COURT OF APPEALS
DECISION
DATED AND RELEASED

June 15, 1995

NOTICE

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No. 94-2113

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

DEBRA JUNGWIRTH
AND THOMAS JUNGWIRTH,

Plaintiffs-Appellants,

GREATER MARSHFIELD HEALTH PLAN,

Involuntary-Plaintiff,

v.

JEFFERSON F. RAY, III, M.D.,
MARSHFIELD CLINIC HEALTH CARE
LIABILITY INSURANCE PLAN and
WISCONSIN PATIENTS COMPENSATION FUND,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

EICH, C.J. Debra and Thomas Jungwirth appeal from a judgment dismissing their medical malpractice action against Dr. Jefferson Ray and his insurer, the Marshfield Clinic Health Care Liability Insurance Plan. The Jungwirths claimed that Ray was negligent in performing surgery on Debra Jungwirth and that she suffered serious and irreversible brain damage as a result. The jury found Ray not negligent and the trial court denied the Jungwirths' motion for a new trial on the basis of claimed errors in the instructions and in the interest of justice.

The issues are: (1) whether the trial court erred in refusing to give a *res ipsa loquitur* instruction; and (2) whether the Jungwirths are entitled to a new trial because their case was prejudiced due to the manner in which the court enforced sanctions against Ray for violating a pretrial prohibition against *ex parte* meetings with Debra Jungwirth's nonparty treating physicians. We see no error in the court's refusal to give the requested jury instruction, and we are not persuaded that the Jungwirths are entitled to a new trial on the basis of the court's implementation of sanctions for the *ex parte* contacts. We therefore affirm the judgment.

In 1989, Ray replaced a diseased mitral valve in Debra's heart with an artificial valve. Shortly after the surgery, Debra suffered two cardio-respiratory arrests when the artificial valve became stuck in a closed position, interfering with the flow of blood through her heart.

A different surgeon replaced the valve some days later, discovering during the surgery that the valve's malfunction was probably caused by a piece or "remnant" of the original diseased valve which had not been removed during the surgery Ray performed. That discovery formed the basis of the Jungwirths' action against Ray.

During pretrial discovery the Jungwirths learned that Ray's attorney had met privately with several nonparty physicians who had seen Debra during her illness. Claiming that these *ex parte* contacts violated both the terms of Debra's medical authorizations and the rule of ***State ex rel. Klieger v. Alby***, 125 Wis.2d 468, 373 N.W.2d 57 (Ct. App. 1985), where we held that defense counsel in medical malpractice cases may obtain information from

nonparty treating doctors only through formal discovery, the Jungwirths asked the court to impose sanctions on Ray.

The trial court agreed and, in addition to directing Ray to turn over copies of any notes or memos relating to his meetings with the physicians, precluded him from using the physicians as his own expert witnesses and barred them from "giving medical opinions adverse to the [Jungwirths'] position" at trial.

Although the Jungwirths received the court's permission prior to trial to call the physicians who had met with Ray's attorney as "adverse witnesses" subject to examination by leading questions, none testified during the Jungwirths' case-in-chief. One of these physicians was called by Ray, however, and the trial court allowed him to testify, reminding Ray's counsel of the pretrial order and warning that the physician's testimony would be limited to such notes as he may have made in the case up to the time of the *ex parte* discussions. During the course of the witness's testimony, the Jungwirths' attorney made several objections to questions he considered as eliciting information beyond the limit set by the court's rulings. All were sustained by the court.

At the conclusion of the trial, the Jungwirths asked that the jurors be instructed on the principle of *res ipsa loquitur*; as indicated above, the trial court declined to do so. The Jungwirths also asked the court to instruct the jury that the testimony of the physician called by Ray had been limited by a pretrial order and that no inferences should be drawn against the Jungwirths from the fact that they did not call the witnesses themselves, or from their objections to questions asked of the witnesses by Ray's counsel. The court denied that motion as well.

As indicated, the jury found Ray not negligent and the trial court denied the Jungwirths' postverdict motions and entered judgment on the verdict. Other facts will be referred to below.

