It is for the jury, not this court, to balance the credibility of witnesses and the weight to give their testimony. ***Id.***, ¶39. Dr. Aldrich concedes that her failure arguably could permit an inference that her supervision was negligent. Indeed, the jury reasonably could have inferred that she did not review the records until after Espinal-Santos' death. If the evidence supports more than one reasonable inference, we accept the one drawn by the jury. ***Id.*** And where, as here, the trial court has approved the jury's verdict, we accord it special deference. ***Id.***, ¶40.

¶15 As to causation, Dr. Varkey testified that blastomycosis is curable with timely diagnosis. Espinal-Santos' presenting symptoms on his December 15 visit should have alerted a health care provider to the possibility of an unusual community-acquired pneumonia. Espinal-Santos' worsening symptoms on his second visit should have made blastomycosis a diagnostic consideration and, given the severity of the pneumonia most probably present, the possibility of complications or death should have been recognized. Dr. Varkey testified that Dr. Aldrich "should have insisted" that Espinal-Santos be reevaluated, a chest x-ray and an O_2 sat. should have been done and an infectious disease or pulmonary consult should have been made.

¶16 While other testimony indicated that a chest x-ray cannot diagnosis blastomycosis, Dr. Varkey testified that one was "absolutely necessary" to assess the severity of the pneumonia and to give "guidance for the next step." He testified that on December 15 a chest x-ray likely would have shown infiltrates

indicative of a pneumonia and that on December 18 there was "no chance" a chest x-ray would have been normal. He opined that it would have shown multiple large infiltrates indicating a severe, advanced pneumonia, which would have provided a lead to considering other techniques to make a specific diagnosis. The jury evidently accepted Dr. Varkey's testimony.[2] Thus, there is credible evidence in the record from which a reasonable jury could conclude that Dr. Aldrich's failure to timely review the medical records and take appropriate action was a substantial factor in causing Espinal-Santos' injuries. *See* WIS JI—CIVIL 1023.

¶17 We next address Dr. Aldrich's argument that the jury's award of $2.7 million for conscious pain and suffering is excessive.[3] On motions after verdict, she argued that the amount should have been reduced to $25,000 or made the subject of a new trial. She asks this court to change the answer to zero.

¶18 An award for pain and suffering must be based on credible evidence, but the amount of the award rests within the discretion of the jury. ***Davis v. Allstate Ins. Co.***, 55 Wis. 2d 56, 58, 197 N.W.2d 734 (1972). A verdict, especially one approved by the trial court, will not be set aside merely because the award was large or because a reviewing court might have awarded less. ***Id.*** at 58-59.

[2] All parties also cite to the testimony of Dr. John Andrews, Espinal-Santos' treating pulmonologist at St. Vincent Hospital, whose videotaped deposition was played at trial. Neither the tape nor the transcript to which the parties direct us are in the record, however. We are bound by the record presented to us and must assume that any missing material supports the trial court's ruling. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

[3] Bellin also challenges the pain and suffering award. We reject its arguments for the same reasons we reject Dr. Aldrich's.

¶19 There was testimony that Espinal-Santos sought treatment because he was "feeling too bad," that it hurt when he coughed and he could not breathe; that he and his wife were advised that his worsening respiratory status could lead to cardiac and/or respiratory arrest and, thus, death; that he was told about the "dangers and risks" of mechanical ventilation, that he could require ventilation for at least three or four days and possibly two weeks or longer, and would be unable to talk while ventilated; that he cried, "[M]y children, my children, my children"[4]; that he asked his wife to bring Anna Sofia to the hospital "to have a picture with her and give her kisses"; that he asked a family friend to help Zavala care for his new baby because he did not know if he ever would return home; that he "worried a lot," and received pastoral care and "much support"; and that he suffered a cardiac arrest, was resuscitated and suffered a second, fatal, heart attack all in one day. Pain and suffering includes physical pain, worry and distress. *See* WIS JI—CIVIL 1766.

