COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 30, 1996

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1886

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

WILLIAM PLUGER,

Plaintiff-Appellant,

v.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., WISCONSIN PATIENTS COMPENSATION FUND, VALLEY ORTHOPEDIC CLINIC, S.C., AND WILLIAM R. RICHARDS, M.D.,

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Wedemeyer, JJ.

LaROCQUE, J. William Pluger appeals a judgment on a verdict dismissing his action against Dr. William Richards and an order denying motions after verdict. Pluger alleged a failure to obtain an informed consent to surgery as required by § 448.30, STATS., 1989-90, as well as negligence in connection with the treatment surrounding his fractured femur. Pluger argues:

(1) The jury's findings of informed consent and no negligence were unsupported by credible evidence; (2) the trial court improperly instructed the jury on both issues; (3) the court erred by excluding evidence of subsequent treatment measures by a different physician; (4) the court erred by excluding impeachment evidence from Richards' deposition testimony, and (5) a new trial is required because the jury's findings are contrary to the great weight and clear preponderance of the evidence. We reject Pluger's arguments and affirm the judgment.

Pluger (d.o.b. 11/9/59) was diagnosed with cancer in his right thigh in 1986. Dr. Donald Hackbarth, an orthopedic oncologist in Milwaukee, treated the cancer by removing the tumor and quadriceps muscle and treating the leg with radiation. This treatment weakened and reduced the blood supply to Pluger's femur. These conditions presented a greater potential for non-healing and infection for fracture injuries.

Pluger suffered an initial non-displaced fracture of his femur in 1988. A non-displaced fracture is one in which the ends of the bone remain in place. A non-displaced fracture heals more readily than a displaced fracture. Hackbarth treated this fracture and left it to heal on its own. Pluger suffered yet another non-displaced femur fracture in 1989, and also fractured his kneecap. At this time, Hackbarth performed a biopsy on the site and, finding no recurrence of cancer, performed surgery to remove the kneecap.

Then, in 1990, Pluger suffered the subject displaced fracture of his femur when he slipped and fell. He managed to drive himself home and lay in pain for several hours, and unsuccessfully tried to reach Hackbarth. Pluger contacted a different doctor, who called in Richards as an orthopedic specialist. Pluger arrived to see Richards at the Appleton Medical Center in a great deal of pain. Before examining Pluger, Richards familiarized himself with Pluger's medical history and reviewed his X-rays. Richards did not confer with the doctors involved in Pluger's prior treatment for cancer and did not review their records.

Richards examined Pluger and discussed treatment options with him. Richards testified that he knew about Pluger's prior radiation therapy and that it put his femur fracture at a high risk of infection and non-healing. For

reasons discussed later, Richards did not inform Pluger of this high risk when he gave Pluger his treatment choices, and Pluger did not know he was at a high risk.

Richards asked Pluger if he would prefer to be stabilized and transferred to Milwaukee to be treated by Hackbarth when he became available. Pluger declined this alternative. Richards then presented Pluger with two primary treatment options. First, he recommended a closed procedure in which Pluger would be placed in traction in the hospital for a number of weeks and then given a spica cast. This procedure would not have exposed the bone to air and presented a lower risk of infection. Pluger declined this treatment because he wanted to avoid an extended stay at the hospital.

Richards also suggested "open intramedullary rodding" in which he would open the fracture site and insert a rod into the bone to properly align and join the ends of the fracture as close as possible. Pluger agreed to the open procedure and signed a consent form.

Richards did not offer Pluger "closed intramedullary rodding" as a treatment option. At trial, Pluger offered the testimony of two physicians that the closed procedure was more appropriate than the open procedure because it presented less risk of an infection. However, a defense expert testified he thought the open procedure was more appropriate.

Richards did not give Pluger a prophylactic antibiotic before surgery or discuss with Pluger the fact that he would not be using one. A prophylactic antibiotic is used to prevent or minimize the chances of infection. Pluger testified that when he signed the informed consent form "I was hurting and I just signed it; ... I felt a lot of pain, and I wanted help now, is what I felt."

Richards performed the surgery, and discharged Pluger shortly thereafter. Pluger saw Dr. James Sargent, Richards' partner, on his first follow-up visit. Pluger complained of pain in his thigh. Pain is a common sign of infection. However, X-rays showed that Pluger's fracture had compressed somewhat, a finding Sargent felt explained Pluger's pain. Pluger showed none of the normal signs of infection such as swelling, redness, tenderness, heat or

induration around the wound. However, prior radiation treatment suppresses these signs of infection.

