

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2197

Cir. Ct. No. 2004CV762

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SANDRA LUEDTKE AND GARY LUEDTKE,

PLAINTIFFS-APPELLANTS,

AURORA HEALTH CARE, INC.,

INTERVENING PLAINTIFF,

v.

**GHAZWAN KATMEH, M.D., GREEN BAY HEART CARE, S.C. AND
PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,**

DEFENDANTS-RESPONDENTS,

**BAYCARE CLINIC FOUNDATION, LTD., BAYCARE CLINIC, LLP,
BAYCARE AURORA, LLC AND MEDICAL PROTECTIVE COMPANY,**

DEFENDANTS,

GREEN BAY PACKAGING HEALTH PLAN,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Sandra and Gary Luedtke appeal a judgment, entered on a jury verdict, dismissing their medical malpractice claims against Dr. Ghazwan Katmeh and related health care entities and insurers.¹ They argue the court erred in excluding evidence of complaints against Katmeh by other patients and a resulting Medical Examining Board investigation. We conclude the court properly exercised its discretion in excluding the evidence and affirm the judgment.

BACKGROUND

¶2 The Luedtkes filed this suit in April 2004. In their complaint, they alleged Katmeh treated Sandra Luedtke for chest pain in November 2001. Katmeh performed a cardiac catheterization² and diagnosed stenosis, or narrowing of the arteries, in several arteries in her heart. Based on Katmeh's findings, a different surgeon performed triple bypass surgery on Luedtke. Luedtke developed complications as a result of the surgery. A second catheterization after the surgery revealed Luedtke in fact had normal coronary circulation. This meant Katmeh

¹ For clarity, we refer to defendants collectively as Katmeh in this opinion.

² In their briefs to the circuit court, the Luedtkes described a cardiac catheterization as a diagnostic procedure used to identify various cardiac defects and diseases. The procedure involves inserting a catheter into an artery or vein, steering it to the heart, then using the catheter to inject x-ray dye and measure pressure inside the heart.

erroneously performed the first catheterization, causing an unnecessary triple bypass surgery.

¶3 The Luedtkes made two claims relevant here. First, they alleged Katmeh negligently performed the catheterization, causing unnecessary surgery and the subsequent complications. Second, they alleged Katmeh failed to obtain informed consent for the procedures performed because he did not inform Luedtke that he had incorrectly diagnosed stenosis in the past, and he failed to disclose past complaints from patients about performing unnecessary cardiac procedures.

¶4 Discovery revealed that Bellin Hospital placed conditions on Katmeh's practice following a review of patient complaints. Although details of the conditions are not in the record, the parties agree that Katmeh was monitored by another physician for six months, and the monitoring concluded in October 2001, approximately one month before Katmeh treated Luedtke. Discovery also revealed a Wisconsin Medical Examining Board disciplinary proceeding alleging Katmeh had performed unnecessary cardiac procedures on six occasions in 1997 and 1998—the same procedures that were the subject of Bellin's review. In 2003, the board filed a complaint, which was resolved when Katmeh admitted one of the six allegations and agreed to attend medical education classes and be monitored by an independent cardiologist for six months.

¶5 Katmeh made a motion in limine to exclude evidence of the past complaints, the hospital review and the board proceeding. As relevant here, he argued the evidence was impermissible other acts evidence under WIS. STAT.

§ 904.04(2).³ In the alternative, he argued the risk of unfair prejudice and jury confusion outweighed the relevance of the evidence, and therefore it should be excluded under WIS. STAT. § 904.03. The Luedtkes responded that the evidence was relevant to their informed consent claim. They argued the evidence was not being offered to show negligence; instead, it was offered to show that Katmeh had not disclosed information necessary for Luedtke to make an informed, intelligent decision on whether to accept his care and recommendations.

¶6 The circuit court excluded the evidence. The court began by noting that the board complaint itself was filed well after Katmeh treated Luedtke, and therefore was not something he could have disclosed to her. The circuit court then discussed whether an informed consent claim could be based on the prior complaints. The court concluded Katmeh was not required to disclose the complaints absent a request. Because Luedtke had not made such a request, the court concluded the evidence was not relevant. In the alternative, the court held the evidence was inadmissible because its relevance was substantially outweighed by the danger of unfair prejudice and jury confusion. *See* WIS. STAT. § 904.03.

¶7 The matter was tried to a jury in June 2007. The jury returned a verdict for Katmeh on both negligence and informed consent. In motions after verdict, the Luedtkes argued they were entitled to a new trial on informed consent because of the excluded evidence. The court denied the motion and entered judgment on the jury verdict.

