STATE OF MICHIGAN

COURT OF APPEALS

JEROME LIBBRECHT and MARGARET LIBBRECHT,

Plaintiffs-Appellees,

v

MARSHALL MEDICAL ASSOCIATES, P.C., and JAMES G. DOBBINS, M.D.,

Defendants-Appellants,

and

THOMAS M. DOBBINS, M.D.,

Defendant-Appellee.

UNPUBLISHED
October 4, 1996

Nos. 176354; 179154
LC No. 91-001111-NH

Before: O'Connell, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendants Marshall Medical Associates, P.C., and James G. Dobbins, M.D., appeal from the jury verdict and judgment for plaintiffs, and from an award of mediation sanctions in favor of plaintiffs. The jury found no liability on the part of defendant Thomas M. Dobbins, M.D. We affirm.

In case no 176354, defendants first contend that evidence of decedent's medical treatment prior to April 16, 1989, was improperly admitted. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Plaintiffs alleged in their complaint that Plaintiff Jerome Libbrecht had exhibited signs and symptoms for several years and that defendants failed to heed or act upon those signs and symptoms. Defendants do not allege that plaintiffs' *complaint* was barred by the statute of limitations, and the

statute of limitations is not a limitation on the admissibility of relevant evidence. We find no abuse of discretion.

Next, defendants argue that the jury verdict, finding defendants James Dobbins and Marshall Medical Associates liable for malpractice, but exonerating defendant Thomas Dobbins, was irreconcilable. The decision whether to grant a new trial is within the discretion of the trial court. *Phillips v Mazda Motor Mfg*, 204 Mich App 401, 411; 516 NW2d 502 (1994). Here, the jury was instructed, without objection, that it could find "neither one or both" of the defendants liable. Further, evidence concerning each defendant's treatment of Mr. Libbrecht was different. While defendant Thomas Dobbins saw Mr. Libbrecht only once, defendant James Dobbins was Mr. Libbrecht's treating physician and saw him numerous times. If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent. *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). This Court will not second guess the jury, and we find no abuse of discretion in the trial court's denial of defendants' motion for new trial.

Defendants also argue that their motion for mistrial should have been granted because plaintiffs' counsel made a number of improper remarks during voir dire. The scope and conduct of voir dire is within the discretion of the trial court. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). The trial court's grant or denial of a mistrial is also within the sound discretion of the trial court, and there must be a showing of prejudice to the defendants' rights if error requiring reversal is claimed. The trial court's ruling must be so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice. *McAlister*, *supra* at 503. Defendants suggest that questions concerning a "malpractice crisis" and high malpractice awards in general may have led the jury to believe that they were awarding insurance proceeds. In response to one of counsel's voir dire questions, one prospective juror commented that it was a "shame" that jury verdicts were so high because it was making malpractice insurance "go up". The prospective juror's comment was the only reference to insurance made during this trial, and the trial court concluded that plaintiffs' counsel had not intentionally elicited the reference to insurance. We agree with the trial court that the remark of a prospective juror, who was later dismissed from the panel, did not prejudice defendants' rights so as to deprive defendants of a fair trial or amount to a miscarriage of justice. We find no abuse of discretion.

Defendants also contend that evidence was improperly admitted concerning the standard of care by plaintiffs' witness, Dr. Dinerstein. We do not agree. Dr. Dinerstein testified over objection concerning the symptoms of carotid artery disease, the different methods of treatment, the types of patients who have strokes and what defendants did in treating Mr. Libbrecht. Much of the challenged testimony was cumulative, and did not, in any case, involve the standard of care. We find no abuse of discretion.

Defendants argue that the trial court should have granted defendants' motion for new trial because testimony regarding the standard of care by plaintiffs' expert, Dr. Markowitz, was improperly admitted. There is no merit to this issue. All of the questions placed before Dr. Markowitz concerning whether defendants had breached the standard of care were, in fact, prefaced by a recitation of the legal definition of that standard. Thus, even if Dr. Markowitz gave opinions concerning his personal

standards, he answered questions concerning defendants' conduct in terms of the "duty as a physician" and "as a family practitioner", and not based on any personal standard. See *May v Wm Beaumont Hosp*, 180 Mich App 728, 761;448 NW2d 497 (1989). We find no abuse of discretion.

Defendants also argue that reversal is required because of an improper comment by plaintiffs' counsel. We do not agree. Immediately after defendants' objection, the trial court gave the jury a cautionary instruction that statements by attorneys are not evidence and should be ignored if not supported by the evidence. The challenged remark in this case was an isolated instance. We agree with the trial court that the cautionary instruction was sufficient to cure any prejudice. The trial court did not abuse its discretion in denying defendants' motion for mistrial. *McAlister, supra* at 503.