¶20 The trial court agreed that the award was "very high" but concluded it had evidentiary support. Further, it did not shock the judicial conscience considering that Espinal-Santos—a theretofore healthy young man with children dependent on him—knew he was going to die. At bottom, the court said, the award was for determination by the "12 reasonable people in terms of … their life experiences and their common sense." We defer to the jury's verdict. *See* ***Morden***, 235 Wis. 2d 325, ¶40.

[4] It is undisputed that, although Maria Jose remained in Honduras, Espinal-Santos regularly sent her money, clothing, gifts and letters and an occasional videotape.

¶21 Dr. Aldrich next asks for a new trial in the interests of justice because the jury findings are contrary to the great weight and clear preponderance of the evidence. The trial court denied her motion, stating that credible evidence supported the entirety of the verdict. A trial court's ruling on such a motion is highly discretionary and will not be reversed on appeal, absent a clear showing of a misuse of discretion or an erroneous application of the law. ***Chille v. Howell***, 34 Wis. 2d 491, 494, 149 N.W.2d 600 (1967). We have found neither.

¶22 Alternatively, Dr. Aldrich seeks a new trial on grounds that the trial court asked repetitive, hypothetical voir dire questions, thus committing error that affected her substantial rights. *See* WIS. STAT. §§ 805.08(1) and 805.18(2). A party's substantial rights are affected only if there is a reasonable possibility that the error contributed to the outcome of the case. ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. A reasonable possibility of a different outcome is one sufficient to undermine our confidence in the outcome. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768.

¶23 The plaintiffs formulated a list of twenty-one questions to identify a bias potential jurors might harbor regarding the insurance or medical malpractice "crisis" in the news at the time of trial. The trial court concluded that nearly all the questions went "far beyond" what was necessary to determine the ability to be fair and impartial about the facts of the case. The court invited response from the parties and prepared its own list of six questions. Ultimately, it asked questions such as whether any of the jurors believed medical malpractice cases increase the cost of health care and, if so, whether he or she could set that belief aside and follow the law if the plaintiffs proved their case. We disagree with Dr. Aldrich's assertion that the court's questioning confused jurors into thinking they had to "decide this case in terms of a more national debate on the state of health care."

Rather, we conclude the court's actions were well within its broad discretion as to the supervision of voir dire. *See* ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979). Dr. Aldrich's substantial rights were not affected.

Bellin's Appellate Issues

¶24 Bellin first contends the trial court committed reversible error by providing the P.A. job descriptions to the jury during deliberations. It asserts that doing so wrongly implied to the jury that the job descriptions were "akin to the standard of care." The record belies this claim.

¶25 The jury sent out a note asking for "Job descriptions and standard of care for Bellin PA supervisor" and "Job descriptions and standard of care for Bellin PAs." The court sent in various jury instructions, including WIS JI—CIVIL 1023, the medical negligence instruction. The jury then sent another note requesting:

> 1. Dr. Aldrich – Standard of Care from Bellin/Job description
>
> 2. What the law states we are supposed to use to determine the verdict
>
> 3. Standard of Care/ Job description of PAs
>
> 4. Calendar for year 2003

The court read the note to the parties, then stated:

> I don't see any problem with the calendar. I think we know what they mean when they say job description of P.A.s. I am not sure what they mean by Dr. Aldrich, standard of care from Bellin, slash, job description. And then they have the same thing, standard of care, slash, job description of P.A.s. And I have no idea what they mean by question 2.

The court proposed to send this note to the jury:

> Dear foreperson: After you gave me your note, I gave you some jury instructions. I am now giving you a calendar. Please send me another note if you are requesting more documents. Be as specific, I underlined specific, as you can about what exhibit or exhibits you are requesting.

