COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2348 **Cir. Ct. No. 2002CV1095**

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

ERIC E. RICE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIN ELISABETH RICE,

PLAINTIFF-RESPONDENT,

V.

GERALD SIELAFF, M.D.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. This is a medical malpractice action brought by Eric Rice, individually and as the personal representative of the estate of Erin Rice, against Gerald Sielaff, M.D., an emergency room physician who treated Erin

Rice shortly before her death due to heart failure. Prior to trial, Dr. Sielaff moved for summary judgment, alleging that Rice's estate[1] failed to comply with the notice-of-claim statute, WIS. STAT. § 893.82(5m) (1997-98).[2] The trial court denied Dr. Sielaff's motion and granted summary judgment in favor of Rice's estate on the issue of compliance with the notice-of-claim statute. Following a nine-day trial, a jury found Dr. Sielaff not negligent in his care of Erin Rice. Rice's estate moved the trial court for a new trial in the interest of justice, and the trial court granted that motion.

¶2 Dr. Sielaff appeals the orders of the circuit court denying his motion for summary judgment and granting Rice's estate's motion for a new trial in the interest of justice. We affirm both orders.

Background

¶3 On April 5, 1999, Erin Rice's mother, Linda, brought Erin to Group Health Cooperative clinics after Erin vomited and exhibited signs of nausea and shortness of breath. After a preliminary examination at Group Health clinics, Dr. Robert Block ordered chest x-rays for Erin. After reviewing the x-rays, Dr. Block instructed Linda to take Erin to the emergency room at the University of Wisconsin Hospital.

[1] Eric Rice, Erin's father, is the plaintiff-respondent here both personally and as personal representative of Erin's estate. For convenience, we will refer to the plaintiff-respondent as "Rice's estate," or "the estate."

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 After Linda and Erin left Dr. Block's office to go to the emergency room, Dr. Block contacted Dr. Sielaff at the emergency room to inform him that he had sent Erin over. Dr. Block told Dr. Sielaff that he was concerned that Erin may have tamponade (pressure on the heart muscle that inhibits the flow of blood from the heart) or pericarditis (inflamed lining of the heart).

¶5 After a preliminary examination at the emergency room, Dr. Sielaff ordered another set of chest x-rays and an electrocardiogram (EKG), which measures the electrical activity of the heart. The x-rays indicated an enlarged heart, filling approximately 50-60% of Erin's chest cavity. The EKG was "abnormal," indicating sinus tachycardia (a heart rate greater than 100), and "poor R-wave progression." Dr. Sielaff, concerned that Erin may have been "throwing" pulmonary emboli, then ordered a "VQ scan" to measure Erin's lung perfusion. The results of the VQ scan reduced Dr. Sielaff's concerns regarding pulmonary emboli, but raised a concern in Dr. Sielaff's mind that Erin had bacterial pneumonia. Dr. Sielaff testified that although pneumonia did not explain the enlarged heart or abnormal EKG, he believed pneumonia was indicated by the VQ scan. Dr. Sielaff diagnosed Erin with bacterial pneumonia. Dr. Sielaff sent Erin home with a prescription for an antibiotic and cough medicine, and instructions to call her primary physician in twenty-four hours with a progress report.

¶6 Linda Rice called and left a message for Dr. Teresa Sizer at Group Health Cooperative clinics the next day, updating Dr. Sizer on Erin's visit to the emergency room. On April 14, 1999, Linda took Erin back to Dr. Block because of complaints of nausea and a loss of appetite. Erin was sent home after that visit, apparently undiagnosed. On April 17, 1999, Linda brought Erin into the University of Wisconsin Hospital emergency room again because Erin acted as though she was "uncomfortable," was very quiet, and had attempted to vomit

during the middle of the night. Erin was admitted into the Intensive Care Unit that morning, and died on April 19, 1999, of dilated cardiomyopathy (an enlarged left ventricle which causes the heart to not pump properly).

¶7 Rice's estate filed suit against Dr. Sielaff, Dr. Sizer, Dr. Block, Group Health Cooperative, Inc., and the University of Wisconsin Hospital and Clinics Authority.

