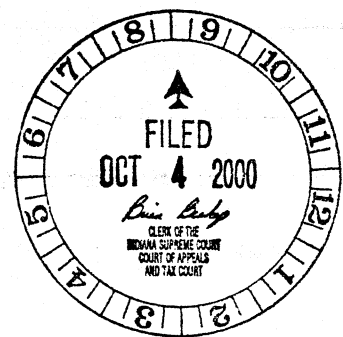


Pursuant to Ind.Appellate Rule 15(A)(3), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CONSOLIDATED MEDICAL)
TRANSPORT, INC.,)

Appellant-Defendant,)

vs.)

No. 45A03-9910-CV-389)

KRISTINE WILEY, Individually, and as the)
Personal Representative of the Estate of)
RONALD WILEY, Deceased,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-9608-CT-1580

October 10, 2000

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Consolidated Medical Transport, Inc. (CoMed) appeals the jury's verdict in favor of Kristine Wiley in her suit for wrongful death, raising the following issues for review:

- I. Whether the trial court erred by requiring the jury to deliberate through the night.
- II. Whether the trial court erred in refusing to grant a new trial.
- III. Whether the trial court erred in instructing the jury regarding damages and life expectancy.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 17, 1995, Ronald Scott Wiley (Scott) suffered an asthma attack which rendered him unconscious and unable to breathe. His wife, Kristine, called 911 and began CPR. Two ambulances responded to the call, including three EMTs and one paramedic, Jeff Marsack. As the person with the highest training, Marsack managed the scene and directed the actions of the other emergency personnel.

When Marsack and the others arrived, Scott was not breathing and was blue in color. Three minutes later, Scott's heart stopped. Marsack tried two times unsuccessfully to place an endotracheal tube into Scott's trachea to provide a means of artificially respirating Scott. On his third attempt to place the tube, he believed he was successful. He taped the tube into place and used the tube to attempt to force air into Scott's lungs. Meanwhile, he also started an IV line and administered medications intramuscularly and through the IV line while an EMT performed CPR. The ambulance left the Wileys' apartment en route to the hospital twenty-four minutes after the first ambulance arrived.

At the hospital, emergency room physician Dr. Shaheen Parvez assumed control over Scott's care. Scott had no heartbeat, and was still blue in color. Upon investigation, Dr. Parvez realized that the endotracheal tube was in Scott's esophagus, not his trachea. Thus, the artificial respiration had been ineffective. Dr. Parvez removed the tube and replaced it correctly in the trachea. Scott's color immediately began to change from blue to pink. Dr. Parvez defibrillated Scott's heart, and Scott's heart resumed beating. Unfortunately, by that time, Scott's brain had been deprived of oxygen for long enough to cause brain death. The following day, he was removed from the ventilator.

Kristine Wiley filed suit for wrongful death against CoMed alleging that Scott's death was caused by the negligent acts of its employees. At the conclusion of the six-day trial, the jury returned a verdict in Wiley's favor for \$933,525.00. CoMed filed a motion to correct errors seeking a new trial, which the trial court denied. CoMed now appeals.

DISCUSSION AND DECISION

CoMed first argues that the trial court erred in requiring the jury to deliberate through the night. The jury retired to deliberate around 3:45 P.M. in the afternoon of May 25, 1999. At 5:15 A.M. the following morning, the jury returned a verdict for Wiley. CoMed argues that because of the overnight deliberations, the jury was sleep deprived, its ability to process information was therefore impaired, and its verdict should now be set aside.

We note, however, that despite CoMed's argument here that the jury's thought processes were compromised during deliberation, at the time, CoMed offered no objection to the jury's continued deliberation. A party may not fail to object to a court's action and then

raise the court's action as error on appeal unless the error is fundamental. *James v. State*, 613 N.E.2d 15, 25 (Ind. 1993). Thus, CoMed has waived this issue for appellate review. See *Eiland v. State*, 433 N.E.2d 400, 404 (Ind. Ct. App. 1982).