¶26 Later, the trial judge expressed her concern to the parties that the jurors might be confusing "job description" and "standard of care" because she overheard the foreperson again ask the bailiff for the "job descriptions/standard of care." The court called the jurors back into the courtroom. This exchange ensued:

> THE COURT: All right. [Foreperson], I overheard you say to the Bailiff that you had asked for these latest materials a while ago and didn't get an answer. I thought I had answered it, by telling you I had given you all the jury instructions now. And if you wanted more documents, you needed to be very specific about what you wanted.
>
> All right. There are two job descriptions that were marked as exhibits and identified and properly in the record. So, you will get those.
>
> FOREPERSON: Okay.
>
> THE COURT: There is no document that address—that is called standard of care for Bellin P.A. supervisor or standard of care for Bellin P.A. There is no such document.
>
> FOREPERSON: Okay.
>
> THE COURT: The standard of care instruction is the one I gave you.
>
> FOREPERSON: Okay.
>
> THE COURT: That's the legal instruction on standard of care. So, you will get both of those job descriptions. And you will have to use those, like all the other evidence in the case, to decide what the standard of care was and whether it was violated. But it is the legal instruction. It is the instruction on the law, standard of care, it's 12—

> [DR. ALDRICH'S ATTORNEY]: 1023.
>
> THE COURT: 1023. That is the, the document on standard of care.
>
> FOREPERSON: Okay.
>
> THE COURT: And you take all the other evidence in the case and you make of it what you wish. But that is the document on standard of care.
>
> FOREPERSON: Okay.
>
> THE COURT: If you have some other document in mind, I don't know what it is. And you will have to be very specific about what you are looking for. And I hope that helps. And we will get those in to you in just a moment.
>
> FOREPERSON: Great.
>
> THE COURT: Thank you.

¶27 The court then asked the parties' attorneys whether there was "anything that you wish I would have said differently or would like me to add? I can do it." Bellin's counsel answered, "No, Your Honor."

¶28 The next morning, the court told the parties that when the jurors stopped their deliberations the prior evening, the bailiff heard a juror say they were "stuck on the standard of care." The court thus reinstructed the jury as follows:

> I gave more thought last night to your notes requesting documents, written documents that might pertain to the standard of care. There is only one document in this case that defines standard of care for both the Physician's Assistants and Dr. Aldrich. That is Wisconsin Jury Instruction 1023. I read it along with all the other ones. And I gave it to you after you started deliberating. And that's the one I was referencing last night.
>
> I don't know if you've re-read it. And I am not telling you you have to. But you may want to consider re-reading that. That is the one document that defines standard of care for all of the Defendants.

> Your job then is to discuss the evidence that pertains to whether the Physician's Assistants or Dr. Aldrich or both fell below that definition of the standard of care. You discuss whatever evidence you want to that pertains to the issue of whether any of them fell below the standard of care in that jury instruction. Whatever evidence is in the record, you can discuss whatever you want that pertains to whether there is a violation of that law. And then you decide how much weight and credit to give to any of the evidence that you discuss that you believe pertains to whether there's been a violation of the standard of care set forth in the jury instruction 1023.
>
> I hope that helps you. That's all. Good luck.

After excusing the jury, the court asked whether counsel for any of the parties had a comment. Each answered, "No, Your Honor."

¶29 The trial court made it abundantly clear that WIS JI—CIVIL 1023 set forth the standard of care. Moreover, what exhibits to permit in the jury room is a matter within the trial court's discretion. ***Badger Bearing, Inc. v. Drives & Bearings, Inc.***, 111 Wis. 2d 659, 669, 331 N.W.2d 847 (Ct. App. 1983). Although the court invited comments, Bellin offered no objection either before or after the court allowed the job descriptions to go in. Reversible error thus cannot be predicated on the court's decision, especially in light of its careful instructions. *See* ***Sage v. State***, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979).

¶30 Bellin next asserts that no credible evidence supports the jury's finding that its negligence, through Conard or Cornelius, was a cause of Espinal-Santos' injuries.[5] We disagree. As already stated, the jury heard Dr. Varkey's

[5] Bellin does not challenge the finding of negligence.

unequivocal testimony that Espinal-Santos' worsening symptoms in a young, otherwise healthy nonsmoker should have led to earlier diagnostic efforts.

