STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1048

Lori Perseke and Daniel Perseke,
as parents and natural guardians of Wyatt Perseke, a minor,
and Lori Perseke and Daniel Perseke, individually,
Respondents,

vs.

Allan E. Ross, M. D., et al.,
Defendants,

City of Ortonville d/b/a Ortonville Hospital
and under the assumed name Ortonville Area Health Services,
Appellant.

Filed April 6, 2010
Affirmed
Schellhas, Judge

Big Stone County District Court
File No. 06-C3-04-120

Terry L. Wade, Craig O. Sieverding, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, Minnesota; and

Brian E. Wojtalewicz, Wojtalewicz Law Firm Ltd., Appleton, Minnesota (for respondents)

Steven R. Schwegman, Michael T. Feichtinger, Kenneth H. Bayliss, Laura A. Moehrle, Quinlivan & Hughes P.A., St. Cloud, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

In this medical-malpractice case, appellant challenges the district court's denial of its motion for judgment as a matter of law (JMOL) and, alternatively, for a new trial or remittitur. We affirm.

FACTS

In 2003, respondents Lori Perseke and Daniel Perseke commenced this medical-malpractice suit on behalf of themselves and their minor son, Wyatt Perseke, born May 9, 2002. Respondents alleged that, during Wyatt's induced birth, he suffered brain injuries and cerebral palsy as a direct result of the negligence of appellant City of Ortonville, d/b/a Ortonville Hospital and under the assumed name Ortonville Area Health Services (OAHS), and others, including defendant Allan Ross, M.D.[1]

The first trial was held in Ortonville and ended in a mistrial after the jury was unable to reach a verdict. The district court changed the venue of the case to Stevens County, and a second trial was held November 3 - 20, 2008. Numerous expert witnesses and others testified at trial.

Anthony John Giefer, M.D., testified that Cytotec is a drug used to induce labor, and that hyperstimulation or tachysystole are risks associated with Cytotec and other

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] Before trial, Dr. Ross and respondents entered into a *Pierringer* settlement.

induction drugs. Hyperstimulation is "overstimulation"; tachysystole refers to frequent contractions and is an abnormal contraction pattern during which there are "repeated contractions with little or no rest between times." Gilbert Martin, M.D., a pediatrician with a subspecialty in neonatology, testified that tachysystole was present when more than five contractions occurred in a ten-minute period. Theodore Peck, M.D., a physician specializing in high-risk obstetrics, explained that tachysystole is too many contractions, meaning six or more in a ten-minute span, while hyperstimulation is present when there are that many contractions with a fetal heart rate that is disturbing.

Dr. Giefer testified that if tachysystole develops during induction, the mother can be turned to her left side, a position in which the blood flow to the uterus is better, and given oxygen. If those measures are not effective, a medication called Terbutaline, which interferes with contractions, can be given. Rarely does Terbutaline totally stop a contraction, but it will decrease the strength and duration of contractions. Dr. Giefer testified that accepted standards of practice require healthcare providers to identify and treat tachysystole. Dr. Giefer testified that Lori Perseke had contraction patterns consistent with tachysystole or hyperstimulation. Dr. Peck testified that tachysystole or hyperstimulation occurred and lasted for "hours and hours."

Lori Perseke's obstetrician, Dr. Ross, had standing orders in place at OAHS regarding the use of Cytotec, which stated: "If uterine hyperstimulation is observed by contraction lasting >90 seconds or if relaxation between contractions is <60 seconds give Terbutaline .25 mg subq and notify physician. Position patient on left side and give

oxygen per non-rebreather mask." But OAHS never administered Terbutaline, and Dr. Ross testified that the nurses never contacted him with concerns about hyperstimulation.

