COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2321 **Cir. Ct. No. 99-CV-333**

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

ROSE MARY CLARK, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ALVIN J. CLARK,

PLAINTIFF-APPELLANT,

V.

M. TERRY MCENANY, M.D. AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J, and Fine, J.

¶1 CANE, C.J. Rose Mary Clark, individually and as special administrator for the estate of Alvin Clark, deceased, appeals a judgment entered upon a jury verdict dismissing her medical malpractice claim against M. Terry

McEnany, M.D., and Physicians Insurance Company of Wisconsin. Clark asks us to exercise our discretionary power of reversal under WIS. STAT. § 752.35[1] because she claims that the real controversy was not fully tried. She argues that the trial court improperly limited evidence of restrictions imposed on McEnany's former surgery practice in California and his attempts to cover up those restrictions. Clark also argues the trial court allowed inadmissible testimony and committed other evidentiary errors. In addition, Clark contends that the court erroneously interpreted the law of causation, resulting in erroneous jury instructions and verdict form.

¶2 Because the record reflects a rational basis for the trial court's evidentiary rulings, we conclude the real controversy was fully tried. Also, because the jury found no negligence and no breach of McEnany's informed consent duties, we do not reach the issue of the court's interpretation of the law of causation. Consequently, we decline to exercise our discretionary power of reversal and therefore affirm the judgment.

I. BACKGROUND

¶3 On February 23, 1994, Dr. M. Terry McEnany was beginning a surgery to replace Alvin Clark's aortic valve, repair the mitral valve and insert a pacemaker. While on the operating table, Clark, age seventy-four, suffered

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

cardiac arrest and died. His widow brought this action alleging negligence and a violation of McEnany's obligation to obtain Alvin's informed consent.[2]

¶4 Pretrial motions were considerable. In Clark's words, "approximately 75 Motions in Limine were filed. In addition, scores of hours were spent in hearing [on six days], which resulted in more than 450 pages of transcripts." Many of the motions dealt with evidence of McEnany's former surgery practice at Kaiser Permanente Medical Group in California. Following a nine-day trial, the jury returned a verdict finding no negligence. The jury also found that McEnany did not fail to disclose necessary information about the course of treatment in order to obtain Alvin's informed consent under WIS. STAT. § 448.30 (1993-94). The court denied motions after the verdict for a new trial. This appeal follows.

II. DISCUSSION

A. INTEREST OF JUSTICE

¶5 Clark argues that under WIS. STAT. § 752.35, we should exercise our discretionary authority to grant a new trial in the interest of justice.[3] We exercise

[2] We limit our recitation of the voluminous record to those facts directly related to the issues raised on appeal. Additional facts will be included in our discussion of the issues.

[3] WISCONSIN STAT. § 752.35, entitled "**Discretionary reversal**," reads:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial,

(continued)

our power of discretionary reversal only in extraordinary cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). A claim that the jury had before it testimony or evidence which had been improperly admitted and that this material obscured a crucial issue may fall within the "real controversy not fully tried" category. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 400, 424 N.W.2d 672 (1988). Also, the real controversy has not been tried when the jury was not given an opportunity to hear significant testimony bearing on an important issue. ***Id.*** The trial court need not find a substantial likelihood of a different result on retrial when it orders a new trial on the grounds that the real controversy was not fully tried. ***Id.*** at 401. For the reasons that follow, we are persuaded that the real controversy was fully tried.

1. *Restrictions on McEnany's California Practice*

¶6 Clark argues that the real controversy was not fully tried because the jury was not given an opportunity to hear testimony concerning the significance and context of the restriction on McEnany's operating privileges imposed when he practiced in California.[4] Clark acknowledges that the court properly allowed some evidence that McEnany's operating privileges were restricted, but claims that critical information was disallowed. Because the record fails to support Clark's argument, we reject it.

> and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

[4] While we employ the term "restriction," we recognize that McEnany maintained his peer review did not result in a restriction, but merely a greater level of assistance.