¶8 Prior to trial, Dr. Sielaff moved for summary judgment based on the estate's failure to comply with the notice-of-claim statute. In an oral order, the trial court denied Dr. Sielaff's motion for summary judgment and granted summary judgment in favor of the estate on the issue of compliance with the notice-of-claim statute.[3]

¶9 The claim against Group Health Cooperative was dismissed just prior to trial. The claims against Dr. Sizer and the University of Wisconsin Hospital and Clinics Authority were dismissed after trial had commenced, but prior to the case being submitted to the jury. The jury heard nine days of testimony, and returned verdicts finding both Dr. Block and Dr. Sielaff not negligent.

¶10 Rice's estate filed post-verdict motions for new trials in the interest of justice as to both doctors. The trial court denied the motion with respect to

[3] The trial court's written order deciding the summary judgment issue stated only that Dr. Sielaff's motion for summary judgment was denied. The written order did not indicate that the court had granted summary judgment in favor of Rice's estate on this issue. However, the trial court later stated that the intent of its oral order, which preceded the written order, had been to grant summary judgment in favor of the estate as well as deny summary judgment for Dr. Sielaff. On appeal, Dr. Sielaff does not argue that the trial court did not grant summary judgment in favor of the estate on this issue.

Dr. Block, but granted the motion with respect to Dr. Sielaff, concluding that the jury's verdict as to Dr. Sielaff was against the weight of the evidence and that the trial was of questionable fairness.

¶11 Dr. Sielaff appeals both the trial court's order denying his summary judgment motion and the order granting the estate's motion for a new trial.

Discussion

Dr. Sielaff's Summary Judgment Motion

¶12 Dr. Sielaff argues on appeal that Rice's estate failed to comply with WIS. STAT. § 893.82(5m) by not filing a notice of claim with the attorney general within 180 days of the date on which Erin Rice's injuries were, or should have been, discovered. Dr. Sielaff argues that two pieces of evidence, which he discovered after the trial court granted summary judgment in favor of Rice's estate, prove that summary judgment should have been granted to him instead of the estate. According to Dr. Sielaff, the two pieces of evidence—a letter from Erin's father, Eric Rice, to one of the estate's medical experts, and Eric Rice's responses during a January 2004 deposition—prove conclusively that the estate failed to comply with the notice-of-claim statute. Therefore, Dr. Sielaff argues, there is no genuine issue of material fact, and he is entitled to summary judgment in his favor.[4]

[4] After the trial court denied Dr. Sielaff's motion for summary judgment, Dr. Sielaff moved for reconsideration. In that motion, Dr. Sielaff attempted to introduce the two new pieces of evidence he now argues prove that Rice's estate failed to comply with the notice-of-claim statute. The trial court refused to consider Dr. Sielaff's new evidence and denied his reconsideration motion. On appeal, Rice's estate does not argue that *we* are precluded from considering Dr. Sielaff's "new evidence." We therefore assume, without deciding, that we may consider this evidence.

¶13 Before proceeding, we note that Dr. Sielaff does not argue that, if the new evidence fails to prove noncompliance with the notice-of-claim statute, there remains a disputed question of fact. In other words, Dr. Sielaff presents only argument that supports granting summary judgment in his favor. He does not, in the alternative, argue that a factual dispute should have prevented summary judgment in favor of both parties. Thus, the question on appeal is straightforward: Does the new evidence Dr. Sielaff points to in his appellate argument conclusively prove that the estate failed to comply with the notice-of-claim statute? For the reasons that follow, the answer to this question is no.

¶14 We review summary judgment decisions *de novo*, applying the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). That method is well established and need not be repeated in full here. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. For purposes of this case, it is sufficient to say that the evidence "must be viewed in the light most favorable to" the non-moving party and, if the moving party fails to establish clearly that there is no genuine issue of material fact, the motion must be denied. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

¶15 In support of his original summary judgment motion, Dr. Sielaff merely compared the date of Erin's death with the date notice of claim was filed. He argued that because Erin Rice died on April 19, 1999, and notice of claim was filed on August 15, 2000, the estate exceeded the 180-day time limit in WIS. STAT. § 893.82(5m).

