COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP568 **Cir. Ct. No. 2008CV153**

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

KIM WESTRICH AND ELIZABETH WESTRICH,

PLAINTIFFS-RESPONDENTS,

V.

MEMORIAL HEALTH CENTER, INC. AND
PHYSICIANS INSURANCE COMPANY OF WI, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Taylor County: ROBERT R. RUSSELL, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. This case is before us for the second time. Kim Westrich fell while sedated following a colonoscopy at Memorial Health Center, Inc. ("the Hospital"). In 2011, a jury found that the Hospital's negligence exceeded Westrich's negligence, and it awarded damages to Westrich and his

wife, Elizabeth. The Hospital appealed, and we reversed the judgment and remanded for a new trial. Following a second trial in September 2016, a jury again found in favor of the Westriches and awarded them damages.

¶2 The Hospital now appeals for the second time, arguing: (1) the circuit court erroneously exercised its discretion by preventing the Hospital from naming new expert witnesses on remand; (2) one of the jurors in the second trial was objectively biased; (3) the circuit court erroneously accepted the Westriches' offer to waive that portion of their damages representing the jury's allocation of fault to Westrich, in order to cure an inconsistency in the jury's verdict; (4) the jury's verdict violates the five-sixths rule; and (5) the Hospital is entitled to a new trial in the interest of justice due to the cumulative effect of these and other errors. We reject each of the Hospital's arguments and affirm.[1]

BACKGROUND

¶3 In our previous opinion, we summarized the relevant factual background as follows:

> Kim Westrich underwent a colonoscopy procedure on August 19, 2005. During the procedure, he was administered Propofol, a sedative. He was given only enough Propofol to make him sleepy and lightly sedated. Propofol wears off quickly, and Westrich's nurse noted that shortly after the procedure he was awake, conversing, and responding appropriately to questions.
>
> Westrich was transferred to the ambulatory care center where nurse Susan Moretz monitored his recovery.

[1] In its "Statement of the Case," the Hospital additionally asserts that the circuit court improperly prevented it from taking a trial deposition of Westrich's employer. However, the Hospital does not develop any argument regarding this issue in either of its appellate briefs. We therefore decline to address it further.

> Westrich complained of stomach cramps, and Moretz helped him out of bed and walked him to the bathroom. Before she left, Moretz instructed Westrich not to get up from the toilet until she returned, and pointed out a call light he could use if he needed assistance.
>
> While on the toilet, Westrich felt a sharp pain that caused him to jump up. He hit his head on the bathroom wall and fell. He stood, opened the bathroom door, and attempted to get back to his bed without assistance. He apparently fell again and was discovered by nurse Pamela Lugo.

Westrich v. Memorial Health Ctr., Inc., No. 2011AP2357, unpublished slip op. ¶¶5-7 (WI App Apr. 9, 2013) (***Westrich I***). One week later, Westrich reported to his physician that he had lost his senses of taste and smell. ***Id.***, ¶8.

¶4 In 2008, the Westriches filed the instant medical negligence lawsuit against the Hospital. In April 2011, a non-unanimous jury found that the Hospital "and/or one or more of its nurses" were causally negligent, but Westrich was also causally negligent. The jury apportioned forty percent of the fault to Westrich and sixty percent to the Hospital and/or its nurses, and it found the Westriches had sustained $830,000 in damages. In August 2011, the circuit court entered a judgment against the Hospital in the amount of $498,000.

¶5 The Hospital appealed from the August 2011 judgment, and the Westriches cross-appealed. We concluded the Hospital was entitled to a new trial because the circuit court "erroneously excluded evidence of an alternative cause for some of Kim Westrich's injuries." ***Id.***, ¶1. Although not strictly necessary to our disposition, we also addressed two additional issues that we determined were likely to arise on remand. ***Id.***, ¶¶2-4. First, we concluded the circuit court had properly prevented the Westriches from introducing national patient fall statistics into evidence at trial. ***Id.***, ¶¶24-30. Second, we rejected the Westriches' argument

that the jury was precluded, as a matter of law, from finding Westrich contributorily negligent. ***Id.***, ¶¶32-38.

¶6 On remand, a second trial took place in September 2016. Once again, the jury returned a non-unanimous verdict in the Westriches' favor. The Hospital filed postverdict motions seeking a new trial on ten separate grounds. As relevant to this appeal, the Hospital argued the circuit court had erred by prohibiting the Hospital from naming additional expert witnesses prior to the second trial. The Hospital further argued one of the jurors in the second trial was objectively biased because he failed to disclose during voir dire that he knew the Westriches' daughter. The Hospital also argued the verdict was defective because the jury's answers to two questions on the verdict form were inconsistent, and the inconsistency violated the Hospital's constitutional and statutory rights to a verdict supported by five-sixths of the jury panel.

¶7 In addition, the Hospital argued the circuit court erred by: (1) admitting certain testimony that the Westriches' standard-of-care expert had provided during the first trial; (2) preventing one of the Hospital's experts from testifying that Westrich had certain personality disorders, even though his testimony to that effect had been admitted at the first trial; and (3) excluding "critical impeachment evidence" regarding one of the Westriches' experts. The Hospital also sought a new trial based on "improper remarks" the Westriches' attorney made during his closing argument, and because the jury's damages award was "both perverse and based on immaterial arguments on damages."

¶8 The circuit court denied each of the Hospital's postverdict motions for a new trial. It ultimately entered a judgment awarding the Westriches

$1 million in damages. The Hospital now appeals. Additional facts are set forth below.

DISCUSSION

I. Refusal to permit the Hospital to name new expert witnesses

¶9 On remand after our decision in ***Westrich I***, the Hospital retained new counsel. It subsequently moved the circuit court to enter a new scheduling order setting forth three categories of deadlines. First, the Hospital requested deadlines for the parties "to list expert witnesses, including new or replacement experts as necessary." The Hospital specifically informed the court it intended to name two new expert witnesses—one specializing in taste and smell, and another specializing in nursing standards of care. Second, the Hospital requested a deadline for it to perform limited discovery regarding Westrich's updated medical records and any additional damages the Westriches claimed to have sustained since the previous trial. Third, the Hospital requested a deadline for filing pretrial dispositive and evidentiary motions.