Pluger's next medical visit occurred a few weeks later with Richards. Pluger complained of increasing pain. Richards did not order any testing for infection. He noted that the rod had moved since the surgery. Although migration of the rod is a sign of infection, it could also be caused by compression of the bone. Richards also concluded the pain was due to migration of the rod and told Pluger to come back in a month.

Pluger's pain worsened before his scheduled follow-up visit with Richards, so he contacted Hackbarth, who asked Pluger to see him in Milwaukee. Hackbarth performed exploratory surgery and noted massive infection at the fracture site. Hackbarth determined the infection had progressed to the point that Pluger's leg needed to be amputated.

Pluger brought this action alleging medical malpractice and that Richards did not obtain his informed consent when he performed the surgery. A jury found that Richards was not negligent in his care and treatment of Pluger and that Richards did obtain Pluger's informed consent. The trial court denied various motions to set aside the verdict.

VALIDITY OF INFORMED CONSENT VERDICT

The concept that a physician obtain an informed consent from a patient "is based on the tenet that in order to make a rational and informed decision about undertaking a particular treatment or undergoing a particular surgical procedure, a patient has the right to know about significant potential risks involved in the proposed treatment or surgery." ***Johnson v. Kokemoor***, No. 93-3099, slip op. at 13 (Wis. Mar. 20, 1996). "Although an action alleging a physician's failure to adequately inform is grounded in negligence, it is distinct from the negligence triggered by a physician's failure to provide treatment meeting the standard of reasonable care. The doctrine of informed consent focuses upon the reasonableness of a physician's disclosures to a patient rather than the reasonableness of a physician's treatment of that patient." ***Id.*** at 12 n.16. "What constitutes informed consent in a given case emanates from what a

reasonable person in the patient's position would want to know" and is described as the prudent patient standard. ***Id.*** at 15. To recover damages under the doctrine of informed consent, a plaintiff must show: (1) The physician had a duty to inform under § 448.30, STATS.[1], and (2) a reasonable person in the plaintiff's position would have refused to consent to surgery by the defendant if he would have been fully informed of its attendant risks and advantages. *See* ***id.*** at 2.

In ***Martin v. Richards***, 192 Wis.2d 156, 175, 531 N.W.2d 70, 78 (1995), our supreme court interpreted the duty imposed by the statute: "the extent of the physician's disclosures is driven ... by what a reasonable person under the circumstances then existing would want to know, i.e., what is reasonably necessary for a reasonable person to make an intelligent decision with respect to the choices of treatment or diagnosis." The application of a statute to a given set of facts is a question of law we review de novo. *See* ***Fire Ins. Exchange v. Basten***, 195 Wis.2d 260, 264, 536 N.W.2d 150, 151-52 (Ct. App. 1995). However, we sustain a jury's factual findings if there is credible evidence to support the findings. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984).

When the verdict has the trial court's approval, this is even more true. The credibility of the witnesses and the weight

---

[1] Section 448.30, STATS., 1989-90, provides:

Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:

(1) Information beyond what a reasonably well-qualified physician in a similar medical classification would know.

(2) Detailed technical information that in all probability a patient would not understand.

(3) Risks apparent or known to the patient.

(4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.

(5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.

(6) Information in cases where the patient is incapable of consenting.

> afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. ... This court is not to search the record on appeal for evidence to sustain a verdict that the jury could have reached, but did not.

Id. at 305-06, 347 N.W.2d at 598 (citations omitted). Therefore, while we review whether § 448.30, STATS., was properly applied to the facts de novo, we accept the jury's findings of the facts unless there is no credible evidence to support the findings.

A. Failure to disclose risk of infection

First, Pluger argues that Richards was required to inform him about his high risk of infection and consequent risk of amputation due to his irradiated leg. A physician must warn the patient of the risks associated with the patient's condition to obtain the patient's informed consent with respect to treatment. ***Scaria v. St. Paul Fire & Marine Ins. Co***., 68 Wis.2d 1, 11, 227 N.W.2d 647, 653 (1975). The expert witnesses in this case concurred that Pluger's leg presented a high risk of infection due to his prior radiation treatment. Pluger argues that a reasonable person in his position would want to know about the high risk of infection when choosing treatment.