¶16 Rice's estate responded by submitting an affidavit of Eric Rice, where he averred the following. The UW physicians responsible for Erin's

medical care told Eric repeatedly that "the standard of care used by them in providing medical care and treatment to [Erin] had been of the highest quality known to medicine." Eric Rice started to research literature relating to viral cardiomyopathy "[s]everal months after [Erin's] death." Eric then forwarded Erin's medical records to several experts in the field, seeking information about the standard of care Erin had received at UW Hospital. "On or about April 27, 2000," one of those experts responded that, in his opinion, the physicians at UW Hospital had "misdiagnosed [Erin's] condition as 'bacterial pneumonia,'" and that "in arriving at such mis-diagnosis, and by not re-visiting it, those physicians had been medically negligent; and that their medical negligence was a proximate cause of Erin's death two weeks later." Based on Eric's undisputed affidavit, the trial court granted summary judgment in favor of the estate on the issue of compliance with the notice-of-claim statute.

¶17 Dr. Sielaff now points to evidence that he asserts conclusively proves that Eric knew of Erin's alleged injury and its cause no later than August 25, 1999, and as early as April 27, 1999.[5] The first piece of evidence is a

[5] The notice-of-claim statute refers only to the discovery of an "injury." It does not refer to the discovery of the injury's cause. Nonetheless, Dr. Sielaff in his brief-in-chief and Rice's estate both cite ***Webb v. Ocularra Holding, Inc.***, 2000 WI App 25, 232 Wis. 2d 495, 606 N.W.2d 552 (Ct. App. 1999), *overruled on other grounds by* ***Paul v. Skemp***, 2001 WI 42, 242 Wis. 2d 507, 625 N.W.2d 860, in which we concluded that the "discovery" of an injury occurs when "the 'plaintiff has information that would constitute the basis for an objective belief of her injury *and its cause*.'" ***Webb***, 232 Wis. 2d at 512 (emphasis added) (quoting ***Clark v. Erdmann***, 161 Wis. 2d 428, 448, 468 N.W.2d 18 (1991)). Both ***Clark*** and ***Webb***, however, concern WIS. STAT. § 893.55, which governs the statute of limitations for a medical malpractice action generally. Those cases do not specifically address WIS. STAT. § 893.82(5m). Nonetheless, because Dr. Sielaff in his initial appellate brief and the estate in its responsive brief assume the definition of discovering an injury is the same for both statutes, we make the same assumption, without further research and without deciding the matter.

We note that Dr. Sielaff points out in his appellate reply brief that WIS. STAT. § 893.82(5m) refers only to the discovery of an injury, and that the "statute is silent on the issue of discovering or reasonably suspecting any *cause of injury*" (emphasis added). But we think this (continued)

letter written on July 21, 2002, by Eric to Dr. G. Kimble Jett, one of the estate's medical experts. That letter contains the following sentence:

> As you might remember, we spoke briefly two years ago (August 25, 1999) about the death of my 20-year old daughter, Erin Elisabeth Rice, from the negligent misdiagnosis and treatment of viral cardiomyopathy.

Dr. Sielaff contends that this sentence "is an indisputable admission by [Eric] that he was on notice no later than … August 25, 1999, of the alleged cause of his daughter's death in issue." We disagree.

¶18 When viewed in a light most favorable to the non-moving party, the sentence in the 2002 letter is, at minimum, ambiguous. The letter was written in 2002 when Eric was undeniably aware of the alleged cause of Erin's death. Thus, it is easily read as Eric making a reference to what he believed to be true in 2002, not what he thought in 1999. Further, as the estate points out, the portion of the letter in which this sentence appears is an introductory paragraph, not a summary of the 1999 telephone conversation between Eric and Dr. Jett. The letter later summarizes that conversation, and the summary does not indicate that Eric knew of the alleged "negligent misdiagnosis" in 1999, or that Dr. Jett had reached such a conclusion at that time.[6]

---

argument is both undeveloped and too late. It is well established that we are not obliged to consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

[6] The letter summarizes the conversation between Eric Rice and Dr. Jett as follows:

> 1. Approximately 60 patients have used the BVS 5000 through Dr. Jett's work (through August 25, 1999).
>
> 2. Dr. Jett treated 10 patients while working in Seattle (through August 25, 1999).

