COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2654
2012AP108

Cir. Ct. No. 2007CV557

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

ESTATE OF JUNE ANDERSON, C/O THE PERSONAL REPRESENTATIVE,

LISA A. LARGE,

PLAINTIFF-RESPONDENT,

V.

ANNE K. BARTEL, M.D.,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Judgment affirmed; order reversed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. The Estate of June Anderson alleged, and a jury agreed, that Anne Bartel, M.D., failed to obtain Anderson's informed consent and was causally negligent in her care and treatment of Anderson before Anderson's death. We affirm the resulting judgment. Dr. Bartel also appeals the order denying her motion to tender the judgment amount to the clerk's office to stop post-judgment interest from accruing. *See* WIS. STAT. § 815.05(8) (2009-10).[1] We reverse the order because post-judgment interest is tolled once the money is paid into the court. ***Downey, Inc. v. Bradley Center Corp.***, 188 Wis. 2d 435, 449, 524 N.W.2d 915 (Ct. App. 1994).

¶2 Anderson was admitted to the hospital with symptoms suggesting pneumonia. The admitting physician prescribed Lovenox, an anticoagulant, to minimize the risk of blood clots patients with pneumonia are predisposed to. When Anderson displayed signs of a pulmonary embolism a week later, a pulmonologist increased her Lovenox dosage.

¶3 Diagnostic tests revealed bilateral lung masses and a mass on one of her adrenal glands, a common site of lung cancer metastasis, but failed to confirm lung cancer. Anderson's primary physician ordered an adrenal biopsy and contacted Dr. Bartel, an interventional radiologist, to perform it. The primary physician did not advise Dr. Bartel that Anderson was on anticoagulation therapy.

¶4 Before undertaking the procedure, Dr. Bartel reviewed a portion of Anderson's main medical chart but not the bedside chart containing Anderson's medication administration record. Dr. Bartel followed her usual practice of asking

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

the nurse in the interventional radiology (IR) department about Anderson's pertinent medical information, particularly anticoagulants. The IR nurse told Dr. Bartel that Anderson was on no blood thinners, basing her response on her own review of Anderson's chart and the telephone "handoff report" from the floor nurse. Dr. Bartel thus was unaware that Anderson was on Lovenox for ten days and an increased dosage for the past three. Dr. Bartel's explanation to Anderson of the risks and benefits of the adrenal biopsy included the general risk of bleeding inherent in an invasive procedure but not the added risk Lovenox posed.

¶5 Post-biopsy, Anderson developed a retroperitoneal hemorrhage. An additional procedure and multiple blood transfusions failed to stop the bleeding. Six days after the biopsy, Anderson died of multiple organ failure.

¶6 Anderson's estate sued Dr. Bartel and the pulmonologist who increased the Lovenox dosage, alleging a lack of informed consent. Competing motions for summary judgment followed. The Estate sought a ruling that Dr. Bartel did not obtain Anderson's informed consent as a matter of law and that the lack of informed consent was a cause of Anderson's death. Dr. Bartel's motion sought the dismissal of the Estate's informed-consent claim on the basis that she could not be faulted for failing to obtain Anderson's informed consent to proceed with the biopsy while taking an anticoagulant if she did not know Anderson was on one. The Estate filed an amended complaint alleging negligence against Dr. Bartel, Anderson's primary physician, the pulmonologist, and the hospital. The Estate later dismissed the pulmonologist and settled with the hospital.

¶7 In the meantime, the trial court denied Dr. Bartel's summary judgment motion and granted the Estate's, but only as to the lack of informed

consent. The court concluded that Dr. Bartel should have known that Anderson was on Lovenox because the information was readily available in Anderson's medical records. Whether the failure to inform was causal would remain an issue for the jury. This court denied Dr. Bartel's petition for leave to appeal that nonfinal order and the trial court denied Dr. Bartel's two motions to reconsider its grant of partial summary judgment to the Estate.

¶8 The informed-consent claim against Dr. Bartel and the negligence claims against her and the primary physician proceeded to trial. Acquiescing to the Estate's persistent requests, the trial court answered this special verdict question in the affirmative: "Did Dr. Bartel fail to disclose information about the adrenal biopsy necessary for Ms. Anderson to make an informed decision?" The jury determined that a reasonable person in Anderson's place provided with that information would have declined the biopsy. It also determined that Dr. Bartel was negligent in her care and treatment of Anderson. The jury found the hospital seventy-five percent causally negligent and Dr. Bartel twenty-five percent causally negligent, but assigned no negligence against the primary physician. It awarded damages of $400,000. The court denied Dr. Bartel's motions after verdict.

¶9 The court entered judgment against Dr. Bartel for $125,792.99—her her portion of the damages plus costs and interest. Dr. Bartel moved to stay execution of the judgment pending appeal and to pay the judgment amount into the court to stop the further accrual of post-judgment interest. The court granted the motion to stay execution of the judgment but denied the motion to pay the judgment amount to the clerk's office. Dr. Bartel's appeal from this order was consolidated with the appeal of the underlying judgment.

¶10 Dr. Bartel's appeal largely centers on the informed-consent claim. She argues that she cannot have failed to provide information that she herself did not have. The jury here was given two related but independent bases upon which to find liability: failure to obtain informed consent and negligent care and treatment. It is undisputed that Dr. Bartel did not inform Anderson of the added risk of undergoing the biopsy while on a therapeutic dose of an anticoagulant. The question of whether a physician is negligent for failing to disclose risks under WIS. STAT. § 448.30(1) can be taken from the jury if the evidence compels that result as matter of law. ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 330, 552 N.W.2d 869 (Ct. App. 1996). The answer here could be nothing but "yes."