Richards concedes that Pluger's high risk of infection is the type of condition that must normally be disclosed. However, Richards argues he was not required to disclose this information because Pluger's emotional distress was sufficient to bar a rational consideration of his treatment options. *See* ***id***. at 13, 227 N.W.2d at 653. We believe that whether the evidence supported Richards' contention was a matter of resolving competing reasonable inferences from the evidence. As discussed later, the court instructed the jury that if a reasonably prudent doctor knows that "disclosure would so seriously upset the patient that the patient would not have been able to weigh rationally the risks of refusing to undergo recommended treatment," then the doctor is not required to disclose that information.

Pluger broke his leg and waited for a number of hours before seeking medical attention. He acknowledged that he was in a great deal of pain when he arrived at the clinic prior to surgery. Pluger described his state of mind when he gave his written consent to surgery: "I was hurting and I just signed it; ... I felt a lot of pain, and I wanted help now, is what I felt." Richards testified that Pluger was "extremely apprehensive" when he discussed surgical options with him. A defense expert testified that Richards' conduct in this area was appropriate because full disclosure would be very upsetting to the patient. Thus, credible evidence supported the jury's implicit finding that a reasonable physician would conclude that Pluger was unable to rationally weigh the high risk of infection in his decision to accept or to refuse surgery.

B. Disclosure: Prophylactic antibiotics

Next, Pluger argues that, given the high risk of infection in his irradiated bone, he reasonably would have wanted to know the benefits and risks of prophylactic antibiotics and the option to use one. Richards argues that he was not required to disclose this information because the decision whether to use an antibiotic involved detailed technical information that a patient probably would not understand. *See* § 448.30(2), STATS., 1989-90.

The jury was instructed that "[a] doctor is not required to give a detailed technical medical explanation that the patient probably would not understand ...." There was extensive trial testimony from experts concerning the debate in the medical community over the use or exclusion of prophylactic antibiotics. To make an informed judgment about a prophylactic antibiotic, Pluger would have had to understand the risk of infection, the increased danger of contracting an antibiotic resistant infection if antibiotics were used and the potential that he would have an allergic reaction to the antibiotic. There was credible evidence from which the jury could reasonably infer that the complexity of the debated factors constituted detailed technical information the patient probably would not understand.

C. Disclosure: Closed method of rodding

Pluger also argues that Richards failed to inform him about the closed method of intramedullary rodding as an alternate, viable mode of treatment. In the closed procedure, the surgeon makes a three- to four-inch incision in the buttocks, inserts a reamer to remove the marrow and create a canal in the bone, and drives a rod through the canal down to the fracture site. Richards testified that the closed procedure was not appropriate in Pluger's case because removal of marrow would increase the risk of non-healing and he worried the bone would split as the rod was driven through it. Despite some contrary testimony from Pluger's experts, the jury verdict implicitly shows acceptance of Richards' testimony that the closed procedure was not appropriate. We will not upset this finding because determining credibility of witnesses is within the province of the jury. ***Fehring***, 118 Wis.2d at 305, 347 N.W.2d at 598. Based on Richards' opinion, the closed procedure was not an "alternate, viable medical mode[] of treatment" about which Pluger had to be informed under § 448.30, STATS., 1989-90.

D. Disclosure: Post-surgery conditions

Finally, Pluger argues that Richards failed to inform him of facts relevant to his condition after treatment. For instance, Richards did not tell Pluger his bone looked sick or that the pain and the migration of the rod in his leg could be signs of infection. Pluger claims he would have seen Hackbarth sooner if Richards would have disclosed this information.

We reject Pluger's argument. Pluger did not present any evidence that Hackbarth's post-surgical treatment would have offered any less risk of infection than treatment by Richards, or any evidence that the routine post-surgical care at issue is the type with which physicians are likely to have different success rates.

Our supreme court recently held that the doctrine of informed consent includes the obligation to refer the patient elsewhere when different physicians have "substantially different success rates." ***Johnson***, slip op. at 30. In ***Johnson***, the plaintiff introduced evidence that the morbidity/mortality rate for the brain surgery that paralyzed the plaintiff was about 30% when the defendant doctor performed the surgery and about 10% when an expert in the field performed the surgery. ***Id.*** at 8. ***Johnson*** held that the duty of informed consent required the doctor in ***Johnson*** to inform the patient of alternate

treatment by a more experienced doctor, but noted "[i]t is a rare exception when ... the difference in experience of the surgeon ... will impact the risk of morbidity/mortality as was the case [in ***Johnson***], thereby requiring referral." ***Id.*** at 37. The court stated that "[i]n the vast majority of significantly less complicated cases, such a referral would be irrelevant and unnecessary." ***Id.*** We distinguish the result in ***Johnson*** in light of the evidence of the increased risk from the treating physician and the evidence of the complexity of the procedure involved. Richards had no duty under the doctrine of informed consent to refer Pluger to Hackbarth for post-surgical care.