I. *RES IPSA LOQUITUR*

The doctrine of *res ipsa loquitur* allows a permissive inference to be drawn from circumstantial evidence which, if not permitted, would leave the plaintiff lacking in sufficient proof to take the case to the jury. ***Carson v. City of Beloit***, 32 Wis.2d 282, 290, 145 N.W.2d 112, 116 (1966). A *res ipsa loquitur* instruction is properly given when

> (a) either a lay[person] is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

Peplinski v. Fobe's Roofing, Inc., No. 93-0568, slip op. at 8 (Wis. May 12, 1995) (quoting ***Lecander v. Billmeyer***, 171 Wis.2d 593, 601-02, 492 N.W.2d 167, 170-71 (1992)).

With respect to the third criterion, the supreme court has held that where the plaintiff's evidence shows substantial proof of negligence on the part of the defendant and offers a complete explanation of the event, it is error to give a *res ipsa loquitur* instruction. ***Turtenwald v. Aetna Casualty & Sur. Co.***, 55 Wis.2d 659, 667, 201 N.W.2d 1, 5 (1972).

> [W]hen both parties have rested and a negligence case is ready for the jury, either of two conditions may exist which would render it error to give the *res ipsa loquitur* instruction. The first occurs when the plaintiff has proved too little--that is, if there has been no evidence which would remove the causation question from the realm of conjecture and placed it within the realm of permissible inferences. The second situation where it is also error occurs when the plaintiff's evidence ... has been so substantial that it provides a full and complete explanation of the

> event if the jury chooses to accept it. In that case the cause is no longer unknown and the instruction will be superfluous and erroneous.

Peplinski, No. 93-0568, slip op. at 8 (quoting ***Turtenwald***, 55 Wis.2d at 668, 201 N.W.2d at 6).

In ***Peplinski***, the supreme court clarified the standard of review applicable to the trial court's decision to give, or not to give, a *res ipsa loquitur* instruction, concluding that the first two criteria--that the result does not occur in the absence of negligence, and that the instrumentality causing the harm must be within the defendant's exclusive control--are mixed questions of fact and law. ***Peplinski***, No. 93-0568, slip op. at 9. We thus employ a two-step process of review to those two determinations; first, examining the trial court's factual findings underlying its decision and unholding them unless they are clearly erroneous, and second, determining whether those facts fulfill the applicable legal standard, which we review independently. ***Id***.

The third element of the test--whether the plaintiff has proved "too little" or "too much"--is entirely discretionary because it "requires the circuit court to make a determination following a careful weighing of the evidence." ***Peplinski***, No. 93-0568, slip op. at 10. And we defer to such a determination "[b]ecause the circuit court is in a better position to consider the evidence, and has the benefit of being present to hear and observe the witnesses at trial ...." ***Id***.

Trial courts have broad discretion in instructing the jury. ***Vonch v. American Standard Ins. Co.***, 151 Wis.2d 138, 149, 442 N.W.2d 598, 602 (Ct. App. 1989). A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991).

[W]here the record shows that the court looked to and considered
> the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will

> affirm the decision even if it is not one with which we ourselves would agree.

Id. (footnote omitted). Because an appropriate exercise of discretion requires the application of correct legal principles to the facts of record, ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis.2d 381, 392, 497 N.W.2d 756, 760 (Ct. App. 1993), a trial court erroneously exercises its discretion when its decision is based on a misapplication or erroneous view of the law. ***Datronic Rental Corp. v. DeSol, Inc.***, 164 Wis.2d 289, 292, 474 N.W.2d 780, 781 (Ct. App. 1991).

Ray urges us to affirm the dismissal of the action because the Jungwirths proved too much in this case.[1] He contends that the testimony of one of their medical witnesses, Dr. James Avery, "provided a complete explanation" of the event causing Debra Jungwirth's injury.

