COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP308 **Cir. Ct. No. 2003CV7355**

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

ROBIN LUCKETT, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF TYWANDA LUCKETT, TYQUONE LUCKETT, JOE BOHANNON, SHENARA BOHANNON, MINOR(S) BY THEIR GUARDIAN AD LITEM, J. MICHAEL END, AND STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

PLAINTIFFS-RESPONDENTS,

V.

AARON C. BODNER, M.D., AURORA SINAI MEDICAL CENTER, PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., AND THE MEDICAL PROTECTIVE COMPANY,

DEFENDANTS-APPELLANTS,

MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC., PRITHIPAL S. SETHI, M.D., AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,

DEFENDANTS-CO-APPELLANTS,

INJURED PATIENTS & FAMILIES COMPENSATION FUND,

DEFENDANTS-CO-APPELLANTS,

DAVID PAUL ALTMAN, M.D. AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed and cause remanded for further proceedings.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Aaron C. Bodner, M.D., Aurora Sinai Medical Center and their insurance companies (referred to hereafter collectively as "Bodner" unless the context otherwise requires), the Medical College of Wisconsin Affiliated Hospitals, Inc., Prithipal S. Sethi, M.D. and their insurance companies (referred to hereafter collectively as "Sethi" unless the context otherwise requires) and the Injured Patients & Families Compensation Fund (the Fund) bring this interlocutory appeal from the trial court's order, made pursuant to WIS. STAT. § 804.11 (2005-06),[1] permitting counsel for the Estate and minor children of Tywanda Luckett to withdraw a certain response to a Request to Admit. Defendants argue that the trial court's order was an erroneous exercise of discretion because they were prejudiced under § 804.11(2) by the withdrawal. We affirm.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

BACKGROUND

¶2 Tywanda Luckett gave birth at Aurora Sinai Medical Center on August 2, 2000. She asked her obstetrician, Dr. Bodner, to perform a tubal ligation, which he did on August 4, 2000. She was discharged later that same day. During the following three weeks, Luckett was seen in Sinai's emergency department three times, was admitted to the hospital twice, and was seen as an outpatient by both her obstetrician and a gastroenterologist. A small mass was found in her abdomen near the tubal ligation site and emergency surgery was performed. Luckett was transferred from surgery to the intensive care unit. She was in shock and dehydrated. Dr. Sethi, a second-year urology resident cared for her postoperatively. Luckett experienced a high heart rate and a drop in blood pressure. Drugs were administered to treat the high heart rate; however, her blood pressure continued to drop, while her heart rate continued to be high. After a second, different drug was administered, Luckett suffered cardiac arrest. She was revived, but suffered permanent severe brain damage. Upon discharge from Sinai on September 29, 2000, she was transferred to Silver Spring Rehabilitation Center (Rehabilitation Center), a long-term care facility. While at the Rehabilitation Center, she was treated by doctors from Froedtert Hospital. Luckett remained at the Rehabilitation Center until her death on August 2, 2005. [2]

[2] In the briefs before this court, and in arguments before the trial court, the parties used a variety of dates as Luckett's date of death. These range from September 29, 2005 through various October 2005 references. None of the dates are supported by citations to a record other than the Suggestion of Death filed with the court on November 21, 2005. That document identifies August 2, 2005, as the date of Luckett's death. Because August 2, 2005, is the only date for Luckett's death that is clearly identified by a document in the trial court record, we will use that date.

¶3 This action was commenced on December 5, 2003, on behalf of Luckett, her three children, and the State Department of Health and Family Services. Originally, the defendants included five physicians, two institutional health services providers, two insurance companies, and the Fund. Scheduling orders were entered on March 23, 2004, October 22, 2004, and June 8, 2005. The record discloses no defense request for an independent medical examination of Luckett during any of the scheduling conferences which preceded these orders as the orders would have set times and conditions for the examination. *See* WIS. STAT. § 804.10. On June 22, 2005, Sinai sent Luckett the following requests to admit:

> REQUEST TO ADMIT NO. 1: Admit that Tywanda Luckett is presently in a persistent vegetative state.
>
> REQUEST TO ADMIT NO. 2: Admit that Tywanda Luckett has been in a persistent vegetative state since she was admitted to the Silver Spring Health and Rehabilitation Center.
>
> REQUEST TO ADMIT NO. 3: Admit that the persistent vegetative state of Tywanda Luckett is permanent.