¶31 Plaintiffs' expert witness P.A. Raymond Mooney testified that Conard's and Cornelius' care fell below the standard of care and delayed earlier diagnosis and proper treatment. Specifically, Mooney testified that, given Espinal-Santos' rapid pulse and respirations, Conard should have ordered a chest x-ray to determine the presence and extent of lung infiltrate and a CBC to assess whether the pneumonia was bacterial or viral. He testified that, given Espinal-Santos' worsening condition and that his treatment needs exceeded her level of expertise, Cornelius should have ordered a chest x-ray and CBC and referred Espinal-Santos to Dr. Aldrich, another physician or an emergency room.

¶32 Cornelius' credibility suffered several blows. She claimed, for example, that she spent twenty minutes forcefully trying to convince Espinal-Santos to agree to a chest x-ray, even telling him he could die, that she grew angry with him for refusing and that changing antibiotics was a "last-ditch effort." She documented, however, only that she advised him "it would be best" to have a chest x-ray and CBC that day and that he declined due to cost. Mooney faulted Cornelius for not completing an "Against Medical Advice" form, or charting in a substantially similar way, to reflect that Espinal-Santos' refusal followed the efforts she described. Cornelius testified that she charted as she did to remain professional and not "blame the patient." Her credibility also suffered when she acknowledged that she realized Espinal-Santos was "seriously ill" and that "something wasn't right" but that, despite being unsure of his diagnosis, and contrary to Bellin's standards she did not consult with Dr. Aldrich. Finally, Cornelius' testimony about her efforts was undercut by Espinal-Santos'

St. Vincent medical record, which said only that he had been told he "may have a little bit of pneumonia, but they did not do a chest x-ray."

¶33 Bellin also argues that the causation argument hinges totally on facts not in evidence, *i.e.,* that Espinal-Santos would have consented to other treatment or tests, consults or hospitalization. We disagree. Espinal-Santos took all prescribed medication, returned as instructed to have his TB test read, stayed off work for five days and, unimproved, sought further care at the emergency room. The jury reasonably could have inferred that he would have consented to further treatment had its necessity been communicated to him.

¶34 Finally, Bellin contends that, taken together, the jury's request for job descriptions in the context of the standard of care, the court's multiple instructions on the standard of care, and postverdict reductions in the jury awards render the verdict perverse. "A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning v. Dore***, 56 Wis. 2d 129, 134, 201 N.W.2d 580 (1972) (footnote omitted).

¶35 We already have explained that we see no error in regard to the court's giving the jury the job descriptions or clarifying instructions. We also conclude that nothing before us suggests that the verdict was perverse as to damages, despite the court's finding that certain of them were excessive. *See* ***id.*** (Unless "grossly so and readily apparent," "[e]xcessiveness [of damages] alone … is not sufficient to label a verdict perverse.").

¶36 On motions after verdict, the trial court found that the $12,500 award for funeral expenses was excessive. The $4338.60 proved at trial was for a casket,

two death certificates and transportation of the remains to Honduras. Instructed to determine fair and reasonable compensation for funeral expenses incurred, the jury may have added amounts for burial, a memorial service, a grave and a tombstone. Because the court could not tell what formed the basis for the award and deemed it impermissible for the jury to "just make up a number," it reduced the award to reflect the evidence. The court did not, however, find the verdict perverse.

¶37 The court also found excessive, but not perverse, the award of $350,000 each to Zavala, Maria Jose and Anna Sofia for loss of society and companionship. It noted that the modified jury instruction did not make it completely clear that the $350,000 was a total amount for all survivors. The jury was instructed that "the law provides that the spouse and children cannot recover more than $350,000 for the loss of society and companionship," that it is "a limit on recovery," and that the jury should determine the amount it believed "would reasonably compensate the spouse and each of the children for any loss of society and companionship." Bellin did not object to the instruction given; indeed, it proposed the instruction. If the instruction was unclear, any objection to it is waived. *See* WIS. STAT. § 805.13(3); *see also* ***Gyldenvand v. Schroeder***, 90 Wis. 2d 690, 696-97, 280 N.W.2d 235 (1979).

By the Court.—Judgments affirmed.

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