Immediately after his birth, Wyatt required bag and mask ventilation for 1 1/2 minutes and he was blue for 45 minutes. He was also flaccid for at least 30 minutes, which means he had no muscle tone and was limp. His respirations were slow and irregular for 13 minutes, and he had "a grunting and substernal retraction respiratory pattern" for at least 30 minutes. He breathed very rapidly for at least two hours and had an abnormal response to stimuli for at least 30 minutes. According to Dr. Giefer, Wyatt's condition at birth was "due to the hyperstimulation, probably tachysystole that was not recognized." Dr. Giefer opined that had Terbutaline been given to Lori Perseke at 1730 hours, "this would have all been very different." And Dr. Peck opined that Wyatt's condition at birth was due to "hours of gradually or reduced oxygen" that resulted from "too many contractions," and opined that tachysystole had not been properly identified and treated.

The day after Wyatt's birth, Dr. Ross arranged for Wyatt to be flown to a hospital in Sioux Falls, South Dakota, where he stayed for 12 days. Personnel at this hospital told respondents that Wyatt was experiencing seizures and periods when he stopped breathing. When Wyatt was over three months old, respondents learned that he had severe brain damage, and he was diagnosed with cerebral palsy.

Wyatt took his first steps with a walker just before he turned two, and he took his first independent steps the following July. Wyatt began receiving speech therapy in daycare, and, for two years during preschool, he had a para, a person provided by the

school district to assist him during the day. At age six and one half, Wyatt could not talk, and drooled excessively. His eating was complicated by the drooling and food falling out of his mouth. His attempts to use eating utensils frustrated him because he could not do it very well. He had difficulty dressing himself and could not tie or untie his shoes. He fell occasionally because of imbalance and had seizures. He was struggling with toilet training. Because he did not like to be alone and was "very anxious" about sleeping, he slept with respondents.

Phyllis Sher, M.D., a pediatric neurologist, opined that at his birth, Wyatt suffered from hypoxic ischemic encephalopathy (HIE). HIE has three parts that correspond to the three words. Hypoxia refers to diminished oxygen; ischemia refers to poor blood flow; and encephalopathy is a "generalized term" that can encompass anything that has to do with altered mental function. At some point, hypoxia has an adverse impact on a child's brain. When hypoxia occurs, cells swell and can swell so much that they explode. Dr. Sher opined that especially toward the end of Lori Perseke's labor, there was trouble "particularly related to perfusion issues," and that hyperstimulation is a cause of that kind of problem. Dr. Sher testified that there was no evidence that the trauma Wyatt experienced occurred prior to the onset of labor. Bonnie Bunch, M.D., a pediatric neurologist, testified that HIE was "probably the most likely cause of his problems." Dr. Bunch testified that Wyatt had a permanent brain injury, and that his problems with his mouth, including his drooling and feeding problems, are related to his brain injury. Gilbert Martin, M.D., a pediatrician subspecializing in neonatology, testified that there

was significant trauma in this case that contributed to Wyatt's injury and that hypoxia played a role.

Appellant's expert witnesses opined that Wyatt's injuries could have occurred before Lori Perseke checked into the hospital. Patrick Barnes, M.D., specializing in pediatric neuroradiology, testified that Wyatt's magnetic imaging was consistent with an injury occurring several days before birth and with swelling that peaked before birth and declined after birth. But, on cross-examination, Dr. Barnes also testified that it was "in the realm of possibility" that Wyatt's injury occurred in the hours just before he was born. Harry Farb, M.D., a physician specializing in obstetrics and maternal-fetal medicine, testified that it was never "indicated necessary or appropriate for Terbutaline to be administered," and that Wyatt's condition after birth was not consistent with Wyatt having hypoxia during labor and delivery sufficient to cause brain injury. Norman Virnig, M.D., a retired neonatologist, opined that Wyatt's injury occurred approximately four days before his birth.