¶7 Our informed consent statute, WIS. STAT. § 448.30 (1993-94), is premised on the tenet that a patient has the right to know about significant potential risks involved in a proposed treatment or surgery. ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 640, 545 N.W.2d 495 (1996). To ensure a patient can give informed consent, a "'surgeon is under the duty to provide the patient with such information as may be necessary under the circumstances then existing' to assess the significant potential risks which the patient confronts." ***Id.*** at 631 (quoting ***Scaria v. St. Paul Fire & Mar. Ins. Co.***, 68 Wis. 2d 1, 11, 227 N.W.2d 647 (1975)). Information material to the patient's decision must be disclosed. Material information is all "inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated." ***Id.*** Informed consent emanates from what a reasonable person in the patient's position would want to know. ***Id.*** at 632. The information reasonably necessary for a patient to make an informed decision will vary from case to case. ***Id.*** at 634.

¶8 To prove that McEnany violated his duty to obtain Alvin's informed consent, Clark introduced evidence showing that in 1992 in California, a peer review was undertaken to investigate certain aspects of McEnany's patient care and treatment. As a result of the peer review, McEnany was required to receive assistance of a staff surgeon until 1993, when he left California and began his practice in Eau Claire, Wisconsin.

¶9 Dr. William Moores, McEnany's former colleague in California, was a Yale University medical school graduate who testified on Clark's behalf. He stated that in late 1992, an investigation arose out of concerns for patient safety resulting in restrictions on McEnany's practice. Moores testified that "a physician normally has an ability to practice medicine unsupervised." He also testified all

surgeons need to have assistants, but the arrangement with McEnany represented a "terribly significant" restriction on McEnany's practice. Moores elaborated that this meant "the restriction does not allow him to function as an independent surgeon making decisions without having them checked by another proctoring surgeon."

¶10 Moores further testified that in his opinion a surgeon's standard of care requires that he reveal a restriction in order to obtain the patient's informed consent. Moores added that McEnany should have revealed the restriction and "[t]hat was an incredibly important part of his ability, background, his ability to perform this operation on Mr. Clark unsupervised." Moores stated that "It's essential that he inform the prospective patient that he was going to make arrangements to work under the same conditions or to give that patient a right to seek care somewhere else." Moores testified that failing to advise a patient with respect to the restriction was a failure to exercise ordinary care. He further stated that had Clark been informed and insisted that the arrangements were the same as those undertaken in California, Clark's death would not have occurred.

¶11 Dr. Brian King, educated at Cambridge University, London University and Oxford University, worked at Mayo Clinic where he had experience in heart surgery. He was also called to testify on behalf of Clark's informed consent claim. King testified that a restriction was imposed upon McEnany that "he cannot do surgery on his own and he has to have a qualified cardiovascular surgeon in the room with him." He characterized it as "a very severe type of restriction." He further stated "the surgeon is obligated to tell the patient that in the recent past he has been restricted in how he should work and — and with whom he should work and he had to have … a second cardiovascular

surgeon present in the room or he couldn't operate." He stated that McEnany failed to exercise reasonable care by not advising Clark about his restriction.[5]

¶12 The court admitted several documents relating to the restriction on McEnany's practice: Exhibit 10, a Kaiser Permanente memo detailing the restriction, along with an enlargement of a copy of the memo; Exhibits 2 and 3, consisting of correspondence between attorneys for McEnany and Kaiser Permanente; and Exhibits 4 to 7, McEnany's professional applications submitted in 1993.

¶13 Exhibit 10, the memo of the March 8, 1993, meeting of McEnany's colleagues in California, stated: "This meeting was scheduled to obtain organized feedback regarding the function of the new Cardiovascular Surgery departmental policy regarding assisting Dr. McEnany with his cases." To clarify "some misunderstanding" regarding the role of McEnany's assistant, the memo provided:

> 1. There is not clear departmental unanimity regarding what is required of their role: i.e., as a surgical assistant or as a proctor.
>
> 2. One surgeon feels so adamant about not assisting Dr. McEnany that he will perform one of Dr. McEnany's cases as an extra case to off load the department of this burden.
>
> 3. The balance of the cardiovascular surgeons will assist Dr. McEnany in the role of an assistant, with the exception that if an [sic] decision during the conduct of the operation that the assisting surgeon deems could jeopardize the outcome of the operation, then the assisting surgeon may seek an opinion from a third member of his or her department as a "tie-breaker."

