**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 2, 2019**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2018AP305** **Cir. Ct. No. 2015CV100**

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

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**MARY V. SWANSON,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**GERALD O. GATZKE, D.D.S., INC., GERALD O. GATZKE, D.D.S. AND PROASSURANCE CASUALTY COMPANY,**

**DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,**

**3M COMPANY,**

**SUBROGATED PARTY.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed in part, reversed in part, and cause remanded with directions*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. This is an appeal and cross-appeal of a money judgment entered in favor of Mary Swanson by the circuit court following a jury trial in which the jury returned a verdict in favor of Dr. Gerald Gatzke. Swanson, a former patient of Dr. Gatzke's, sued Dr. Gatzke for dental malpractice. Dr. Gatzke admitted that he was negligent in his treatment of Swanson, but argued that Swanson's own negligence contributed to her injury. The jury found that Swanson was negligent and apportioned liability at 60% to Swanson and 40% to Dr. Gatzke. Swanson moved the circuit court for a new trial. The court denied Swanson's motion but sua sponte changed the jury's apportionment of liability to 50% each. For the reasons discussed below, we conclude that the court erred in changing the jury's apportionment of negligence, but affirm the court's denial of Swanson's motion for new trial.

## *BACKGROUND*

¶2 In the fall of 1997, Swanson was diagnosed with Sjogren's Syndrome. Sjogren's is an autoimmune disease that can affect the production of fluid by salivary glands. Individuals with Sjogren's may not produce enough saliva to keep the mouth clean, which leads to a propensity for oral disease and a significantly increased susceptibility to cavities, oral infections, and oral sores.

¶3 At the time of her Sjogren's diagnosis, Swanson was receiving dental care from Dr. Gatzke. Swanson's rheumatologist, Dr. Jody Hargrove, recommended that Swanson consult with Dr. Nelson Rhodus, a dentist and instructor at the University of Minnesota who had undertaken research in

Sjogren's. Swanson did not consult with Dr. Rhodus, but instead continued to seek treatment from Dr. Gatzke.

¶4 Swanson informed Dr. Gatzke of her Sjogren's diagnosis in May 1998. Swanson's dental records show that between May 1998 and May 6, 2014, Swanson saw Dr. Gatzke sixty-two times for treatment, but during that time, there were multiple instances in which Swanson went long periods of time (twelve months or more) between visits with Dr. Gatzke. Swanson received dental cleanings irregularly, but had approximately twenty-three cavities filled, fourteen crowns placed, four root canals, five teeth extracted (four for cosmetic reasons to address an overbite), and four teeth prepared for a bridge (which related to the extraction of teeth to address the overbite**).**

¶5 Swanson's final two visits with Dr. Gatzke took place on April 29 and May 6, 2014. On April 29, Dr. Gatzke did a full examination and cleaned Swanson's teeth. At that visit, Dr. Gatzke diagnosed a single cavity in tooth #28 and, on May 6, repaired that decay. Dr. Gatzke did not diagnose any other decay in Swanson's teeth.

¶6 On May 11, 2014, Swanson experienced severe tooth pain. Dr. Gatzke's office was not open on that day and Swanson was seen by Dr. Cheryl Lindgren. During Dr. Lindgren's examination of Swanson, Dr. Lindgren observed decay on every one of Swanson's teeth, including under each of Swanson's crowns, which necessitated a total restoration of Swanson's dentition. This restoration included: nineteen crown removals, decay repairs and crown preparations; twenty-one crown placements; nineteen electro-surgeries on Swanson's gums; seven bridge preparations; six extractions; two dental implants; and several root canals.

¶7 Swanson sued Dr. Gatzke for professional negligence. She alleged that Dr. Gatzke was negligent in his treatment of her, and in his failure to diagnose and treat the oral decay identified by Dr. Lindgren. Swanson alleged that as a result of Dr. Gatzke's negligence, she had to undergo multiple dental interventions and treatments, was likely to necessitate further interventions and treatments, had incurred significant dental and health expenses, and was likely to incur in the future significant dental and health expenses.