¶4 On July 22, 2005, counsel admitted the truth of the requests. Luckett died on August 2, 2005. A new scheduling order was entered on August 31, 2005. At the time of this order, apparently all parties were unaware of Luckett's death because the Suggestion of Death pursuant to WIS. STAT. § 803.10 was not filed until November 21, 2005.

¶5 The final pretrial hearing, which included motions for summary judgment and numerous motions in limine, was scheduled for Friday, January 19, 2007. During the afternoon of January 18, 2007, counsel for Luckett advised all other counsel by email that he "mistakenly admitted that Tywanda Luckett was in a persistent vegetative state from the time of her admission to Silver Spring

Nursing Home." Counsel explained that he was withdrawing that admission because in preparing for trial he discovered notes by doctors on three different days which suggested that Luckett may not have been in a persistent vegetative state. Counsel described the notes specifically:

> [A] note of April 11, 2001, by Dr. John R. McGuire, a physiatrist at Froedtert … states in his physical examination part of the note: "She was able to follow simple commands and nod her head 'yes' or 'no' to simple questions."
>
> On April 26, 2001, Dr. Thomas Kidder, an otolaryngologist at Froedtert wrote: "It is difficult to tell but I believe she is able to comprehend some of what is said to her …."
>
> On June 21, 2001, Dr. Kidder wrote that Tywanda was "very frightened and fearful." "She seems to be able to indicate yes or no." In a swallow study report of June 21, 2001, it is stated: "… the patient appeared very tentative and frightened."

¶6 The final pretrial hearing occurred on Friday, January 19, 2007. Counsel for Luckett advised the court of the discovery the previous afternoon and of his request to withdraw the admission that he now believed was incorrect. Counsel explained:

> Yesterday afternoon as somebody at my office was helping me get ready for the trial she … pointed out some medical records from Froedtert that were about nine months after this incident where Tywanda Luckett coded and was in bad condition. And those records from Froedtert indicate she was aware of what was going on. She could shake her head yes or no and was responsive to questioning of her to a degree.

¶7 Counsel explained that, long prior to making this discovery, he had received a request to "admit that Tywanda Luckett was in a persistent vegetative state beginning at the time that she was transferred to Silver Springs Nursing Home." Counsel acknowledged that when he made this admission, he was

unaware of the notes from Froedtert. Counsel also told the court that he had immediately advised all other counsel of the details of the newly-discovered information and that he would withdraw the admission that he now believed was not factually correct. Counsel explained: "I'm really upset about the fact that we didn't recognize it until yesterday afternoon. But the fact of the matter is that in these records by three different health care providers at Froedtert they say that she is responding to them."

¶8 The trial court initially analyzed the problem of the recently discovered medical record entries, stating: "I think both from the Plaintiffs' perspective and from the Defendants' perspective you have got to have a chance to have somebody with a level of expertise in vegetative states come in and evaluate this."

¶9 Counsel for the Fund argued that "excusable neglect"[3] had not been shown because the records were from 2001, and the records were in counsel's possession when the admission was answered in 2005. Further, the Fund argued prejudice because: withdrawal "impacts the damages in this case," it had not deposed the providers who made the statements, and it had "not had the opportunity to even name a witness to discuss the vegetative issue." Finally, the Fund argued that it would be impossible to "find somebody in two weeks to get all the 2,000 pages of records to that individual and respond to what has now … become an issue when it was not an issue…."

[3] WISCONSIN STAT. § 804.11(2) does not contain the phrase "excusable neglect."

¶10 Sinai indicated that, in conjunction with other defense counsel, it "had retained an expert witness on this issue before the answers to requests to admit were received" and that counsel learned "last year that our expert died." Sinai argued that at the time the request for admissions was answered in July 2005, "there were at least 2,000 pages of medical records that were available for review," and that two of the statements on which counsel for Luckett relies were in the nursing home records. Finally, "since it makes such a hugh [sic] difference in the value of our case," Sinai stated it would need time to address the issue, time which was not available before the scheduled trial, thus the request to withdraw the admission should be denied.