¶11 We therefore approach the case from the aspect of negligence. The jury was instructed that the court's answer to the informed-consent question was to have no bearing on the answer to any other verdict question. We presume the jury was following the trial court's instructions when it answered that Dr. Bartel was negligent with regard to her care and treatment of Anderson. *See* ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶17, 254 Wis. 2d 830, 647 N.W.2d 362.

¶12 Our review of a jury's verdict is narrow and we must sustain it if there is any credible evidence to support it. ***Kuklinski***, 203 Wis. 2d at 331; *see also* WIS. STAT. § 805.14(1). The scope of our review is even narrower where, as here, the trial court upheld the verdict on postverdict motions. *See* ***Weber v. White***, 2004 WI 63, ¶17, 272 Wis. 2d 121, 681 N.W.2d 137. We may not overturn the verdict absent such a complete failure of proof that the verdict must have been based on speculation. ***Kuklinski***, 203 Wis. 2d at 331.

¶13 Credible evidence supports the jury's finding of negligence. Dr. Bartel testified that she reviewed portions of Anderson's chart to determine

whether the adrenal biopsy was indicated and anatomically feasible; that she did not review the medication records, in part because the bedside record was "not available" when she looked for it; and that she relied on the nursing staff, chiefly the IR nurse, to relay relevant information about Anderson's history and medications. Dr. Bartel acknowledged that, despite the IR nurse's report, the medication summary included multiple references to "enoxaparin," the generic form of Lovenox. Anderson's primary physician confirmed that "anybody reviewing the chart would have seen" at least four places in it indicating that Anderson was on Lovenox.

¶14 Dr. Richard Lewan, the Estate's expert, confirmed that it is standard protocol for any doctor to ascertain a patient's medications before performing a procedure and that he could not conceive of any scenario where a physician planning an invasive procedure would be relieved of the duty to personally consult the patient's chart. Dr. Bartel's expert, by contrast, deemed it reasonable, appropriate and within the standard of care for Dr. Bartel to rely on the IR nurse and other staff to convey accurate information to her. The weight and credibility to be given the opinions of expert witnesses was for the jury to determine. *See* WIS JI—CIVIL 260; *see also* ***State v. Pharm***, 2000 WI App 167, ¶31, 238 Wis. 2d 97, 617 N.W.2d 163.

¶15 Dr. Bartel next contends that the trial court erred in denying her motion to bar Dr. Lewan, a family care physician, from testifying as to the standard of care of an interventional radiologist. Admission of an expert witness's opinion testimony is a matter of trial court discretion. ***Brain v. Mann***, 129 Wis. 2d 447, 458, 385 N.W.2d 227 (Ct. App. 1986). To be sustained, a

discretionary determination must be based upon facts of record as well as the appropriate and applicable law. ***Id.***

¶16 The manner in which Dr. Bartel performed the biopsy or otherwise rendered care peculiar to her discipline was not at issue. Rather, Dr. Lewan testified about standards fundamental to the practice of any physician, namely, a personal and thorough record review to gather essential information about the patient's medical history. Dr. Bartel's challenge thus goes to the weight, not the admissibility, of Dr. Lewan's testimony. Because Dr. Lewan was a qualified expert and his testimony was relevant, the court did not err by admitting it.

¶17 Dr. Bartel also contends that the trial court erred in denying her motion to bar Dr. Lewan from opining about pain and suffering because the opinion was not previously disclosed and it called for a level of expertise Dr. Lewan did not possess. Even if the trial court erroneously allowed the testimony, a new trial is not warranted because the error would have been harmless. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698.

¶18 When Dr. Lewan testified, Anderson's daughters, Laura Mueller and Lisa Large, already had testified about her post-biopsy condition. Mueller testified that Anderson was too weak to use the bathroom, could not get comfortable, kept "moaning and weeping," and reported "excruciating" pain. Large testified that she could hear Anderson moaning down the hall. She found Anderson gripping the bedrail, curled into a fetal position, sweating profusely, and complaining of "bad" pain and pressure in her back and stomach. Anderson required morphine but even then remained restless. Large testified that over the next few days, her mother became "bloated everywhere," her eyes "bulg[ed]," her

stomach grew "very distended," and the skin on her hands, fingers, toes, ears, lips and nose broke down and turned black. There is ample evidence of Anderson's pain and suffering, apart from Dr. Lewan's testimony.

¶19 Finally, Dr. Bartel asserts that the trial court misconstrued WIS. STAT. § 815.05(8), which governs the payment of post-judgment interest. Section 815.05(8) provides that post-judgment interest will accrue at the stated rate "from the date of the entry of the judgment until it is paid." Reading "until it is paid" to mean until the judgment is paid to the Estate, the trial court rejected Dr. Bartel's effort to stop the accrual of interest by paying the judgment amount into either the clerk's office or an escrow account. On this point, we agree with Dr. Bartel.

¶20 Another district of this court held some time ago that post-judgment interest is tolled when a party pays the judgment in full to the clerk's office. *See* ***Downey, Inc.***, 188 Wis. 2d at 449. The court observed that motivating the debtor to pay the judgment is one purpose of the statute and that, once the payor tenders the money into the court, he or she "has surrendered the funds and no longer has the use of the money." ***Id.*** We do not wholly agree with the rationale of ***Downey*** because we believe that if someone is to benefit, it should be the injured party rather than the payor. Nonetheless, as we are one court, we are bound by decisions of other districts. *See* ***Mallon v. Campbell***, 178 Wis. 2d 278, 289, 504 N.W.2d 357 (Ct. App. 1993); *see also* WIS. STAT. § 752.41(2) (providing that "[o]fficially published opinions of the court of appeals shall have statewide precedential effect"). ***Downey*** therefore controls.

By the Court.—Judgment affirmed; order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.