¶8 The case was tried to a jury. Dr. Gatzke admitted that he was negligent in his dental treatment of Swanson and that his negligence was a cause of Swanson's injury, but alleged that Swanson was contributorily negligent. The jury was left to determine: (1) whether Swanson was negligent with respect to her own dental care; (2) if Swanson was negligent, whether her negligence was a cause of her injury; and (3) if Swanson was negligent and her negligence was a cause of her injury, what percent of negligence by Dr. Gatzke and Swanson caused Swanson's injury; and (4) the sum of money that would compensate Swanson for past and future dental expenses, and past and future pain and suffering. The jury found that Swanson was negligent and that her negligence was a cause of her injury. The jury found that Dr. Gatzke was 40% negligent in causing Swanson's injuries, and that Swanson was 60% negligent in causing her own injuries. The jury found that Swanson's damages were: $30,000 for past dental expenses; no damages for future dental expenses; $25,000 for past pain and suffering; and $5,000 for future pain and suffering.

¶9 Swanson moved the circuit court for a new trial on the grounds that the jury's verdict is contrary to the great weight of the evidence, the award of damages is inadequate, and in the interest of justice. Following a hearing, the court determined that there is sufficient evidence to support the jury's finding of

negligence on the part of both Dr. Gatzke and Swanson, and the jury's award of damages. However, the court determined that the apportionment of damages "is contrary to the weight of the evidence" and "is not supported by a greater weight of the credible evidence." The court denied Swanson's motion for a new trial, but sua sponte changed the jury's apportionment of negligence to assign 50% liability each to Dr. Gatzke and Swanson.[1]

¶10 Dr. Gatzke appeals and Swanson cross-appeals. Additional facts are discussed below as necessary.

## ***DISCUSSION***

¶11 Dr. Gatzke contends that the circuit court erred by changing the jury's apportionment of negligence on special verdict question 5. Swanson cross-appeals, contending that the court erred in denying her motion for a new trial. We address their contentions in turn below.

### *A. The Circuit Court Erred by Changing the Jury's Apportionment of Negligence*

¶12 Special verdict question 5 asked, if the jury found that Swanson was negligent with respect to her own dental health and her negligence was a cause of injury to her: "What percentage of negligence causing injury to [] Swanson do

[1] Under WIS. STAT. § 895.045 (2017-18), a plaintiff may recover against a defendant where the plaintiff's negligence is not greater than the negligence of the person against whom recovery is sought. *See* ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶9, 244 Wis. 2d 720, 628 N.W.2d 842. A plaintiff who is found 50 percent negligent will be able to recover 50 percent of his or her damages from a defendant who is found equally at fault. ***Id.*** However, a plaintiff found 51 percent or more negligent will not be able to recover against the defendant. *See* ***id.*** Thus, Swanson is not able to recover from Dr. Gatzke under the jury's apportionment of negligence, but is able to recover from Dr. Gatzke under the court's apportionment. All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

you assign to" Dr. Gatzke and to Swanson. To repeat, the jury found that Dr. Gatzke was 40% negligent and that Swanson was 60% negligent. Gatzke contends that sufficient evidence was presented at trial to support the jury's answer to question 5. We agree.

¶13 A motion to change a jury's special verdict answer challenges the sufficiency of the evidence to sustain the answer. WIS. STAT. § 805.14(1); ***State v. Michael J.W.***, 210 Wis. 2d 132, 143, 565 N.W.2d 179 (Ct. App. 1997). We review challenges to the sufficiency of the evidence de novo, applying the same standards as the circuit court. ***State v. Wanta***, 224 Wis. 2d 679, 688, 592 N.W.2d 645 (1999). A jury's verdict will not be disturbed if there is "any credible evidence" to support the verdict. ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 408, 331 N.W.2d 585 (1983). On review, we search the record for any such evidence, viewing the evidence in the light most favorable to the verdict. ***Weber v. Chicago & Nw. Transp. Co.***, 191 Wis. 2d 626, 632, 530 N.W.2d 25 (Ct. App. 1995); and ***Heideman v. American Fam. Ins. Grp.***, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991). If credible evidence and any inferences therefrom support the verdict, we must uphold the jury's findings even if there is strong, contrary evidence. *See* § 805.14(1); ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995).