To avoid waiver, CoMed contends that these circumstances constitute fundamental error. In order to rise to the level of fundamental error, the error must constitute a clearly blatant violation of basic and elementary principles, and the harm or potential for harm therefrom must be substantial and apparent. *James*, 613 N.E.2d at 25. Fundamental error is an error that is such a substantial and blatant violation of basic principles that it renders the trial unfair. *Sturma v. State*, 683 N.E.2d 606, 610 (Ind. Ct. App. 1997). To fall within this exception, error must be such that if not rectified it would deny the defendant fundamental due process. *Id.*

The length of time a jury should be permitted to deliberate is within the sound discretion of the trial court. *Farrell v. State*, 622 N.E.2d 488, 492 (Ind. 1993); *Parrish v. State*, 515 N.E.2d 516, 520 (Ind. 1987). In order to secure a reversal on this basis, a complaining party must show a clear abuse of discretion coupled with prejudice. *King v. State*, 531 N.E.2d 1154, 1161 (Ind. 1988).

Here, the trial court did not abuse its discretion in not requiring jurors to stop deliberating and rest. The record shows no indication that the jurors felt fatigued or that they requested a break, nor does it disclose any compulsion on the part of the trial court. The trial court simply let the jurors continue deliberating through the night. We find no error of any kind here, fundamental or otherwise.

Nonetheless, CoMed argues that this case is governed by *Farrell*, 622 N.E.2d at 488. In that case, our supreme court reversed a criminal conviction where the jury was required to deliberate all night. However, in *Farrell*, both parties joined in objecting to forcing the jury to continue to deliberate. *Id.* at 491-92. Moreover, there was evidence that the jurors were tired and upset. Here, no one objected to continued deliberation, and nothing indicates that the jurors were compromised by the situation. There was no error here.

CoMed next argues that the trial court erred in failing to grant it a new trial because of a lack of evidence on the issue of proximate cause. Wiley claimed five theories of negligence: failure of CoMed's employees to transport Scott to the hospital in a timely manner; failure of CoMed's employees to properly control Scott's respirations; failure of CoMed's employees to follow treatment protocols; failure of CoMed's employees to properly intubate Scott; and failure of CoMed's employees to protect Scott's airway during transfer at the hospital. CoMed claims that because there was insufficient evidence on any of these theories, it was entitled to a new trial.

The trial court's standard of reviewing a verdict when considering a motion to correct error requesting a new trial is governed by Ind. Trial Rule 59(J)(7). *Precision Screen Machines, Inc. v. Hixson*, 711 N.E.2d 68, 70 (Ind. Ct. App. 1999). When faced with a motion for a new trial, the trial judge has an affirmative duty as a "thirteenth juror" to weigh conflicting evidence and determine whether in the minds of reasonable men a contrary verdict should have been reached. *Id.* As a thirteenth juror, the trial judge: 1) hears the case along with the jury; 2) observes witnesses for their credibility, intelligence and wisdom; and

3) determines whether the verdict is against the weight of the evidence. *Id.* When the verdict is against the weight of the evidence, it is the trial court's duty to grant a new trial. T.R. 59(J)(7).

Our review of the trial court's decision, however, is subject to a different standard. The trial court has broad discretion to grant or deny a motion for a new trial and that determination will be reversed only for an abuse of discretion. *Precision Screen Machines*, 711 N.E.2d at 70; *Deree v. All American Shipping Supplies, Inc.*, 718 N.E.2d 1214, 1215 (Ind. Ct. App. 1999), *trans. denied*. An abuse of discretion will be found when the trial court's action is against the logic and effect of facts and circumstances before it and the inferences which may be drawn therefrom. *Precision Screen Machines*, 711 N.E.2d at 70; *Deree*, 718 N.E.2d at 1215. On review, we neither weigh the evidence nor judge the credibility of witnesses. *Deree*, 718 N.E.2d at 1215.

Wiley's suit sounded in negligence. To sustain an action for negligence, she had to establish: (1) a duty owed by the defendant to conform its conduct to a standard of care arising from its relationship with the plaintiff; (2) a breach of that duty; and (3) an injury proximately caused by the breach of that duty. *Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999). CoMed claims there was insufficient evidence on any of Wiley's theories of negligence with regard to whether CoMed's employees proximately caused Scott's death.

