COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 1999

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 98-1053

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

JULIE BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY K. BROWN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

JULIE BROWN, INDIVIDUALLY, SARA MARIE BROWN AND AMANDA JOY BROWN, BY THEIR GUARDIAN AD LITEM, MELITA M. BIESE AND PRIMECARE HEALTH PLAN, INC.,

PLAINTIFFS,

V.

PHYSICIANS INSURANCE CO. OF WISCONSIN, INC., JOHN CHRISTIANSON, M.D., DOUGLAS SLEIGHT, M.D. AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

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

FINE, J. The defendants in this medical-malpractice case appeal, and Julie Brown, as personal representative of the estate of her husband, Gary K. Brown, cross-appeals a judgment entered by the trial court that awarded to Brown as personal representative some $550,000, excluding taxable costs.[1] Gary Brown died in a hospital while under the care of the defendant physicians, John Christianson, M.D., and Douglas Sleight, M.D. The jury found that both physicians were negligent, and awarded to Julie Brown, as personal representative of Gary Brown's estate, $1,000,000 for Gary Brown's conscious pain and suffering on the day he died—from midnight until approximately 6:30 a.m. on August 28, 1994. The trial court granted the defendants' motion for a remittitur, and reduced the amount to $550,000. The defendants contend that there is no evidence to support *any* award for Gary Brown's conscious pain and suffering on August 28. Julie Brown, as personal representative of Gary Brown's estate, argues that the trial court erroneously exercised its discretion in reducing the award. We affirm on both the appeal and the cross-appeal.

1. *The appeal. Sufficiency of the evidence to support an award for Gary Brown's conscious pain and suffering.*

The defendants contend that there is no evidence to support any jury award for Gary Brown's conscious pain and suffering on August 28, 1994, the day

[1] The trial court also entered judgments awarding money to Sara Marie Brown and Amanda Joy Brown, Gary K. Brown's minor children, as well as to Julie Brown personally. These judgments are not at issue on this appeal.

he died. Our review on this issue is severely limited; we give great deference to the jury, and must look at the evidence in the light most favorable to sustaining its verdict. *See* RULE 805.14(1), STATS. ("No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party."); ***Sumnicht v. Toyota Motor Sales, Inc.***, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). Deference to the jury's verdict is even greater when it is approved by the trial court. *See* ***Staehler v. Beuthin***, 206 Wis.2d 610, 617, 557 N.W.2d 487, 489 (Ct. App. 1996).

As the trial court recognized, there was ample evidence from which the jury could have concluded that Gary Brown had conscious pain and suffering between midnight and 6:30 a.m. on August 28, 1994. Gary Brown was admitted to the hospital on August 25 with pain, a distended stomach, and what was later found to be an obstructed bowel. On admission to the hospital, he complained of being "unable to have a bowel movement for the last 8 days."

During the morning of August 28, his heart rate was between 120 and 140 beats per minute, which is significantly faster than normal. He also had an elevated respiratory rate, which, the jury heard, was consistent with pain. Additionally, his bowel was necrotic, which, the jury was told, can cause sharp stomach pain. Finally, there was evidence from which the jury could have concluded that Gary Brown vomited violently—there were gastric acids in his lungs, which were also filled with blood. The jury's implicit conclusion that Gary Brown was awake during at least part of this severe distress was supported by the testimony one of the expert witnesses that people "don't vomit at all after they're

dead," as well as by evidence that he had trouble sleeping that morning. There is ample support for the jury's determination that Gary Brown suffered conscious pain during the morning of August 28.

2. *The cross-appeal. The trial court's determination that a remittitur reducing the jury's award of $1,000,000 to $550,000 was warranted.*

RULE 805.15(6), STATS., provides, as material here:

> If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount.

Rather than undergo a new trial, Julie Brown, as personal representative of Gary Brown's estate, opted to accept the reduction, subject to her contention here that the trial court erred in ordering the remittitur.

RULE 805.15(6), STATS., is a codification of ***Powers v. Allstate Insurance Co.***, 10 Wis.2d 78, 102 N.W.2d 393 (1960):

> It is our considered judgment that we should adopt the rule that where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages, or of having a new trial on the issue of damages.