(continued)

¶19 We conclude, therefore, that the 2002 letter does not conclusively prove that Eric knew or should have known the cause of Erin's injury on or before August 25, 1999.

¶20 The second piece of evidence that Dr. Sielaff asserts is conclusive proof Eric knew of the cause of Erin's injury prior to August 25, 1999, is in Eric's January 29, 2004 deposition testimony. At that deposition, Eric responded as follows to a question about what he knew as of April 27, 1999, concerning Erin's treatment:

> The logic was that Erin was sent to the hospital because of a suspected heart problem. Okay. She was diagnosed with pneumonia and we were relieved, as any parent would be. And then she goes back into the hospital on the 17th with a critical heart problem. So wouldn't that raise questions in your mind, too, if that happened to your child?

This response falls far short of conclusively proving that Eric knew or should have known the cause of Erin's death on or before April 27, 1999. Viewed in a light

---

3. Dr. Jett first used the BVS-5000 machine in 1989 on 33-year old male (see paper) and went from 5% to 65% ejection fraction in 8 days. He also used monoclonal antibodies – T lymphisides – OKT3 – Coaxi – similar to heart muscle – and had spontaneous recovery of the patient's heart.

4. Dr. Jett said that there was a ~75% survival rate with myocardidis with the use of the machine, in 50 to 100 cases reported.

5. Dr. Jett said that 20 to 30 cases are reported each year.

6. Dr. Jett said we could have taken Erin to St. Luke's or other hospital in Milwaukee or Chicago (where they had a BVS-5000) in ambulance or helicopter on Saturday 17 April 1999 and had the best shot to save her!

most favorable to the estate, it merely indicates that the events leading up to Erin's death raised a flag in Eric's mind.

¶21 We conclude that the evidence Dr. Sielaff now relies on does not conclusively prove that the estate failed to comply with the notice-of-claim statute. Thus, we affirm the trial court's order denying Dr. Sielaff's motion for summary judgment and granting summary judgment in favor of the estate on the notice-of-claim issue.

The Trial Court's Order Granting A New Trial In The Interest Of Justice

¶22 The trial court granted the estate's post-verdict motion for a new trial "in the interests of justice." The court concluded that the weight of the evidence established that Dr. Sielaff was negligent and that the trial was of questionable fairness. Rather than summarize the trial court's reasoning, we quote from its oral order:

> In this case there was credible evidence that Dr. Sielaff was not negligent. Dr. [John] Whitcomb [expert witness for Dr. Sielaff] had impressive credentials and gave an opinion supported by the evidence that Dr. Sielaff met the standard of care.
>
> Dr. Sielaff also testified in effect that his treatment met the standard of care. It is up to the jury to determine credibility, but it was striking that Dr. Sielaff was the only witness who testified that Erin's EKG was normal for a young female adult. This indicates either an inability to correctly read an EKG or lack of candor about what he saw. The overwhelming evidence pointed to Dr. Sielaff's negligence.
>
> There is a good summary of that evidence contained in plaintiff's brief on Pages 3 through 11 and just to quote some brief excerpts. Dr. [Robert] Schoene [expert witness for the estate] testified, "Misreading two grossly abnormal tests." And he also said, "These weren't subtle."

Dr. [Howard] Zeft [expert witness for the estate] said the EKG is "grossly abnormal." "Alarming" for a 21 year old.

Dr. [Michael] Lesch [expert witness for Dr. Block] said, the x-ray showed "abnormally large" heart and the EKG was "quite abnormal." And note he was an expert witness for one of the other defendants.