Avery testified that a surgeon must be "meticulous" to the point of being a "perfectionist" in ensuring the removal of all tissue that might interfere with the functioning of an artificial replacement valve. According to Avery, the surgeon must not leave any portion of muscle, cord, tendon or "suture tail" in the heart because if any of those things are present, there is a "real risk that the [valve] will get stuck." In Avery's opinion, Debra Jungwirth's heart arrests were caused by the sticking of the replacement valve which was, in turn, caused by a "cordal remnant" that Ray had "missed" while installing the valve in Debra's heart. With respect to Ray's negligence, Avery was asked whether, in his opinion (to a reasonable degree of medical certainty), Ray "exercised the degree of care and skill required of the average heart surgeon under the circumstances

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[1] The trial court did not consider this requirement of the *res ipsa* rule, concluding instead that there had been no showing that the instrumentality causing the injury was within Ray's exclusive control. It is, however, an "accepted appellate court rationale that a ... judgment or verdict will not be overturned where the record reveals that the trial court's decision was right, although for the wrong reason." ***State v. Alles***, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982). Additionally, as the supreme court noted in ***Peplinski v. Fobe's Roofing, Inc.***, No. 93-0568, slip op. at 10-11 (Wis. May 12, 1995), "[w]hile the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision." We thus look to the record to determine "whether it provides a reasonable basis for the trial court's ... ruling," ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993), and we conclude that it does.

of his surgery on [Debra Jungwirth]." He responded, "I do [believe] he fell below the standard for one reason and one reason alone, he missed a cord."[2]

The Jungwirths argue that Avery's testimony does not provide a full and complete explanation of the cause of Debra's cardiac arrest because he failed to "identify any *specific* act of negligence by Dr. Ray which led to the failure to remove the [cordal] remnant ...." (Emphasis in original.) They cite ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 496 N.W.2d 226 (Ct. App. 1993), as a case in which we rejected "a similar argument."

In ***Fiumefreddo***, the plaintiff's laryngeal nerve was damaged during surgery to remove his thymus gland and he sued the surgeons for malpractice. His medical witness testified that laryngeal damage "should not occur" during a thymus resection if the surgeon adheres to the applicable standard of care; that because the nerve was injured in this case, the defendant must have deviated from that standard of care; and, further, that such deviation was a cause of the plaintiff's injury. ***Fiumefreddo***, 174 Wis.2d at 15, 496 N.W.2d at 228. The trial court denied the plaintiff's request for a *res ipsa loquitur* instruction, concluding that the plaintiff had "proved too much" because the testimony of his expert provided a full explanation of the event. We disagreed and reversed, concluding that the testimony did not furnish a complete explanation of the injury because it did not "show a specific act of negligence" on the surgeon's part. ***Id***. at 19, 496 N.W.2d at 229.

The Jungwirths claim that Avery, their expert in this case, was unable to state whether Ray was negligent in failing to employ (or misemploying) a particular surgical technique for locating and removing such tissue--such as "flushing" the area with a saline solution--and that, as a result, the ***Fiumefreddo*** "specific-act-of-negligence" test was not met.

We disagree. ***Fiumefreddo*** is distinguishable. The testimony in that case was very general: a laryngeal injury should not occur during thymus-removal surgery in the absence of negligence, and because such an injury occurred, the surgeon must have been negligent. ***Fiumefreddo*** was, as the

[2] Avery also testified that, in his opinion, "Ray's negligence was a cause of ... injury to Debra Jungwirth." He stated, "By leaving the residual cord at the first operation, it set up this catastrophe that resulted in a cardiac arrest ... in the woman ...."

Jungwirths claim, a "classic *res ipsa loquitur* case." In contrast, Avery's testimony was quite specific: he said that Ray's negligence consisted of his failure to remove tissues or tissue remnants in Debra Jungwirth's heart that were likely to interfere with the functioning of the new valve.

Avery testified that a surgeon fails to meet the required standard of care when, in the performance of a surgical procedure involving the removal and replacement of a mitral valve, he or she fails to remove tissue or tissue fragments which are known to be present. When such tissues are not removed, Avery testified, that there is a "real risk" of the very result that occurred here: the "sticking" of the new valve. By failing to remove the cordal remnant in Debra Jungwirth's heart, Avery stated, Ray fell below the applicable standard of care. We believe that testimony is sufficiently "specific" to provide a full and complete explanation of the event causing Debra Jungwirth's injury. As we noted above, the purpose of the *res ipsa loquitur* instruction is to allow a permissive inference from circumstantial evidence which, if not permitted, would leave the plaintiff's case lacking in sufficient proof to go to the jury. ***Carson***, 32 Wis.2d at 290, 145 N.W.2d at 116. It does not require more--such as testimony that he simply failed to see the remnant, or failed to perform some procedure, such as flushing, that might have aided him in seeing it--to come within the rule that one who "proves too much" is not entitled to a *res ipsa loquitur* instruction. We conclude, therefore, that the trial court did not err in declining to give it.