¶14 A person's negligence is a cause of a plaintiff's injury or damage if the negligence was a substantial factor in producing the injury or damage. ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 262, 580 N.W.2d 233 (1998). Swanson asserts that determining whether her negligence was a cause of her injury in this matter "involve[s] special knowledge, skill, or experience" that a layperson does not have and, therefore, a causal connection between her negligence and her injury can only have been established by expert testimony. Swanson argues that

Dr. Gatzke failed to present expert testimony that her negligence was a substantial factor in producing her injuries and, thus, there is not "any credible evidence" to prove that it was.

¶15 "[I]n medical malpractice actions involving matters beyond [] jurors' knowledge as laypersons," the party bearing the burden of proof "must supply an expert witness to testify as to causation." ***Glenn v. Plante***, 2003 WI App 96, ¶10, 264 Wis. 2d 361, 663 N.W.2d 375, *overruled on other grounds*, 2004 WI 24, 269 Wis. 2d 575, 676 N.W.2d 413 (2004). In such cases, the lack of expert testimony as to causation can result in an insufficiency of proof. ***City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.***, 33 Wis. 2d 560, 568, 149 N.W.2d 661 (1967).

¶16 Dr. Gatzke does not dispute Swanson's assertion that this is a complex case requiring expertise regarding whether the negligence of Dr. Gatzke and/or Swanson was a substantial factor in causing Swanson's substantial dental injuries. It is plainly true that numerous factors may have affected Swanson's dentition and led to her need for a complete oral restoration, including Swanson's Sjogren's, the care Swanson took of her teeth and gums, the frequency in which she sought dental care, and the care provided by Dr. Gatzke. Regardless whether an expert witness was required, we agree with Dr. Gatzke that expert testimony supports the jury's finding that Swanson's conduct was a substantial cause of her injuries.

¶17 Dr. Gatzke points to the following as credible evidence supporting the jury's answer to special verdict question 5: testimony by Swanson that she was aware that Sjogren's can lead to severe dental problems; expert testimony that individuals with Sjogren's should have "more regular, frequent visits." Dr.

Gatzke's testimony that there were sometimes long gaps in time between Swanson's visits with him, that he expressed concern to her over the sometime long gaps in time between her visits, that he would tell Swanson that she should come see him to have her teeth examined and cleaned more frequently, and that Swanson refused on more than one occasion to see Dr. Gatzke to have her teeth cleaned; Dr. Gatzke's testimony that he offered her fluoride products for daily use, but that she declined his offer; a medical notation by Dr. Hargrove that in 1997, Dr. Hargrove recommended to Swanson that Swanson see Dr. Rhodus, a dentist specializing in Sjogren's, and testimony by Swanson that she did not make an appointment to see Dr. Rhodus.

¶18 The evidence set forth above is largely factual evidence. In addition to that evidence, Dr. Gatzke also points to the following expert testimony by Dr. Rhodus. Dr. Rhodus testified that over the span of his career, he had treated "four to five hundred different patients" suffering from Sjogren's. Dr. Rhodus testified that he would consult with Sjogren's patients "on their over all disease condition and [the] prevention that they needed to help decrease the likelihood that they would continue to progress with their dental disease." Dr. Rhodus testified that individuals with Sjogren's have an "extremely high[]" risk of developing tooth decay, an approximately 60 to 100 times higher risk of developing cavities than a person without Sjogren's, and an even greater risk of developing decay around the margins of a tooth that has been restored.

¶19 Dr. Rhodus testified that for individuals with Sjogren's, proper care should include "more regular, frequent visits" with his or her dentist and supplemental, prescription-strength fluoride. Dr. Rhodus testified that Swanson has "severe Sjogren's." Dr. Rhodus testified that there were "several gaps" in Swanson's treatment with Dr. Gatzke and that each time Swanson returned to Dr.

Gatzke's care after a gap in treatment, it was for treatment of a cavity. Dr. Rhodus further testified that had Swanson sought treatment from him as recommended by Dr. Hargrove following her Sjogren's diagnosis, they "[p]robably" would not have been in litigation.

