COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1988

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

LEO W. ZIULKOWSKI, INDIVIDUALLY AND AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF LEONA F. ZIULKOWSKI,

PLAINTIFF-APPELLANT,

V.

DR. GREGORY M. NIERENGARTEN, D.O., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., A WISCONSIN CORPORATION AND PATIENTS COMPENSATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

SCHUDSON, J. Leo W. Ziulkowski, individually and as the special administrator of the estate of Leona F. Ziulkowski, appeals from the

judgment, following a jury trial, dismissing his medical malpractice action against Dr. Gregory M. Nierengarten and his insurers. Ziulkowski's action alleged that Dr. Nierengarten was negligent in his care and treatment of Mrs. Leona F. Ziulkowski, causing her pain, disability, and death. On appeal, Ziulkowski raises eight issues. We affirm.

I. Jury Selection

Ziulkowski first argues that the trial court erred during voir dire in refusing to allow counsel:

> to inquire of the prospective jurors as to whether they believed that the outcome of the trial could affect the medical license of [Dr. Nierengarten], and whether they believed that the outcome of the trial could affect Dr. Nierengarten's ability to practice his profession in the future, and whether they believed that the outcome of the trial could affect the cost of providing health care in general.

Ziulkowski bases his argument on what he claims were the trial court's side-bar rulings after the following exchange with one of the prospective jurors:

> [COUNSEL FOR ZIULKOWSKI]: … Members of the jury panel, this is a civil action. It's a lawsuit for damages. Does anybody in this panel think that this case will have any effect on Dr. Nierengarten's medical license?
>
> [JUROR]: It will have an affect on his license, is that what you're asking?
>
> [COUNSEL FOR ZIULKOWSKI]: Do you think it will?
>
> [JUROR]: Of course.

> [COUNSEL FOR ZIULKOWSKI]: This is a civil action for damages only. It will not affect his medical license, but do you believe it will?
>
> [JUROR]: Yes, I do, and I believe it affects all of us indirectly. It's called practicing medicine, if you ask me. This is the reason people like me can't afford medical treatment is for things that we are sitting here doing right now.
>
> [COUNSEL FOR ZIULKOWSKI]: Do you believe that because of your views you could not be a fair juror in this trial?
>
> [JUROR]: I don't think I could.

The record reflects that the trial court conducted a brief colloquy with the juror, after which "a side bar conference was held out of the hearing of the jury." The trial court then excused the juror.

Neither counsel nor the court provided any further record of the side bar conference. Nierengarten, however, does not dispute Ziulkowski's contention that the trial court foreclosed him from asking the other prospective jurors those same questions. The trial court's oral decision denying Ziulkowski's post-verdict motions provides a brief explanation of its ruling. The trial court stated, in part:

> First of all, I would note that it would have been helpful to have had a copy of the transcript regarding this specific issue. The reason why I say that is, [Nierengarten's counsel's] recollection is that we had some discussion at side bar regarding this particular issue. Health care costs, impacts on a doctor's license, her recollection it was at side bar, and it wasn't memorialized. I wasn't taking notes during voir dire ….
>
> ....
>
> While the court gives latitude in the voir dire phase, latitude does not extend to asking questions which may mislead, confuse or misinform the jury. The particular issue that you raise, I believe, falls completely within this court's discretion. The issue that was being broached was

> one where it could have misled the jurors as to the law. It could have confused them as to their role as fact finders. And I believe would have misinformed them.

We conclude that Ziulkowski has failed to establish that the trial court erred in restricting his lawyer's voir dire questions.

The supreme court has declared:

> Control of the *voir dire* examination rests primarily with the trial court. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." The trial court has broad discretion as to the form and number of questions to be asked. The exercise of this discretion and the court's restriction upon inquiries, however, are subject to "the essential demands of fairness."

Hammill v. State, 89 Wis.2d 404, 408, 278 N.W.2d 821, 822 (1979) (footnote and citations omitted). Further, an appellant's "failure to make a record of the process of jury selection" allows us to "conclude from the record that the jury was drawn … without any evidence of prejudice." ***Jones v. State***, 66 Wis.2d 105, 111, 223 N.W.2d 889, 892 (1974).

Here, the record does not disclose the trial court's exact ruling. We do not know, for example, whether the trial court's side bar ruling would have allowed Ziulkowski to explore the desired subjects with other questions.[1] We do not even know whether Ziulkowski objected at side bar. We do note, however, that, on the record, Nierengarten never objected to Ziulkowski's questions and Ziulkowski never objected to the trial court's side bar ruling.

