

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2002

Cornelia G. Clark
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. 01-0432
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-259

**IN COURT OF APPEALS
DISTRICT IV**

**BERNARD WILLKOMM, WAYNE WILLKOMM, AS SPECIAL
ADMINISTRATOR OF THE ESTATE OF JANIS WILLKOMM,**

PLAINTIFFS-APPELLANTS,

V.

**ROMEO SORIANO, M.D., DEAN MEDICAL CENTER, INC.
AND PIC WISCONSIN, INC.,**

DEFENDANTS-RESPONDENTS,

**UNITED HEALTHCARE INSURANCE COMPANY AND DONNA
SHALALA,**

SUBROGATED DEFENDANTS.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. In this medical malpractice case, the appellants, the deceased patient's husband and the special administrator of the estate of the deceased patient, raise five issues, none of which has merit. The issues are: (1) whether the evidence supports the jury's finding that Dr. Romeo Soriano obtained informed consent from Janis Willkomm, the patient; (2) whether the evidence supports the jury's finding that Dr. Soriano was not negligent or causally negligent; (3) whether the circuit court erred in excluding evidence that Dr. Soriano had not passed the board certification examination; (4) whether the circuit court erred in striking portions of the testimony of a doctor who attended Janis after Dr. Soriano had operated on her; and (5) whether the circuit court erred in excluding portions of testimony from the doctor who referred Janis to Dr. Soriano. We will address each issue in turn after a brief account of the facts.

¶2 Janis Willkomm, age seventy-six, went to see her family physician, Dr. Robert Stader, about abdominal pain in February of 1998. Dr. Stader discovered an abdominal mass and a biopsy confirmed colon cancer. Dr. Stader referred Janis to an oncologist. Both Dr. Stader and the oncologist then referred her to Dr. Soriano, a general surgeon, to remove the tumor in her colon. Prior to surgery, Dr. Soriano discussed the risks of the operation with Janis and her husband. Neither Dr. Soriano nor Mr. Willkomm remembers the specific risks Dr. Soriano explained. Dr. Soriano did advise Janis that she could have the surgery performed at a major medical facility, but she chose to have it performed in Lancaster, Wisconsin. Dr. Soriano did not tell Janis that he was not board-certified or that he had failed the certification examination three times.

¶3 Dr. Soriano operated on March 2, assisted by Dr. Stader. Dr. Soriano found that the tumor was larger than he had thought and that it had adhered to Janis's vaginal, pelvic, and sacral areas. Dr. Soriano removed the

tumor. Janis was later transferred to University Hospital in Madison due to incessant bleeding. There was conflicting evidence as to when the decision was made to send Janis to Madison. At Madison, Janis underwent several surgeries, all attempting to control her bleeding. She died on March 22, 1998.

¶4 The Willkomms first argue that Dr. Soriano did not obtain Janis’s informed consent to the operation. According to the Willkomms, Dr. Soriano either did not look at Dr. Stader’s reports and the reports from the oncologist, or he was not aware that the information in those reports meant that the surgery would not be routine. As a result, Dr. Soriano did not disclose the potential complications suggested by the reports to the Willkomms. Furthermore, the Willkomms argue, Dr. Soriano failed to inform them of the complications that could ensue if the tumor was located in a different spot than where Dr. Soriano expected it to be. Finally, the Willkomms argue that it was “inappropriate” for the circuit court to include the “remote possibility” instruction in the informed consent instruction given to the jury.

¶5 WISCONSIN STAT. § 448.30 (1999-2000)¹ sets forth a physician’s duty to disclose alternate forms of treatment and the risks associated with them. The statute does not require the physician to disclose “[e]xtremely remote possibilities.” WIS. STAT. § 448.30(4). Information material to the patient’s decision to undergo a procedure must be disclosed. See *Martin v. Richards*, 192 Wis. 2d 156, 174, 531 N.W.2d 70 (1995). A doctor must disclose information that a reasonable person in the patient’s position would want to know. See *id.*

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶6 The jury found that Dr. Soriano did not fail to obtain Janis's informed consent to the operation. We will uphold that finding if there is credible evidence to sustain it. *See Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979).