¶20 The weight and credibility of witnesses' testimony is a matter for the fact finder, here the jury. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Construing the evidence set forth above, and all reasonable inferences that can be drawn from that evidence, in the light most favorable to the jury's verdict, as we must do, we conclude that there is sufficient evidence that a jury could infer that the extensive decay that Swanson was diagnosed with after she sought treatment from Dr. Lindgren, and the extensive dental work that she had done to treat that decay, was caused more by her failure to seek treatment from a dentist with specialized knowledge of the needs of a patient with Sjogren's and from her failure to seek frequent, regular care from Dr. Gatzke, even when encouraged by Dr. Gatzke to do so, than Dr. Gatzke's treatment of her. We, therefore, agree with Dr. Gatzke that credible evidence supports the jury's answer to special verdict question 5, and conclude that the court erred in changing that answer.

*B. The Circuit Court Did Not Err by Denying Swanson's Motion for a New Trial*

¶21 On cross-appeal, Swanson contends that she should be granted a new trial pursuant to WIS. STAT. § 805.15(1) because: (1) the jury's apportionment of negligence is contrary to the great weight of the evidence; (2) the damage award is inadequate; and (3) in the interest of justice.

¶22 A circuit court's decision to grant or deny a motion for a new trial is discretionary, and will be reversed only if the court erroneously exercised its

discretion. *See* ***Krolikowski v. Chicago & Nw. Transp. Co.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). A court properly exercises its discretion when it examines the relevant facts, applies the correct standard of law, and uses a rational process to reach a reasonable conclusion. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Id.***

*1. The Jury's Apportionment of Liability is Not Contrary to the Great Weight of the Evidence*

¶23 Under WIS. STAT. § 805.15(1), a circuit court may grant a new trial if the jury's verdict is contrary to the "weight of the evidence," which we are directed to mean the great weight and clear preponderance of the evidence. *See* ***Krolikowski***, 89 Wis. 2d at 580 (a court may grant a new trial in the interest of justice where it concludes "the jury[]s findings are contrary to the great weight and clear preponderance of the evidence.") Verdicts can be against the great weight of the evidence even though supported by credible evidence. ***Id.***

¶24 Swanson argues that she is entitled to a new trial because the jury's apportionment was contrary to the great weight of the evidence. Specifically, she argues that the jury's apportionment was insufficiently supported because: (1) she did not have a duty to diagnose and treat her decay; (2) Dr. Toburen, a general dentist and adjunct assistant professor of dentistry, and an expert witness for Dr. Gatzke, estimated that the decay developed during Swanson's last year of treatment with Dr. Gatzke; (3) no witness testified that her conduct was negligent during her last year of treatment with Dr. Gatzke; and (4) Dr. Gatzke

acknowledged that "there was nothing being done from [a] dental perspective" to address the effects of Swanson's Sjogren's.[2] We reject this argument because, in contrast to the evidence pointed to by Swanson, there was evidence from which a jury could reasonably find that Swanson's negligence was greater than Dr. Gatzke's.

¶25 As explained above, the circuit court found, without explanation, that the jury's apportionment of negligence "is contrary to the weight of the evidence," and did not make findings in support of the jury's apportionment.[3] Accordingly, we search the record to determine if the evidence supports the court's discretionary decision. *See* ***Randall***, 235, Wis. 2d 1, ¶7. Doing so, we conclude that the jury's verdict apportioning negligence is not against the great weight and clear preponderance of the evidence and, thus, Swanson is not entitled to a new trial on that basis.

¶26 In a letter from Dr. Hargrove to Dr. Gatzke in 1999, Dr. Hargrove stated that individuals with Sjogren's must have very good oral hygiene and should have their teeth cleaned at least four times per year. Dr. Gatzke testified that during the time that he treated Swanson, Swanson "was not a compliant patient with regard to getting her teeth cleaned." Dr. Gatzke testified that during the twenty-nine years he treated her, Swanson had her teeth cleaned only five

[2] Swanson also asserts that no expert testified that her negligence caused her need for a complete dental restoration. However, we have rejected that assertion above in ¶¶17-20 and need not repeat our reasoning.