¶11 Sethi's counsel confirmed the joint retention of an expert on the issue of vegetative state and identified the deceased expert as Dr. Ronald E. Cranford. Counsel observed that when the answers to the requests to admit were received, "there is no question but that this lady was in a persistent vegetative state. I think everybody in this room felt that." However, counsel acknowledged that before his death, Dr. Cranford had not reviewed some of the records now available and that even as of January 19, 2007, counsel himself had not "looked at every page of records."

¶12 In September 2006, more than a year after the admission in dispute and approximately four months before the motion to withdraw the admission, Sethi identified Dr. Cranford as one of his experts in his witness disclosure statement, disclosed Cranford's death, and noted in a parenthetical next to Dr. Cranford's name on the witness list: "will need to replace."

¶13 Physicians Insurance, discussing Luckett's late discovery of relevant information, acknowledged that "this has probably happened to everybody at one

time or another," observed that the new information "potentially changes the value of [Luckett's] case by millions of dollars" and concluded that "the Court has the difficult question of balancing writeoffs on behalf [sic] and against the rights of the Defendants." Physicians Insurance explained that reliance on the admission figured into evaluation of the potential value of the case, and that if testimony about the recently discovered observations is going to be allowed, additional experts would have to be retained and deposed, an activity that would be impossible before the scheduled trial date.

¶14 The trial court indicated it wanted to take until the following Monday to review case law on withdrawal of admissions. No party asked for additional time to argue the motion. The trial court then moved to other pretrial matters. During an exchange in which defense counsel was expressing concerns about the logistics of managing the expert witnesses for the upcoming trial, the trial court returned to the plaintiffs' request to withdraw admissions and asked for any additional information any counsel thought the trial court needed before ruling. The court again offered to adjourn the matter of the withdrawal until the following Monday: "If you want to have further input and you are not in a position where you can do that right now then you need to tell me that and I'll [put] that on the front burner for Monday. So whatever you want to do is fine with me."

¶15 No party requested a delay in the decision. The trial court then gave the parties its current thinking, and requested email addresses so it could provide a written decision later in the day. The court described its current views:

> I'm going to try to locate that case. I'm going to take a look at it. It's not a slam dunk in my opinion, but on the other hand it's a very significant aspect of the case, I think from both perspectives.… I do think that it is

> understandable that given the volume of records that are involved, given the length of treatment, the complexity of medical issues, et cetera, that it was … missed. So all of that bodes very strongly in terms of the ultimate analysis in favor of withdrawal.
>
> What bodes against it is the fact that … we're suppose[d] to start in two weeks.

¶16 The trial court sent a written decision to all parties later on January 19, 2007. In that decision, the trial court, relying on ***Mucek v. Nationwide Communications, Inc.***, 2002 WI App 60, 252 Wis. 2d 426, 643 N.W.2d 98, discussed the two-prong analysis required when deciding a motion to withdraw an admission, and noted that "the resultant obligation to prove a fact that had been conclusively established does not establish prejudice." As to the first prong, whether presentation of the merits of the action will be subserved by withdrawal, the trial court found:

> If, as the entries in the medical records referenced in this morning's arguments arguably indicate, Ms. Luckett was capable of and did experience pain and suffering for the extended period between the time she lapsed into a coma to the time of her death, it is appropriate for the jury to consider that fact and, if liability is established, award damages to compensate that loss.

¶17 As to the second prong, whether the party who obtained and relied on the admission will be prejudiced, the trial court found: "We are on the verge of trial.…[4] Allowing the withdrawal, necessitating additional expert evaluation, testimony and related discovery, requires adjournment of the impending trial and adds significant expense." (Footnote added.)

[4] The trial court had adjourned the trial date once before because an attorney for Bodner had a scheduling conflict.

¶18 The trial court specifically rejected claims that increased financial exposure because of possible larger damages established prejudice, stating:

> The Fund, in particular, noted in their argument in opposition to the motion their concern with respect to significantly increased exposure. I don't view that as a pertinent consideration on the prejudice prong. If the plaintiff can establish Ms. Luckett experienced pain and suffering during this period as a result of negligence on the part of any of the health care providers, damages should be awarded. If she did not, or if the plaintiff cannot adequately prove that she did, no damages will be awarded.