[1] The record simply does not support the dissent's assertion that the trial court "prevented Ziulkowski's lawyer from finding out whether other members were also biased against medical-malpractice lawsuits." Dissent slip op. at 1.

Moreover, to the limited extent we are able to evaluate the trial court's ruling based on its post-verdict decision, we conclude that the trial court was correct. Although testing juror attitudes regarding issues surrounding medical malpractice actions certainly may be part of a fair inquiry, counsel may not do so in a way that confuses or misleads. Here, the trial court correctly ruled that, notwithstanding the fact that counsel's questions of the juror elicited responses that led to her removal, they were misleading. As Nierengarten argues, concern with the case consequences is not part of a jury's fact-finding function. "The members of the jury are not to concern themselves about whether the verdict answers will be favorable to one party or to the other party, nor should a jury be concerned 'with what the final result of [the] law suit may be.'" ***Delvaux v. Vanden Langenberg***, 130 Wis.2d 464, 481, 387 N.W.2d 751, 759 (1986) (citations omitted; alteration in ***Delvaux***). Moreover, questioning and telling jurors that the outcome "will not affect [Dr. Nierengarten's] medical license" ignores the legal possibility that the outcome could do just that. *See* § 448.02(3)(b) & (c), STATS. (providing that "a finding by a court that a physician has acted negligently in treating a patient is conclusive evidence that the physician is guilty of negligence in treatment" and may lead the medical examining board to "suspend or revoke" a doctor's license).

II. Opening Statement

Ziulkowski argues that the trial court committed prejudicial error by allowing Nierengarten's counsel to "argue her case to the jury during the opening statement." He cites what he contends are "[t]he eight glaring arguments." He concedes, however, that he failed to object to five of them, that the trial court sustained his objection to one of the others, and that he failed to move for a mistrial based on any of the alleged prejudicial statements.

The two sets of comments to which counsel's objections were overruled were:

> The first question that you will be asked to address is was Dr. Nierengarten negligent? You will be told that negligence is a violation of the standard of care of the reasonable family practitioner under the same or similar circumstances. It is not a question of whether a gastroenterologist would have done something differently.
>
> ....
>
> We all have sympathy for the family, but that's not why we're having a jury trial.

We have reviewed these, as well as the other alleged improper statements to which counsel made no objection, within the context of the full opening statement. All were proper opening statement remarks either forecasting what the evidence was expected to establish, accurately referring to the applicable legal standards, or clarifying the issues to be tried. The single remark to which the trial court sustained counsel's objection — "In other words, he [Dr. Ammon, the gastroenterologist who had been deposed prior to trial] was acknowledging that he doesn't know what the family practice practitioner is" — was a relatively innocuous interpretation of what counsel, in his preceding sentence, had represented to be Dr. Ammon's statement "that he would defer to the board certified family practice physician as to whether Dr. Nierengarten exercised reasonable care." Not surprisingly, therefore, Ziulkowski never moved for a mistrial. Indeed, by failing to do so, he may have waived his current challenge, *see* ***Kink v. Combs***, 28 Wis.2d 65, 72, 135 N.W.2d 789, 793-94 (1965) (waiting to move for a mistrial, based on opening statements, until "after an adverse verdict has been returned" waives the "right to assert prejudice later"), or at least tacitly

conceded the *de minimis* nature of counsel's comment. *See* ***Pophal v. Siverhus***, 168 Wis.2d 533, 543, 484 N.W.2d 555, 558 (Ct. App. 1992).

III. Evidentiary Rulings

Ziulkowski challenges two of the trial court's evidentiary rulings.

A. "Jack of All Trades"

The defense called Dr. Gary Ruoff, a family practice physician. Cross-examining him, Ziulkowski's counsel noted that Dr. Ruoff had written fifty-four papers covering fifty-four different subjects. He then asked, "Is it fair then to call you a Jack of all trades but master of none?" The trial court sustained Nierengarten's counsel's objection and, in a chambers' conference, explained:

> Well, I basically sustained the objection because it is not unlike my sustaining your objection to [Nierengarten's counsel's] use of the term "red flag" without the witness giving a definition. Jack of all trades expert to none may mean one thing to you, another thing to [Nierengarten's counsel] and a third thing to me. I don't think it is necessarily disparaging but we should be working off of the same level of playing field.
>
> Now, if you want to use that phrase and ask him what it means so that everybody is on the same level playing field, I will allow it since I did allow [Nierengarten's counsel] to use the red flag language.