In light of the jury's verdict finding no failure to obtain Pluger's informed consent, we need not address Pluger's "cause" contention: that as a matter of law a reasonable person in Pluger's position would have refused treatment had he been properly informed.

INFORMED CONSENT JURY INSTRUCTIONS

Physicians have a duty to inform their patients about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. *See* § 448.30, STATS., 1989-90. Paragraph 6 of the comments to WIS J I—CIVIL 1023.2, the standard informed consent jury instructions, states that the trial court may instruct the jury to excuse the doctor's nondisclosure of such information based on the exceptions listed in § 448.30 if the evidence in the case makes giving the instructions advisable.[2] The trial court in our case gave this additional instruction to the jury over Pluger's objection. Pluger argues that the trial court erred by giving this

[2] Paragraph six of the comments to WIS J I—CIVIL 1023.2 provides:

> The evidence presented in a case may make advisable the giving of additional instructions, such as: a doctor is not required to give a detailed technical medical explanation that the patient probably would not understand; ... to disclose information to the patient if the doctor as a reasonable, prudent person knows that disclosure would so seriously upset the patient that the patient would not have been able to weigh rationally the risks of refusing to undergo the recommended treatment; to advise the patient of risks apparent or known to the patient .... Scaria v. St. Paul Fire & Marine Ins. Co., [68 Wis.2d 1, 227 N.W.2d 297 (1975)].

instruction because no credible evidence of any of the statutory exceptions to disclosure existed. Next, Pluger argues that even if the evidence warranted giving the instruction, we should reverse the judgment because the instructions contain a misstatement of law. We disagree.

Generally, a trial court has wide discretion in instructing a jury as long as the instructions fully and fairly inform the jury of the rules and principles of law applicable to the case. ***D.L. v. Huebner***, 110 Wis.2d 581, 624, 329 N.W.2d 890, 909 (1983). However, whether credible evidence exists to support giving the instruction is a question of law we review de novo. ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 60, 443 N.W.2d 50, 54 (Ct. App. 1989). Further, whether the instructions correctly state the law is a question of law we review de novo. ***State v. Neumann***, 179 Wis.2d 687, 699, 508 N.W.2d 54, 59 (Ct. App. 1993).

We conclude that credible evidence justified the trial court's inclusion of the exceptions to disclosure in the informed consent instruction. As to the issue of the risk of infection, as recounted earlier, there was evidence from which the jury could reasonably infer that Richards met the common law exception adopted in ***Scaria***. A doctor need not disclose information to a patient if the patient is emotionally distraught and the information would upset the patient to the extent that he could not intelligently weigh his treatment options. As to the issue of the option of prophylactic antibiotics, the evidence reasonably implied that Pluger's treatment involved complex medical issues that a jury could reasonably infer that Pluger would not understand, excusing disclosure under § 448.30(2), STATS., 1989-90.[3]

Nevertheless, Pluger argues that the standard jury instruction misstates the law because it includes the ***Scaria*** exception. He argues that this exception no longer exists in Wisconsin because it is not expressly included in § 448.30, STATS. This statute became effective after ***Scaria*** was decided.

[3] Richards also argues that a jury could reasonably infer Pluger would have known about the risk of infection in treating his leg because he had fractured his femur twice after his radiation therapy, excusing disclosure under § 448.30(3), STATS., 1989-90. We do not address this argument because we decide the instructions issue on other grounds.

We reject Pluger's argument. Our supreme court recently noted that § 448.30, STATS., codified ***Scaria***, implying that statute was not intended to substantively change ***Scaria***. ***Johnson***, slip op. at 29.

