COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2495 **Cir. Ct. No. 98 CV 8672**

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

JOSEPH M. GRAZIANO, JR., AND THERESA A. GRAZIANO,

PLAINTIFFS-APPELLANTS,

V.

RONALD L. ALLEN, M.D., D/B/A ALLEN EYE CARE ASSOCIATES, S.C., AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

COMPCARE HEALTH SERVICES INSURANCE CORPORATION AND LABORERS HEALTH & WELFARE FUND,

DEFENDANTS.

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

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

¶1 PER CURIAM. Joseph M. Graziano, Jr., and Theresa A. Graziano appeal from a judgment entered on a jury verdict dismissing their medical malpractice claim against Ronald L. Allen, M.D., d/b/a Allen Eye Care Associates, S.C. The Grazianos allege that the trial court erroneously: (1) instructed the jury on the standard of care; (2) drafted special verdict questions; and (3) excluded evidence.[1] We affirm.

I.

¶2 Ronald L. Allen, M.D., performed several refractive surgeries on Joseph M. Graziano's eyes to improve his vision. The surgeries included automated lamellar keratoplasties and radial keratotomies. According to Joseph Graziano, his vision became worse after the surgeries. To improve his vision, Joseph Graziano saw Luis Ruiz, M.D., a world renowned refractive surgeon. Dr. Ruiz performed LASIK procedures on Joseph Graziano's eyes in Bogota, Columbia, and the Caribbean Islands.

¶3 The Grazianos filed a medical malpractice claim against Dr. Allen, claiming that Dr. Allen negligently performed the operations. According to the complaint, Joseph Graziano's "eyes were severely damaged and his vision harmed and diminished and he was required to seek further hospital and medical care and attention … and incurred further medical expenses."

¶4 At trial, the Grazianos presented several expert witnesses, including Christopher Born, M.D. Dr. Born limited his testimony to his findings based on

[1] The Wisconsin Patients Compensation Fund joins in the response brief filed by Dr. Allen.

his examination of Joseph Graziano. In a letter dated April 1, 1996, Dr. Born opined:

> As you can see from my note the patient had a very poorly done initial [automated lamellar keratoplasty], because he had no resection in the right eye and an inadequate resection in the left eye. Apparently, the doctor who was doing this had topography, but must not had [sic] been able to interpret the topography since there is no pattern compatible with an [automated lamellar keratoplasty] in the right eye.

¶5 The Grazianos also presented the live testimony of Robert G. Taub, M.D. Dr. Taub testified that Dr. Allen did not negligently perform the automated lamellar keratoplasties. He testified, however, that Joseph Graziano's radial keratotomies "were performed in a negligent manner." He explained that the operations "left a central clear corneal area which was a geometric center of the cornea but the patient's visual axis is not in that position; therefore, scar tissue is present over the visual axis of both eyes." When asked by the defense, Dr. Taub admitted that he did not perform radial keratotomies.

¶6 Dr. Allen also presented the testimony of several expert witnesses, including Francis W. Price, M.D. In a videotaped deposition, Dr. Price testified that he practiced refractive surgery. According to Dr. Price:

> [W]hat we are seeing now in ophthalmology is more subspecialization where there's some of us that primarily do just the cornea or related diseases with that. [W]hat we have seen over the last few years is a subspecialization of some degree in refractive surgery.
>
> That's relatively new. It's not particularly one where you could say someone is just a subspecialist in that, although some people limit their practice to that; but we do have fellowships that are just for refractive surgery and we have had for a number of years and we have special subspeciality organizations that are just made up of refractive surgeons.

Dr. Price further testified that Dr. Allen met the standard of care to a reasonable degree of medical certainty when he performed the refractive surgeries.

¶7 Dr. Allen also testified in his defense. He testified that he took several courses to learn how to perform refractive surgery. He said that at the time of the trial, he had performed almost 5,000 refractive procedures.

¶8 At the close of the evidence, the trial court narrowed the scope of Dr. Allen's liability to the radial keratotomies and instructed the jury:

> [I]n treating Joseph M. Graziano's condition, Dr. Ronald Allen was required to use the degree of care, skill, and judgment which reasonable ophthalmologists who perform radial keratotomies would exercise in the same or similar circumstances, having a due regard for the state of medical science at the time Mr. Graziano was treated.

The jury found that Dr. Allen was not negligent.

II.