¶19 Finally, the trial court balanced the equities in favor of allowing Luckett to attempt to prove conscious pain and suffering by withdrawing the admission and the arguments made by defendants against such withdrawal. The trial court recognized concerns about possible prejudice, but made no finding that prejudice consistent with controlling case law had been established. The trial court concluded: "The proper answer to this dilemma lies in the balancing of the two prongs.… While significant prejudice concerns exist, the fairness issue implicated by the possibility that Ms. Luckett was conscious of the catastrophic injuries she suffered cries out for resolution on the merits." Defendants bring this interlocutory appeal of the trial court's order allowing withdrawal of the admission.

STANDARD OF REVIEW

¶20 Whether relief should be granted from the effect of an admission is a decision within the trial court's discretion. ***Mucek***, 252 Wis. 2d 426, ¶25.

> We will uphold a trial court's discretionary act if the court examined the relevant facts, applied a proper standard of law, and, demonstrating a rational process, reached a conclusion that a reasonable judge could reach. At the same time, if a trial court fails to adequately set forth its reasoning, we may independently review the record to

> determine if it provides a basis for the court's exercise of discretion.

Id. (internal citations omitted). We analyze the trial court's exercise of discretion in the context of the provisions of WIS. STAT. § 804.11(2),[5] the construction of which is a question of law we review *de novo*. ***State v. Stenklyft***, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769. "[W]hether to allow withdrawal of an admission is reviewed under the erroneous exercise of discretion standard." ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248**,** ¶37, 297 Wis. 2d 70, 727 N.W.2d 857; *see also* ***OLR v. Lister***, 2007 WI 55, ¶70, 300 Wis. 2d 326, 731 N.W.2d 254. The appellate court may search the record for evidence sustaining the trial court's decision. *See* ***Dodge v. Carauna***, 127 Wis. 2d 62, 67, 377 N.W.2d 208 (Ct. App. 1985). "If a trial judge bases the exercise of his discretion upon a mistaken view of the law, his conduct is beyond the limits of his discretion." ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983).

EXERCISE OF DISCRETION UNDER WIS. STAT. § 804.11(2)

¶21 WISCONSIN STAT. § 804.11(2) permits a trial court to allow withdrawal of an admission if "the presentation of the merits of the action will be

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[5] WISCONSIN STAT. § 804.11, entitled "Requests for admission," states, in pertinent part:

> **(2)** EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits." As we observed in ***Mucek,*** the language in WIS. STAT. § 804.11(2) is nearly identical to its counterpart provision in Rule 36(b) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 36;[6] ***Mucek***, 252 Wis. 2d 426, ¶29. Accordingly, we may look to federal case law for guidance in our analysis. ***Mucek***, 252 Wis. 2d 426, ¶29 ("[W]here a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority.") (citing ***State v. Evans***, 2000 WI App 178, ¶8 n.2, 238 Wis. 2d 411, 617 N.W.2d 220). Federal law is of assistance in understanding the prejudice that must be established to bar withdrawal of an admission, as we explained in ***Mucek***:

> We find no Wisconsin case defining "prejudice" in this context, but it is commonly understood to mean injury, damage, or detriment. *See* ***City of Madison v. Lange***, 140 Wis. 2d 1, 7, 408 N.W.2d 763 (Ct. App. 1987). Federal cases explain that the prejudice contemplated by this statute is not simply that a party would be worse off without the admissions. *See* ***ADM Agri-Indus., Ltd. v. Harvey***, 200 F.R.D. 467, 471 (M.D. Ala. 2001); *see also* ***Bergemann v. United States***, 820 F.2d 1117, 1121 (10th Cir. 1987) ("The prejudice contemplated by Rule 36(b) is not simply that the party who obtained the admission now has to convince the jury of its truth."). Rather, the party benefiting from the admission must show prejudice in addition to the inherent consequence that the party will now have to prove something that would have been deemed conclusively

[6] The Federal Rules of Civil Procedure were amended effective December 1, 2007. The version of FED. R. CIV. P. 36(b) applicable to this case states, in pertinent part:

> Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

> established if the opposing party were held to its admissions.

Mucek, 252 Wis. 2d 426, ¶30.

¶22 We consider, therefore, whether defendants met their burden to show the trial court more than that they are worse off without the admission because they will now have to prove (or more accurately, refute) something that would otherwise not have been an issue.