Further, Pluger did not specifically raise this objection at the jury instruction conference as required by § 805.13(3), STATS.[4] That section requires the grounds for objection to be stated on the record "with particularity" to afford the opposing party and trial counsel the opportunity to correct the error and to afford appellate review of the grounds for the objection. *See* ***Air Wisconsin, Inc. v. North Cent. Airlines, Inc.***, 98 Wis.2d 301, 311, 296 N.W.2d 749, 753 (1980). At the jury instruction conference, Pluger's counsel objected to the instructions on the following grounds:

> I think it unduly emphasizes the defense theory in this case and it is not necessary to instruct, to give the jury instructions on the matter of informed consent, and given the Court's determination, that, in my opinion, unduly emphasizes the defense position on that issue. ... [T]o the extent ... the informed consent questions are inconsistent with those that I requested of the Court, I do object to them.

This general objection did not notify either the trial court or Richards of any argument concerning the validity of the exception to disclose noted in ***Scaria***. Because Pluger did not bring the nature of the alleged error into focus in his objection at trial, he did not preserve the objection for review. *See* ***Air Wisconsin***, 98 Wis.2d at 311, 296 N.W.2d at 753.

VALIDITY OF NEGLIGENCE VERDICT

---

[4] Section 805.13(3), STATS., provides in part:

> Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection *with particularity* on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict. (Emphasis added.)

Pluger asserts that no credible evidence supported the jury's verdict that Richards was not negligent in three areas: his failure to use a prophylactic antibiotic, his use of open intramedullary rodding, and his post-operative care. We sustain a jury's factual findings if there is credible evidence to support the findings. ***Fehring***, 118 Wis.2d at 305, 347 N.W.2d at 598.

Richards testified that he did not use prophylactic antibiotics because their overuse can have ill effects. A defense expert testified that Richards' conduct was reasonable because using antibiotics can mask infection by killing nonresistant bacteria, leaving resistant bacteria to smolder in the patient's body. We conclude that credible evidence supports the jury verdict that Richards was not negligent for choosing not to use prophylactic antibiotics.

Next, Pluger contends that credible evidence does not support the jury's verdict that Richards was not negligent because he used the open method of intramedullary rodding instead of the closed method. A defense expert testified the open method was more appropriate than the closed method in Pluger's case. Richards testified that the closed procedure could have split Pluger's femur because it involves inserting a rod in the center of the bone, whereas the open procedure does not present this risk. Credible evidence supported the jury's conclusion that the open method was appropriate.

Finally, Pluger contends that no credible evidence supports the jury's verdict that Richards was not negligent in his post-surgical care of Pluger. After surgery, the rod Richards placed in Pluger's leg migrated and Pluger complained of massive pain. Pluger points to evidence that these are both signs of infection and that Richards did not test him for infection or adequately monitor him after surgery.

Richards testified that Pluger's bone compressed, which could cause the rod to migrate. Richards also testified that Pluger's pain could have been caused by the migration of the rod itself and that Pluger's leg did not show any external signs of infection. Further, Hackbarth testified that he did not tap the site for infection when Pluger saw him after the operation because there were no signs of infection other than the pain, and he believed the pain might have come from migration of the rod. Finally, a defense expert testified that it would be unusual for an infection to cause pain but show no external signs. We

conclude that credible evidence supports the jury's verdict that Richards' post-operative treatment was not negligent.

JURY INSTRUCTIONS REGARDING NEGLIGENCE

Pluger claims that the court failed to tailor the jury instruction to the facts of this case. As noted, a trial court has wide discretion in instructing a jury. ***Huebner***, 110 Wis.2d at 624, 329 N.W.2d at 909. However, jury instructions should be tailored to fit the specific facts of the case and should not be used if prejudicial to a party. *See* ***Leibl v. St. Mary's Hospital***, 57 Wis.2d 227, 233, 203 N.W.2d 715, 718 (1973). "Misleading instructions ... which may cause jury confusion are a sufficient basis for a new trial." ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis.2d 594, 603, 541 N.W.2d 173, 177 (Ct. App. 1995).

The trial court gave the following jury instruction:

> If you find that more than one method of treatment for William Pluger's condition is recognized, then Doctor Richards was at liberty to select any of the recognized methods. Doctor Richards was not negligent merely because he made a choice of a recognized alternative method of treatment if he used the required care, skill, and judgment in administering that treatment. This is true even though other medical witnesses may not agree with him on the choice that was made.