Dr. Whitcomb, the witness who testified on Dr. Sielaff's behalf said that a healthy 20 year old heart fills about 30 percent of the chest cavity. Erin's heart filled 50 to 60 percent of her chest cavity. And in regard to whether a referral to a cardiologist should have been made he said, "it is important that it be addressed somewhere in the course of their care" without specifically holding Dr. Sielaff responsible for the failure to have that happen.

I question whether the question of Dr. Sielaff's negligence was fairly tried. This trial was an ordeal. Except for [Dr. Sielaff's attorney], the attorneys were extremely argumentative. There was massive legal argument before and during the trial. There were frequent side-bars interrupting testimony and even interrupting the arguments of counsel.

There was a great volume of technical evidence.

There were many defendants, many different claims of negligence, a number of which were dismissed prior to the verdict. Although I don't concede that was an error, I think it did lead to the jury hearing a lot of testimony that ended up not being useful to their deliberations, and confusion might have resulted.

The most striking to me is the short duration of the deliberations. After nine days packed with testimony, the jury was in recess only two hours. It is my belief, although we had trouble tracking down any proof of this, that they had a meal during that time, and I don't know if any of you remember that, but given the number of hours they had been in court and the time they went out to deliberate which was something like two o'clock in the afternoon, unless the record shows that there was a significant recess between nine and two which I don't think it does, then I would conclude that they also ate during that two hours of deliberations.

There were only two questions that they ultimately had to decide on the verdict and that was the negligence of

> Dr. Block and the negligence of Dr. Sielaff, but they could not have adequately reviewed the applicable evidence, weighed the credibility of the various witnesses, and come to a thoughtful decision in that amount of time. There was a great deal of evidence as to each of the two questions on the verdict.
>
> I do find that the verdict in respect to Dr. Sielaff is against the great weight of the evidence in at least two respects. There is overwhelming credible evidence that established that Dr. Sielaff should have told Erin Rice and her mother that the x-ray and EKG were grossly abnormal. Instead he either said or implied that the test results were alright.
>
> Secondly, there was overwhelming credible evidence that Dr. Sielaff should have ordered an echocardiogram. Although Dr. Whitcomb testified that the care was adequate, the great weight of the evidence established that, given the other test results, the standard of care required an echocardiogram.

¶23 Dr. Sielaff argues that the trial court's decision is based on "mistaken views of evidence and testimony" and that the trial court has improperly substituted its "perception of credibility of witnesses for that of the jury." Dr. Sielaff further argues that the trial court's reasons for questioning the fairness of the trial were "patently inadequate/insufficient to be the basis of granting a new trial." We are not persuaded.

A. The Weight Of The Evidence

¶24 Our supreme court in ***Krolikowski v. Chicago & Northwestern Transportation Co.***, 89 Wis. 2d 573, 278 N.W.2d 865 (1979), laid out the standard for appellate review of a trial court's decision to grant a new trial in the interest of justice on grounds that a jury's findings are contrary to the evidence:

> A new trial may be granted in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. The order granting a new trial in the interest of justice must contain

> the reasons and bases for the general statement contained therein that the verdict is against the great weight and clear preponderance of the evidence. Review by this court is ordinarily limited to the reasons specified in the trial court's order.
>
> On review of an order granting a new trial in the interest of justice, this court does not seek to sustain the verdict of the jury but looks for reasons to sustain the findings and order of the trial judge. The granting of a new trial is in the discretion of the trial court, and this court may reverse only where a clear [erroneous exercise] of discretion is shown….
>
> No [erroneous exercise] of the trial court's discretion will be found if the trial court sets forth a reasonable basis for its determination that one or more material answers in the verdict are against the great weight and clear preponderance of the evidence. There is an [erroneous exercise] of discretion if the trial court grounds its decision upon a mistaken view of the evidence or an erroneous view of the law.

Id. at 580-81 (citations omitted).