Dr. Bunch testified that Wyatt needs special-education services and therapies because of the injuries he suffered at birth. Wyatt receives speech therapy, occupational therapy, and physical therapy. For his own protection and the protection of others, he needs more supervision than other children and, throughout his life, he will need full supervision. Wyatt will need someone like a guardian to handle his financial and medical affairs. He will need medication for epilepsy. He needs orthotics, which are a kind of bracing system for the limbs that are commonly in the form of a brace that goes inside the shoe and up the back of the calf. People with gait problems who need bracing are at risk

for earlier onset of arthritis and joint problems. Dr. Sher said that there might also be other things that Wyatt needs, particularly with ongoing seizures. Dr. Sher also testified that Wyatt will probably function in a group home in the future. Both Drs. Sher and Bunch opined that Wyatt will not be competitively employed, but might function and earn money in "sheltered workshops," in which workers are supervised and perform simple, repetitive tasks.

Karen Hobart, an occupational therapist and life-care planner, completed a future-needs assessment for Wyatt, summarizing Wyatt's needs and expenses from diapers to his future group home. Hobart estimated the total cost of Wyatt's future needs to be $6,705,145.13. Hobart acknowledged on cross-examination that her estimate was not reduced to present value and included a home health aide, which Wyatt did not have.

Roger Feldman, who has a Ph.D. in economics, testified and explained the concept of present value to the jury. Feldman opined that it would not be fair to use the cost estimate provided by Hobart because it was not reduced to present value. Dr. Feldman opined that the present value of Wyatt's future care needs was $4,653,491, and that the present value of Wyatt's lost earning ability was $1,843,343.

Daniel Perseke testified that there were therapies that respondents wanted for Wyatt that he was not getting, such as a home health professional and daily speech therapy. When asked why respondents were not providing these services to Wyatt, Daniel Perseke answered that they could not afford it. Appellant did not object to these questions or answers.

The jury found that Dr. Ross and OAHS were negligent in the care and treatment of Lori Perseke and/or Wyatt and that the negligence was a direct cause of injury to Wyatt. The jury found that Dr. Ross was also negligent in failing to disclose to Lori Perseke any risk of treatment, that a reasonable person in Lori Perseke's position would have declined treatment if she had known the undisclosed risks, and that the undisclosed risks resulted in harm to Wyatt. The jury assigned 70% negligence to Dr. Ross, 30% to OAHS, and awarded respondents damages in the total amount of $9,566,000. The district court denied appellant's posttrial motions and this appeal follows.

D E C I S I O N

JMOL

JMOL is governed by Minn. R. Civ. P. 50. Under rule 50.01(a), a motion for JMOL may be made after a party has been fully heard on an issue on the grounds that there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Under rule 50.02, JMOL may be sought after trial regardless of whether a JMOL motion was made earlier in the trial. If JMOL is sought after a verdict is returned, the district court may allow the judgment to stand, order a new trial, or direct entry of JMOL. Minn. R. Civ. P. 50.02(a).[2]

This court applies de novo review to the district court's denial of a JMOL motion. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). "JMOL is appropriate

[2] The rules presently use the term judgment as a matter of law (JMOL) but previously used the term judgment notwithstanding the verdict (JNOV). *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 n.1 (Minn. App. 2007). The change "did not alter the substantive practice relating to these motions." *Id.*

when a jury verdict has no reasonable support in fact or is contrary to law." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007) (citing *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990)). The JMOL standard has also been phrased to require consideration of "whether the verdict is manifestly against the entire evidence." *Langeslag v. KYMN, Inc.*, 664 N.W.2d 860, 864 (Minn. 2003) (quotation omitted). "The jury's verdict will not be set aside 'if it can be sustained on any reasonable theory of the evidence.'" *Longbehn*, 727 N.W.2d at 159 (citing *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998)). Denial of JMOL must be affirmed if, considering the evidence in the light most favorable to the prevailing party, "there is any competent evidence reasonably tending to sustain the verdict." *Langeslag*, 664 N.W.2d at 864 (quotation omitted).

