COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0649

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

BRUCE MARTINDALE,

PLAINTIFF-APPELLANT,

V.

BRUCE A. RIPP, CITY OF BELOIT, PEKIN INSURANCE COMPANY, AND CITIES AND VILLAGES MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 EICH, J. Bruce Martindale sued the City of Beloit, seeking damages for personal injuries sustained when the car he was driving was rear-ended by a City garbage truck. The jury found that the truck driver's negligence

was not a cause of Martindale's injuries, and Martindale appeals from a judgment, entered on the jury's verdict, dismissing his action. He argues that he is entitled to a new trial because of the trial court's erroneous evidentiary rulings. Specifically, he claims the court improperly excluded the testimony of his expert medical witness regarding the "mechanism" by which his jaw was injured in the accident, and that of the medical witness and Martindale himself concerning the risks of possible future corrective surgery. We conclude that the court did not erroneously exercise its discretion in excluding the evidence, and we therefore affirm the judgment.

¶2 Martindale, stopped at a red light, was struck from the rear by the City's fully-loaded garbage truck. The truck driver's negligence was conceded, and the central issue at trial was whether that negligence, and the resulting accident, caused the injury to the temporomandibular joint in Martindale's jaw. Martindale's key witness was Dr. Doran E. Ryan, an oral and maxillofacial surgeon who was prepared to testify, by videotaped deposition, that, in his opinion, Martindale suffered a whiplash injury to his jaw as a result of being thrown around in his car following the impact. Prior to trial, the court granted the City's motion *in limine* to exclude Ryan's testimony about the "mechanism" by which Martindale's jaw became injured—the "whiplash"—on grounds that, while he was qualified as a medical expert, Ryan knew nothing about the "mechanics" of the accident itself. Thus, while the court permitted the jury to hear Ryan testify regarding his examinations of Martindale and explain the nature of his injury, Ryan was not allowed to testify that the accident was a cause of Martindale's

injury. In the court's words: "There is no foundation on the witness's qualifications to give his expert opinion as to how the accident occurred …."[1]

¶3 As indicated, the jury answered the causation question in the negative, and the court entered judgment dismissing the action. Other facts will be discussed below.

Standard of Review

¶4 Admission or rejection of evidence is left to the discretion of the circuit court. ***State v. Keith***, 216 Wis.2d 61, 68, 573 N.W.2d 888, 892 (Ct. App. 1997). We review the court's decision under the well recognized erroneous-exercise-of-discretion standard, keeping in mind that the court's broad discretion "is subject to the essential demands of fairness." ***State v. Koch***, 144 Wis.2d 838, 847, 426 N.W.2d 586, 590 (1988). Our review of discretionary rulings is highly deferential: We do no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***State v. Salentine***, 206 Wis.2d 419, 429-30, 557 N.W.2d 439, 443 (Ct. App. 1996). Indeed, we generally look for reasons to sustain discretionary decisions. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). And while expert opinion evidence is generally admissible if it will assist the jury in the resolution of difficult or little-understood factual issues, ***State v. Blair***, 164 Wis.2d 64, 74-75, 473 N.W.2d 566, 571 (Ct. App. 1991), the trial court may, in its discretion, require the offering party to lay a foundation for admission of opinion evidence if it feels the jury might otherwise be mislead or

[1] The court also excluded an illustration depicting the manner in which Ryan believed Martindale's injury occurred.

confused. ***Rabata v. Dohner***, 45 Wis.2d 111, 134-35, 172 N.W.2d 409, 420-21 (1969).

Discussion

¶5 Contrary to Martindale's assertions, the trial court never concluded that Ryan was not competent to testify regarding the injury to his jaw. No one questioned Ryan's professional qualifications. Indeed, he was permitted to testify, among other things, that he is an expert in treating diseases and abnormalities of the oral cavity and jaw,[2] and that his examination of Martindale led him to conclude that the discs in Martindale's left and right temporomandibular joints had been displaced and that the damage was permanent. He explained the structural makeup, positioning and purpose of the joints (which permit the proper functioning of the jaw), and noted that Martindale's earlier dental examinations did not indicate any problems in that area before the accident.

¶6 In the portion of the deposition excluded by the court, Ryan gave his opinion as to the manner in which Martindale's jaw was injured in the accident, stating at one point: "My impression would be that the accident is what caused the displacement of [Martindale's] discs in his joint." Ryan also offered a drawing of a head in three different positions which, in his opinion, was "an accurate representation of the mechanism of whiplash-related internal disc injury." He then testified that the illustration

> would depict what *could* happen in a whiplash injury and I have no other reason to believe that [Martindale] had an injury to his jaw other than the whiplash injury in this accident. And since I've already testified that I think the accident caused this problem, this is the mechanism of – I

[2] A copy of Ryan's *curriculum vitae* listing his extensive credentials and experience in the area was an exhibit at trial.

> believe – cause[d] internal joint derangement (emphasis added).[3]

¶7 The trial court, believing that there was no evidence that Ryan had any knowledge as to what happened to Martindale in the collision—no knowledge of the "mechanics" of the accident or his actual injury, or that the impact in fact caused a "whiplash"—ruled this testimony inadmissible.[4]

¶8 We see no misuse of discretion in the ruling. All Ryan knew about the accident was that Martindale was driving a car with a headrest too low for his head, and the car was struck from behind by a garbage truck. Apparently he never inspected Martindale's car (or a similar model) and knew nothing about Martindale's movements or what happened to him or the car at and after the moment of impact. Finally, we note that, despite the fact that Martindale knew well before trial that Ryan's opinion as to how the injury occurred—his testimony on the causal relationship between the accident and the injury—would be excluded, he never sought out another expert. Nor did he call Ryan as a witness at

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[3] In Ryan's opinion, Martindale sustained a whiplash-type injury due to hyperextension caused by the movement of his car at impact. He explained that "the jaw is swung forward and it moves out of where it normally is and it's slung forward and it's done so rapidly so that you get a separation of the disc from the lower jaw bone." This, he said, is what happened to Martindale as a result of the collision. According to Ryan, the impact, and the resulting whiplash, also caused hyperflexion on Martindale's left side, which, in turn, caused a stretching or tearing of the ligament and displacement of the disc.