A. Jury Instruction

¶9 First, the Grazianos claim that the trial court erroneously exercised its discretion when it instructed the jury on Dr. Allen's alleged negligence. "'The trial court has broad discretion when instructing a jury,' and 'an allegedly erroneous jury instruction,' requires a new trial only if 'the overall meaning communicated by the instructions' did not correctly state the law." ***Johnson v. Agoncillo***, 183 Wis. 2d 143, 148, 515 N.W.2d 508, 510 (Ct. App. 1994) (quoted source omitted), *overruled on other grounds by* ***State v. Messelt***, 185 Wis. 2d 254, 518 N.W.2d 232 (1994).

¶10 The standard for determining if a physician failed to exercise due care is whether the physician used the degree of skill and care that a reasonable physician would use in the same or similar circumstances. ***Department of Regulation & Licensing v. State Med. Examining Bd.***, 215 Wis. 2d 188, 199–200, 572 N.W.2d 508, 513 (Ct. App. 1997). The pattern jury instruction, WIS JI—CIVIL 1023 provides, as relevant:

> In (treating) (diagnosing) (plaintiff's) (injuries) (condition), (doctor) was required to use the degree of care, skill, and judgment which reasonable doctors (doctors who are in general practice) (specialists who practice the specialty which (doctor) practices) would exercise in the same or similar circumstances, having due regard for the state of medical science at the time (plaintiff) was (treated) (diagnosed).

As we have seen, the trial court narrowed the scope of the standard of care to the degree of care that "reasonable ophthalmologists who perform radial keratotomies" would exercise.

¶11 The Grazianos appear to argue that the jury instruction unduly favored the defendants because it classified Dr. Allen and Dr. Taub differently. According to the Grazianos, the modified standard of care classified Dr. Allen as a "specialist" in refractive surgery, while their main witness, Dr. Taub, was classified as an ophthalmologist. We disagree.

> [A]n instruction should not be unduly favorable to any party. While a circuit court has "some leeway in the choice of language and emphasis in framing instructions," the instructions "as a whole must not favor one side or the other but should set forth the respective versions of the evidence of the contestants."

Nowatske v. Osterloh, 198 Wis. 2d 419, 428, 543 N.W.2d 265, 268 (1996) (quoted source omitted), *overruled on other grounds by* ***Nommensen v. American***

Cont'l Ins. Co., 2001 WI 112, 246 Wis. 2d 132, 629 N.W.2d 301. In this case, the trial court did not narrow the scope of the Grazianos' claim until it heard all of the evidence, including Dr. Taub's testimony. The trial court explained:

> [W]hat we've been discussing at great length is the scope of the claim. We had talked about, in instruction No. 1023, having placed in it "ophthalmologists who perform refractive surgery." I had initially felt that was an appropriate way to frame it. That's the way you had requested. But I think that as the case has gone on, Mr. and Mrs. Graziano and Dr. Allen, the focus has been narrowed, in my opinion, based on what Dr. Taub had to say. He said the only real fault he could find with Dr. Allen as far as to a reasonable degree of medical probability that he failed to meet the standard was with regard to how he performed those radial keratotomies.
>
> ….
>
> One final point I'll make, it's been very clear from testimony not all ophthalmologists do radial keratotomies, there are some that do it and some that do not.

We agree.

¶12 The Grazianos' expert witness, Dr. Taub, was the only expert who testified on the standard of care. He testified that Dr. Allen negligently performed the radial keratotomies, but did not negligently perform the automated lamellar keratoplasties. The Grazianos do not contest this on appeal. They claim that the jury instruction was improper, however, because Dr. Taub testified that refractive surgery is not a "subspeciality" of ophthalmology. They support this contention with evidence that refractive surgery is not recognized as a "specialty" by the American Medical Association. We disagree that this is significant.

¶13 The trial court did not classify Dr. Allen as a "specialist"—it called him an ophthalmologist. The trial court added the phrase "who performs radial keratotomies" to the term "ophthalmologist" to tailor WIS JI—CIVIL 1023 to the

evidence. This was an appropriate exercise of the trial court's discretion. *See* ***Nowatske***, 198 Wis. 2d at 428, 543 N.W.2d at 268 (jury instructions must conform to the evidence); ***Leibl v. St. Mary's Hosp.***, 57 Wis. 2d 227, 233, 203 N.W.2d 715, 718 (1973) (standard instructions should be tailored to meet the needs of the specific case). Indeed, the Grazianos do not dispute that the only evidence they presented on Dr. Allen's negligence was with respect to the radial keratotomies. Moreover, there was expert testimony that not all ophthalmologists perform refractive surgery. Accordingly, the trial court held Dr. Allen to the standard of a reasonable ophthalmologist who performs radial keratotomies based on the "respective versions of the evidence" presented at trial. ***Nowatske***, 198 Wis. 2d at 428, 543 N.W.2d at 268.