II. THE *EX PARTE* CONTACT SANCTIONS

The Jungwirths' second challenge is not to the imposition of the ***Klieger*** sanction but to the manner in which the trial court enforced the sanction--particularly with respect to the testimony of Dr. William Myers, the surgeon who replaced the valve implanted by Ray.

The trial court allowed Ray to call Myers as a witness but, pursuant to its pretrial orders, barred him from eliciting any favorable opinion evidence and, further, limited Myers's testimony to the notes he had made prior to the prohibited *ex parte* contact. The Jungwirths claim that because they were forced to object to certain questions that defendants' counsel asked Myers, it appeared to the jury that they were attempting to "hide" unfavorable testimony

from Myers--whom they describe as an "ostensibly objective [and] unbiased witness."

According to the Jungwirths, the trial court compounded its failure to recognize the "inherent prejudice" in allowing the defense to call Myers as a witness by refusing to give the jury instructions that would (1) explain why the objected-to testimony was being precluded and (2) warn against drawing adverse inferences from either from the Jungwirths' failure to call the nonparty physicians directly or from their objections to portions of the physicians' testimony. We are not persuaded.

The Jungwirths point to questions posed to Myers regarding his operative notes, which the Jungwirths' counsel objected to as violating "the Court's earlier ruling" on the permissible scope of testimony. After the last objection, the court admonished Ray's counsel that his examination of Myers was to be governed by "previous rulings of this Court," stating: "If you persist otherwise, I'll have to consider some form of sanction."[3]

The trial court denied the Jungwirths' request for a special instruction on its earlier ruling for several reasons: (1) it felt the instruction would distract the jurors from the testimony by "involv[ing]" them in legal rulings made outside their presence; (2) it intended to (and did) instruct the jury on the effect of counsel's objections; and (3) it was concerned that emphasizing counsel's "behavior in attempt[ing] to get Dr. Myers to [testify]" also would distract jurors and that it "want[ed] the jury to consider the outcome of this case based on the evidence and not because of any concern that I have regarding that attempt to get in Dr. Myers'[s] testimony."

As we have noted above, the trial court has wide discretion in instructing the jury. ***Vonch***, 151 Wis.2d at 149, 442 N.W.2d at 602. The trial court is in a much better position than an appellate court to assess and evaluate what occurs at a trial--particularly with regard to matters such as a statement's likely impact or effect on a jury. Indeed, that is one of the primary reasons for

[3] Ray's counsel asked for further clarification of the court's ruling, and the court stated: "That [ruling, limiting Myers's testimony to a factual recitation of his notes made prior to the *ex parte* communication, is] not a new ruling for you. That's a ruling that has been a part of this case for quite some time, so you don't need to ask that question again."

the deference we accord to trial judges in this area. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis.2d 646, 657, 511 N.W.2d 879, 883 (1994). The trial court did not erroneously exercise its discretion when it declined to give the requested instruction.[4]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] We also disagree with the Jungwirths that the only reasonable inference to be drawn from their attorney's objections is that they were made in order to "hide" relevant evidence from the jury. Rather, we agree with Ray that the jury could just as easily infer that his own attorney's questions were improper and that he faced the threat of court-imposed sanctions for asking them. And we note in this regard that the trial court instructed the jury that attorneys have a "duty to object to what they feel are improper questions asked of witnesses" and that jurors "are not to draw any conclusion for either side from the fact that an objection was made to any question and that the witness may not have been permitted to answer it." We assume that jurors follow the court's instructions. ***State v. Pitsch***, 124 Wis.2d 628, 645 n.8, 369 N.W.2d 711, 720 (1985).