¶10 In response, the Westriches stipulated to the Hospital's request for a deadline regarding limited discovery related to updated medical records and additional damages. The Westriches also stated they did not oppose the Hospital's request for a deadline to file pretrial motions. However, the Westriches opposed the Hospital's request for deadlines to name the new expert witnesses. They argued the Hospital had not "demonstrated any cause why [it] should be permitted to name new expert witnesses" in those areas, and the interests of justice weighed against granting the Hospital's motion.

¶11 The circuit court agreed to enter a new scheduling order regarding the limited discovery and motion practice to which the Westriches had stipulated. However, the court denied the Hospital's request to set deadlines for the parties to name new expert witnesses. Relying on ***Westrich I***, the court reasoned that, in remanding for a new trial, the court of appeals "did not envision starting over with a new scheduling order with new deadlines, new experts, new discovery." The court further stated the Hospital had not provided a "good reason" for a new scheduling order.

¶12 The parties agree that the circuit court's denial of the Hospital's request for deadlines to name new expert witnesses is subject to the erroneous exercise of discretion standard of review. *See* ***Alexander v. Riegert***, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987) (noting that whether to modify a scheduling order is within the circuit court's discretion); ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶9, 317 Wis. 2d 460, 767 N.W.2d 272 (stating circuit courts "have inherent power, within the limits of their discretion, to control their dockets"). We will uphold a circuit court's discretionary decision if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991). Whether the court applied the appropriate legal standard in exercising its discretion is a question of law that we review independently. ***Parker***, 317 Wis. 2d 460, ¶12.

¶13 The Hospital argues the circuit court applied an incorrect legal standard when it concluded the Hospital had not provided a "good reason" for a new scheduling order. The Hospital asserts this was tantamount to a conclusion that the Hospital had not shown "cause" for a new scheduling order. In ***Schneller***,

the plaintiffs moved the circuit court to extend a scheduling order's deadline to name experts. ***Schneller***, 162 Wis. 2d at 303-04. On appeal, our supreme court concluded the circuit court properly exercised its discretion in denying the plaintiffs' motion. ***Id.*** at 306. In particular, the court concluded the circuit court "applied the proper standard of law by expressly finding that there was no cause for the [plaintiffs'] failure to comply with the scheduling order." ***Id.*** at 307.

¶14 The Hospital argues ***Schneller***'s "cause" standard is inapplicable here because, unlike ***Schneller***, this case does not involve a motion to amend an existing scheduling order. The Hospital contends there was no scheduling order in place following our remand in ***Westrich I***, and it therefore moved the circuit court to enter a new scheduling order. The Hospital further argues that, even if the circuit court's pre-existing scheduling order remained in place following our remand in ***Westrich I***, ***Schneller***'s "cause" standard is no longer good law because it was based on a statutory provision that was subsequently repealed. *See* ***Schneller***, 162 Wis. 2d at 307 (citing WIS. STAT. § 802.10(2));[2] S. CT. ORDER 95-04, 191 Wis. 2d xxi (eff. Apr. 19, 1995). Accordingly, the Hospital argues the circuit court should have applied the balancing test articulated in ***Alexander***—a pre-***Schneller*** case—when analyzing the Hospital's motion for deadlines to name new experts.

¶15 Ultimately, we need not decide whether the circuit court should have used ***Schneller***'s "cause" standard or ***Alexander***'s balancing test to decide the

[2] ***Schneller v. St. Mary's Hospital Medical Center***, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991), did not specify which version of the Wisconsin Statutes it relied upon. In this opinion, all future references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Hospital's motion. Under either standard, we conclude the court did not erroneously exercise its discretion.

¶16 Using the "cause" standard, the circuit court reasonably concluded the Hospital had failed to provide a "good reason" for setting new deadlines to name experts. At the time the circuit court denied the Hospital's motion, a full trial on the Westriches' claims had already taken place. Nine years had elapsed since Westrich's fall, and the Westriches' lawsuit had been pending for six years. Both parties had the opportunity to—and did—name expert witnesses prior to the first trial. The only reason the Hospital provided to support its claimed need to name new experts is that it had retained different counsel on remand. However, the circuit court could reasonably conclude the mere fact that the Hospital's new attorneys wanted to pursue a different strategy during the second trial was not a good reason to permit the Hospital to name new experts, which would have resulted in added expense for the Westriches and would have further delayed the resolution of their claims. Although the Hospital asserts on appeal that it had a "right to alter its defense strategy for the new trial," it does not provide any authority in support of that assertion.[3] Moreover, the circuit court's order did not prevent the Hospital's new counsel from pursuing a different strategy during the

[3] In ***Alexander v. Riegert***, 141 Wis. 2d 294, 297, 300, 414 N.W.2d 636 (1987), our supreme court concluded the circuit court had erroneously exercised its discretion by refusing a request by the plaintiffs, who had retained new counsel, to modify a scheduling order to permit them to name additional expert witnesses. However, ***Alexander*** is distinguishable because the plaintiffs' first attorney in that case had been ordered to withdraw based on a conflict of interest—namely, that his firm had previously represented one of the defendants. ***Id.*** at 296-97. The ***Alexander*** court emphasized that the first attorney's failure to name appropriate experts may have been influenced by his conflict of interest. ***Id.*** at 300. As this court later observed, "[T]he holding in ***Alexander*** protects the client from the adverse effects of a conflict of interest, not from incompetency of counsel." ***Camelot Enters., Inc. v. Mitropoulos***, 151 Wis. 2d 277, 283, 444 N.W.2d 401 (Ct. App. 1989). There is no allegation in this case that the Hospital's prior attorneys were in any way influenced by a conflict of interest.

second trial; it merely prevented counsel from naming new experts in support of that strategy change.

¶17 The result is the same under ***Alexander***'s balancing test. There, our supreme court stated that, in assessing the plaintiffs' request to modify a scheduling order to permit them to name new experts, the circuit court was required to balance "the integrity of the scheduling order reflecting the court's calendar and the defendant's apparent completion of trial preparation," *see* ***Alexander***, 141 Wis. 2d at 300, against the plaintiffs' interest in fully presenting their case, *see* ***id.*** at 301. Under this standard, the Hospital argues it should have been allowed to name new experts because: (1) no trial date had been set at the time it filed its motion; (2) it had recently retained new counsel for the retrial; (3) its request to name two new experts was narrow in scope and would not have resulted in repetitive discovery; and (4) the additional experts would have allowed the Hospital "to fairly present its case" and would have "aid[ed] the jury in its assessment of the controversy at trial."

