COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

NOTICE

Nos. 96-0322
96-1112

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

DEAN DE BACK ,

PLAINTIFF-RESPONDENT,

v.

JAMES E. WHITE, M.D., JAMES E. WHITE, M.D., S.C., PHYSICIANS INSURANCE COMPANY OF WISCONSIN AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-APPELLANTS.

APPEAL from judgments of the circuit court for Waukesha County: ROBERT T. MC GRAW, Reserve Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. This is the second appeal relating to a medical malpractice action initiated by Dean DeBack against James E. White,

M.D. The first appeal was filed by DeBack following an unfavorable jury verdict in which the jury found that White was not negligent in the diagnosis, care and treatment of DeBack and that White did not fail to properly obtain informed consent for surgical treatment performed on DeBack. *See* ***DeBack v. White***, No. 93-0609, unpublished slip op. at 2 (Wis. Ct. App. May 4, 1994) (***DeBack I***). We reversed the jury's determination, concluding that the trial court had erroneously refused to allow rebuttal testimony relevant to the negligence issue and that previously barred information which was prejudicial to DeBack was introduced to the jury. *See* ***id.*** The case was retried before a jury which returned a verdict in favor of DeBack. White appeals.[1]

BACKGROUND

In order to give the reader a better understanding of the issues in this second appeal, we will first provide the background for White's challenges. The facts relevant to this appeal date back to the original proceedings and were summarized by this court in ***DeBack I***.

In 1984, DeBack visited White complaining of soreness and clicking in the left side of his cheek. White diagnosed DeBack's problem as a temporomandibular joint (TMJ) dysfunction. On November 20, 1985, White performed surgery on DeBack's left temporomandibular joint. DeBack did not report any postoperative discomfort.

[1] White appeals from two judgments entered by the trial court. The original judgment entered after the jury verdict and an amended judgment apparently entered to correct a mathematical error in the original judgment.

On April 27, 1987, DeBack returned to White with complaints of sweating on the left side of his face whenever he ate and increasing problems with his right TMJ. On March 7, 1988, White performed a surgical procedure on DeBack's right TMJ and a facelift procedure on the left side. During the following year, DeBack's symptoms worsened. DeBack last saw White on May 11, 1989, and initiated a medical malpractice suit against White in November 1990.

Judge Mark Gempeler presided over the first trial. The issues in the first trial were whether White had provided DeBack with adequate care and treatment and whether White had obtained a proper informed consent from DeBack prior to the surgery. The jury there found that White was not negligent and that DeBack sustained damages in the amount of $440,000.

DeBack appealed the judgment on various grounds; however, we addressed only two of DeBack's arguments: (1) that the trial court erred by denying DeBack's motion for a mistrial after the jury heard certain prohibited evidence relating to DeBack's psychological condition; and (2) that the trial court erred by refusing to permit DeBack's treating physician to testify at trial as a rebuttal witness. We held that "the court's refusal to allow DeBack's rebuttal witness, together with the introduction of prohibited psychological evidence, resulted in the real issue of White's alleged negligence not being fully tried." Consequently, we reversed the judgment and remanded for a new trial on the issue of negligence. *See* ***id***., slip op. at 5.

Judge Gempeler was designated to preside over the second trial. Prior to the second trial, White learned that certain ex parte communications directed to Judge Gempeler had taken place without his knowledge during the

pendency of DeBack's appeal. In addition, White had deposed DeBack's rebuttal witness and had concluded that the offer of proof made by DeBack's counsel at the first trial was inaccurate. White filed a motion in limine requesting that the trial court dismiss the action either as a sanction for DeBack's engaging in ex parte communications with the court or because the offer of proof made by DeBack's counsel at the first trial did not accurately reflect the deposition testimony of the expert witness. Based on these developments, Judge Gempeler recused himself, and the matter was assigned to Reserve Judge Robert T. McGraw.

Judge McGraw denied White's motions. The matter proceeded to trial and the jury found White negligent. Following the trial, White brought several posttrial motions renewing these issues. Again, Judge McGraw denied the motions, and judgment was entered against White. He appeals.

White's first challenge to the second verdict relates to the court of appeals ruling in ***DeBack I***. White contends that the offer of proof made by DeBack's counsel at the first trial did not accurately reflect the actual testimony given by the expert witness. Because the court of appeals reversal of the first proceeding was based in part upon the offer of proof, White argues that the original verdict should be reinstated. We conclude that the offer of proof made by DeBack's counsel and relied upon by the court of appeals was sufficiently accurate and fairly characterized the expert witness's actual testimony.