Pluger asserts the instruction conveys the meaning that if Richards chose a treatment appropriate for a typical fractured femur, but not appropriate for a fractured femur weakened by radiation such as Pluger's, then Richards would not be negligent. We disagree. The instruction says if "more than one method of treatment for *William Pluger's condition* is recognized, then Doctor Richards was at liberty to select any of the recognized methods." (Emphasis added.) The parties presented substantial evidence about Pluger's specific condition and the fact that it was not a typical femur fracture. The requested instruction was sufficiently tailored to fit the evidence and was not misleading.

EXCLUSION OF EVIDENCE REGARDING SUBSEQUENT USE OF ANTIBIOTICS

Hackbarth used a prophylactic antibiotic when he performed surgery on Pluger's prior fractures and when he performed exploratory surgery on the area Richards treated. Pluger wanted to introduce Hackbarth's explanation of how and why he used an antibiotic in these procedures. The trial court excluded this evidence under § 904.03, STATS.[5]

The trial court has discretion to admit or exclude evidence, and we will not upset its decision on appeal absent an erroneous exercise of discretion. ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 456, 523 N.W.2d 274, 280 (Ct. App. 1994). We affirm a trial court's discretionary decision if it has a "reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***Id.***

The trial court questioned the relevance of Hackbarth's use of antibiotics because he performed different procedures from those Richards performed. The court noted that introduction of the use of antibiotics in these procedures may confuse the jury. The trial court also noted that there would be considerable testimony on this issue, implying that the evidence of Hackbarth's use of antibiotics was cumulative. We conclude that the trial court did not abuse its discretion because it made a reasonable application of § 904.03, STATS., to the relevant facts of the case.

EXCLUSION OF RICHARDS' DEPOSITION TESTIMONY

Next, Pluger argues that the trial court erred by prohibiting the use of Richards' deposition testimony. At a deposition, Richards testified that he offered Pluger two methods of treatment: traction and open medullary

---

[5] Section 904.03, STATS., provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

rodding. At trial, Richards testified that he gave Pluger the option of being taken to Milwaukee for treatment. Pluger argues that he should have been able to use the deposition testimony as a means of impeachment, assumably to show that Richards was untruthful in his deposition by failing to mention that he gave Pluger the option to be transferred to Milwaukee as a "method of treatment."

At trial, defense counsel objected to the use of the deposition testimony on the grounds that it is not a prior inconsistent statement, assumably referring to § 804.07(1)(a), STATS. Under that section, a party may use *any* deposition testimony for the purpose of "contradicting or impeaching the testimony of deponent as a witness." The trial court sustained the objection, assumably on the grounds that the deposition testimony was not inconsistent so it was not admissible under § 804.07(1)(a). We agree the trial court erred because Richards is a party to the case and § 804.07(1)(b), STATS., provides that "[t]he deposition of *a party* ... may be used by an adverse party for any purpose." (Emphasis added.) However, we do not reverse the judgment because we conclude that any error is harmless.

We will not reverse for error unless it is probable the jury was misled so that it would have reached another result if the error had not occurred. ***La Chance v. Thermogas Co.***, 120 Wis.2d 569, 577, 357 N.W.2d 1, 5 (Ct. App. 1984). We conclude that knowledge of Richards' arguably inconsistent testimony does not make it probable the jury would have reached a different result. Pluger does not demonstrate any other reason why his failure to use Richards' deposition testimony prejudiced his case. Therefore, we will not reverse for the error.

NEW TRIAL IN THE INTEREST OF JUSTICE

Pluger argues that even if we conclude that there is credible evidence to support the verdict, we should order a new trial in the interest of justice because the jury's findings were contrary to the great weight and clear preponderance of the evidence. *See* ***DeGroff v. Schmude***, 71 Wis.2d 554, 563, 238 N.W.2d 730, 735 (1976). We disagree. We have examined the record and

conclude that the jury's findings were not against the great weight of the evidence.

CONCLUSION

Credible evidence supported the jury's verdict that Richards did not fail to obtain Pluger's informed consent before conducting open intramedullary rodding and that Richards was not negligent. The trial court's informed consent jury instruction was supported by the evidence and Pluger failed to preserve an objection that the instructions misstated the law. In the area of negligence, the trial court adequately tailored its jury instruction to the condition of Pluger's weakened leg. The trial court did not abuse its discretion by excluding evidence about the use of antibiotics during subsequent procedures. The exclusion of a small part of Richards' deposition testimony was harmless error. The jury's findings were not against the great weight of the evidence, so a new trial is not required in the interest of justice.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.