¶18 We acknowledge that these factors weigh in favor of the Hospital's position. However, on the other side of the scale, we must consider that, at the time the circuit court denied the Hospital's motion, the Westriches' claims had been pending for an extended period of time. A full trial on those claims had already taken place. Permitting the Hospital to name different or additional experts would have resulted in added cost and delay. The court could reasonably conclude the Hospital's interest in naming those experts did not outweigh these countervailing factors. Under these circumstances, we cannot conclude the circuit court erroneously exercised its discretion by denying the Hospital's motion.

¶19 The Hospital asserts the circuit court "predicated its ruling on the erroneous belief" that our opinion in ***Westrich I*** "intended to curb post-remand pretrial activities." The Hospital contends that belief was mistaken because, when discussing the parties' arguments regarding the admissibility of patient fall statistics, this court stated:

> Our analysis should sound a cautionary note for the parties and court on remand. If the Westriches again seek to use the statistics at trial, they must offer an expert with the requisite personal knowledge, offer the statistics for a purpose other than the truth of the matter asserted, or make use of an available exception to the hearsay rule.

Westrich I, No. 2011AP2357, unpublished slip op. ¶31. Based on this passage, the Hospital argues ***Westrich I*** "expressly contemplated further pretrial activities after remand."

¶20 The Hospital reads the foregoing passage from ***Westrich I*** too broadly. In that excerpt, we merely suggested that, on remand, *if* the Westriches chose to offer certain statistical evidence, they might be afforded the opportunity to designate an expert as to that specific, limited issue. We did not, however, indicate that the circuit court on remand would be required to allow the Westriches to name such an expert. Moreover, the Westriches did not seek leave to name an expert regarding the statistical evidence on remand; instead, the Hospital sought to name different or additional experts regarding taste and smell and nursing standards of care. Under these circumstances, the cited excerpt from ***Westrich I*** does not contradict the circuit court's reasonable conclusion that, as a general matter, this court "did not envision starting over with a new scheduling order with new deadlines, new experts, new discovery." Nor did our conclusion in ***Westrich I*** that the Hospital was entitled to a new trial because the circuit court "erroneously excluded evidence of an alternative cause for some of Kim

Westrich's injuries," ***id.***, ¶1, suggest that the Hospital would be permitted to name new experts on remand.

¶21 Finally, the Hospital argues the circuit court erroneously exercised its discretion by "[d]isregard[ing]" the reasons the Hospital proffered in support of its request to name new experts. However, those reasons were set forth in the Hospital's circuit court brief, and the court expressly stated during its oral ruling that it had reviewed the parties' briefs before issuing its decision. While the court did not expressly address the Hospital's reasons for seeking to name new experts, that failure does not require reversal of the court's decision. "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." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Here, for all of the reasons stated above, we conclude the circuit court did not erroneously exercise its discretion by refusing to set deadlines for the parties to name new experts.

II. Juror bias

¶22 During jury selection, the Westriches' attorney asked whether any of the prospective jurors knew either of the Westriches' children, James and Ciara.[4] Only two prospective jurors responded to that question. Juror 35 indicated he had gone to school with James but had not seen him since graduating in 2010. Juror 44 reported that he and Ciara worked for the same employer and had previously worked on the same shift.

[4] In the trial transcript, the Westriches' daughter's name is spelled "Sierra." However, in their appellate briefs, both parties spell her name "Ciara."

¶23 After trial, the Hospital learned that Juror 77, who served on the jury panel, also knew Ciara Westrich. According to defense investigator Laura Minerva, when asked after trial about his "overall impression" of Kim Westrich, Juror 77 responded, "I don't know. I know his daughter. One of my friend's [sic] dated her." Minerva's report further states:

> [Juror 77] said he probably should have said something when he realized it [i.e., that he knew Ciara] but didn't. I asked when it was he realized it and he said it was when Kim was on the stand, he mentioned his daughter's name and then [Juror 77] put two and two together!

The Hospital argues it is entitled to a new trial because Juror 77 was objectively biased, in that he knew the Westriches' daughter but failed to disclose that fact during voir dire.

¶24 Prospective jurors are presumed to be impartial. ***State v. Funk***, 2011 WI 62, ¶31, 335 Wis. 2d 369, 799 N.W.2d 421. "The party challenging a juror's impartiality bears the burden of rebutting this presumption and proving bias." ***Id.*** Here, in order to establish that it was entitled to a new trial based on juror bias, the Hospital was required to prove that: (1) Juror 77 incorrectly or incompletely responded to a material question during voir dire; and (2) it is more probable than not that, under the circumstances of this case, Juror 77 was biased against the Hospital. *See* ***id.***, ¶32. It appears undisputed that the Hospital has met its burden of proof as to the first of these elements. The operative question is therefore whether the Hospital has proven it is more probable than not that Juror 77 was biased against it. *See* ***id.***

¶25 Wisconsin courts have recognized three types of juror bias: statutory bias, subjective bias, and objective bias. ***Id.***, ¶36. Only objective bias is at issue here. When assessing objective bias, we are not concerned with the

challenged juror's actual state of mind—that is, whether he or she was, in fact, impartial. *See* ***id.***, ¶¶37-38. Instead, we ask "whether [a] reasonable person in the individual prospective juror's position could be impartial." ***State v. Faucher***, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999).

¶26 When reviewing a circuit court's decision regarding objective bias, we accept the court's factual findings unless they are clearly erroneous, but whether those facts fulfill the legal standard for objective bias is a question of law. ***Funk***, 335 Wis. 2d 369, ¶30.

> Although we do not defer to a circuit court's decision on a question of law, where the factual and legal determinations are intertwined, as they are in determining objective bias, we give weight to the circuit court's legal conclusion. We have said that we will reverse a circuit court's determination in regard to objective bias "only if as a matter of law a reasonable judge could not have reached such a conclusion."