[3] The circuit court also stated that the jury's apportionment of greater negligence to Swanson "is unreasonable, especially in the light of the defense [counsel's] suggestion in closing that the negligence of each party be 50%." However, closing arguments are not evidence, *see* ***State v. Jorgensen***, 2008 WI 60, ¶31, 310 Wis. 2d 138, 754 N.W.2d 77, and, as we explain above, the jury's apportionment was not contrary to the great weight of the evidence.

times, and that after Swanson informed him of her Sjogren's diagnosis, she did not have her teeth cleaned for eight years. Dr. Gatzke testified that he would mention to Swanson the long gaps in treatment and Swanson's dental records show that after her diagnosis, there were multiple times in which she went approximately twelve months or longer without obtaining any type of treatment from Dr. Gatzke. Dr. Gatzke also testified that he "continued to offer products," but those products "were turned down."

¶27 As noted above, there was evidence that Dr. Hargrove advised Swanson that Swanson should consult with Dr. Rhodus, a dentist specializing in the treatment of Sjogren's, It is undisputed that Swanson did not do so. And, as previously observed, Dr. Rhodus testified that had Swanson sought treatment from him as recommended by Dr. Hargrove following her Sjogren's diagnosis, they "[p]robably" would not have been in litigation.

¶28 The evidence that Dr. Gatzke was the cause, or predominate cause, of Swanson's injury and the evidence, and the reasonable inferences that could be drawn from that evidence, is not so compelling that we can say the jury erred in its apportionment of liability. We, therefore, reject Swanson's contention that she is entitled to a new trial under WIS. STAT. § 805.15(1) because the jury's apportionment of liability is contrary to the great weight and clear preponderance of the evidence.

2. *Swanson is Not Entitled to a New Trial Based on an Inadequate Award of Damages*

¶29 Swanson contends that she is entitled to a new trial under WIS. STAT. § 805.15(1) because the jury's award of damages is inadequate. "[W]here a jury has answered other questions in the verdict so as to find no liability on the part of

the party charged with negligence," an award of inadequate damages "is not in itself grounds for ordering a new trial." ***Mainz v. Lund***, 18 Wis. 2d 633, 645, 119 N.W.2d 334 (1963). Under Wisconsin's law, a plaintiff cannot recover damages if the plaintiff's negligence exceeds the negligence of the party against whom relief is sought. WIS. STAT. § 895.045(1). The jury found that Swanson's negligence exceeds that of Dr. Gatzke and, thus, Swanson cannot recover damages from Dr. Gatzke. Given our conclusion that the jury's liability finding in this case should not be upset, Swanson's argument that she is entitled to a new trial because the damage award is inadequate is moot.

*3. Swanson is Not Entitled to a New Trial in the Interest of Justice*

¶30 Largely repeating the substance of arguments that we reject for the reasons explained above, Swanson contends that this court should order a new trial in the interest of justice "based upon the lack of evidence" to support the jury's finding that her negligence exceeded Dr. Gatzke's negligence and the jury's inadequate award of damages. *See* WIS. STAT. § 752.35 (court of appeals may grant a new trial in the interest of justice if it is probable that justice has been miscarried). However, we have already concluded that the jury's apportionment of negligence was not contrary to the great weight of the evidence and that any challenge of the jury's damage award is moot. To the extent that Swanson is arguing that statements made by defense counsel during closing argument prejudiced the jury against her, Swanson has not presented this court with a clear, developed argument that statements by counsel were so prejudicial as to warrant a new trial. We, therefore, conclude that there is no basis for granting a new trial in the interest of justice.

## *CONCLUSION*

¶31 For the reasons discussed above, we conclude that the circuit court erred in changing the jury's answer to special verdict question 5, which apportioned negligence between Swanson and Dr. Gatzke. We also conclude that the jury's answer to that question is not contrary to the great weight of the evidence, and that any challenge of the jury's damage award is moot. For those reasons, we conclude that Swanson is not entitled to a new trial and affirm that portion of the court's judgment denying Swanson's motion for new trial. We remand with directions to the circuit court to enter judgment on the verdict as answered by the jury.

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

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