DISCUSSION

¶23 On appeal, defendants make a variety of arguments, the general theme of which is that they were prejudiced because the late withdrawal of the admission means they will, therefore, have to do new discovery and may be exposed to greater losses if Luckett can prove additional pain and suffering. Bodner and Sethi argue prejudice results from withdrawal of the admission because Luckett's death after the admission prevented them from conducting an independent medical examination of her condition. These arguments were not made to the trial court and thus are not properly raised here. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) ("We normally will not review an issue raised for the first time on appeal. This is a general rule of judicial administration from which we may depart.") (internal citations omitted). We elect to resolve this contention notwithstanding the waiver.

¶24 In addition to the ability to bring a motion at any time for a medical examination of Luckett, pursuant to WIS. STAT. § 804.10(1), defendants had numerous opportunities to request an order for a medical examination in connection with several WIS. STAT. § 802.10(3) scheduling orders issued between the commencement of the litigation on December 5, 2003, and the July 22, 2005

admission at issue here. None of the defendants made such a request. Defense counsel indicated at the January 19, 2007 hearing that the medical records which Luckett's attorney discovered on January 18, 2007, had also been in defendants' possession (as well as in Luckett's) at the time of the July 22, 2005 admissions. The trial court could have determined, had defendants made this argument, that defendants' lengthy prior opportunities to request a medical examination, coupled with defendants' prior possession of the information at issue here, defeated a claim of prejudice under WIS. STAT. § 804.11(2). *See* ***Dodge***, 127 Wis. 2d at 67.

¶25 Bodner relies on ***Mucek*** to argue that prejudice under WIS. STAT. § 804.11(2) is established solely by the defendants' need for additional discovery. However, ***Mucek*** held that it was proper for the trial court, in considering whether prejudice had been established, to assess the "ongoing failure to cooperate with discovery" by the party seeking relief from an admission. ***Mucek***, 252 Wis. 2d 426, ¶27. The trial court in ***Mucek*** observed, when denying the motion and the subsequent attempt on the day of trial to belatedly answer the admission request, that: "Rarely have I really seen such egregious conduct on the part of a defendant." ***Id.*** We concluded that "a trial court may consider a party's history of discovery abuse when deciding whether to permit withdrawal or amendment of admissions, both when determining prejudice under § 804.11(2) and when otherwise exercising the court's authority to control the orderly and prompt processing of a case." ***Mucek***, 252 Wis. 2d 426, ¶28. While the ***Mucek*** court does note, in a footnote, that a federal court has found that the "need for additional discovery added to prejudice that would be suffered if withdrawal were permitted," ***id.***, ¶32 n.8, it raised this only in the context of its discussion regarding the defendant's discovery abuses and the time and expense those abuses had already cost the plaintiff, ***id.***, ¶32. We did not require in ***Mucek*** that a trial court

must deny withdrawal of an admission if discovery costs will be increased. ***Id.*** Rather, we approved the trial court's exercise of discretion and explained what the trial court could properly consider. *See* ***id.,*** ¶¶27-36.

¶26 In this case, by contrast, the record demonstrates that extensive discovery was conducted by all parties and that the parties cooperated with each other regarding such complexities as the scheduling of depositions of the numerous expert witnesses. Here, the trial court made no finding of discovery abuse when it discussed possible prejudice concerns, or when it decided to adjourn the trial to permit the additional discovery all parties would need to fairly present their cases after the admission was withdrawn. The trial court's analysis, conclusions and explanations were a reasoned exercise of discretion consistent with the law discussed in ***Mucek***.

¶27 The trial court applied the correct law when it required more than the need for additional discovery to establish the prejudice prong of WIS. STAT. § 804.11(2). Sethi argued that because defendants' expert witness on the subject of vegetative state was deceased, this was evidence of prejudice. However, on September 1, 2006, more than two years after receiving the admission, and ten months after notice of Luckett's death, Sethi, in his expert witness disclosure list, notified all parties of his intent to replace this deceased expert witness. More than one defense counsel acknowledged that they shared this deceased expert witness. The trial court could properly conclude that the already-acknowledged defense intent to replace a deceased expert witness was not affected by withdrawal of the admission and thus did not establish prejudice to defendants caused by the withdrawal.