Id. (quoting ***Faucher***, 227 Wis. 2d at 721).

¶27 In denying the Hospital's motion for a new trial based on juror bias, the circuit court concluded the Hospital had not met its burden to prove Juror 77 was objectively biased because, under the circumstances, a reasonable person in his position could have been impartial. We cannot say, as a matter of law, that a reasonable judge could not have reached that conclusion. *See* ***id.*** There is no evidence Juror 77 had a close relationship with Ciara Westrich. He merely indicated he that "kn[e]w" Ciara because one of his friends had dated her at some point in the past. There is nothing in the record to indicate when Juror 77's friend dated Ciara, or how frequently Juror 77 came into contact with Ciara during that time period. Under these circumstances, the circuit court appropriately characterized Juror 77's relationship with Ciara as "distant."

¶28 That characterization is further supported by the fact that Juror 77 did not initially realize Kim Westrich was Ciara's father and only "put two and two together" when Kim mentioned Ciara's name during his testimony. If Juror 77 had an even moderately close relationship with Ciara, one would expect he would have immediately realized Kim's relationship to Ciara during voir dire. On these facts, the circuit court reasonably concluded the Hospital had not met its burden to prove it was more probable than not that Juror 77 was objectively biased—that is, that a reasonable juror in his position could not have been impartial. *See* ***id.***, ¶¶32, 38.

¶29 The Hospital argues the circuit court's conclusion regarding objective bias is contrary to ***Funk***. There, our supreme court stated:

> In cases involving a juror who was not forthcoming during voir dire and subsequently sat on the jury, a circuit court is to consider the following three, non-exclusive factors to determine objective bias:
>
> (1) did the question asked sufficiently inquire into the subject matter to be disclosed by the juror;
>
> (2) were the responses of other jurors to the same question sufficient to put a reasonable person on notice that an answer was required;
>
> (3) did the juror become aware of his or her false or misleading answers at anytime during the trial and fail to notify the trial court?

Id., ¶39 (quoting ***Faucher***, 227 Wis. 2d at 727). The Hospital argues all three of the ***Funk*** factors are "clearly present" in this case. It contends the circuit court erred by failing to rely on these factors and instead basing its decision on "immaterial" considerations.

¶30 We disagree. ***Funk*** expressly states that the three factors listed therein are "non-exclusive." ***Id.*** The circuit court acknowledged the existence of

those factors, but it correctly stated they were "just three of a number of factors that the Court could consider making a decision regarding [objective] bias." The court then determined that, under the circumstances of this case, other factors demonstrated the Hospital had failed to prove that Juror 77 was objectively biased. Again, we cannot say, as a matter of law, that a reasonable judge could not have reached that conclusion. *See* ***id.***, ¶30.

¶31 The Hospital argues any characterization of Juror 77's relationship with Ciara as "distant" is "speculative and, more importantly, misses the point." The Hospital notes that, because Juror 77 failed to respond during voir dire when asked whether any of the potential jurors knew the Westriches' children, the Hospital was deprived of the opportunity to question Juror 77 about the nature of his relationship with Ciara. However, because the Hospital is the party seeking a new trial based on Juror 77's alleged bias, it has the burden to prove it is more probable than not Juror 77 was biased. *See* ***id.***, ¶32. Following trial, the Hospital could have asked Juror 77 additional questions regarding the nature of his relationship with Ciara.[5] The Hospital either failed to do so or failed to submit Juror 77's responses in support of its postverdict motion.

[5] WISCONSIN STAT. § 906.06(2) would have prevented Juror 77 from testifying or providing an affidavit or statement regarding

> any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

That statute would not, however, have prevented Juror 77 from providing additional information about the nature of his relationship with Ciara.

¶32 The Hospital also observes that, when the defense investigator asked Juror 77 what his thoughts were about the case, he responded, "Both attorneys come in and you have the plaintiff and defendant. And if the defendant is going to settle you know they are in the wrong. It was a waste of time." The defense investigator then asked, "So it came out that there were settlement negotiations?" Juror 77 responded, "Not until after the trial. You just figure if they are willing to settle then they did something wrong. If they did something wrong, why waste our time?" The Hospital contends the fact that the parties had engaged in settlement negotiations "was not publicly available" but "may have been information known to Ciara Westrich." The Hospital therefore argues one could reasonably infer that Juror 77 discussed the case with Ciara after the trial, which would support a further inference that he and Ciara had "a more intimate relationship" than the circuit court believed.

¶33 The Hospital's argument in this regard is purely speculative. The Hospital has not produced any evidence that Juror 77 learned of settlement negotiations from Ciara Westrich, or that Ciara actually was aware of any settlement negotiations in this case. Again, in order to obtain a new trial, the Hospital had the burden to prove it was more probable than not that Juror 77 was objectively biased.

¶34 The evidence in the record supports the circuit court's finding that Juror 77's relationship with Ciara was "distant," and the Hospital presented no evidence to contradict that finding. On this record, the court reasonably concluded the Hospital had failed to meet its burden to prove objective bias—i.e., it failed to prove it was more probable than not that a reasonable person in Juror 77's position could not have been impartial.

III. Inconsistent verdict

¶35 The verdict form that was submitted to the jury in this case contained nine questions. Question 1 asked the jury whether the Hospital's nurses were negligent in the care and treatment of Westrich, and Question 2 asked whether their negligence was a cause of Westrich's injuries. The jury answered both of those questions in the affirmative. Questions 3 and 4 asked the jury, respectively, whether the Hospital was negligent "in [its] failure to have a written fall policy and/or a written fall training program for its nurses," and whether its negligence was causal. Again, the jury answered both of those questions in the affirmative. The jury also answered "Yes" to Question 5, which asked whether Westrich was negligent. However, in response to Question 6, which asked whether Westrich's negligence was causal, the jury responded "No."

¶36 Immediately after Question 6, the verdict form stated, "**ANSWER THE FOLLOWING QUESTION ONLY IF YOU HAVE ANSWERED 'YES' TO QUESTIONS NO. 2 AND/OR 4 AND 6. OTHERWISE, PLEASE GO TO QUESTION NO. 9.**"[6] The next question—Question 7—asked the jury to apportion negligence between Westrich, on one hand, and the Hospital "and/or its Nursing Staff," on the other. In answering Question 7, the jury attributed seventy-five percent of the total negligence to the Hospital and/or its nursing staff, and twenty-five percent to Westrich.