To establish medical malpractice, a plaintiff must introduce expert testimony as to: (1) the standard of care; (2) the defendant's departure from that standard; and (3) whether the departure was a direct cause of the plaintiff's injuries. *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993). Appellant argues that the evidence was insufficient to support the jury's verdict of negligence against OAHS because the evidence was insufficient to prove that the nurses, on whose actions OAHS's liability was based, were negligent in failing to contact Dr. Ross earlier than they did. Appellant also argues that causation is lacking for two reasons: (1) Dr. Ross would not have done anything differently had he been contacted earlier; and (2) no expert testimony established that Wyatt's injury was caused while the nurses were monitoring Wyatt's delivery.

Standard of Care

Appellant argues that the evidence is insufficient to prove that the nurses violated the standard of care. We disagree. The record contains competent evidence that sustains the verdict with respect to the nurses' violation of the standard of care.

The testimony of Dr. Giefer and Dr. Peck addressed the standard of care applicable to the nurses. Dr. Giefer testified that a nurse should, when watching and attending to a labor patient, know about hyperstimulation and tachysystole, and that nurses are expected to be able to determine duration, frequency, and strength (or quality) of contractions accurately. Dr. Giefer also testified that accepted standards of practice require healthcare providers to identify and treat tachysystole, and it is not an accepted standard to just wait and see if problems develop with the baby and then treat the problems. Dr. Giefer testified that it was appropriate for a doctor to write orders for the nurses to follow and that once a doctor writes an order, accepted standards of practice mandate that nurses follow the order—"They either follow it or contact the physician and say why they're not wanting to follow it." Nurses cannot ignore an order "when it's laid down that specifically." If a doctor believes an order is no longer applicable, then the doctor changes the order. The change would either be written specifically or given as an oral order to a nurse who then writes it in a chart. Accepted standards of practice require that countermanding or revoking orders be documented, and existing orders should be followed until countermanded or revoked.

Dr. Peck testified that accepted standards of practice require nurses and doctors to be able to recognize when hyperstimulation or tachysystole is happening. "[R]ecognition

is the key to everything." Once it is recognized, "we do something to correct it." "[T]he presence of tachysystole for more than just a brief period of time should automatically set up an alert . . . that something is wrong." Dr. Peck said that "what should have been done is that the nurses should have recognized it, told the physician about it, and between the two of them come up with a treatment which is Terbutaline and it's in the orders."

Here, the parties do not dispute that the nurses neither gave Terbutaline nor contacted Dr. Ross to explain why they did not want to administer Terbutaline despite the presence of tachysystole or hyperstimulation. The jury heard the testimony of Lori Perseke's treating nurses, Doreen Diekmann and Janell Hrdlicka, and it was within the province of the jury to evaluate the nurses' credibility and weigh their testimony.

Substantial competent evidence supports the jury's verdict of negligence against OAHS. We conclude that the district court properly denied OAHS's motion for JMOL.

Causation

Appellant argues that the evidence did not establish that any departure from the standard of care by the nurses caused Wyatt's injuries. Again, we disagree. The record, as previously described in part, contains competent evidence that reasonably tends to sustain the verdict.

Appellant argues that Dr. Ross would not have done anything differently had the nurses contacted him earlier, and that causation is therefore lacking. Dr. Ross testified that before Wyatt was delivered, based on all the information he had, he did not think that there was any problem with oxygenation with Wyatt. Dr. Ross opined that the fetal monitoring strip was reassuring throughout and that "there wasn't ever an indication to

give Terbutaline at any point or deviate from the course that—that we did." He testified that, while the nurses were caring for Wyatt and Lori Perseke and he was not present, there were no signs of recurrent abnormal contraction patterns or hypoxia. As he looked back to review what the nurses had done, and as he looked at the fetal monitoring strips, he did not see "any point in this labor to intervene." But, on cross-examination, Dr. Ross admitted that he relies on nurses to alert him to abnormal uterine contraction patterns because they are his "eyes and ears" for monitoring labor, and he never told the nurses that they did not need to contact him if there was an abnormal uterine contraction pattern. And Dr. Ross agreed that, with or without his standing order, accepted standards of medical practice required the nurses to call him when there was a persistent pattern of contractions with a resting interval of less than 60 seconds between contractions.