[4] The court stated:

> There is no foundation on the witness's qualifications to give his expert opinion as to how the accident occurred and the testimony that's in the deposition. The witness is not giving his opinion to a standard of reasonable probability – what you are trying to do is to tie the defendant's injury to some whiplash problem, but – and it may well be that a whiplash-type of thing caused it – but the testimony, in the judgment of the Court, doesn't meet the standard necessary in order to allow it.

trial in order to attempt to lay the missing foundation. He opted instead to proceed with the videotaped deposition, with Ryan's causal testimony excluded.

¶9 Martindale has not persuaded us that the trial court's exclusion of Ryan's testimony was either unreasonable or inconsistent with applicable law. We are, therefore, constrained to sustain that decision—even if it is not one we ourselves would have made in the same circumstances. ***Burkes***, 165 Wis.2d at 590, 478 N.W.2d at 39 (citations omitted).

¶10 Martindale next argues that the court improperly excluded (a) Ryan's testimony regarding possible complications that could result from future corrective surgery, and (b) Martindale's own testimony regarding specific risks of that surgery as explained to him by Ryan, another physician, and his father—together with information about the temporomandibular joint he obtained on the Internet. He offered this evidence in support of his claim for future damages.

¶11 The court allowed Ryan to testify that the chances of successful corrective surgery for Martindale were 85% on the right side of his jaw and 75% on the left side. However, the court barred him from testifying about possible complications which could arise from the such surgery.

¶12 In the portion of Ryan's (videotaped) testimony excluded by the court, he discussed the following "complications" which he said might occur should Martindale elect to undergo corrective surgery, including: a change in his bite pattern; possible continued pain and decreased range of motion; bleeding, infection and nerve injury; and an ear infection. Ryan acknowledged, however: that there was only a 10% chance of any change in bite pattern; that if Martindale underwent physical therapy, continued pain and decreased range of motion

"probably would not happen"; and that there was less than a 1% chance of bleeding, nerve injury or infection. According to Ryan, the "highest" risk faced by Martindale was a 15% to 25% chance that his condition would be unchanged by the surgery.

¶13 It is true, as Martindale points out, that the supreme court said in ***Brantner v. Jenson***, 121 Wis.2d 658, 360 N.W.2d 529 (1985), that a physician, and the plaintiff himself or herself, could testify about concerns over future corrective surgery in support of a claim for mental distress relating to the surgery—but it was well established in that case that the plaintiff faced a "realistic possibility of … surgery" which would involve a long recovery and extreme pain. ***Id.*** at 667-68, 360 N.W.2d at 534. The ***Brantner*** court stated that, while "[a] doctor's realistic prediction as to the possibility of future surgery, illness or disability may give rise to reasonable [compensable] fear and anxiety in the [plaintiff]," that is not the case where "[a physician] describes to the victim … remotely conceivable complications which may develop from the physical injury caused by the defendant's negligence." ***Id.*** at 666-67, 360 N.W.2d at 534. "Anxiety about a … highly unlikely consequence is not a recoverable element," said the court, because "[l]iability [must] cease[] at a point dictated by public policy and common sense." ***Id.*** at 667, 360 N.W.2d at 534.

¶14 Applying ***Brantner***, the trial court stated in this case:

> Well, I am not going to permit speculation as to what may or may not occur if surgery is had. If he has got a fear of surgery then, and the jury buys that, they can award him damages based upon that fear. But they certainly can't award him damages on the basis of complications that might result from the surgery that he doesn't have.
>
> ….

> [Y]ou will get [the possibility of successful surgery] in, and you can get in testimony that he apparently has a fear of having surgery. But we won't get into what complications might occur if surgery were there.[5]

According to the court, the "fatal flaw" in Martindale's case was his failure to establish a reasonable possibility that the remote complications of possible future surgery will occur.

¶15 The court also noted that Ryan could not recall any specific discussions with Martindale about future surgery. All he could say was that he had "probably" discussed the subject with him at some time. Indeed, Martindale acknowledged that he had no plans to have the surgery, stating: "I simply haven't arrived at the point where my quality of life has been impinged to the degree where I want to take the risk of surgery." Finally, Ryan testified that he didn't know whether Martindale would ever progress to the point where he would seek corrective surgery.

¶16 Here, too, we are satisfied that the trial court applied the applicable law to the facts with respect to Ryan's and Martindale's proffered testimony and,

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[5] Moreover, the court correctly excluded Martindale's testimony about what Dr. Ryan explained to him about the risks and possible complications of surgery. The court stated:

> [I]nsofar as the possibility of surgery resulting into consequences that are unfavorable, I can't see how you can get that in without the testimony of the doctor to a reasonable possibility. We have had that in the exhibit. That was the ruling of the Court at the time. I am satisfied that is the correct ruling so that won't come in.
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> … You have had the testimony of Dr. Ryan. He had been examined and cross-examined. And that's what we have got, so we will have to rely on that…. It won't come in from [Martindale]. What comes in will have to come from the doctor….

in doing so, reached a reasonable result—and that is all that is required for a sustainable exercise of discretion.

By the Court.—Judgment affirmed.

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