[6] We observe this language is somewhat unclear. It was apparently intended to convey that the jury should answer Question 7 if it answered "Yes" to: (1) Question 2 and/or Question 4; and (2) Question 6. However, it could also be interpreted to mean that the jury should answer Question 7 if it answered "Yes" to: (1) Question 2; *and/or* (2) Questions 4 and 6. Under the second interpretation, the jury could have determined it should answer Question 7 based solely on the fact that it responded "Yes" to Question 2, regardless of how it answered Questions 4 and 6.

¶37 It is undisputed the jury's verdict was inconsistent, in that it found Westrich's negligence was not causal but then apportioned to him twenty-five percent of the total negligence. As a general rule, "when a verdict is inconsistent, such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial." ***Westfall v. Kottke***, 110 Wis. 2d 86, 98, 328 N.W.2d 481 (1983). However,

> [w]here the verdict, because of the inconsistent answers, will not support a judgment for 100 per cent of the damages, but plaintiff *prefers* to take judgment for the amount which the verdict will support if the inconsistency be resolved against the plaintiff, there is no sound reason for the delay and expense of a new trial merely to resolve the inconsistency.

Id. at 99 (quoting ***Erdmann v. Wolfe***, 9 Wis. 2d 307, 314, 101 N.W.2d 44 (1960)) (emphasis in ***Westfall***). Accordingly, a circuit court has "discretion" to "amend a verdict when the party injured by the inconsistency waives a portion of its damage claim and the waiver does not result in a change of the prevailing party as found by the jury." ***Id.*** at 99. A court should reject such a waiver, however, when: (1) "the jury apportioned negligence by such a narrow margin that would indicate a new trial could arrive at a different result"; or (2) "the facts indicate that there could be a close question on the apportionment of negligence." ***Id.*** at 100. A circuit court's decision whether to reject a waiver based on either of these grounds is reviewed under an erroneous exercise of discretion standard.

¶38 Here, the circuit court properly exercised its discretion by accepting the Westriches' offer to waive twenty-five percent of their damages. The court concluded the jury's apportionment of twenty-five percent negligence to Westrich and seventy-five percent to the Hospital and/or its nurses was not a "close call" and did not indicate "that a new trial could result in a contrary result on the

negligence issue." We agree with that assessment. Although the Hospital notes that the first trial resulted in an apportionment of only sixty percent negligence to the Hospital and its nurses, we do not find that fact persuasive. Taken together, the results of the first and second trials show that two separate juries found the Hospital and its nurses more than fifty percent at fault for Westrich's injuries. This reality supports the circuit court's conclusion that a new trial would not lead to a different result.

¶39 The circuit court also appropriately concluded that "the pertinent facts in this case did not reveal a close question on the apportionment of negligence." In support of its argument that the court erred in this respect, the Hospital cites evidence supporting its position that it was not causally negligent and, in any event, Westrich's negligence exceeded the Hospital's. However, our review of the record indicates there was ample evidence from which a reasonable jury could conclude both that the Hospital was causally negligent and that its negligence exceeded Westrich's. The mere existence of some evidence supporting the Hospital's position is insufficient to demonstrate that there could be a "close question" in this case regarding the apportionment of negligence. *See* ***Westfall***, 110 Wis. 2d at 100.

¶40 The Hospital emphasizes that the jury "did not return a unanimous verdict." Jurors 61 and 52 dissented as to Question 2, concluding the nurses' negligence was not causal. Juror 62 dissented as to Question 4, concluding the Hospital's negligence was not causal. Juror 20 dissented as to Question 5, concluding Westrich was not negligent. Finally, Jurors 62 and 52 dissented as to Question 6, concluding Westrich's negligence was causal.

¶41 The Hospital argues the number of dissenting jurors, in and of itself, "weighs in favor of the proposition that a retrial could result in a defense verdict." We are not persuaded. Again, two trials have been conducted in this case, both of which resulted in verdicts in favor of the Westriches. Although some jurors dissented as to various questions in both trials, the mere presence of dissenters does not convince us the apportionment of negligence in this case could be a "close question." *See* ***id.***

¶42 The Hospital further argues one could reasonably infer, based on the number of dissenters, "that the jury's apportionment of comparative fault was the product of compromises during deliberation." Specifically, the Hospital contends the jury's assessment of twenty-five percent negligence against Westrich "might have been a compromise to entice jurors who would not otherwise have found [the Hospital] causally negligent to switch sides, thereby avoiding a deadlocked panel." This argument, however, is purely speculative. We therefore decline to consider it further.[7]

¶43 In summary, the circuit court properly exercised its discretion in concluding that: (1) the jury did not apportion negligence by such a narrow margin as to indicate that a new trial could arrive at a different result; and (2) the facts did not suggest there could be a "close question" on the apportionment of negligence. *See* ***id.*** Accordingly, the court properly exercised its discretion by accepting the Westriches' offer to waive twenty-five percent of their damages in order to eliminate the inconsistency created by the jury's answers to Questions 6

[7] The Hospital also contends "the gravity of having so many dissenting jurors is compounded by the potential that Juror No. 77 was biased." However, we have already rejected the Hospital's juror bias argument.

and 7. In light of that waiver, the verdict's inconsistency provides no basis for the Hospital to obtain a new trial.

IV. Violation of the five-sixths rule

¶44 The Wisconsin Constitution provides for the right to a jury trial in all cases at law, "[p]rovided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof." WIS. CONST. art. I, § 5. Pursuant to that authority, the legislature enacted WIS. STAT. § 805.09(2), which states: "A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."

¶45 The Hospital argues the jury's verdict in this case violates the five-sixths rule because ten jurors "concluded that Mr. Westrich's negligence did not cause his injuries," but the same ten jurors "later assessed comparative fault between Mr. Westrich and [the Hospital]."[8] In other words, the Hospital contends the same ten jurors did not conclude: (1) that Westrich's negligence was causal; and (2) that twenty-five percent of the total negligence was attributable to Westrich. Citing multiple cases, the Hospital asserts that "[i]f the jury answers the comparative fault question, then the same ten jurors must all agree on answers on the plaintiff's negligence and cause, the defendant's negligence and cause, and the comparison of negligence between the two."