[5] King further testified that a physician has no obligation to discuss peer review information with a patient.

4. Dr. Grey will communicate this agreement with Dr. Madvig.

5. This process is not an experiment of a new practice style for Dr. McEnany, but rather a temporary solution to potentially reduce the situations where Dr. McEnany exposes himself (and subsequently, the patient) unnecessarily to problems by doing complex operative procedures with inadequate assistance. This process will need continual assessment and may require possible refinement, but we all agree that we must allow the process to continue as expediently as possible.

¶14 Clark concedes that the court admitted certain evidence concerning the California restrictions of McEnany's surgery practice, but complains that it improperly excluded Exhibit 11. Exhibit 11 details specific procedures to implement the objectives set out in Exhibit 10.[6]

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[6] Exhibit 11 reads:

> Summary of Format for Assisting Dr. McEnany during Practice Review—Meeting held April 21, 1993 at 2200 O'Farrell, 8th floor Conference Room.
>
> Attending were Dr. Madvig, Dr. Grey, and the members of the Department of Cardiovascular Anesthesia and Cardiovascular Surgery (Drs. Burgess, Flachsbart, Richter, and Moores).
>
> 1. The attending assistant surgeon is to be paged when the patient is undergoing induction of anesthesia; the operating room nurses will be asked to do this once communication with Dr. McEnany has taken place.
>
> 2. The attending assistant surgeon shall be in the hospital building (2425 Beary), in scrubs, and available at any time once the patient has undergone induction of anesthesia.
>
> 3. Dr. McEnany can ask at any time for the assistant attending surgeon to be paged to scrub; this is, however, to take place no later than when the patient is being given the heparin in

(continued)

¶15 Although Exhibit 11 was not received, the jury was generally informed of its contents. On Moores' direct examination, Clark's attorney inquired: "Exhibit 11, the April 21, 1993, meeting, also addresses the subject of the restriction, correct?" Moores replied, "It does." Clark's counsel inquired, "Does it make more explicit the times and circumstances in which that senior staff surgeon must be present?" to which Moore replied, "It does."

¶16 During discussions with the court regarding Exhibit 11's admissibility, Clark's counsel withdrew his request to admit it, stating: "Why don't I in moving admission seek only 10, and he can testify about the meeting on April 21 and what occurred so we avoid the 11 issue?"

¶17 In light of Clark's attorney's withdrawal of his request to have it admitted, we conclude Clark's claim of evidentiary error is not preserved. *See* ***State v. Rogers***, 196 Wis. 2d 817, 830, 539 N.W.2d 897 (Ct. App. 1995). We further conclude the exclusion of Exhibit 11 did not prevent the real controversy from being fully tried. Through testimony and other exhibits, the jury learned that as a result of a peer review, McEnany was required to have a surgeon assist during

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> preparation for cannulation. Dr. McEnany will initiate this request.
>
> 4. Dr. McEnany may cannulate the patient once the attending assistant surgeon is scrubbed and at the table. If the case is a redo, the attending assistant surgeon shall be scrubbed before the sternum is split.
>
> 5. Once the patient is stable, the pacing wires and chest tubes are in place, and the operation has come to a point when the sternum will be closed, the attending assistant surgeon may leave. The second assistant will then be called to help complete the closure.

operations in order not to jeopardize patient safety. Also, Moores testified to the general contents of Exhibit 11. We are satisfied that the exhibit itself was not necessary to put the restrictions "in context" as Clark alleges. We decline to grant a new trial in the interest of justice.

2. *Coverup*

¶18 Clark concedes the court permitted evidence of a "deal" orchestrated between McEnany and his former California employer to "coverup" the restriction, specifically correspondence between their attorneys. During cross-examination, McEnany identified a letter from his attorney to Kaiser Permanente reciting an understanding that upon McEnany's resignation, the "practice review" would terminate. The letter references "nondisclosure of [his] file" and an "agreed-upon letter of reference/recommendation" should one be requested in the future. McEnany was also examined regarding a second letter from Kaiser Permanente affirming its agreement to a letter of reference and that the practice review would be terminated upon resignation. The letter further stated, "[W]e will agree to keep all the quality assurance information which has been gathered to date regarding Doctor McEnany's practice confidential. We will not include it in his personnel file, and we will not disclose it to anyone outside of TPMG except as required by legal process."[7]

[7] McEnany's attorney objected to certain other portions of the letter and the court sustained the objection, ruling that it contained an opinion of the lawyer that was irrelevant. This ruling is not challenged on appeal.