To determine whether an act is the proximate cause of another's injury, we consider whether the injury was a natural and probable consequence of the negligent act, which, in the

light of the attending circumstances, could have been reasonably foreseen or anticipated. *Dughaish ex rel. Dughaish v. Cobb*, 729 N.E.2d 159, 164 (Ind. Ct. App. 2000) (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind.Ct.App.1996), *trans. denied*). Thus, to be considered a proximate cause, the negligent act must have set in motion a chain of circumstances which in natural and continuous sequence lead to the resulting injury. *Id.*

Dr. Parvez testified that shortly after Scott arrived in the emergency room, he found that the endotracheal tube was located in Scott's esophagus. He removed the tube and placed a new tube, after which Scott's color improved and he was able to regain a spontaneous heartbeat. He also testified that a nurse found a large amount of vomit in the tube, which can happen when the tube is incorrectly placed esophageally. He further testified that he believed that Scott had never been intubated properly and that having a properly placed tube would have substantially increased Scott's chances of getting better.

Dr. Gregory Powell Moore, a board certified emergency medicine physician, testified that CoMed employees erred in administering medicines intramuscularly at the scene because Scott had no heartbeat, thus no circulation. In such cases, injections are pointless because the medicine stays in the muscle tissue. He testified that failing to administer the medicine through the tube was a variance from CoMed's established treatment protocols. He further opined that CoMed's employees' breach was a major and primary reason that Scott did not survive this asthma attack and that had he been intubated correctly, he would have survived.

Dr. Edward Bartkus, a staff physician in emergency medicine and veteran paramedic, testified that CoMed's employees' failure to meet the standard of care was a significant factor leading to and causing Scott's death. He testified that his review of the records led him to conclude that Scott was never properly intubated and that if he had received effective care, he would have lived.

While CoMed offered experts who reached contrary opinions, we are not in a position to reweigh the evidence. That was the duty of the trial court in entertaining the motion. The fact remains that there was sufficient evidence supporting the theory that CoMed's employees proximately caused Scott's death through the breaches identified in Wiley's complaint. The trial court did not abuse its discretion in refusing to grant CoMed a new trial on this basis.

Finally, CoMed contends that the trial court erred in giving Instruction 12, which explained life expectancy and damages. The challenged instruction read:

"If you find for the plaintiff on the issue of liability, then you must determine the amount of money which will fairly compensate plaintiff for those elements of damage which were proven by the evidence to have resulted from the negligence of defendant, Consolidated Medical Transport, Inc. In determining plaintiff's total damages, you may consider:

- (a) the age, health and normal life expectancy of the deceased immediately before the injury causing death;

...."

Record at 365, 2060-61. CoMed claims that this was error because there was evidence that Scott did not have a "normal" life expectancy.

The manner of instructing the jury lies largely within the sound discretion of the trial court. *Cohen v. State*, 714 N.E.2d 1168, 1176 (Ind. Ct. App. 1999), *trans. denied*. This court will not find reversible error unless the instruction, when considered as a whole and in reference to other instructions, is such that the charge misleads the jury as to the law applicable to the case. *Id.* In considering whether the trial court erred in giving or refusing an instruction, we consider the following factors: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the instruction is covered by other instructions given. *Id.*

CoMed's expert, Dr. Terrance Moisan, testified that, based on his review of Scott's medical records prior to the episode resulting in his death, there was a fifty percent chance that Scott would have a near-fatal asthma episode within five years of 1990. CoMed cites this testimony as evidence that Wiley had a shortened life expectancy.

First, CoMed places undue emphasis on the word "normal." The jury instruction explained to the jury that it could take into account Scott's age, health and normal life expectancy. Thus, the jury was instructed that it could consider the fact that Scott's life expectancy may have been shortened by his asthmatic condition. Furthermore, CoMed mischaracterizes Dr. Moisan's testimony as concluding that Scott had a five-year life expectancy. Dr. Moisan stated that he would have anticipated a fifty percent likelihood of a near-fatal asthma episode. Beyond the obvious distinction between "fatal" and "near fatal," we note that Dr. Moisan's testimony referred to the period 1990 to 1995, not the five years

after 1995 had Scott survived that episode. Thus, Dr. Moisan's testimony did not establish that Scott has a five-year life expectancy.

The trial court's instruction was supported by the evidence. Accordingly, the trial court did not err in instructing the jury on damages and life expectancy and CoMed is not entitled to a new trial on this basis.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.