[8] The Hospital asserts that whether the jury's verdict violated the five-sixths rule is a question of law for our independent review. The Westriches do not dispute this assertion. We therefore independently review whether a five-sixths violation occurred.

¶46 We reject the Hospital's contention that a five-sixths violation occurred in this case. In each of the cases the Hospital cites, the jury appropriately answered the negligence, causation, and comparison questions; however, the same ten jurors did not agree on each question. That is not the case here. Instead, in this case, ten jurors found that Westrich was not causally negligent, and all twelve jurors then inappropriately answered the comparison question. The fact that the jury erroneously answered the comparison question renders its verdict inconsistent, subject to the standards set forth in ***Westfall***. It does not result in a five-sixths violation. To hold otherwise would mean that all inconsistent verdicts—even those where all twelve jurors agreed as to all questions—would violate the five-sixths rule. Such a result would abrogate ***Westfall***, which expressly held that a circuit court has discretion to accept an inconsistent verdict "when the party injured by the inconsistency waives a portion of its damage claim and the waiver does not result in a change of the prevailing party as found by the jury." ***Westfall***, 110 Wis. 2d at 99.

¶47 Moreover, even assuming the jury's verdict in this case should be analyzed using the five-sixths rule rather than the standards for inconsistent verdicts, our supreme court has recognized that a dissenting vote "may be disregarded when the result thereof operates in favor of the objecting party." ***Lorbecki v. King***, 49 Wis. 2d 463, 467, 182 N.W.2d 226 (1971). Here, the jurors who assessed twenty-five percent comparative fault against Westrich did so in favor of the objecting party—i.e., the Hospital. The Hospital therefore cannot argue that those "dissenting" votes gave rise to a five-sixths violation.

¶48 The Hospital contends a second five-sixths violation occurred in this case because Jurors 52 and 61 dissented from the jury's finding that the nurses' negligence was causal, Juror 62 dissented from the finding that the Hospital's

negligence was causal, and Juror 20 dissented from the finding that Westrich was negligent. Because these four jurors dissented from questions regarding negligence and causation, the Hospital argues they were disqualified from answering the comparative negligence question, leaving only eight jurors competent to answer that question. *See* ***Fleischhacker v. State Farm Mut. Auto. Ins. Co.***, 274 Wis. 215, 220, 79 N.W.2d 817 (1956) ("[J]urors who dissent from a finding of negligence or its causality, which is material to a comparison of negligence, are disqualified from answering the question of comparative negligence.").

¶49 We reject this argument for two reasons. First, the Hospital did not raise it in the circuit court. We need not consider arguments raised for the first time on appeal. *See* ***State v. Tentoni***, 2015 WI App 77, ¶12 n.6, 365 Wis. 2d 211, 222, 871 N.W.2d 285. Second, as explained above, because the jury in this case answered Question 6 in the negative, it was not required to—and should not have—answered Question 7, the comparative negligence question. However, the jury did answer Question 7, attributing twenty-five percent of the total negligence to Westrich. The jury's answer in that regard benefitted the Hospital. As such, the Hospital cannot now argue that some of the jurors who answered Question 7 were not competent to answer that question. *See* ***Lorbecki***, 49 Wis. 2d at 467 (stating a dissenting vote "may be disregarded when the result thereof operates in favor of the objecting party").

V. New trial in the interest of justice

¶50 Finally, the Hospital argues it is entitled to a new trial in the interest of justice because the real controversy has not been fully tried, or because it is probable justice has miscarried. *See* WIS. STAT. § 752.35. Specifically, the

Hospital argues it was "unduly prejudiced" by the cumulative effect of the "errors" discussed above, along with several additional errors. We have already rejected the Hospital's arguments regarding the circuit court's refusal to allow the Hospital to name new expert witnesses, juror bias, and defects in the jury's verdict. Those issues are therefore irrelevant to a cumulative prejudice analysis. We now further conclude, for the reasons explained below, that the Hospital's additional claims of error lack merit.

¶51 First, the Hospital argues it was prejudiced by the circuit court's "erroneous and inconsistent rulings regarding the admission of pertinent expert testimony." (Capitalization omitted.) We review a circuit court's decision to admit or exclude expert testimony under the erroneous exercise of discretion standard. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687.

¶52 During the first trial in this case, Yolanda Smith, R.N., provided expert testimony for the Westriches on the standard of care. Following our remand in ***Westrich I***, the Westriches moved to read in Smith's prior trial testimony during the second trial, due to her unavailability. The Hospital did not oppose the Westriches' motion; however, it sought to make new objections to Smith's testimony, which it had not raised during the first trial. The circuit court denied the Hospital's request to raise these new objections.

¶53 We conclude the circuit court properly exercised its discretion. Because Smith was unavailable to testify at the second trial, permitting the Hospital to raise new objections to her prior trial testimony would have been unfair to the Westriches. As the Westriches aptly note, permitting new objections would have left them "in the untenable position of having no ability to ask [Smith]

any additional, clarifying questions, lay additional foundation to cure foundational issues newly raised by the Hospital, or further demonstrate her expertise in response to the newly raised objections to her qualifications." The Hospital had the opportunity to—and did—raise objections during Smith's testimony at the first trial, and it was also able to fully cross-examine Smith at that time. Moreover, the Hospital fails to develop any argument on appeal explaining why it was prejudiced by the admission of any of Smith's prior testimony.

¶54 The Hospital argues the circuit court further erred by preventing the Hospital's neuropsychology expert, Thomas Hammeke, from testifying that Westrich had certain personality disorders, even though Hammeke had presented that testimony during the first trial. The Hospital asserts this ruling was inconsistent with the court's decision to prohibit new objections to Smith's testimony. We do not agree that the court's treatment of these witnesses was inconsistent. Unlike Smith, Hammeke testified live at the second trial. The court emphasized this distinction during a sidebar, in which it told the Hospital's attorney, "I completely understand your argument about if Dr. Hammeke wasn't here and we simply had a transcript. Yes, that changes things. But we have him here." Moreover, the court conducted a proper admissibility analysis, concluding the probative value of Hammeke's proffered testimony—"if there would be any probative value"—was substantially outweighed by the risk of unfair prejudice. *See* WIS. STAT. § 904.03. On this record, we conclude the court did not erroneously exercise its discretion by excluding Hammeke's testimony.

