COURT OF APPEALS
DECISION
DATED AND RELEASED

February 20, 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

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No. 95-0972

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

**PATRICIA S. MAGYAR, Individually,
and as Special Administrator of the
ESTATE OF ANTHONY F. MAGYAR, Deceased,**

Plaintiffs-Respondents,

CITY OF MILWAUKEE,

Involuntary-Plaintiff,

v.

**WISCONSIN HEALTH CARE
LIABILITY INSURANCE PLAN and
LAWRENCE J. FRAZIN, M.D.,**

Defendants-Appellants,

WISCONSIN PATIENTS COMPENSATION FUND,

Defendant-Co-Appellant,

NEUROLOGICAL SURGERY OF MILWAUKEE, S.C.,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

WEDEMEYER, P.J. Dr. Lawrence J. Frazin, his insurer, Wisconsin Health Care Liability Insurance Plan, and the Wisconsin Patients Compensation Fund appeal from a judgment entered after a jury returned a verdict in favor of Patricia S. Magyar and the estate of her husband, Anthony F. Magyar, in a medical malpractice action. The appellants raise several issues for our consideration: (1) whether the trial court erred in admitting evidence regarding the April 10, 1990, surgery and the December 13, 1990, surgery in one trial; (2) whether the trial court erred in excluding testimony from an expert witness; (3) whether the trial court erred in handling the situation when a juror overheard a negative comment made about her by Dr. Frazin's wife; (4) whether Magyar's attorney engaged in improper closing argument; (5) whether the damages awarded by the jury were excessive; and (6) whether the trial court erred in denying appellants' motion for change of venue. Because the trial court did not erroneously exercise its discretion with regard to any of the issues raised, we affirm.

I. BACKGROUND

On April 10, 1990, Dr. Frazin performed two planned cervical fusions on Anthony Magyar. He also performed an unplanned third fusion because he miscounted the proper cervical level. Subsequent to this operation, Anthony began experiencing swallowing problems. As a result, Dr. Frazin performed another surgery on Anthony on December 13, 1990. During this surgery, Dr. Frazin removed certain osteophytes, that were protruding out from the spine causing swallowing difficulties. Subsequent to this surgery, Anthony developed an infection, which went untreated for several days. On December 18, 1990, Dr. Frazin consulted with an infectious disease specialist, Dr. Brian Buggy, who diagnosed the infection and began treating it with a course of antibiotics. Anthony never recovered and died on December 22, 1990.

Patricia Magyar, Anthony's wife of more than thirty-eight years, instituted a medical malpractice action against Dr. Frazin, his insurer, Wisconsin Health Care Liability Insurance Plan, the Wisconsin Patients Compensation Fund and Neurological Surgery of Milwaukee. The claim alleged that the health care providers were negligent with respect to both the April 10, 1990, surgery and the December 13, 1990, surgery. It was Patricia's position that Dr. Frazin should have administered antibiotics prophylactically during the December surgery and his failure to do so was a substantial factor in causing Anthony's death. It was Dr. Frazin's position that he had ordered antibiotics by listing them on a "preference card" filled out prior to surgery. Anthony's medical records, however, do not document that any antibiotics were administered.

The trial commenced on November 28, 1994. On that date, the trial court and the other parties were informed that counsel for Magyar and counsel for Neurological Surgery of Milwaukee had reached an agreement to dismiss Neurological Surgery as a party. The dismissal was contingent on the trial court's ruling with regard to Neurological's named expert witness, Dr. Richard Proctor. If the trial court excluded Dr. Proctor as a witness, Neurological Surgery of Milwaukee would be dismissed. Neither Dr. Frazin, nor the Fund had named Dr. Proctor, who was the only infectious disease expert for the defense, on their witness list. The trial court determined that Dr. Proctor would not be allowed to testify because neither remaining defendant had in any way identified him as a potential witness.

The case proceeded to trial. The jury returned a verdict that found Dr. Frazin negligent with respect to the April surgery, but that this negligence was not causal. The jury found Dr. Frazin both negligent and causal with respect to the December surgery. The jury awarded $75,000 for pain and suffering to Anthony's estate and $650,000 for loss of society and companionship to Patricia. All postverdict motions filed by appellants were denied and judgment was entered on the verdict. Dr. Frazin, his insurer, and the Fund now appeal from that judgment.