White additionally argues that: (1) Judge McGraw erred in failing to dismiss the action or exclude expert testimony as a sanction for ex parte contacts initiated by DeBack's physicians with Judge Gempeler; (2) Judge McGraw erred in failing to declare a mistrial following an improper statement made by DeBack's counsel in opening statements; (3) Judge McGraw erred by failing to declare a

mistrial following arguments made by DeBack's counsel regarding White's level of experience and competence; and (4) we should exercise our discretionary reversal power pursuant to § 752.35, STATS., to reverse the judgment. We reject each of White's contentions and affirm.

Additional facts relevant to these issues will be given in the body of the opinion.

DISCUSSION

Offer of Proof in ***DeBack I***

In ***DeBack I***, the parties disputed whether the procedure performed by White was a "high condylectomy," a procedure involving the removal of a portion of the jawbone with a saw, or a "condylar shave," which involves the shaving off of a portion of the jawbone with a file. DeBack's theory of recovery was that White performed a "high condylectomy," a procedure which was outdated and below the standard of care within the field of oral surgery at the time of DeBack's surgery. In his defense, White characterized the procedure he performed as a condylar shave in spite of the fact that in his pretrial deposition and postoperative notes he identified the procedure performed on DeBack as a high condylectomy. White's expert testified that White performed a condylar shave and that a condylar shave may at times be referred to as a high condylectomy. *See* ***id.***, slip op. at 6.

On rebuttal, DeBack's counsel sought to introduce the expert testimony of Dr. Ryan to refute the testimony of White's expert. Judge Gempeler denied DeBack's request, stating that the witness should have been presented in DeBack's case-in-chief. DeBack's counsel made an offer of proof stating that the expert, Ryan, "would testify that there is a significant difference between a high condylectomy and a condylar shave, and that the two surgical procedures performed by White were high condylectomies where a significant portion of each condyle head was removed." ***Id***., slip op. at 6-7. Judge Gempeler denied the request and DeBack appealed.

Based on the offer of proof, we concluded that Judge Gempeler erroneously denied DeBack's request to admit Ryan's testimony in his rebuttal case. *See* ***id.***, slip op. at 8. Now, in this appeal, White contends that the "Court of Appeals reversal of the initial verdict was contingent upon alleged facts that have turned out to be false." White argues that DeBack's offer of proof was inaccurate because it was not supported by Ryan's testimony given during depositions prior to the second trial. Because the discrepancies between DeBack's offer of proof and Ryan's actual testimony are insubstantial, we conclude that the offer of proof was sufficiently accurate in providing the trial court with the essence of Ryan's testimony.

White contends that "Dr. Ryan testified that although Dr. White performed a high condylectomy in March of 1988, he did not perform this procedure in November of 1985." White's argument overlooks the real issue of negligence in this case—whether White performed a "condylar shave" or a "condylectomy." With respect to the November 1985 surgery, Ryan testified that:

> [White] didn't do what I would classify as a condylar shave. ... Essentially [White] took a saw and cut off part

> of the condyle, which is what you do with a high condylectomy, though he really didn't do a high condylectomy because he doesn't cut the top of the condyle off; he cut off the back, part of the lateral side.

The above testimony given by Ryan indicates that in his opinion White performed a condylectomy in November 1985. In her offer of proof, DeBack's counsel stated that Ryan would testify that "the two surgical procedures performed by White were high condylectomies …." *See* ***id.***, slip op. at 7. The procedure was not mischaracterized by counsel with respect to the "condylar shave" or the "condylectomy." The only thing Ryan questioned was the use of the term "high" when describing the condylectomy White performed on DeBack in November 1985. This discrepancy is not relevant to the general type of procedure performed, nor does it reveal a misrepresentation in the offer of proof.

White further contends that "contrary to the offer of proof [Ryan] did not believe that a significant portion of each [condyle] was surgically removed by Dr. White." Ryan was deposed twice—once in April 1995 and again in June 1995. At the first deposition, Ryan indicated that he did not believe a significant portion of the right condyle had been removed. However, at the second deposition, Ryan testified that after reviewing the records he was able to conclude that White removed "a considerable amount of bone."