¶19 Clark's counsel also cross-examined McEnany regarding his 1993 Wisconsin professional applications for licenses and hospital privileges. McEnany's application stated that he had not been subject to any disciplinary actions; his staff memberships had not been revoked, suspended, reduced, voluntarily withdrawn or not renewed; and his licenses or certificates to practice had not been restricted, revoked, suspended, limited, surrendered, or cancelled; no other disciplinary action been taken against him and his hospital privileges had not ever been limited or removed.

¶20 McEnany stated he answered "no" to the question whether any hospital suspended, restricted, or refused his staff privileges, or whether he had voluntarily or involuntarily limited his privileges any time while under peer investigation. McEnany acknowledged that above his signature the application stated that a false or forged statement made in connection with his application may be grounds for revocation.

¶21 While Clark concedes the court permitted evidence of the "deal" to "coverup" the restriction, she complains the trial court improperly redacted critical portions of the letters so that when the jury received the exhibits, evidence of the deal was meaningless. We are unpersuaded that the redactions prevented the real controversy from being fully tried. Through testimony, the jury was made aware of the letters' contents. Thus, the record does not support Clark's assertion that the jury was denied the ability to consider evidence of the "coverup." We conclude that the court's determination that portions of the letters should not accompany the jury while they deliberated did not prevent the real controversy from being fully tried.

¶22 Clark further argues that the court erred when it precluded her from arguing that McEnany lied in his applications and to state licensing authorities. The jury heard testimony that McEnany denied the applications' inquiry whether his privileges had ever been limited or restricted in any way. Clark claims that the trial court erroneously prohibited her from arguing from this evidence that McEnany had lied in his application responses, thus preventing the real controversy from being fully tried. We are unpersuaded.

¶23 The jury heard evidence of McEnany's responses on the applications as relevant to whether there was a restriction, but not whether he lied. The court reasoned that McEnany maintained his peer review did not result in a restriction, but merely a greater level of assistance during surgery. The court limited argument, concluding that to use the responses on the applications to argue that McEnany lied would be tantamount to showing prior bad acts or impeaching his credibility with specific instances of misconduct. The court also stated that the evidence was of marginal relevance as to credibility because it tended to show that McEnany believed he was not restricted. It ruled that as proof on the issue of credibility, the evidence's prejudicial effect far exceeded its probative value.

¶24 Regardless whether the trial court committed error in limiting the use of McEnany's professional applications, we are not satisfied it would require reversal in the interest of justice. McEnany's answers on the applications were consistent with his testimony that he did not believe the conditions on his surgery privileges were restrictions. Clark, on the other hand, presented evidence that the requirement relating to an assistant surgeon was a restriction. Thus, the jury heard evidence of McEnany's answers on his applications and conflicting evidence on the issue whether the condition imposed was a restriction. We are unconvinced that the jury was prevented from hearing significant testimony bearing on an

important issue and that the real issue was not fully tried. *See* ***Schumacher***, 144 Wis. 2d at 400.

¶25 Clark further argues that the trial court improperly excluded evidence that the restriction was required to have been reported to the California medical board in an "805 report." The trial court ruled:

> What I indicated with regard to the 805 is there had been no determination of the California Medical Examining Board that this was a reportable event, that there had been a stipulation by Dr. McEnany with regard to his license in California; thus, there had been no factual conclusion with regard to that. … The issue of fact is whether Dr. McEnany had a restriction on his practice in California or was it—or was it observation by colleagues for the purpose of internal evaluation. There is no issue of fact before the court as to whether this was something that should have been reported or not.

The court held that it was not for the jury to determine whether a restriction, if any, should have been reported to any authority.