II. DISCUSSION

A. Allowing evidence of April surgery in trial on December surgery.

The appellants first complain that the trial court should not have allowed the jury to hear about the April surgery together with the December surgery and that if Magyar wanted to pursue both causes of action, each surgery should have been tried separately. We review a trial court's evidentiary rulings under the erroneous exercise of discretion standard. *See* ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993). If a trial court applies the proper law to the established facts, we will not find an erroneous exercise of discretion if there is any reasonable basis for the trial court's ruling. ***Id.*** Appellate courts generally look for reasons to sustain discretionary determinations. ***Steinbach***, 177 Wis.2d at 185-86, 502 N.W.2d at 159.

In deciding to allow the introduction of evidence regarding the April surgery, the trial court reasoned that allowing the evidence:

> ... facilitates judicial economy. We are basically talking [about] the same ... players ... the same corporation and the same patient and the same course of medical treatment.
>
> I think that [it] is best handled on—in the framing of the verdict questions and can be done—done so fairly readily and I think without prejudice to the parties in the separate incidents.

Based on this reasoning, we conclude that the trial court did not erroneously exercise its discretion in admitting evidence of the April surgery and the December surgery in one trial. It had a reasonable basis for doing so: it appeared to be a continuum of negligent treatment. Further, separating the two incidents on the verdict form allowed the jury to consider each independently. There is nothing in the record to indicate that hearing about the April surgery improperly prejudiced the jury against Dr. Frazin.

Accordingly, we conclude that the trial court's decision was not an erroneous exercise of discretion.

B. Excluding Dr. Proctor as a witness.

The appellants next claim that the trial court erred in excluding Dr. Proctor as a witness because Dr. Proctor was a *defense* witness that all three defendants were relying on, that he was not a surprise, and that "burying" Dr. Proctor flies in the face of the purpose of our judicial system—the search for truth.

This court would never condone tactics that intentionally bury a witness who has information relevant to the resolution of the case. Our state has long abandoned "trial by ambush" lawyering. Nevertheless, the issue before us is limited to whether the trial court erroneously exercised its discretion in excluding Dr. Proctor as a witness. ***Prill v. Hampton***, 154 Wis.2d 667, 678, 453 N.W.2d 909, 913 (Ct. App. 1990). Again, the question is not whether this court would have ruled differently, but whether the trial court applied the relevant facts to the pertinent law and reached a reasonable conclusion. ***Steinbach***, 177 Wis.2d at 185-86, 502 N.W.2d at 159. Based on this standard, we conclude that the trial court did not erroneously exercise its discretion.

In civil litigation, all parties are bound by certain procedural rules. One of those rules is that all parties must abide by the scheduling order issued by the trial court, or risk being penalized for failing to abide by it. The scheduling order in this case required each party to name the witnesses it intended to call at trial. Both Dr. Frazin and the Fund filed witness lists.

Neurological Surgery of Milwaukee, after obtaining relief from the scheduling order deadline, filed its witness list, naming Dr. Proctor in May 1994. The appellants rely on ***Haack v. Temple***, 150 Wis.2d 709, 442 N.W.2d 522 (Ct. App. 1989), in support of their argument that it was not necessary for them to specifically name Dr. Proctor as their own witness. ***Haack***, however, is distinguishable from the instant case.

In ***Haack***, this court reversed a trial court's ruling excluding a nurse who had treated the plaintiff from testifying because she was not specifically named on the defendant's witness list. ***Id.*** at 716, 442 N.W.2d at 525. The defendant in ***Haack***, however, had noted on his witness list that he may call "All physicians, psychologists, psychiatrists and any other expert type witnesses that have examined, treated or evaluated Roman Haack at any time; [and] Any other expert or lay witness called by any party in this proceeding." ***Id.*** at 711, 442 N.W.2d at 522. We reasoned in ***Haack*** that this designation necessarily contemplated calling the excluded nurse because she fell into the category "expert type" witness who treated Haack. ***Id.*** at 716, 442 N.W.2d at 525. In addition, we concluded that this nurse would not be a "surprise" witness because she had been specifically named on Haack's witness list. ***Id.***

The ***Haack*** case is quite different from the situation in the instant case. Neither Dr. Frazin, nor the Fund made a provision on their witness list to call "any witness named by any other party." If either had, we would conclude that the trial court erred in excluding Dr. Proctor, because similar to the nurse in ***Haack***, he would not have been a surprise witness. Because Dr. Frazin and the Fund did not identify as their own potential witnesses, "witnesses named by other parties," we cannot conclude that the trial court's decision to exclude Dr. Proctor was an erroneous exercise of discretion.[1]

[1] Although it is unfortunate for the appellants that Neurological Surgery's counsel led them to believe Dr. Proctor was a "shared defense" witness, this is not legally binding.