An offer of proof need not be stated with complete precision or in unnecessary detail, but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt. *See* ***State v. Haynes***, 118 Wis.2d 21, 28-29, 345 N.W.2d 892, 896 (Ct. App. 1984). DeBack's offer of proof provided Judge Gempeler with the essence of the testimony expected from Ryan. We refuse to hold that an offer of proof must exactly mirror the actual evidence. Based on our review of the

record, we conclude that the offer of proof given by DeBack's counsel was sufficiently accurate and fairly characterized Ryan's testimony. We therefore affirm Judge McGraw's denial of DeBack's motion to reinstate the original verdict.

Ex Parte Contacts

During the pendency of the appeal in ***DeBack I***, certain expert witnesses and physicians were prompted by DeBack to contact Judge Gempeler who presided over the first trial.[2] All of the correspondence received by Judge Gempeler expressed strong discontent with the outcome of the initial proceedings. Although White was given a copy of the first letter sent to Judge Gempeler, he was not notified of the additional letters received by Judge Gempeler. As we have noted, Judge Gempeler recused himself based on these developments and Judge McGraw presided over the remainder of the proceedings.

Prior to trial, White filed a motion in limine requesting dismissal of the case as a sanction against DeBack for engaging in ex parte communications with Judge Gempeler. In the alternative, White requested that the experts and physicians who had contacted Judge Gempeler be precluded from testifying at the second trial. White's motion was denied.

[2] There is some dispute in the briefs regarding whether DeBack or DeBack's counsel initiated the ex parte contacts. Regardless of who initiated the contacts, we conclude that the trial court did not erroneously exercise its discretion to sanction; therefore, we will not attempt to resolve this factual dispute. However, we do note that the ex parte contacts were extremely improper. Even though DeBack's counsel was apparently not involved in instigating the ex parte contacts, once she learned of the contacts, she did have a duty to notify opposing counsel. *See* SCR 20:3.5.

White contends that Judge McGraw erred by failing to sanction DeBack for ex parte communications initiated by his doctors and expert witnesses with Judge Gempeler.[3] Whether a sanction is appropriate and the choice of sanction to be imposed are issues subject to trial court discretion. *See* ***Johnson v. Allis Chalmers Corp.,*** 162 Wis.2d 261, 273-75, 470 N.W.2d 859, 863-64 (1991). We will sustain a discretionary determination that is a reasonable product of a demonstrated rational mental process based upon facts of record and the applicable law. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Here, Judge McGraw denied White's motion to dismiss the case or exclude testimony from the experts who engaged in the ex parte communications. The record reflects that Judge McGraw considered the sanctions proposed by White and deemed them inappropriate. In denying White's motion, Judge McGraw stated:

> I am of the opinion that the remedy of Judge Gempeler's reclusion of himself from the case in connection with the unfortunate ex-parte communications received by him was appropriate on his part and did, in fact, as far as this Court is concerned solve the problem. I don't think that the situation at this stage warrants a dismissal of the action nor do I believe that it warrants a preclusion from testimony of the persons who wrote the errant letters.

White argues that in light of our supreme court's decision in ***Johnson***, the appropriate sanction for the ex parte communications in this case is dismissal. We disagree. The ***Johnson*** court did not instruct or even suggest that

[3] We note DeBack's response to White's argument on this issue: "Judge Gempeler's recusal prevented any potential error or prejudice from ex parte contacts with the court by expert witnesses …." DeBack's argument misses the point. White's request for dismissal was not based on his belief that the ex parte communications would result in future error or prejudice. White requests dismissal as a *sanction* for DeBack's improper conduct.

dismissal is the only appropriate sanction for certain violations. Rather, in affirming the trial court's choice of sanctions, the ***Johnson*** court observed that "[t]he question is not whether this court as an original matter would have dismissed the action; it is whether the circuit court abused its discretion in doing so." ***Johnson***, 162 Wis.2d at 273, 470 N.W.2d at 863.

While we agree with White that the ex parte contacts were extremely improper, we cannot conclude that Judge McGraw erroneously failed to dismiss the case or exclude the expert testimony of those persons who participated in the ex parte communications with Judge Gempeler. We therefore affirm Judge McGraw's discretionary ruling on this motion.

