

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 25, 1996

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

NOTICE

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

No. 94-2232

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**SUSAN HANMER, EUGENE HANMER,
CRAIG HANSON AND RAYMOND E. KREK,
AS GUARDIAN AD LITEM OF REBECCA
HANSON A/K/A REBECCA HANMER,**

Plaintiffs-Appellants,

v.

**WYETH LABORATORIES, INC.,
WYETH LABORATORIES, AMERICAN HOME
PRODUCTS CORPORATION,
FORT ATKINSON MEDICAL CENTER, S.C.,
FRANK BERAN, M.D.,
JOHN DOE AND/OR JANE DOE,
COUNTY OF JEFFERSON,
COUNTY OF JEFFERSON HEALTH AGENCY
AND WISCONSIN PATIENTS COMPENSATION FUND,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Jefferson County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

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

PER CURIAM. Susan Hanmer and her daughter, Rebecca Hanson, appeal from a judgment dismissing their medical malpractice action against Dr. Frank Beran and Fort Atkinson Medical Center, S.C. They contend that the trial court erroneously exercised its discretion by not admitting into evidence certain interrogatories and by not granting a mistrial or giving a curative instruction following improper remarks in the closing argument of defense counsel. We reject these arguments and affirm.

Rebecca was born on January 26, 1974. Dr. Beran was the attending physician at her birth. Rebecca saw Dr. Beran at the Fort Atkinson Medical Center for follow-up "well baby" check-ups. Rebecca received a smallpox vaccination on April 29, 1975, at the Jefferson County Courthouse from Jefferson County Clinic nurses. She subsequently sustained serious neurologic injury, ultimately resulting in a temporal lobectomy, which she and her mother attribute to the vaccination.

Hanmer's and Rebecca's claims against Dr. Beran and the Fort Atkinson Medical Center rest on their contention that Dr. Beran recommended to Hanmer that Rebecca receive the smallpox vaccination. Hanmer testified that she was given an immunization guide by Dr. Beran or his nurse. The guide listed the smallpox vaccination as a vaccination which should be given to children. She testified that she discussed the smallpox vaccination with Dr. Beran. According to Hanmer's testimony, Dr. Beran recommended to her that Rebecca receive a smallpox vaccination; that it would be less expensive to take Rebecca to the Jefferson County Clinic for the vaccination; and that it would be better for Rebecca to receive the vaccination as an infant than as an adult. Hanmer testified that Dr. Beran had his nurse call the clinic to determine when the smallpox vaccinations would next be given and that Dr. Beran then gave those dates to her.

The immunization guide was printed in June of 1971. In September 1971, the United States Public Health Service recommended that the smallpox vaccination not be used routinely for infants in the United States because the risk of injury from the vaccination surpassed the risk of contracting the disease.

Dr. Beran testified that he did not recall the exact conversations he had with Hanmer twenty years ago, but he did know the "routine" that he used in similar situations during that time period. Based on his recollection of this routine, Dr. Beran testified that if Hanmer had asked him about giving Rebecca the smallpox vaccine, he would have told her that he was not giving the vaccination and that the center had stopped giving routine smallpox immunizations in 1972. He testified that in 1974 or 1975 he would have recommended the smallpox vaccination only for someone who was planning to travel to certain locations overseas where smallpox was still active. Dr. Beran testified that he would not have discussed the smallpox vaccination unless he was asked about it and that, other than the baby book, "there's no other information that's routinely given at the clinic." He acknowledged that either he or his nurse gave Hanmer the immunization guide.

The jury found that Hanmer and Rebecca had failed to prove that Dr. Beran had recommended the smallpox vaccination to Hanmer. Plaintiffs' motions after verdict were denied, and judgment was entered in favor of Dr. Beran and the Fort Atkinson Medical Center on November 1, 1994.

Hanmer and Rebecca contend that the trial court erroneously exercised its discretion by not admitting into evidence the following interrogatory questions and answers:

INTERROGATORY NO. 32: Please set forth any and all information given to Susan Hanmer in writing or orally by Dr. Beran and any member of the staff of Fort Atkinson Medical Center concerning smallpox vaccine and/or smallpox the disease. For your response, please include: [dates, copies, etc.].