In addition, we conclude that it was not erroneous for the trial court to deny appellants' alternative motion to adjourn the trial to enable them to secure another infectious disease specialist to replace Dr. Proctor. Our conclusion is based on the fact that this trial had already been adjourned on four separate occasions and if an adjournment was granted, it would be approximately another year before the first available trial date.

C. Juror Dismissal.

The appellants also complain about the manner in which the trial court handled the dismissal of a juror during the trial. On the fourth day of the trial, a juror, Sharon Sanders, overheard a statement made by Dr. Frazin's wife to Dr. Frazin. The comment was made when the jurors were passing in between the defense table and the first row of courtroom spectators. Mrs. Frazin said something to the effect that "she's the one." The comment apparently referred to what Mrs. Frazin had observed as Sanders dozing during part of the testimony. Sanders, upset by the comment, told the trial court what happened. The trial court informed the parties and decided to individually voir dire Sanders outside the presence of counsel. Based on this voir dire, the trial court determined that Sanders should be dismissed. The trial court also individually voir dired two other jurors, who Sanders indicated she had told about the incident. Both other jurors indicated that this would not affect their ability to render a fair and impartial verdict.

The trial court then informed the entire jury generally about what happened and that Sanders had been discharged. One additional juror indicated that he too was aware of the incident. This juror also indicated that the incident would not affect his impartiality.

Appellants contend that their counsel should have been allowed to voir dire the affected jurors and it was error for the trial court to exclude them. The trial court, in its discretion, may discharge a juror during the trial for cause. ***State v. Lehman***, 108 Wis.2d 291, 299, 321 N.W.2d 212, 216 (1982). Although the preferred procedure in conducting voir dire of jurors during trial is for all counsel to be present, *see* ***id.*** at 300, 321 N.W.2d at 216, there are exceptional circumstances where excluding *all counsel* from voir dire is a satisfactory way to deal with the situation. We believe the situation in the instant case is just such a situation. The trial court voir dired Sanders in chambers, on the record, and shared what it discovered with all parties. Given Sanders's perception that the defense was in some way prejudiced against her, it was not erroneous for the trial court to handle the voir dire on its own. Moreover, the trial court did ample inquiry with the other affected jurors and determined that each was able to continue to act impartially. There is nothing in the record that contradicts

this finding and, therefore, we uphold it.[2]

D. Improper Closing.

Appellants also claim that Magyar's attorney made improper closing arguments which prejudiced the jury against the appellants. Appellants make numerous arguments with respect to Magyar's attorney's closing. We address only one because our review of the others indicates that each was either a clearly permissible closing argument, *see* ***State v. Draize***, 88 Wis.2d 445, 455-56, 276 N.W.2d 784, 789 (1979), or cured by a sustained objection made contemporaneously to the argument during the trial.

We choose to address specifically, however, the contention that Magyar's attorney made improper comments regarding Dr. Frazin's and Dr. Buggy's credibility and truthfulness. In this state, there is a fine line between commenting on the credibility of witness whose credibility is in issue, *see* ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis.2d 648, 505 N.W.2d 399 (Ct. App. 1993), and stating an opinion as to whether a witness is telling the truth. *See* SCR 20:3.4(e). Although Magyar's counsel came close to crossing this line with respect to his statements that "in my opinion" Dr. Frazin is not being honest with you and "[Dr. Buggy] was honest with you to a fault," we cannot say that they constitute improper comments that rise to the level of reversing the judgment. We base this conclusion on several factors: (1) the record demonstrates that Dr. Frazin's credibility was clearly in issue; and (2) the comments were isolated and brief. *See* ***State v. Johnson***, 153 Wis.2d 121, 132 n.9, 449 N.W.2d 845, 849 n.9 (1990). Accordingly, we reject appellants claim that the comments made during Magyar's counsel's closing argument require reversal of the judgment.