Opening Statements

During opening statements, DeBack's counsel remarked that "Mr. DeBack is not here to have Dr. White's license revoked. That's not what this case is about." White immediately objected to the statement as "inappropriate." The trial court agreed with White and advised the jury to disregard the remark. At the close of DeBack's opening statement, White's counsel moved for mistrial. The court denied White's motion noting that a curative instruction had been made to the jury.

On appeal, White contends that the licensing remark made during opening statements was "totally inaccurate and misinformed the jury on a crucial fact." White argues that the trial court erred in denying his motion for a new trial. Because we conclude that DeBack's counsel's statement did not substantially affect White's rights, we affirm the ruling of the trial court.

It can be reversible error for the court or counsel to inform the jury, either directly or implicitly, of the ultimate result of its verdict. *See* ***Kobelinski v. Milwaukee & Suburban Transp. Corp.***, 56 Wis.2d 504, 520-21, 202 N.W.2d 415, 425 (1972). However, for us to order a new trial for improper remarks by counsel, it must "affirmatively appear" that the remarks prejudiced the complaining party. *See* ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 329, 417 N.W.2d 914, 920 (Ct. App. 1987). We must be convinced that the verdict reflects a result which in all probability would have been more favorable to appellants but for the improper conduct. *See* ***id***. The test for showing prejudice is most stringent when the trial court has found that the improper argument did not have a prejudicial effect and the trial court did not grant a new trial. *See* ***id***. at 329-30, 417 N.W.2d at 920. We are not convinced that the jury's verdict in this case would have been different but for the remark made by DeBack's counsel during opening statements.

White contends that the supreme court's ruling in ***Erb v. Mutual Service Casualty Co***., 20 Wis.2d 530, 123 N.W.2d 493 (1963), required a mistrial in this case. We disagree. Although the court in ***Erb*** concluded that a new trial was necessary because of improper remarks made by counsel, it did so because, under the facts of that case, the remark was sufficiently prejudicial so as to affect the substantial rights of the complaining party. *See* ***id***. at 536, 123 N.W.2d at 496. Here, we are unable to conclude that DeBack's counsel's remark regarding White's license was sufficiently prejudicial so as to substantially affect his rights. First, although irrelevant to the proceedings and therefore improper, the remark itself was not incorrect–the case was not about White's license to practice medicine. Second, and more importantly, the trial court immediately addressed

the inappropriate remark with a curative instruction, and there was no further reference to White's medical license.

White argues that the "severity" of counsel's error was "compounded by the fact her argument was completely inaccurate." White contends that the result of the verdict could in fact cause him to lose his license. While this may be true, it is also true that DeBack was not seeking to effectuate this result in the present action. We remain unpersuaded that the inappropriate remark made by DeBack's counsel substantially affected White's rights.

In the alternative, White argues that the trial court erred in refusing to allow him to address licensing in his opening statement. We disagree. The record reflects that the court found the initial reference to White's license "completely beyond any reasonable relevancy." After instructing the jury to disregard the licensing remark, the court did not want the matter addressed further. We cannot conclude that the trial court's ruling was erroneous or that it in any way prejudiced White's case. We therefore reject White's contention that he is entitled to a new trial on this ground.

White's Competency

White next contends that he is entitled to a new trial because DeBack's counsel improperly called into question his experience and general competency to perform temporomandibular surgery. White argues that statements made by DeBack's counsel to the jury regarding White's level of competency and

experience were improper because White's level of expertise is not relevant.[4] We reject White's arguments and conclude that the arguments made by DeBack's counsel were not improper and that a new trial is not warranted.

The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. *See* ***State v. Bunch***, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. *See* ***id***. A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. *See* ***id.*** at 506-07, 529 N.W.2d at 925.

White correctly states in his brief that the question for the jury in a medical malpractice case involving a plastic surgeon is whether, in treating the plaintiff, the plastic surgeon used the degree of care, skill and judgment which is usually exercised in the same or similar circumstances by a reasonable plastic surgeon, having due regard for the state of medical science at the time plaintiff was treated. *See* WIS J I–CIVIL 1023. Based on this, White suggests that DeBack's counsel improperly led the jury to believe that White should be held to the standard of care exercised by a specialist in TMJ surgery rather than the standard of care exercised by plastic surgeons presented with similar diagnoses.