The trial resumed and Ziulkowski's counsel and Dr. Ruoff had the following exchange:

> Q Dr. Ruoff, in the last question I used the phrase Jack of all trades and master of none in reference to you. I don't intend that to be a disparaging remark about you. I intend that to be my belief that your study and your learning and research is in a wide variety of subjects.

> How do you understand the phrase jack of all trades master of none?
>
> A I really don't know how to interpret that because as far as a family physician I have my competence as a family physician and it has nothing – my competence has nothing to do with this case.
>
> My attitude for coming here, the reason why I am here is to defend the family physician who is sitting right there and to give a different opinion than Dr. Sutherland, who I feel differs markedly in my approach to this particular case, and a Jack of all trades or master of none I would take that personally, and I would take it personally against my profession.

Ziulkowski now argues that "[t]he trial court committed prejudicial error in refusing to allow appellant's counsel to question Dr. Ruoff about the statement 'that a family practitioner is a jack of all trades but master of none' because Dr. Ruoff had said that such a statement was offensive to him and offensive to his chosen profession." We disagree. In the first place, Ziulkowski has failed to explain how the alleged error is prejudicial. In the second place, the record establishes that the trial court never actually refused to allow the question. Following Dr. Ruoff's answer, the trial court commented that "the witness has answered your question … so you should move on." Ziulkowski's counsel did not disagree or object.

B. Photographs

In rebuttal, Ziulkowski introduced five photographs of Leona Ziulkowski with members of her family. The trial court admitted two of them and allowed their publication to the jury, but refused to publish the other three, concluding that they were cumulative. Ziulkowski argues that the three photos also should have been published "to demonstrate to the jury the appearance of

Leona Ziulkowski and the appearance of her family to help the jury in weighing the damages."

"Whether photographs are displayed to the jury is discretionary with the trial judge." ***State v. Hagen***, 181 Wis.2d 934, 946, 512 N.W.2d 180, 184 (Ct. App. 1994). Other than contending "that he had a right to select which pictures to present to the jury and that they would be helpful to the jury in weighing the appearance of Leona Ziulkowski because respondents had alleged that she was obese, probably in hopes that her appearance would affect the damage awards," Ziulkowski utterly fails to explain how the three excluded photos would have served that purpose any better than the two the trial court allowed. Indeed, he does not dispute the trial court's conclusion that they were cumulative. Thus, we reject his argument. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

IV. Closing Arguments

Ziulkowski offers two challenges to trial court rulings regarding his counsel's closing argument.

A. Golden Rule

Near the conclusion of the opening portion of his closing argument, Ziulkowski's counsel stated:

> Finally, as you've been told by Judge DiMotto, counsel will now get up and make her own argument and try to rebut what I said, then I'll get another chance at rebuttal of what she says in her argument. Remember this though. Leo Ziulkowski gets only one chance, one trial,

> and only one opportunity to present his grievance to you people. Don't let him down.

The trial court sustained an objection concluding that the comment, "don't let Leo down ... comes pretty close, if not crossing the line, of violating the golden rule discussed in ***Hansen vs. Crown Controls*** [***Corp.***,181 Wis.2d 673, 512 N.W.2d 509 (Ct. App. 1993), *vacated in part on other grounds*, 185 Wis.2d 714, 519 N.W.2d 346 (1994),] and ***Rodriguez vs. Slattery*** [,54 Wis.2d 165, 194 N.W.2d 817 (1972)]."

In ruling on post-verdict motions, however, the trial court conceded that its ruling was wrong; that, "[i]n hindsight, I really don't think the golden rule was applicable, because you weren't asking the jury to put themselves in the shoes of anyone." Nevertheless, the court concluded that it had reached the right result for a different reason: "[T]o say that the jury should not let the plaintiff down in their verdict is really … appealing to sympathy of the jury. Mr. Ziulkowski was sitting in the courtroom. In essence, you were saying look at that man and don't let him down."

Ziulkowski argues only "that an accumulation of mistakes such as the ruling on the claimed golden rule argument, when taken together, constitute prejudicial error and … that this mistake … and others … warrant a retrial." He fails, however, to challenge the trial court's post-verdict rationale for its ruling. Thus, although "Don't let him down" is hardly a remarkable way in which to conclude a closing argument, Nierengarten's counsel did object and, given the well-settled standard that a jury is not to be swayed by "feelings of sympathy," WIS JI—CIVIL 190, we cannot conclude that the trial court's post-verdict rationale was wrong. Further, once again, Ziulkowski has offered nothing to suggest that the alleged error was prejudicial.