¶28 The trial court carefully considered the two-prong analysis required by WIS. STAT. § 804.11(2), concluding that allowing withdrawal was consistent with allowing Luckett the opportunity to litigate the full extent of her damages, and concluding that the prejudice concerns defendants raised—namely increased discovery costs and potentially increased financial exposure—were not the prejudice contemplated by case law interpreting § 804.11(2). In balancing the plaintiffs' rights to present their full claim for damages against prejudice concerns, but not finding the type of prejudice required by § 804.11(2), the trial court explained its reasoning and properly exercised its discretion.

By the Court.—Order affirmed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

¶29 FINE, J. (*dissenting*). The prejudice to the defendants here is palpable and outrageous. In my view, the circuit court erroneously exercised its discretion in determining that the significant increase in the defendants' exposure *coupled with* their inability to effectively defend against that increased exposure was not prejudice. Accordingly, I respectfully dissent.

¶30 First, the request for admission was served on June 22, 2005, and sought to eliminate conscious pain and suffering from much of the case. The request was a significant one because conscious pain and suffering can bloat the survivors' recovery (and their lawyers' attorneys' fees) even though the person who may have suffered conscious pain is now dead.

¶31 Second, because admitting the request would remove a significant item of potential damages (here, some *five years* of conscious pain and suffering) from the table, the request for admission is not something that a competent personal-injury lawyer would admit without thorough analysis. Indeed, medical-malpractice cases are not easy to prove—there are volumes of medical records, conflicting opinions by battalions of experts, and the often difficult task of presenting a complicated case masked by medical arcana. Thus, these cases are not taken on a whim; there is a careful cost/benefit analysis so that the lawyer who decides to take the case is assured that a potential recovery will not only cover the myriad considerable costs it takes to bring such a case to the cusp of settlement no less to trial, but also that any recovery will, after deduction of the extensive costs, which are fronted by the lawyer, and the lawyer's fees, provide more than a modicum of recovery for the client. Simply put, some or many medical-

malpractice cases that may be worthwhile from a liability standpoint are not worth taking because the potential recovery is not large enough. *Cf.* ***Guzman v. St. Francis Hosp., Inc.***, 2001 WI App 21, ¶5, 240 Wis. 2d 559, 571, 623 N.W.2d 776, 782 (non-economic damages provide a pool for attorney's fees). Five-years' worth of non-economic damages of conscious pain and suffering is not something that would ordinarily be given away—either on a whim or without careful analysis.

¶32 Third, as we have seen, the request to admit was served on June 22, 2005. A month passed before it was responded to, with an admission, on July 22, 2005. Plaintiffs' decedent died less than a month later, apparently on August 2, 2005. Her death removed any chance of having the defendants' experts examine her to test what the documents later produced by the plaintiffs' lawyer from his files seemingly reveal. Although the Majority appears to fault the defendants for not seeking such examinations while the plaintiffs' decedent was still alive, as of July 22, 2005, there was *no need to do so* because of the admission.

¶33 Fourth, the circuit court opined that it did not see that "significantly increased exposure" was "a pertinent consideration on the prejudice prong." Majority, ¶18. The Majority apparently agrees because it does not further discuss it. In my view, and, admittedly, there are apparently no cases directly on point, this is an horrendous view of the law, and is contrary to both common-sense and fairness. True, *if* the recipient of an admission can, as provided by WIS. STAT. RULE 804.11(2), "maintain[a] defense on the merits," then the harm resulting from significantly increased exposure might be *de minimis*. By the same token, the inability to defend against a *de minimis* increase in exposure also might not be prejudicial. Here, however, we have a perfect storm of prejudice—potentially astronomical increased exposure *and* the inability to adequately defend against it.

¶34 In sum, the defendants can*not* adequately defend against the claim for five years of conscious pain and suffering because the plaintiffs' decedent is no longer alive and thus whether she was in a persistent vegetative state cannot be tested by anyone. This is akin to sending a fighter into a boxing ring with both hands tethered.

¶35 In my view, this case presents prejudice as a matter of law, and I would reverse.[1]

[1] Plaintiffs' remedy for loss of their claim for their decedent's conscious pain and suffering would be a legal-malpractice claim against their lawyer. The circuit court and the Majority shift the burden of potential liability for five-years' worth of conscious pain and suffering to the defendants and those who pay the insurance-company-defendants' medical-malpractice premiums. This is the elephant in the room that both the circuit court and the Majority ignore. Sadly, the elephant has crushed fair play for *all* the parties.