¶26 Clark argues that it was the reporting requirement that made the restriction significant and relevant. She contends that without the ability to show that the restriction was required to be reported to the Medical Board of California, the evidence of the restriction was meaningless. She claims that the "confidential deal with Kaiser that it would not report the restriction to the Medical Board of California gave Dr. McEnany the assurance to be able to advise Luther Hospital and the Wisconsin Regulation and Licensing authorities in his applications that his privileges had never been limited, restricted or suspended in any way." The problem with Clark's argument is that it never demonstrates that the restriction was required to have been reported. The court found that there was no determination, and there is no challenge to this preliminary finding. Absent this

foundation, we cannot conclude that the court erroneously rejected the claimed evidence.

3. *Inadmissible Evidence*

¶27 Next, Clark argues that the trial court erroneously admitted evidence against Moores regarding his bias. Specifically, Clark complains that the court erroneously permitted evidence concerning Moores' suspension and termination at Kaiser, his being taken off of "in-house" call as a result of alleged misconduct,[8] a practice review at Kaiser, a lawsuit Moores filed against Kaiser, a California court of appeals decision resulting from that lawsuit and Moores' alleged bias against McEnany's former employer. The record reflects a rational basis for the court's decision and fails to demonstrate that the real controversy was not fully tried.

¶28 A trial court's decision whether to admit evidence is discretionary. ***Kokemoor***, 199 Wis. 2d at 635. When we review discretionary rulings, "we look not to see if we agree with the circuit court's determination, but rather whether 'the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the fact[s] of record.'" ***Vivid, Inc. v. Fiedler***, 219 Wis. 2d 764, 794, 580 N.W.2d 644 (1998) (citation omitted). "We must be mindful that the court below passed upon the matter under circumstances more favorable for arriving at a just result than are afforded here," ***Weeden v. City of Beloit***, 29 Wis. 2d 662, 666, 139 N.W.2d 616 (1966) (citation omitted), and we must search

[8] Moores explained that "in-house" call refers to a physician who spends the night in the hospital to be available for twenty-four hours for patient care. To be "off house call" meant that he was taken off the duty roster for in-house calls.

the record for support of the trial court's evidentiary ruling. ***Rademann v. DOT***, 2002 WI App 59, ¶20, 252 Wis. 2d 191, 642 N.W.2d 600.

¶29 Here, the record shows that the court admitted evidence of Moores' alleged bias. "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." ***State v. Long***, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884 (citation omitted). Bias may be induced by a witness' like, dislike or fear of a party, or by the witness's self-interest. ***Id.*** Proof of bias is almost always relevant because the jury, as fact finder and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony. ***Id.*** Bias of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely. *See* 3A WIGMORE, EVIDENCE § 948 (Chadbourn rev. 1970).

¶30 The record demonstrates the court reasonably exercised its discretion when it admitted evidence of Moores' alleged bias. The trial court allowed some, but not all, evidence McEnany offered, stating that it was fair to show "personal animosities" as proof of bias. For example, the court permitted Moores to be cross-examined regarding his lawsuit filed against Kaiser. Moores testified he sued Kaiser for its retaliation against him for complaining about Kaiser to the medical board. The court permitted this testimony because it went to the parties' relationship.

¶31 Clark argues, nonetheless, that the suit against Kaiser was irrelevant to Moores' relationship with McEnany. We are unpersuaded. McEnany complained that Moores used allegations of McEnany's incompetence as a way to

attack McEnany's employer, Kaiser. We conclude that the court properly permitted inquiry into Moores' feelings and relationship with McEnany and their former employer as evidence of witness bias.

¶32 Clark also challenges the limited evidence regarding Moores' practice reviews. Clark relies on ***State v. Lindh***, 161 Wis. 2d 324, 360, 468 N.W.2d 168 (1991), which states "[n]umerous cases have held that allegations of professional wrongdoing, misconduct or negligence that is unrelated to the case on trial is not a proper subject of impeachment of an expert medical witness." Here, the court permitted information about Moores' "involuntary separation with Kaiser Permanente" only to show Moores' relationship with Kaiser. The challenged evidence was admitted not to show Moores' bad conduct or character, but rather to show the relationships and animosities among Moores, Kaiser and McEnany. As stated in ***Long***, evidence of a witness' relationship to a party or organization is appropriate proof of bias. ***Long***, 255 Wis. 2d 729, ¶17.