B. Objections

Ziulkowski argues that "it was prejudicial error to allow respondents' counsel to continue to make multiple objections during appellant's counsel's final argument in that the multiple objections were obviously designed to disrupt the final argument … rather than being legitimate objections to the content of the statements being made." He contends that "thirteen separate objections … is far more than what is normally made in the course of a final argument," inconsistent with the "[p]rofessional courtesy" and "wide scope and latitude" ordinarily allowed.

Ziulkowski acknowledges, however, that most of the objections to his counsel's closing arguments were sustained. Other than claiming that "fully half of the objections sustained by the trial court were improperly sustained," he does not challenge the trial court rulings. Further, he again fails to explain how anything in the conduct of the closing arguments prejudiced his case. Indeed, we note that once again, he neither objected nor moved for a mistrial. *See* ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989) ("Failure to object at the time of the alleged improprieties in the closing argument also waives review of that alleged error.").

V. Jury Deliberation

Ziulkowski argues that he "was denied a fair trial because the jury failed to follow the court's instructions to seriously deliberate about the issues when they reached a verdict in no more than one hour and forty minutes, which time included the election of a foreman and the consumption of the jury's lunch." This argument has no merit. *See* ***State ex rel. Hussong v. Froelich***, 62 Wis.2d 577, 595, 215 N.W.2d 390, 400 (1974) ("the fact that jury deliberations were

completed in a relatively short time for the complexity or length of a trial is not relevant in determining prejudice"), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

VI. Damage Verdict

Ziulkowski argues that "[i]t was error for the jury to fail to follow the court's instructions to answer the last two questions of the special verdict on damages and was another example of the jury failing to follow the court's instructions." We disagree.

In the first place, as Ziulkowski concedes, the jury did not fail to answer the verdict questions on damages; it answered them by entering "0" for the damage amounts. As Nierengarten points out, "[t]he jury was … instructed that if it did not believe any damages resulted from Dr. Nierengarten's treatment, it should not award damages. This is exactly what the jury did in this case." In the second place, as the supreme court has explained, where a jury finds no liability, a new trial is not needed simply because the jury failed to determine damages. *See* ***Jahnke v. Smith***, 56 Wis.2d 642, 652, 203 N.W.2d 67, 73 (1973) (noting that "where the jury has answered questions in regard to liability [which] would deny recovery, it would be pointless to order a new trial merely because the award which the jury has decided the plaintiff will not get anyway is less than it should be").

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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FINE, J. *(dissenting)*. Leo W. Ziulkowski's attorney asked a prospective juror questions on *voir dire* that led directly to this question and answer:

> [Q] Do you believe that because of your views [about medical malpractice cases and the cost of medical treatment] you could not be a fair juror in this trial?
>
> [A] I don't think I could.

Majority op. at 3. After attempting but failing to rehabilitate the juror, which the majority obliquely refers to as "a brief colloquy," ***ibid.***, the trial court held an unrecorded sidebar conference, and then excused the potential juror for cause.[2] The trial court, however, prevented Ziulkowski from asking similar questions to other members of the venire panel, apparently because it believed that the "issue being broached" was misleading. *See* ***id.*** at 4.[3]

A venireman who "is not indifferent in the case" may not serve as a juror. Section 805.08(1), STATS. Lawyers in Wisconsin state courts have the absolute right to ask questions on *voir dire* to determine whether potential jurors will be fair. ***Ibid.*** The trial court, after failing to rehabilitate the venire-panel member who indicated that she did not think that she could be fair, prevented Ziulkowski's lawyer from finding out whether other members were also biased against medical-malpractice lawsuits. This, in my view, deprived Ziulkowski of a

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[2] The trial court directs both the trial and the court reporter. The trial court thus has the primary responsibility to ensure that there is a record of the lawyers' motions and objections, and its rulings. *See* ***State v. Munoz***, 200 Wis.2d 391, 402–403, 546 N.W.2d 570, 574–575 (Ct. App 1996).

[3] In light of the trial court's opinion that the issue itself was misleading, it is illogical to speculate that the trial court may have "allowed Ziulkowski to explore the desired subjects with other questions." Majority op. at 4.

fair hearing and was error. *See* ***State v. Ramos***, 211 Wis.2d 12, 16, 564 N.W.2d 328, 330 (1997) (trial court erroneously exercises its discretion when decision based on error of law).[4] I respectfully dissent and would reverse for a new trial.[5]

[4] If any of the questions that Ziulkowski's lawyer wanted to ask were pregnant with inaccurate or misleading statements of law, the trial court could have corrected those errors by instructing the panel and by admonishing the lawyer.

[5] I agree with the majority that Ziulkowski's other contentions of trial-court error are without merit.