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶8 A circuit court’s decision to exclude evidence is discretionary and will be upheld unless the court erroneously exercised its discretion. *State v. Ford*, 2007 WI 138, ¶30, 742 N.W.2d 61. A court properly exercises its discretion when it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶9 Here, the Luedtkes devote most of their brief to arguing the evidence was relevant to their informed consent claim. That is, they contend a doctor’s failure to disclose prior complaints can amount to a failure to inform the patient about “the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments.” *See* WIS. STAT. § 448.30. We need not reach this issue, however, because even if the evidence is relevant to informed consent, the court properly excluded it under WIS. STAT. § 904.03.

¶10 Under WIS. STAT. § 904.03:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice exists to the extent that a piece of evidence “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.” *State v. Davidson*, 2000 WI 91, ¶73, 236 Wis. 2d 537, 613 N.W.2d 606 (citations and quotations omitted).

¶11 Here, the court stated:

[E]ven if one were to determine that [the evidence] would be relevant ... I would further have to determine whether or not the probative value is substantially outweighed by the danger of unfair prejudice. In this case, the risk of unfair prejudice is extremely high. It's so high I don't believe that a cautionary instruction would be adequate to resolve that risk.

I would also note that I think that the probative value is somewhat diluted in this case. For example, the specific facts and circumstances of each [complaint] would have to be then presented in this case to determine whether or not it's even similar....

The other area that affects the probative value would be the—at least the contention at this point that the entire process of discipline and review [at Bellin] was ... somewhat suspect and was at least affected by, if not controlled completely by ... an antagonism that arose out of decisions [by Katmeh] to work for a competing entity....

I would further note that the risk of jury confusion ... is extremely high ... because you're talking then again about a wide variety of cases and not [Luedtke's case.] ... [Katmeh's] prospect for a fair trial based upon the facts and circumstances of this case would be significantly impaired by the introduction of a wide variety of cases that may or may not even be similar, and so for all of these reasons, I am granting [Katmeh's] motion....

¶12 This statement shows the court began by correctly identifying the risk of unfair prejudice inherent in evidence of prior complaints. The trial involved both negligence and informed consent. Although the Luedtkes agreed that evidence of the complaints was offered to prove only informed consent, the jury might also have concluded the complaints and Bellin's review showed Katmeh was a bad doctor, or decided Katmeh was negligent in other cases and therefore was also negligent in treating Luedtke. If the jury did so, it would have "base[d] its decision on something other than the established propositions in the case[,]” unfairly prejudicing Katmeh. *See id.*

¶13 The court also correctly identified the danger of confusing the jury by what would essentially have been six mini-trials on different incidents. At the time of trial, no disciplinary proceeding had been filed, much less resolved, and Katmeh contended the Bellin review was a result of Bellin’s antagonism toward him rather than a legitimate grievance. As a result, the jury would have been required to sort out conflicting evidence on whether the complaints and the Bellin review actually indicated poor performance by Katmeh. As the court noted, these mini-trials on other incidents would have made it difficult for Katmeh to receive a fair trial on “the facts and circumstances of this case” as opposed to the facts of the other incidents.

¶14 Finally, the court correctly noted that the probative value of the evidence of other complaints was, in the court’s words, “somewhat diluted” because it was not clear whether the complaints had merit and how similar their underlying facts were to Luedtke’s situation. The court concluded its analysis by stating that overall, the relevance of the evidence was outweighed by an “extremely high” danger of unfair prejudice and jury confusion.

¶15 The Luedtkes disagree with this conclusion, arguing the relevance of the evidence “far outweighs any potential prejudice” to Katmeh. However, it is well settled law that when we review a court’s exercise of discretion, our focus is on the court’s reasoning process, not the ultimate result. *Johnson v. Johnson*, 225 Wis. 2d 513, 516, 593 N.W.2d 827 (Ct. App. 1999); *see also Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). The Luedtkes do not identify any error in the court’s reasoning, except to argue they “have not argued that the prior disciplinary issues ... were relevant to the medical malpractice claim.” However, as the circuit court correctly noted, unfair prejudice flows from how the jury might have actually used the evidence, not how it would have been instructed

to use it. *See Davidson*, 236 Wis. 2d 537, ¶73. The court identified the relevant facts, applied the correct standard, and reached a reasonable conclusion. *See LeMere*, 262 Wis. 2d 426, ¶13.

¶16 The Luedtkes also request a new trial in the interest of justice. *See* WIS. STAT. § 752.35. They argue the real controversy was not fully tried because the evidence was excluded. We disagree. The court properly excluded evidence in order to focus the jury on the specific facts and circumstances of this case. Under those circumstances, excluding the evidence did not mean the real controversy was not fully tried. *See id.*

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