Although the jury may have determined that Dr. Ross's testimony established that he did not see a reason to intervene based on the fetal monitoring strip and record, his testimony did not establish directly that even if tachysystole or hyperstimulation were present and identified, he would have countermanded and revoked his standing order for Terbutaline or chosen not to treat the hyperstimulation or tachysystole. And Dr. Ross's testimony did not establish that the nurses were relieved of their duty to follow his order to administer Terbutaline and contact him if hyperstimulation, as defined in his order, was present.

Further, the legal authority on which appellant relies is not applicable. Appellant cites *Seef v. Ingalls Memorial Hosp.*, 724 N.E.2d 115 (Ill. App. Ct. 1999), *Martin v. Ledingham*, 774 N.W.2d 328 (Mich. Ct. App. 2009), *Gill v. Foster*, 626 N.E.2d 190 (Ill.

1993), *Rampe v. Cmty. Gen. Hosp. of Sullivan Co.*, 660 N.Y.S.2d 206 (N.Y. App. Div. 1997), and *Albain v. Flower Hosp.*, 553 N.E.2d 1038 (Ohio 1990), *overruled on other grounds by Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994). Generally speaking, these cases involved circumstances in which causation was lacking because a doctor testified that even if nurses had reported information, the doctors would not have altered their course of treatment. *See, e.g.*, *Seef*, 724 N.W.2d at 118, 122 (affirming dismissal after expert testimony on causation was barred due to a doctor testifying that he would not have done anything differently had he seen monitor strips earlier); *Martin*, 774 N.W.2d at 330 (holding that testimony that better reports should have caused better care or further reporting was insufficient where there was testimony from the doctors about "what they would actually have done had they received the nurse reports"). All of these cases are from other jurisdictions, and many have significant distinguishing features. The most significant distinguishing feature is that liability in the foreign cases was based on the nurses' failure to report. Here, part of the nurses' departure from the standard of care was their failure to identify and treat a condition pursuant to Dr. Ross's standing orders.

Because the record contains competent evidence reasonably tending to sustain the verdict, we affirm the district court's denial of JMOL.

New Trial

Motions for a new trial are governed by Minn. R. Civ. P. 59.01. A district court's decision on a motion for a new trial is reviewed for an abuse of discretion, unless the court's ruling relied solely on a matter of law, in which case the ruling is reviewed de

novo. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). "An appellate court will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 477 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Aug. 23, 2006).

Grounds for a new trial include a verdict not justified by the evidence, misconduct of the prevailing party and excessive or insufficient damages "appearing to have been given under the influence of passion or prejudice." Minn. R. Civ. P. 59.01(b), (e), (g). Here, appellant argues that there was insufficient evidence of liability, that counsel committed misconduct, and that the verdict was the result of passion or prejudice.

As previously discussed, the record contains evidence supporting the verdict. As to misconduct by counsel, "[t]he decision to grant a new trial based on claimed attorney misconduct rests wholly within the district court's discretion." *Lake Superior Ctr.*, 715 N.W.2d at 479. "The district court judge is best positioned to determine whether an attorney's misconduct has tainted the jury's verdict." *Id.* "An objection to improper remarks, a request for curative instruction, and a refusal by the trial court . . . are generally prerequisites to the obtaining of a new trial on appeal." *Id.* (quoting *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977)). An exception applies for misconduct that is "so flagrant as to require the court to act on its own motion." *Id.* (quoting *Hake*, 258 N.W.2d at 582).