There is no merit to defendants' claim that the testimony of Robert Ancell was speculative and improperly admitted. The witness' testimony was based on his examination of the medical records and the Veterans' Administration facility, and on interviews with plaintiffs. Ancell, a rehabilitation counseling expert, testified that the medical records from the VA hospital attested to a "pending discharge" of Mr. Libbrecht, and that, to that end, the hospital had been sending him home on weekends. Ancell also testified that Mrs. Libbrecht could not perform the requirements of Mr. Libbrecht's care, that the VA hospital was unable to provide the necessary environment and treatment, that Mr. Libbrecht's needs could best be met by a facility such as Mediplex and that the costs of such treatment was between $200 and $350 a day. Defendants presented no evidence that Mr. Libbrecht was receiving sufficient care at the VA hospital. Defendants' allegation that Mr. Libbrecht was, and perhaps still is, at the VA hospital does not contradict the evidence that Mr. Libbrecht was not receiving proper care and that proper care would cost a considerable amount of money. The trial court did not abuse its discretion in allowing testimony concerning Mr. Libbrecht's need for different and continued care and the cost of such care. Defendants were not entitled to a collateral source reduction for future medical and other care costs. As the trial court stated, no offset for collateral source benefits is provided under the statute for future medical and health care costs. MCL 600.6306(d); MSA 27A.6306(d).

Defendants contend that reversal is required because of improper remarks in plaintiffs' closing argument. The remarks were not objected to below. Reviewing plaintiffs' closing argument as a whole, we conclude that a cautionary instruction would have cured any prejudice counsel's isolated statements may have had. Accordingly, defendants have waived review of this issue on appeal. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).

Defendants argue that the trial court should have granted remittitur. This Court may not disturb a trial court's grant or denial of remittitur unless there has been an abuse of discretion. Remittitur is justified if the jury verdict is excessive, that is, if the amount awarded is greater than the greatest amount the evidence would support. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989). We find no abuse of discretion here. The jury award for future medical expenses was the lowest amount suggested by the evidence, no award was made for future pain and suffering, and the award was reduced by 30% because of Mr. Libbrecht's comparative negligence in being a heavy smoker. Mrs. Libbrecht testified concerning the close relationship she and her husband had enjoyed

during their lengthy marriage and described the loss she had suffered because of Mr. Libbrecht's stroke. In light of the evidence, the jury verdict was not excessive.

In case no.179154, defendants raise challenges to the award of attorney fees. This Court will uphold an award of attorney fees absent an abuse of discretion. *MBPIA v Hackert Furniture*, 194 Mich App 230, 234; 486 NW2d 68 (1992). MCR 2.403. Defendants claim that plaintiffs' counsel padded their bill and billed for duplicative services. The trial court held an evidentiary hearing on this matter. Trial counsel was questioned extensively concerning his method of billing and the work he performed. The trial court reduced both the number of hours and the hourly rate of payment claimed in making its award. We find no abuse of discretion.

Defendants argue that plaintiffs impermissibly billed for appellate work. We do not agree. MCR 2.403 permits an award of attorney fees "for *all* services necessitated by the rejection of the mediation award." *Troyanowski v Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988). As noted previously, the trial court held a full evidentiary hearing on this issue and concluded that the fees incurred were necessitated by the trial and the post-trial motions. We find no abuse of discretion.

Defendants also contend that the trial court erred in failing to reduce the award by the portion of attorney fees attributable to the case against defendant Thomas Dobbins. There is no merit to defendants claim that the award should have been reduced by one-half. Defendants shared pleadings, presented identical defenses and witnesses, and were represented by the same attorney. Plaintiffs' preparation and trial work were substantially identical to both defendants. In addition, while not separating the work hours incurred for each defendant, the trial court did reduce the amount requested by nearly half. The amount of the award was not unreasonable and we find no abuse of discretion.

Finally, defendants argue that the trial court erred in granting plaintiffs taxable costs for expert witness fees paid prior to the trial court's approval. Defendants noted below that there was "an issue as to whether or not that's appropriate", but conceded that the "custom is that that's usually and customarily done by attorneys." In effect, defendants agreed not to object to the procedure and have waived the issue for appellate review. In any case, the trial court found that the expert witness fees were reasonable. We find no abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell
/s/ Harold Hood
/s/ Roman S. Gribbs