¶25 Dr. Sielaff first argues that, contrary to the trial court's assumption, there was no evidence that the pertinent standard of care required him to inform Erin or her mother about the abnormal EKG and x-ray results. On this point we agree with Dr. Sielaff. Our independent review of the record does not reveal any testimony indicating that the standard of care applicable to Dr. Sielaff required that he disclose Erin's abnormal test results to Erin or her mother. However, because we conclude that the trial court's other reasons for ruling the verdict was against the weight of the evidence are reasonable, the court's faulty reasoning on this point is not grounds for reversal. *See* ***id.*** at 581 ("If one ground relied upon by the trial court in granting a new trial in the interest of justice is correct, this is sufficient to affirm the order of the trial court." (citations omitted)).

¶26 Next, Dr. Sielaff attacks the trial court's belief that the applicable standard of care required Dr. Sielaff to order an echocardiogram for Erin. Dr. Sielaff argues that that belief was inappropriately based on testimony from doctors who did not regularly practice in emergency medicine, that is, doctors who lacked the expertise to opine on the standard of care applicable to emergency medicine. According to Dr. Sielaff, the court "merely adopted the testimony of three physicians testifying outside of their practice areas" and "[t]hree non-specialists does not amount to greater weight." We disagree with Dr. Sielaff's analysis of the trial court's decision.[7]

¶27 If Dr. Sielaff means to argue that the estate did not lay a sufficient foundation for its experts to testify regarding the standard of care for emergency medicine, we reject the argument as underdeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review an issue inadequately briefed). If Dr. Sielaff is arguing only that the testimony of the estate's medical experts must be assigned less weight because those experts lack expertise in emergency medicine, we find the argument unpersuasive.

¶28 First, as the estate points out, Dr. Schoene and Dr. Jett have both practiced emergency medicine for periods ranging between seven and ten years. Further, Dr. Zeft testified, without objection, that Dr. Sielaff fell below the standard of care for emergency room physicians. Apart from pointing out that the estate's witnesses do not *currently* practice emergency medicine, Dr. Sielaff fails to identify any reason why these doctors were not qualified to give an opinion on

[7] We note that Dr. Sielaff does not dispute the trial court's summary of the evidence, a summary that is consistent with our own review of the record.

the standard of care for emergency medicine. Because it is far from apparent that doctors need to currently practice emergency medicine to have the expertise to know the standard of care applicable to Dr. Sielaff's performance in this case, we fail to see why the trial court was required to accord greater weight to Dr. Sielaff's expert. Indeed, if the estate's witnesses lacked the expertise to give their opinions, Dr. Sielaff's trial counsel should have been able to successfully move to prohibit their testimony on the topic.

¶29 Dr. Sielaff states in his appellate brief: "The [trial] court, in its oral decision, recognized the qualifications of [Sielaff's expert] Dr. Whitcomb, recognized that Dr. Whitcomb stated unequivocally that Dr. Sielaff met the standard of care and yet *ignores this evidence by stating somehow the jury's decision was against the 'greater weight'*" (emphasis added). This summary mischaracterizes the trial court's reasoning.

¶30 It is true that the trial court acknowledged Dr. Whitcomb's expertise and his testimony. And it is true that Dr. Whitcomb opined that Dr. Sielaff met the standard of care applicable to emergency room physicians in his treatment of Erin. But Dr. Sielaff omits the reason the trial court discounted Dr. Whitcomb's opinion. The court found it telling that Dr. Whitcomb himself supported the estate's negligence theory when he testified that the heart of a twenty-year-old woman, a woman about Erin's age, would normally fill 30% of her chest cavity, and the x-ray of Erin's heart Dr. Sielaff viewed showed that it filled 50-60% of her chest cavity. The trial court observed that all of the plaintiff's experts and Dr. Lesch, a codefendant's expert, testified that the EKG was abnormal. The court found it important that Dr. Schoene testified that Dr. Sielaff had "[m]isread[] two grossly abnormal tests" that "weren't subtle," and Dr. Zeft testified that the EKG was "grossly abnormal" and "[a]larming" for a twenty-one-year-old.

¶31 Our review on appeal is limited to determining whether the trial court set forth a reasonable basis for its decision, one that is not based on an erroneous view of the law or a mistaken view of the evidence. Dr. Sielaff has not shown that the court based its decision on either a mistaken view of the law or the evidence. The court did not, as Dr. Sielaff contends, misapprehend the evidence. Rather, the trial court reasonably concluded that the greater weight of the evidence established negligence.