OAHS argues that respondents' counsel committed misconduct by eliciting testimony about respondents' ability to pay for treatment, by asking the jury to send a message, and by arguing that the jury could draw negative inferences from OAHS's failure to call certain witnesses. But OAHS did not object to Daniel Perseke's testimony or to the argument about drawing negative inferences. And although OAHS did object to respondents' improper send-a-message argument, OAHS did not request a curative instruction from the district court. OAHS points out that Dr. Ross requested a curative instruction regarding the argument that the jury could draw negative inferences related to OAHS's failure to call certain witnesses, arguing essentially that Dr. Ross's request functioned both as an objection and a request for a curative instruction. But the district court denied Dr. Ross's request for a curative instruction, saying: "The Court's going to deny the request for curative instruction, find that the objection could have been made at the time. It was waived. Request for a curative instruction is denied." We agree with the district court—the objection was waived. "Generally, *a contemporaneous* objection to improper remarks and a request for curative instructions are prerequisites to receiving a new trial on appeal." *Cox v. Crown CoCo, Inc.*, 544 N.W.2d 491, 499 (Minn. App. 1996) (emphasis added). OAHS has failed to satisfy the prerequisites for a new trial based on misconduct.

Damages

"[T]he matter of granting a new trial for excessive or inadequate damages rests almost wholly in the discretion of the trial court." *Krueger v. Knutson*, 261 Minn. 144, 154, 111 N.W.2d 526, 533 (1961). "[O]nly where a verdict is so inadequate or excessive

that we are convinced that it could only have been rendered on account of passion or prejudice" should this court interfere. *Id.* The district court "has the significant advantage of viewing the entire proceedings, some of which is not apparent in a record. We should not interfere with the court's determination unless there is a clear abuse of discretion." *Caspersen v. Webber*, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973).

Here, the jury awarded damages as follows:

1. Past health-care expenses	$63,000
2. Future health-care expenses until age 18	$907,000
3. Pain, disability, emotional distress, etc.	$250,000
4. Future pain, disability, emotional distress, etc.	$2,750,000
5. Future health-care expenses	$3,746,500
6. Loss of earning capacity	$1,850,000.

Based on the record before us, we cannot conclude that the verdict is so excessive that it could only have been rendered on account of passion or prejudice. The jury's award of past health-care expenses is only slightly more than the amount detailed by respondents at trial ($61,142.52 in Exhibit 31; and $62,563.14 in Exhibit 31A). As to Wyatt's future health-care expenses from age 6 until age 18, we note that, although respondents submitted evidence of expenses totaling $906,971, their counsel argued to the jury that it was appropriate to deduct a wheelchair expense, thereby reducing the total to $751,512. The jury nevertheless awarded respondents $907,000 in future health-care expenses until age 18. For future health-care expenses after Wyatt reaches age 18, respondents sought $3,746,520, and supported their request with expert testimony. The

jury awarded exactly $3,746,520. Similarly, the jury's damages award for Wyatt's lost earning capacity was $1,850,000, only slightly more than the damages sought by respondents, $1,843,343, a request supported by expert testimony. The jury clearly paid close attention to the trial testimony and evidence. Given the extent of Wyatt's permanent injuries, we cannot conclude that the jury's damages award is so excessive that it could only have been rendered on account of passion or prejudice.

OAHS also argues that the jury's general damages award was excessive. But, when a case, such as this, reflects a devastating injury, a general damages award does not seem unreasonable. *See Busch v. Busch Const., Inc.*, 262 N.W.2d 377, 398 (Minn. 1977) (stating that the jury's award of $800,000 for general damages did not seem unreasonable in view of the devastating injuries suffered by adult plaintiff whose life expectancy was 29.4 years). We conclude that the district court did not abuse its discretion in denying OAHS's alternative motion for a new trial.

Remittitur

OAHS also challenges denial of remittitur. "The standard for reviewing a remittitur is the same as if a new trial had been granted unconditionally." *Id.* at 400. A new trial may be granted on the ground that an excessive verdict appears to have been given under the influence of passion or prejudice, or on the ground that the damages are not justified by the evidence. *Id.* (citing Minn. R. Civ. P. 59.01). A remittitur decision is reviewed for an abuse of discretion. *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. App. 1987). Consistent with our previous discussion of the jury's damage award, we conclude that the district court did not abuse its discretion in denying remittitur.

Because we affirmed the district court, we do not reach respondents' challenge of the district court's grant of summary judgment to appellant on the theory of joint enterprise.

Affirmed.