Id., 10 Wis.2d at 91–92, 102 N.W.2d at 400. A trial court's decision to order a ***Powers***-remittitur under RULE 805.15(6) is vested in the trial court's discretion. ***Badger Bearing, Inc. v. Drives and Bearings, Inc.***, 111 Wis.2d 659, 671–672,

331 N.W.2d 847, 854 (Ct. App. 1983). The trial court must, of course, "resolv[e] any direct conflicts in the testimony in favor of the prevailing party." ***Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.***, 190 Wis.2d 650, 669, 529 N.W.2d 905, 912 (1995). ***Badger Bearing*** states the standard for our review:

> The test to determine abuse of discretion is whether, if the trial court had been sitting as the sole finder of fact and had fixed the damages in the disputed amount, this court would still disturb the finding. *Lutz v. Shelby Mutual Insurance Co.*, 70 Wis.2d 743, 759, 235 N.W.2d 426, 435 (1975). If there is a reasonable basis for the trial court's determination as to the proper amount, it will be sustained. *Id.*

Badger Bearing, 111 Wis.2d at 672, 331 N.W.2d at 854. "[I]t is only in an unusual case that we will disturb the amount which the trial court has fixed as reasonable for the purpose of granting the plaintiff an option to accept judgment in that amount in lieu of a new trial on damages." ***Koele v. Radue***, 81 Wis.2d 583, 589, 260 N.W.2d 766, 768 (1978) (brackets by ***Koele***, internal quotes and quoted source omitted).

The trial court here evaluated carefully the evidence of Gary Brown's pain and suffering, giving the Estate the benefit of any conflicts in the evidence. The trial court assessed Gary Brown's pain and suffering as "short-term," albeit "horrendous," all in the context of his being disoriented and asleep for at least part of the time. It is clear from its analysis that the $550,000 is the amount that it would have set if this had been a bench trial. If it had, there is no doubt but that we would have affirmed the award as not inadequate. This is thus not one of the unusual cases where reversal is appropriate.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

No. 98-1053(CD)

SCHUDSON, J. *(concurring in part; dissenting in part).* I agree with the majority's conclusion on the appeal. I write separately, however, to express my qualified disagreement with the majority's conclusion on the cross-appeal.

If, as the majority maintains, our review of the trial court's determination is simply governed by the "test" articulated in ***Badger Bearing, Inc. v. Drives and Bearings, Inc.***, 111 Wis.2d 659, 672, 331 N.W.2d 847, 854 (Ct. App. 1983)—"whether, if the trial court had been sitting as the sole finder of fact and had fixed the damages in the disputed amount, this court would … disturb the finding," and whether "there is a reasonable basis for the trial court's determination as to the proper amount"—then the majority is correct. It seems, however, that our standard of review may not be so simple. Indeed, it may be that the ***Badger Bearing*** test does not even come into play until and unless the trial court first determines that the jury's award is "excessive" or "clearly excessive."

The confusing case law in this area implies that before a trial court may exercise its discretion to set what it deems to be the appropriate amount of damages, it must first find, based on specific references to the evidence, that the jury's award was "excessive," or "clearly excessive," or, perhaps, "excessive" as defined by a "clearly excessive" standard. Some of the case law also suggests that anything less than "clearly excessive," even in combination with disagreement with the jury's award, is not enough to reduce a jury's award.

For example, in ***Bethke v. Duwe***, 256 Wis. 378, 41 N.W.2d 277 (1950), the supreme court affirmed a trial court's decision declining to reduce an award *even though* the trial court considered the jury's award to be, in the words of the trial court, "'*probably in excess* of what the court would have granted had the case been tried to the court without a jury.'" ***Id.*** at 381, 41 N.W.2d at 278 (emphasis added). "'[T]hat is not the criterion to determine whether or not the verdict should stand,'" the trial court declared, and the supreme court agreed. ***Id.*** The supreme court quoted "[t]he general rule on the matter of damages" in 15 AM. JUR., *Damages*, § 205:

> "In actions sounding in damages merely, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere. As shown elsewhere, *a verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly excessive as to indicate that it was the result of passion, prejudice, or corruption, or it is clear that the jury disregarded the evidence or the rules of law.* * * *
>
> "Since it is for the jury, and not for the court, to fix the amount of the damages, their verdict in an action for unliquidated damages *will not be set aside merely because it is large or because the reviewing court would have awarded less.* Full compensation is impossible in the abstract, and different individuals will vary in their estimate of the sum which will be a just pecuniary compensation. Hence, all that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience. * * *"

Id. at 384-85, 41 N.W.2d at 280 (emphasis added). *See also* ***Fahrenberg v. Tengel***, 96 Wis.2d 211, 236, 291 N.W.2d 516, 527 (1980).

In ***O'Brien v. State Farm Mutual Automobile Insurance Co.***, 17 Wis.2d 551, 117 N.W.2d 654 (1962), the supreme court reversed a trial court's reduction of a jury's damage award because "[t]he trial court does not state that

the evidence did not support the findings of the jury, but *only that the verdict was excessive*." ***Id.*** at 559, 117 N.W.2d at 659 (emphasis added). The court then reiterated:

> "The general rule governing the trial judge or appellate court in determining whether damages are excessive is that since it is for the jury, and not for the court, to fix the amount of the damages, *their verdict will not be set aside merely because it is large or because the reviewing court would have awarded less.* The court relies upon the good sense of jurors to determine the amount of damages and all that the court can do is to see that the jury approximates a fair estimate. Where the question is a close one, it should be resolved in favor of the jury verdict."

Id. at 559-60, 117 N.W.2d at 659 (emphasis added; quoted sources omitted). *See also* ***Coryell v. Conn***, 88 Wis.2d 310, 316, 276 N.W.2d 723, 726 (1979). Even after we decided ***Badger Bearing*** in 1983, this court, as well as the supreme court, continued to invoke the relatively rigorous standards articulated in ***Bethke***, ***O'Brien***, ***Coryell***, and ***Fahrenberg***. *See, e.g.,* ***Finken by Gutknecht v. Milwaukee County***, 120 Wis.2d 69, 78, 353 N.W.2d 827, 832 (Ct. App. 1984); ***Brown v. Maxey***, 124 Wis.2d 426, 440, 369 N.W.2d 677, 684-85 (1985).

Thus, although the case law clouds our standard of review and leaves some doubt about whether and when to apply the ***Badger Bearing*** test, it seems to establish that we must not apply the ***Badger Bearing*** test unless and until the trial court has satisfied the statutory prerequisite: "*If* a trial court determines that a verdict is excessive." § 805.15(6), STATS. (emphasis added). Therefore, before we use the relatively easy ***Badger Bearing*** test to evaluate a trial court's determination of damages, the trial court must apply the far more rigorous standards articulated in ***Bethke***, ***O'Brien*** and their progeny to determine whether the jury's determination of damages was "excessive" or "clearly excessive."

In the instant case, the trial court expressed no criticism of the jurors or their evaluation of the evidence. Indeed, the trial court commented that they "were a good group of jurors and *made good decisions in the verdict*" (emphasis added). Granted, the trial court referred to the evidence and expressed why it would have awarded less. But the trial court never found the jury's verdict to be unreasonable; it never explained why the evidence did not support the jury's damage award. The trial court's disagreement with the jury's reasonable verdict simply is not enough to justify reducing the jury's award.

And although the trial court mentioned that the damage issue "really best is looked at as excessive verdict situation," [sic] it never found the jury's damage determination to be "excessive," much less "clearly excessive." It merely disagreed with the jury's determination. Similar to the circumstances in ***Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.***, 190 Wis.2d 651, 529 N.W.2d 905 (1995), in which the supreme court reversed this court's decision upholding a trial court's decision reducing a jury's damage award, "the circuit court did not evaluate the evidence or point out in which respects the evidence did not support the jury verdict." ***Id.*** at 670, 529 N.W.2d at 913. Here, discussing the evidence and commenting favorably on the jury's "good decisions," the trial court never applied the proper standards and never found the jury's verdict "excessive" or "clearly excessive." Accordingly, on the cross-appeal, I respectfully dissent.