¶32 Our conclusion that we must affirm the trial court's decision that the jury's verdict is against the weight of the evidence is, by itself, sufficient to affirm the trial court's order granting a new trial in the interest of justice. Nevertheless, in the next section we also address the trial court's view that fairness concerns supported granting a new trial.

B. The Fairness Of The Trial

¶33 Dr. Sielaff seemingly construes the trial court's decision to order a new trial in the interest of justice as resting on two alternative grounds: (1) that the verdict was against the weight of the evidence; and (2) the trial was unfair for seven reasons. Thus, he attempts to persuade us that neither ground, standing alone, warrants a new trial. But we read the trial court's decision to say that the seven fairness reasons *support* its decision to grant a new trial, not that these reasons alone justify a new trial. Indeed, this is the only reasonable reading in light of the fact that the trial court denied the estate's motion for a new trial with respect to the negligence allegation against codefendant Block, and the court's seven reasons apply equally to the jury's negligence finding with respect to Dr. Block. Having put the seven reasons in context, we proceed to address Dr. Sielaff's contention that each of them is without merit.

¶34 As summarized in Dr. Sielaff's appellate brief, the trial court listed seven reasons why it was concerned that the estate did not receive a fair trial: "(1) the jury deliberation was of short duration, (2) the trial was an ordeal, (3) the attorneys were argumentative, (4) the legal arguments were massive, (5) there were frequent side bars interrupting testimony and even interrupting arguments of counsel, (6) there was a great volume of technical evidence, and (7) there were many defendants and claims." We address each of his attacks on these reasons.

¶35 Dr. Sielaff criticizes the trial court's reliance on reason number one, the jury's short deliberation. Dr. Sielaff argues that this reason, by itself, is not sufficient to support the new trial order. He points to ***State v. John***, 11 Wis. 2d 1, 103 N.W.2d 304 (1960), a decision affirming the denial of a new trial in the interest of justice where the jury deliberated for sixty-seven minutes after a seven-day trial. But Dr. Sielaff's argument is flawed for at least two reasons. First, ***John*** involved a trial court's decision *denying* a motion for a new trial. Thus, it says little about whether this factor would, by itself, support *granting* a new trial. Second, the trial court here did not rely on the short deliberations as a stand-alone reason for ordering a new trial and the ***John*** decision does not diminish the proposition that short jury deliberation following a long trial is a proper interest-of-justice consideration. *See* ***id.*** at 13.

¶36 Appellate counsel for Dr. Sielaff states that "no precedent … could be found" to support consideration of reasons two through seven "as reasons to doubt the fairness of a trial." If he is saying that consideration of these factors is contrary to law, he fails to develop the argument. If he is saying that there is no logical connection between these factors and the fairness of the trial, we disagree. This case began with multiple claims and defendants, and several of these claims and defendants were dismissed as the trial proceeded. The presentation of

complex evidence was often interrupted by extended argument; often, the jury needed to retire to the jury room while legal issues were hashed out. Plainly, the trial court believed that these distractions may have interfered with the jury's consideration of the issues remaining at the end of the trial. We need not decide whether these factors alone justify a new trial in the interest of justice, and Dr. Sielaff fails to persuade us that they do not support such a decision.

¶37 Dr. Sielaff notes that in ***Bittner v. American Honda Motor Co.***, 181 Wis. 2d 93, 511 N.W.2d 325 (Ct. App. 1993), we held, in Dr. Sielaff's words, "that the complexity of a trial done over seven weeks with 477 exhibits was not a sufficient reason to grant a new trial." Dr. Sielaff's point is not apparent. Of course a trial court should not grant a new trial simply because a trial is complex. That would be akin to saying that complex factual issues may not be fairly tried. And, just as obviously, the trial court did not order a new trial here simply because the trial was complex. Since ***Bittner*** does not support the proposition that trial complexity is an improper consideration in combination with other factors, Dr. Sielaff's reliance on that case is misplaced.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.