¶33 Clark argues, nonetheless, that this type of impeachment evidence is prohibited under ***Lindh***. We are unpersuaded. ***Lindh*** does not prohibit bias evidence; it delineates the scope of the court's discretion in admitting impeachment evidence. In ***Lindh***, allegations of sexual misconduct with patients against a psychiatrist were found to have great potential to unduly prejudice the jury against the witness, to distract the jury from the real issues in the case, and would have caused the jury to speculate about unproven charges against the witness. ***Id.*** at 363-64. "The appellate court should not find the trial court abused its discretion when the relevance of the proffered bias evidence was unclear and the risk of prejudice was real." ***Id.*** at 363. As a result, our supreme court held that the trial court did not err when it concluded that any relevance of the proffered

evidence was outweighed by other considerations, including the risk of unfair prejudice, such that it was not improper to exclude the evidence. ***Id.*** at 364-65.

¶34 Evidence relevant to prove bias, like evidence offered to prove other facts, "must also satisfy [WIS. STAT. §] 904.03 … requiring the trial court to weigh the probative effect of the evidence against its prejudicial effect." ***Id.*** at 362.[9] Unduly prejudicial evidence has a tendency to influence the outcome by improper means or 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 of the case. ***Id.*** Under this standard, we are satisfied that the court reasonably concluded that the proof of Moores' relationship with Kaiser and, by extension, his relationship with McEnany, was not unduly prejudicial.

¶35 Clark further argues that the trial court erroneously permitted Moores to be questioned regarding being "off house call." Moores testified that he was "off house call" as defined by his employer as "a change in my duty assignment." Moores stated he was not suspended. When asked whether that was a restriction on his privileges, the court stated that it would permit the question to show what his understanding of a restriction was. The court stated: "You can go into it on the in-house call business only because he thought it was a restriction, Kaiser told him it was not, and then he figures, well, I guess it wasn't a restriction." The court added that Moores could explain why he agrees with his

[9] WISCONSIN STAT. § 904.03 provides: "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."

employer that it was not a restriction. Moores testified that this was a change in duty assignment and had nothing to do with restrictions on patient care.

¶36 The record reveals a rational basis for the court's decision. One of the issues Clark raised was whether McEnany was subject to restrictions on his California surgery practice. McEnany disputed that the rules governing his practice were actually restrictions rather than merely assistance. Because Moores testified regarding the alleged restrictions, the court permitted cross-examination to show Moores' understanding of what a restriction was. We conclude the court did not erroneously exercise its discretion.

¶37 Two other of Clark's complaints form no basis for discretionary reversal. Clark complains that McEnany sought to admit Exhibit 110, a California Court of Appeals decision upholding a practice review of eleven cases. The court, however, sustained Clark's objection to the document. Therefore, the court denied introduction of the court of appeals decision of which Clark complains.

¶38 Clark also complains "the critical issue of Dr. McEnany's negligence was obscured by the improper cross-examination of Dr. Moores." She complains that Moores was on the stand for at least one full day and a half, with the majority of the time spent on cross-examination. Our review of the record shows that much of Moores' cross-examination was related to his direct testimony regarding his medical opinions. We are not persuaded that the length of his cross-examination prevented the real controversy from being fully tried.

¶39 Consequently, we are unpersuaded that any of the court's evidentiary rulings require a new trial in the interest of justice.

4. *Drs. Shuman and Linden*

¶40 Clark argues that the trial court improperly allowed McEnany to call unlisted expert witnesses. These experts had been stricken from Clark's witness list on McEnany's motion and Clark had been unable to depose them before trial. Clark argues severe prejudice resulted. We conclude that the record reveals a rational basis for the court's decision and fails to show prejudice.[10]

¶41 An amended scheduling order dated November 16, 2000, provided that discovery would be completed by February 15, 2002. Under an October 9, 2001, scheduling order, defense experts were to be identified by January 1, 2002.[11] McEnany's notice of experts, dated December 27, 2001, reserved the right to call any expert witnesses named by any other party. On December 28, 2001, Luther Hospital, previously a party in the action, named Dr. Robert L. Shuman as an expert witness. McEnany's March 1, 2002, witness report identified Shuman as a witness and provided a summary of his anticipated testimony.