¶55 The Hospital also argues the circuit court erroneously excluded "critical impeachment evidence" regarding Dr. Alan Hirsch, the Westriches' neurology expert on taste and smell. Hirsh did not testify in person at the second trial. Instead, his videotaped deposition testimony was played for the jury. During

Hirsch's cross-examination, the Hospital had played an infomercial in which Hirsch advocated on behalf of Sensa, a weight-loss product he had developed that was ultimately the subject of a Federal Trade Commission (FTC) complaint against Hirsch and several other parties. The Hospital also introduced as exhibits during Hirsh's deposition a "Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief" that was entered against Hirsch and others in the FTC's lawsuit, as well as an FTC press release regarding that lawsuit.

¶56 The circuit court excluded those portions of Hirsh's deposition testimony pertaining to the Sensa evidence. The court reasoned the FTC complaint, the stipulated final judgment, the Sensa infomercial, and the FTC press release had minimal relevance to the issues presented at trial, and what little relevance they did have was outweighed by the risk of unfair prejudice. *See* ***id.*** The court explained, "I want to make this evidence that's presented to the jury in this case as easily digestible as possible. I don't want the jury to get confused. I don't want the jury to be misled." The court further found that the Sensa materials were "collateral" to the issues raised in the Westriches' lawsuit.

¶57 We conclude the circuit court did not erroneously exercise its discretion by excluding the evidence regarding Hirsch's involvement with Sensa.[9] The court reasonably concluded that evidence had minimal relevance to the issues presented for the jury's determination—namely, whether the Hospital and/or its nurses were negligent, and whether that negligence was a cause of Westrich's

[9] The Hospital contends the Westriches "did not even object" to this evidence. While the Hospital is correct that the Westriches did not object to the Sensa evidence during Hirsch's videotaped deposition, they were not required to do so. *See* WIS. STAT. § 804.07(2), (3)(c)1. Before the second trial, the Westriches properly filed a motion in limine to exclude the Sensa evidence.

injuries. To the extent the Sensa materials were probative of Hirsch's credibility, we agree with the circuit court that their probative value was minimal, given that the FTC never made any finding that Hirsch committed deceptive acts or engaged in false advertising in connection with Sensa. The court also reasonably determined the minimal probative value of this evidence was outweighed by the risk of unfair prejudice to the Westriches and the likelihood the evidence would confuse or mislead the jury.

¶58 In addition, WIS. STAT. § 906.08(2) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in § 906.09, may not be proved by extrinsic evidence." Stated differently, sec. 906.08(2) "forbids use of extrinsic evidence to impeach a witness' credibility on a collateral matter." ***State v. Olson***, 179 Wis. 2d 715, 723, 508 N.W.2d 616 (Ct. App. 1993). "A matter is collateral if the fact to which error is predicated could not be shown in evidence for any purpose independently of the contradiction." ***Id.*** at 724.

¶59 Here, the circuit court determined the extrinsic evidence regarding Hirsch's involvement with Sensa was "collateral" to the issues raised by the Westriches' lawsuit. The court properly exercised its discretion in that regard because the Sensa evidence could not have been admitted for any purpose other than to impeach Hirsch's credibility. *See* ***id.***; *see also* ***State v. Spraggin***, 71 Wis. 2d 604, 623, 239 N.W.2d 297 (1976) (indicating a circuit court has discretion to determine whether a matter is collateral). WISCONSIN STAT. § 906.08(2) therefore provides additional support for the court's decision to exclude the Sensa evidence.

¶60 The Hospital next argues it is entitled to a new trial in the interest of justice because the Westriches' attorney made improper remarks during his closing argument. First, the Westriches' attorney told the jury that "[w]e all hear about frivolous lawsuits," but "[y]ou don't hear as much about frivolous defenses." Second, the Westriches' attorney stated the Hospital had failed to "accept responsibility" for Westrich's injuries. Third, the Hospital argues the Westriches' attorney insinuated that defense counsel had convinced one of the Hospital's expert witnesses to lie on the stand.

¶61 We agree with the circuit court that none of these remarks provide a basis to grant the Hospital a new trial. The court properly instructed the jury that it was to make its decision "solely on the evidence offered and received at trial," and that "[r]emarks of the attorneys are not evidence." We presume the jury followed these instructions. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). We therefore agree with the circuit court that the Hospital has not shown the jury's verdict likely would have been more favorable to the Hospital absent the Westriches' attorney's allegedly improper remarks.

¶62 Finally, the Hospital argues it is entitled to a new trial because the jury's damages award was perverse, due to "[i]mmaterial" arguments on damages by the Westriches' counsel. At the time of Westrich's fall, the Hospital carried liability insurance with a limit of $1 million per occurrence, as required by statute. *See* WIS. STAT. § 655.23(4)(b)2. Pursuant to § 655.23(5), the Hospital's liability for the Westriches' claims was therefore limited to $1 million. As a result, in order to recover damages exceeding $1 million, the Westriches were required to name the Wisconsin Injured Patients and Families Compensation Fund ("the Fund") as a party. *See* WIS. STAT. § 655.27(1). Although the Westriches initially named the Fund as a party, they stipulated to its dismissal prior to the first trial.

¶63 During the second trial, the Westriches' attorney asked the jury to award the Westriches $1.3 million in damages. The jury awarded them $1.47 million.[10] The Hospital argues that award was perverse because, given the Westriches' inability to recover damages exceeding $1 million, the court should have barred their attorney from advocating for damages greater than that amount. In the alternative, the Hospital contends the court should have instructed the jury that the Westriches could not recover any damages exceeding $1 million.