ANSWER: None was given.

INTERROGATORY NO. 34: Please set forth and describe in detail any and all information provided routinely to patients in 1975 concerning smallpox vaccine by Dr. Beran, Fort Atkinson Medical Center, its agents or employees. For your response, please include: [dates, descriptions, etc.].

ANSWER: None was given.

INTERROGATORY NO. 35: Please set forth any and all information you provided to Susan Hanmer on or before April 29, 1975 regarding smallpox vaccine by Dr. Beran, Fort Atkinson Medical Center or its employees. For your response, please include: [date, description, etc.].

ANSWER: Object that this interrogatory is vague and overbroad. Subject to those objections, no information was given to Susan Hanmer regarding smallpox vaccinations for Rebecca Hanmer.

Decisions regarding the exclusion of evidence at trial are left to the discretion of the trial court. *State v. Clark*, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We affirm a discretionary decision by the trial court if the trial court examined the relevant facts, applied the proper standard of law and used a demonstrated rational process in reaching a reasonable conclusion. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Under § 904.03, STATS., a trial court is given discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of confusion or if its presentation is cumulative of other evidence.

The court stated that the responses to the interrogatories could be interpreted in three potentially different ways: that Dr. Beran routinely gave no information regarding smallpox in 1975; that Dr. Beran had no specific recall of giving such information to Hanmer; or that Dr. Beran believed the response "none was given" was in reference to giving a smallpox vaccine to Rebecca. The court noted the confusion this could cause the jury, calling interrogatories "crude discovery tools." The court then balanced the value of the interrogatories against this potential for confusion by noting that the interrogatories did not contain information that was not covered elsewhere in admitted evidence.

Given the ambiguities in the interrogatory responses, we cannot say that this was an erroneous exercise of discretion. The trial court applied the

proper standard of law, examined the relevant facts and used a rational process in deciding to exclude the interrogatory responses.¹

Hanmer's and Rebecca's second argument is that the trial court erroneously exercised its discretion in failing to grant a mistrial or give a curative instruction after improper remarks in closing argument by defense counsel. Defense counsel stated that after seven years of testimony from dozens of witnesses, the plaintiffs did not bring forward any other people who had been "steered" by Dr. Beran after 1972 to the county clinic for smallpox vaccinations. Defense counsel also stated, inaccurately, that Hanmer and Rebecca had access to "anything they wanted from Dr. Beran, and there's no evidence that anyone else was steered." Hanmer and Rebecca moved for a mistrial and asked the court for a curative instruction that they had no ability to obtain the names of patients without the patients' consent; that they did not have access to patients' names; and that defense counsel knew these things when he made his closing argument.

The decision not to grant a mistrial is within the discretion of the trial court. *Haskins v. State*, 97 Wis.2d 408, 419, 294 N.W.2d 25, 33 (1980). Similarly, the instructions given to a jury on an issue are within the discretion of the trial court. *Fischer v. Ganju*, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992).

The trial court chose to remedy the impropriety by allowing Hanmer's and Rebecca's counsel to make responsive comments in closing argument. Their counsel was allowed to argue that Dr. Beran alone had the ability to bring in his other patients to testify, implying that the failure to do so really weighed against him, not Hanmer and Rebecca.

The court did not give the requested curative instruction because it considered the WIS J I—CIVIL 110 instruction to adequately address the problem. That instruction states that arguments by attorneys in closing are just arguments and should not be considered by the jury as evidence.

¹ Because we conclude that the trial court did not erroneously exercise its discretion in excluding the interrogatory responses, we do not decide whether the objection to their exclusion was waived.

We conclude the trial court did not erroneously exercise its discretion by failing to grant a mistrial or give the requested curative instruction. The trial court applied the correct law to the relevant facts in a rational process and reached reasonable conclusions. The decisions not to grant a mistrial and not to give the requested jury instruction do not constitute an erroneous exercise of the trial court's discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.