[4] Although White argues that a new trial is warranted because of improper arguments made by DeBack's counsel regarding White's competency, he additionally argues that: (1) the evidence was not relevant under § 904.01, STATS.; (2) the probative value of the evidence is substantially outweighed by the danger of unfair prejudice; and (3) the evidence is unfairly prejudicial because it influences the outcome by improper means. However, White did not object to the trial court's admission of competency evidence at trial. Therefore, we address White's challenge in terms of improper argument and failure to grant a mistrial—the grounds upon which White objected to the evidence at trial and the basis upon which he raises his challenge on appeal.

White contends that consistent with our holding in ***Johnson v. Agoncillo***, 183 Wis.2d 143, 151-52, 515 N.W.2d 508, 512 (Ct. App. 1994), he should only be held to conform to the standard of a health care provider in his specialty. While this is true, White also seems to believe that his specialization in plastic surgery protects him from liability resulting from a negligent attempt to perform specialized surgery outside of his field.[5] ***Johnson*** instructs us that this is not so.

In ***Johnson***, we concluded that physicians of one class who treat patients whose medical problems arguably require the expertise of physicians in another class are not required to conform to the standard of care applicable to that other class. *See* ***id***. at 151, 515 N.W.2d at 512. "Thus, for example, a cardiologist who attempts to treat a patient with cancer … is not held to the standard applicable to oncologists." ***Id***. at 151-52, 515 N.W.2d at 512. However, we went on to state that "the cardiologist who negligently attempts treatment outside of his or her expertise is not, however, thereby immunized from liability. If competent evidence establishes that the average cardiologist would either refer the cancer patient to an oncologist or would consult with an oncologist, the cardiologist could be found negligent for not referring or consulting." ***Id.*** at 152, 515 N.W.2d at 512.

We take note that DeBack did not question White's level of competency in the general field of plastic surgery. Rather, DeBack's counsel only presented evidence as to White's level of expertise in performing TMJ surgery. White argues that "lack of competency is not relevant in a medical malpractice

[5] As DeBack's counsel points out, White's argument is "akin to an eye doctor botching a brain surgery and then arguing that he was not negligent because he did the best brain surgery that an eye doctor could do."

action." We disagree. Whether a physician's competency is relevant in a medical malpractice action depends upon the particular case.

In support of his position, White relies on ***Nowatske v. Osterloh,*** 201 Wis.2d 497, 549 N.W.2d 256 (Ct. App. 1996), and ***Sommers v. Friedman***, 172 Wis.2d 459, 493 N.W.2d 393 (Ct. App. 1992). In ***Nowatske***, this court concluded that evidence of prior unrelated medical malpractice actions was not admissible to impeach an expert witness because the evidence had no bearing on the witness's credibility. *See* ***Nowatske***, 201 Wis.2d at 505, 549 N.W.2d at 259. In ***Sommers***, the plaintiff's husband died shortly after being treated by the defending physician. *See* ***Sommers***, 172 Wis.2d at 461, 493 N.W.2d at 394. The plaintiff sought to introduce evidence that the defending physician had failed two attempts to pass voluntary internal medicine specialty board examinations. *See* ***id***. at 469, 493 N.W.2d at 397. We upheld the trial court's discretionary finding that the failed examinations were not relevant to the physician's overall competency. *See* ***id***. at 471, 493 N.W.2d at 398.

Nowatske and ***Sommers*** are readily distinguishable from this case. In ***Nowatske***, the competency evidence was not relevant to the veracity of the expert witness's testimony. In ***Sommers***, the physician was not acting as a specialist when she treated the plaintiff's husband. Here, White is the defendant, not a witness, and White acted as a specialist in performing TMJ surgery on DeBack. The very issue in dispute in this case is whether White performed an out-of-date and unaccepted surgical procedure. Therefore, whether White possessed the level of training and expertise necessary to perform the surgery was directly relevant to whether White, as a plastic surgeon, should have treated DeBack.

We conclude that the evidence regarding White's general competency to perform surgery on DeBack was relevant, and thus, the remarks made by DeBack's counsel regarding White's competency were not prejudicial. We affirm the trial court's decision to deny White's motion for a new trial on this ground.

Discretionary Reversal

Finally, White requests that we exercise our discretionary power under § 752.35, STATS., to reverse the judgment on the grounds that the controversy was not fully tried or, alternatively, that justice has miscarried. We decline to do so. In support of his request, White presents as a whole the challenges which have already been rejected by this court. White has not persuaded us that, in spite of our holdings, the proceedings before the trial court were unjust or that the real controversy has not been tried. We therefore affirm the judgments of the trial court.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.