¶7 The problem with the Willkomms' argument is that neither Janis's husband nor Dr. Soriano could recall the details of the conversation in which Dr. Soriano explained the risks of the operation. However, there was ample evidence from other witnesses that Dr. Soriano did not fail to obtain Janis's informed consent to the operation. Dr. Meyers, the Willkomms' expert, testified that a doctor cannot "possibly outline every possible complication or they would never have surgery. They would just die of the cancer then because it is scary." Dr. Meyers also testified that even if Dr. Soriano did not discuss adhesions with Janis, that failure would not fall beneath the standard of care. Dr. Hauser, Dr. Soriano's expert, testified that the extent of the tumor's spread was not apparent from the pre-operative reports. Therefore, Dr. Soriano could not have known to warn Janis about the risks associated with the tumor's invasion of certain areas. Furthermore, Dr. Hauser testified that uncontrollable bleeding during this type of surgery is "[a]n extremely unusual risk" about which surgeons need not inform patients. The jury had ample evidence from which to draw its conclusion that Dr. Soriano obtained informed consent from Janis, and we will not overturn its verdict.

¶8 As a related issue to the validity of Janis's informed consent, the Willkomms argue that the circuit court should not have included the "remote possibility" instruction when instructing the jury. The circuit court instructed the jury that a doctor is required to explain the risks of a procedure before obtaining

the patient's consent, but that the doctor does not have to warn patients of remote possibilities.

¶9 The Willkomms waived this issue by not raising it in their motions after verdict. *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987). We choose, however, to address the issue on the merits. See *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 22, 522 N.W.2d 536 (Ct. App. 1994) (waiver is an administrative rule).

¶10 We first note that the circuit court has considerable discretion when instructing the jury, so long as the court “fully and fairly informs the jury of the rules and principles of law applicable to the particular case.” *Nowatske v. Osterloh*, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). The language to which the Willkomms object—“Extremely remote possibilities that might falsely or detrimentally alarm the patient are also not required to be disclosed”—comes from the standard jury instruction on informed consent. WIS JI—CIVIL 1023.2. It is derived from WIS. STAT. § 448.30(4), which contains identical language. And, as noted above, Dr. Hauser testified that the complications during the operation were unusual. Thus, the instruction was a correct statement of the law and was supported by the evidence.

¶11 We now turn to the Willkomms' second argument—that the evidence did not support the jury's verdict that Dr. Soriano was not negligent. We will search the record for evidence to sustain the verdict, *Meurer*, 90 Wis. 2d at 450-51, and view the evidence in the light most favorable to the verdict, *id.* at 450.

¶12 Ample evidence supports the jury's verdict that Dr. Soriano was not negligent. Dr. Hauser opined that, given the recommendations of Dr. Stader and the oncologist, and given the thorough pre-operative workup performed, it was

reasonable for Dr. Soriano to perform the surgery and for him to do it in Lancaster. Dr. Hauser further opined that there was nothing further Dr. Soriano should have done pre-operatively. According to Dr. Hauser, there was no way Dr. Soriano could have determined before surgery that the tumor had adhered to other structures. Dr. Hauser also testified that once Dr. Soriano saw the tumor, it was reasonable for him to proceed because there was nothing about its appearance that suggested it would be unusually complicated to remove. Dr. Hauser also agreed with Dr. Soriano's decision to continue with the surgery and remove the tumor before transferring Janis to Madison. While the jury also heard conflicting testimony from the Willkomms' expert, Dr. Meyers, it was for the jury to decide who was more credible, *Meurer*, 90 Wis. 2d at 450, and we will not disturb the jury's verdict.

¶13 The Willkomms next argue that the circuit court's exclusion of evidence that Dr. Soriano had failed his board certification examination three times was "inappropriate."² The circuit court allowed the Willkomms to question Dr. Soriano about the fact that he was not board-certified. The circuit court ruled, however, that evidence that Dr. Soriano had failed the certification examination would be unduly prejudicial.