¶42 Clark named Dr. Richard P. Linden as an expert witness on March 1, 2002. On March 14, Clark requested to amend her witness list to include Linden. McEnany objected, specifying that he had no objection to Linden testifying as a

[10] McEnany argues that Clark has waived this claim of error. Because his waiver argument is undeveloped, we do not address it. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

[11] An amended scheduling order dated November 16, 2000, provided that discovery would be completed by February 15, 2002.

fact witness but objected to him testifying as an expert.[12] The trial court denied Clark's motion.

¶43 Two days before the April trial date, McEnany identified Shuman and Linden as witnesses. Over Clark's objection, the trial court permitted McEnany to call both Shuman and Linden to testify at trial. The court pointed out that Linden was not McEnany's witness and not under his control, but under Luther's control. It ruled that Linden was subject to questioning by Clark's counsel outside the presence of the jury prior to cross-examination. The court also ruled that Shuman's testimony would be subject to a short discovery deposition prior to testimony at trial.[13]

¶44 The trial court has the inherent power to control its scheduling. ***Neylan v. Vorwald***, 124 Wis. 2d 85, 94, 368 N.W.2d 648 (1985). It is within the trial court's discretion to modify its scheduling order, WIS. STAT. § 802.10(3)(b),

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[12] Counsel for McEnany stated:

> [B]oth parties would maybe want to reserve the right to have the pathologist testify as a fact witness about what he knew, because when we were in California, Moores said he was relying on the pathology report, and I may want to know that the report is accurate and things like that, on our motion is not to strike him as a witness entirely but as a [sic] expert witness to give opinions of standard or whatever you want to call it.

The trial court struck Linden as an expert witness but stated that he was subject to subpoena as a fact witness.

[13] Also, at the March 29 pretrial conference, McEnany's counsel indicated he had no objection to a discovery deposition of Linden despite the fact that the parties were beyond the discovery deadline. The trial court formally cut off discovery, but indicated the parties could arrange discovery after the deadline.

and its decision will not be reversed except for an unreasonable exercise of discretion. ***Alexander v. Riegert***, 141 Wis. 2d 294, 298-99, 414 N.W.2d 636 (1987). "To find an abuse of discretion an appellate court must find either that discretion was not exercised or that there was no reasonable basis for the trial court's decision." ***WPS v. Krist***, 104 Wis. 2d 381, 395, 311 N.W.2d 624 (1981). The trial court's determinations in the conduct of a trial will not be disturbed unless the rights of the parties have been prejudiced. ***Alexander***, 141 Wis. 2d at 298.

¶45 The record reflects the court reasonably exercised its discretion. The court observed that these were not surprise witnesses. It permitted them to be questioned before they testified. Clark fails to explain how the court's ruling resulted in prejudice. We conclude the court's ruling did not prevent the real controversy from being fully tried and does not require reversal in the interest of justice.

5. *Oral Rulings*

¶46 Clark argues that the trial court erred because it refused to reduce its oral rulings from numerous pretrial motion hearings into a written order at McEnany's counsel's suggestion, resulting in inconsistent rulings at trial and severe prejudice to Clark. A trial court has the inherent authority to correct its own errors. *See, e.g.,* ***Village of Thiensville v. Olsen***, 223 Wis. 2d 256, 262, 588 N.W.2d 394 (Ct. App. 1998); ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). Consequently, a written order would not have prevented the trial court from reassessing its earlier rulings. Clark fails to provide any legal authority to the contrary. *See* WIS. STAT. RULE 809.19(1)(e). We are

unpersuaded that this argument provides a basis for a new trial in the interest of justice.

B. CAUSATION

¶47 Finally, Clark argues that the trial court erroneously interpreted the law of causation, resulting in erroneous jury instructions and form of the verdict. Clark acknowledges that because the jury returned a verdict finding that McEnany did not fail to disclose information necessary for Alvin to make an informed decision, it did not reach the cause question. She argues, nonetheless, that because a new trial in the interest of justice is warranted, we should address this issue. Because we do not reverse in the interest of justice, our resolution of the cause issue would have no practical effect. Therefore, we do not reach this issue.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.