E. Excessive Damages.

[2] Appellants also claim that it was error for the trial court to send Sanders back to the jury room after her initial complaint without admonishing her not to discuss this with other jurors. Although we agree such an admonition would be the preferred practice, we are satisfied that the trial court's findings that the three other affected jurors could remain impartial rendered this error harmless.

Appellants also claim that the $650,000 loss of society and companionship award was excessive and the trial court erred in denying their motion for remittitur. The trial court determined that this award was not so out of proportion so as to be excessive. In reaching this determination, the trial court indicated that the only evidence the jury heard was that the Magyars had a very loving relationship and, therefore, this justified the award. We agree. *See* ***Redepenning v. Dore***, 56 Wis.2d 129, 134, 201 N.W.2d 580, 584 (1972) (appellate court will uphold trial court's denial of remittitur motion where based on the evidence, trial court concluded that the damages awarded were not excessive).

It is true that Anthony, who was sixty-three at the time of his death, had an anticipated life expectancy of only ten years. Nevertheless, Patricia and Anthony had apparently been happily married for thirty-eight years. The relationship, as noted by the trial court, was a very loving relationship. The post-retirement years for a couple married a long time are often considered to be the "golden years"—the time that both look forward to, a time to really enjoy life and each other. We cannot say that $65,000 a year to compensate Patricia for this loss is excessive.

F. Change of Venue.

Finally, one appellant contends the trial court erred in denying a motion to change venue based on a Channel 12 news story that aired ten days prior to trial about medical malpractice and bad doctors. The story specifically referenced Dr. Frazin. The trial court determined that voir dire would be an effective remedy to address the news story. During voir dire, the potential jurors were asked if they had seen any recent reports about medical malpractice. None had.

Based on this, we conclude that the trial court's choice to conduct voir dire was appropriate, *see* ***State v. White***, 68 Wis.2d 628, 632-35, 229 N.W.2d 676, 678-80 (1975) (pretrial publicity may be handled by change of venue, a continuance or through voir dire), and see nothing in the record to convince us that the jury actually selected to serve had been prejudiced by the news report.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*concurring in part; dissenting in part*). Although I do not necessarily join in the majority's reasoning in all respects, I do agree with the majority's conclusions on most issues. I disagree, however, with the majority's conclusion regarding the exclusion of Dr. Proctor.

On the first day of trial, negotiations between the plaintiff and defendant Neurological Surgery of Milwaukee ("NSM") resulted in dismissal of NSM as a defendant in exchange for an agreement that Dr. Proctor, NSM's expert witness, would not testify. The trial court then denied the requests of the appellants and co-appellant to call Dr. Proctor as their expert witness because neither had listed him among their expert witnesses.

Apparently there is no dispute that Proctor's testimony could have been significant. As the Wisconsin Patients Compensation Fund argues on appeal, Dr. Proctor "was the only infectious disease expert on the defense side. He would have testified that the failure, if any, to give antibiotics during the December 13, 1990 surgery was *not* a cause of Mr. Magyar's death." Clearly, all the parties anticipated that Dr. Proctor would be the defense expert witness on this subject.

Given that the Magyar/NSM agreement specifically provided for the exclusion of Proctor as a witness, there seems to be ample basis for the Fund's argument:

> Plaintiffs-respondents took advantage of the fact that the remaining defendants ... had not supplemented their witnesses lists to name Dr. Proctor. On the first day of trial, without any notice whatsoever, the plaintiffs-respondents agreed to dismiss NSM under the sole condition that NSM silence its crucial expert witness. Plaintiffs-respondents knew how damaging such an agreement would be to the appellants and co-appellant. They also knew that under the doctrine of joint and several liability and chap. 655, Wis. Stats., they could obtain a full recovery of their damages from Dr. Frazin, his insurer, and the Fund, regardless of whether NSM was on the verdict.... Plaintiffs-

> respondents' tactical game prevented a full and fair trial and precluded an adequate defense.

"Forbidding a party to call a witness is a drastic measure in a trial, where truth is sought." ***Fredrickson v. Louisville Ladder Co.***, 52 Wis.2d 776, 784, 191 N.W.2d 193, 196 (1971). Here, no party ambushed another by producing a surprise witness; instead, a last-minute stratagem ambushed the appellants and co-appellant by precluding testimony from a crucial witness everyone expected. Under the unusual circumstances of this case, I would conclude that the exclusion of Dr. Proctor was an erroneous exercise of discretion. Accordingly, on this issue, I respectfully dissent.