¶14 Our standard of review of a circuit court's evidentiary ruling is whether the circuit court erroneously exercised its discretion. See *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 407-08, 588 N.W.2d 236 (1999).

² The Willkomms blend into this argument the notion that Dr. Soriano had a duty to tell the Willkomms as part of their informed consent discussion that he had failed the board exams. This argument is poorly developed and, therefore, we need not address it. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Our review of a circuit court's discretionary decision is highly deferential. *Tralmer Sales & Serv., Inc. v. Erickson*, 186 Wis. 2d 549, 572, 521 N.W.2d 182 (Ct. App. 1994). We will sustain such a decision as long as the record reflects a reasoned application of the appropriate legal standards. *See id.* at 572-73.

¶15 Evidence that a doctor did not pass the board certification examination may give rise to the inference that the doctor's care was substandard. *Sommers v. Friedman*, 172 Wis. 2d 459, 471, 493 N.W.2d 393 (Ct. App. 1992). In *Sommers*, the circuit court reasoned that whatever limited relevance the board examination failures had was outweighed by the potential for prejudice in letting such information get to the jury. *Id.* at 470-71. In upholding the circuit court's evidentiary ruling, this court deemed the circuit court's analysis "a textbook example of the exercise of trial court discretion." *Id.* at 471.

¶16 Here, as in *Sommers*, the circuit court gave a well-reasoned and logical explanation for its decision. The circuit court noted that Dr. Soriano's lack of board certification could be introduced, but information that Dr. Soriano had tried to pass the test and failed would be unduly prejudicial. The circuit court then offered to give the jury a limiting instruction warning that the information that Dr. Soriano was not certified "should not be utilized to make any inference that because Dr. Soriano is not board certified he is not competent." This ruling is a reasoned application of the appropriate legal standards to the facts of the case, and we will not overturn it.

¶17 Next, the Willkomms contend that the circuit court's limitation on testimony from Dr. Potenza, Janis's treating physician in Madison, was highly prejudicial. The Willkomms took Dr. Potenza's evidentiary deposition, but they did not name him as an expert witness. The circuit court, therefore, limited

Dr. Potenza's testimony to facts and observations; Dr. Potenza was not allowed to testify about his opinions. A circuit court may limit testimony under these circumstances. See *Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 314-17, 470 N.W.2d 873 (1991).

¶18 Moreover, the Willkomms do not identify the opinions which were excluded and do not explain how the exclusion worked to their prejudice. We will not search the record to develop the Willkomms' argument for them. *Walker v. Univ. of Wisconsin Hosps.*, 198 Wis. 2d 237, 246 n.7, 542 N.W.2d 207 (Ct. App. 1995).

¶19 Lastly, the Willkomms argue that the circuit court's exclusion of testimony that Dr. Stader now limits his referrals to Dr. Soriano was prejudicial. Dr. Stader would have testified that since Janis's death he limits the number of patients he refers to Dr. Soriano. Dr. Stader's decline in referrals would be a commentary on Dr. Soriano's standard of care. This would amount to an expert opinion rendered by Dr. Stader. The circuit court excluded the testimony, reasoning that Dr. Stader, a non-surgeon, was not qualified to offer standard of care opinions.

¶20 As noted above, we review a circuit court's evidentiary rulings for an erroneous exercise of discretion. *County of Kenosha*, 223 Wis. 2d at 407-08.

¶21 The Willkomms waived this issue by not raising it in their motions after verdict. *Ford Motor Co.*, 137 Wis. 2d at 417. If we were to address the merits, we would agree with the circuit court's conclusion. Dr. Stader is a family practitioner. He is not qualified to render an expert opinion on the standard of care for a surgeon. The Willkomms should not be able to get that opinion in through

the back door by introducing testimony that Dr. Stader no longer refers as many patients to Dr. Soriano. The circuit court was correct in its ruling.

By the Court.—Judgment affirmed.

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