¶64 We do not find the Hospital's argument regarding damages persuasive. By agreeing to dismiss the Fund from their lawsuit, the Westriches did not concede they had sustained only $1 million in damages or waive their right to prove that their damages exceeded that amount. They merely agreed $1 million was the most they could recover, regardless of the actual amount of the jury's damages award. In addition, if the Hospital were correct that the circuit court was required to either prevent the Westriches from requesting more than $1 million in damages or to inform the jury of that limit, the jury would likely conclude it could not award the Westriches damages in excess of $1 million, even if it believed their actual damages exceeded that amount. Then, given the apportionment of negligence, the Westriches could ultimately recover far less than $1 million, even though the jury believed the Westriches had sustained much greater damages. That result would be patently unfair. Furthermore, it would represent an arbitrary limitation on the jury's ability to award damages that is not mandated by any of the relevant statutes. For these reasons, we conclude it was not inappropriate for

[10] As discussed above, the circuit court accepted the Westriches' offer to waive twenty-five percent of the damages the jury awarded them. This resulted in a net verdict of $1,102,500 in the Westriches' favor. The court then granted the Hospital's motion to reduce the net verdict to $1 million, pursuant to WIS. STAT. § 655.23(5).

the Westriches' attorney to argue they had sustained damages exceeding $1 million, nor was the circuit court required to instruct the jury about the existence of that limit.[11]

¶65 Two previous court of appeals opinions support our conclusion that the circuit court did not err: ***Olson v. Darlington Mutual Insurance Co.***, 2006 WI App 204, 296 Wis. 2d 716, 723 N.W.2d 713 (***Olson I***), and ***Olson v. Darlington Mutual Insurance Co.***, 2009 WI App 122, 321 Wis. 2d 125, 772 N.W.2d 718 (***Olson II***). After sustaining an injury, Olson filed suit against various defendants, demanding "judgment not to equal or exceed the amount necessary for removal to federal court, $75,000." ***Olson I***, 296 Wis. 2d 716, ¶2. After Olson reached a confidential settlement with one defendant, one of the remaining defendants moved the circuit court to compel disclosure of the settlement amount. ***Id.*** The circuit court granted that motion based on judicial estoppel, finding Olson was required to disclose the settlement amount in order to allow the remaining defendants to assess their remaining potential liability "within Olson's asserted $75,000 of damages." ***Id.***

¶66 We reversed the circuit court's decision, concluding judicial estoppel did not require disclosure of the settlement amount. ***Id.***, ¶11. In a concurring

[11] The Hospital speculates that the Westriches' attorney advocated for an inflated damages award "as a means of offsetting any comparative fault the jury might assign to Mr. Westrich." The Hospital argues that, had the jury been informed of the $1 million limit, it could have "used that knowledge to assess the credibility of the plaintiffs' position on damages." However, as noted above, by agreeing to dismiss the Fund the Westriches did not acknowledge their damages were less than the $1 million limit. Instructing the jury on that limit therefore would have had no bearing on the Westriches' credibility. In addition, the Hospital's claim that the Westriches' attorney inflated their damages in order to offset any comparative fault the jury might attribute to Westrich is purely speculative. The Hospital does not develop any argument that the record did not support the Westriches' request for $1.3 million in damages.

opinion, Judge Deininger went further, opining, "[N]ot only is the settlement amount not discoverable at the present time, it is not admissible at trial and plays no role in determining the amount of any judgment Olson may obtain against the remaining defendants." ***Id.***, ¶12 (Deininger, J., concurring). In support of that conclusion, Judge Deininger explained:

> Because she has limited the damages she seeks in this litigation to an amount less than $75,000, Olson cannot obtain a judgment against the Webers and Darlington Mutual that awards more than that amount of damages. Olson did *not* allege, however, that she *suffered* less than $75,000 in damages. Rather, she simply chose, for strategic reasons, to limit any recovery in this litigation to less than that figure. I conclude that Olson's strategic choice is not unlike that of a small claims plaintiff who has a claim against a defendant that exceeds $5,000 but chooses to proceed under WIS. STAT. ch. 799, thereby limiting the potential judgment to a maximum award of $5,000 in damages. *See, e.g.*, ***Bryhan v. Pink***, 2006 WI App 111, ¶¶12-20, [294 Wis. 2d 347], 718 N.W.2d 112 (concluding that, when a small claims plaintiff's actual damages exceed the statutory award limitation, the court should apply any reduction for comparative negligence to the total damages found before applying the limitation).

Olson I, 296 Wis. 2d 716, ¶13 (Deininger, J., concurring) (footnote omitted).

¶67 Following our remand in ***Olson I***, one of the remaining defendants requested a jury instruction stating Olson had suffered less than $75,000 in damages. ***Olson II***, 321 Wis. 2d 125, ¶1. In a subsequent appeal, we concluded the circuit court had erred by granting that request. ***Id.*** First, we held there was "no basis for a jury instruction as to the amount demanded in Olson's complaint." ***Id.***, ¶8. We reasoned:

> It is undisputed that Olson is limited to a recovery of less than $75,000. This remains true whether or not the jury is informed of that limit. Because a jury instruction that Olson's recovery is ultimately limited to less than $75,000 would serve no purpose, we conclude that the facts of this case do not warrant that instruction.

Id. Second, we rejected the defendant's argument that Olson's complaint constituted a "judicial admission" that she had sustained less than $75,000 in damages. ***Id.***, ¶¶9, 17. Relying on Judge Deininger's concurrence in ***Olson I***, we explained, "[T]he fact that Olson decided to demand less than $75,000 to avoid removal to federal court does not mean she suffered less than that amount of damages. It only means that is the maximum amount she may recover." ***Olson II***, 321 Wis. 2d 125, ¶17.

¶68 Similarly, the fact that the Westriches agreed to dismiss the Fund from this lawsuit does not mean they suffered less than $1 million in damages; it only means that is the maximum amount they may recover. Moreover, as we noted in ***Olson II***, the fact that a plaintiff's damages are limited to a certain amount "remains true whether or not the jury is informed of that limit." ***Id.***, ¶8. Thus, informing the jury of the limit "would serve no purpose." ***Id.*** Under these circumstances, the circuit court did not err by permitting the Westriches' attorney to argue they had sustained damages exceeding $1 million, nor was the court required to instruct the jury regarding the existence of that limit.

¶69 In summary, none of the Hospital's claimed errors—whether considered individually or cumulatively—convince us the Hospital is entitled to a new trial in the interest of justice. We therefore affirm the circuit court's judgment in favor of the Westriches.

By the Court.—Judgment affirmed.

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