B. Special Verdict Questions

¶14 The Grazianos also claim that the trial court erroneously exercised its discretion when it drafted the special verdict questions. A trial court has broad discretion in framing a special verdict. *See* ***Maci v. State Farm Fire & Cas. Co.***, 105 Wis. 2d 710, 719, 314 N.W.2d 914, 919 (Ct. App. 1981). We will not interfere with the form of a special verdict if the question, taken with the applicable jury instruction, fairly presents the material issues of fact to the jury. *See* ***Murray v. Holiday Rambler, Inc.***, 83 Wis. 2d 406, 425, 265 N.W.2d 513, 523 (1978).

¶15 The Grazianos specifically object to special verdict questions one and three, which provide:

> **Question #1**: Was the defendant, Ronald L. Allen, M.D., negligent with respect to the radial keratotomies he performed on Joseph M. Graziano, Jr.?
>
> ….

> **Question #3**: What sum of money will fairly and reasonably compensate the plaintiff, Joseph M. Graziano, Jr., for any injuries he suffered as a result of the radial keratotomies with respect to:
>
> A. Past Medical Expenses?
> $ _____
>
> B. Past and future pain, suffering, & disability?
> $ _____
>
> C. Future loss of earning capacity?
> $ _____

¶16 The Grazianos again claim that the special verdict questions were improper because they "gave the defendant, Ronald L. Allen, M.D., the status of a specialist, not as an ophthalmologist, … and in doing so diminished the status of plaintiffs' expert witness, Dr. Robert M. Taub, in the eyes of the jury because Dr. Taub did not perform radial keratotomies." (Uppercasing omitted.) Again, we disagree.

¶17 As noted, the trial court added the term "radial keratotomies" to the special verdict questions to narrow the focus of the case to Dr. Allen's alleged negligent performance of the radial keratotomies. This was supported by the evidence. Thus, the special verdicts, when considered in light of the jury instructions, fairly presented the material issue of Dr. Allen's alleged negligence to the jury.

C. Evidentiary Rulings

¶18 The Grazianos also present an extensive list of alleged errors the trial court committed in its evidentiary rulings. The decision to admit or exclude evidence is within the sound discretion of the trial court. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). A trial court properly

exercises its discretion when it applies the appropriate legal standard to the relevant facts of the case. *See* ***id.***

¶19 In this case, the trial court granted several of Dr. Allen's motions *in limine* to exclude, among other things: Dr. Born's letter; promotional brochures and a promotional videotape from Dr. Allen's office; and an offer Dr. Allen made to finance Joseph Graziano's treatment by Dr. Ruiz. We address each one in turn.

1. Dr. Born's Letter

¶20 First, the Grazianos claim that the trial court erred because it would not allow them to read Dr. Born's letter to the jury after they read the letter to the jury as part of Dr. Born's deposition testimony.[2] The trial court initially admitted the letter on the condition that Dr. Born's opinion would be tied to the standard of care by the Grazianos' experts. The trial court excluded the letter during Dr. Allen's cross-examination because none of the Grazianos' expert witnesses, including Dr. Taub, had testified that Dr. Allen breached the standard of care with respect to the automated lamellar keratoplasties:

> I assumed, however, that the opinions that they were going -- that they would give, the things that they would say, Mr. and Mrs. Graziano, would be something that Dr. Taub turned around and said was negligence because they didn't.

[2] The Grazianos are not clear about when they wanted to present the letter. The trial court excluded the letter when the Grazianos tried to present it during Dr. Allen's cross-examination. In their reply brief, they claim, however, that the trial court excluded the letter and "use of the deposition" during "final argument" without any "explanation." The Grazianos do not point us to and we do not see where they tried to use the letter or the deposition testimony during closing arguments. Accordingly, we will analyze the ruling the trial court made during Dr. Allen's cross-examination. WIS. STAT. RULE 809.19(1)(d) ("The brief must contain … appropriate references to the record.").

> Well, as a matter of fact, Dr. Taub said the [automated lamellar keratoplasty] surgery, and he is your only expert who testified as to negligence, was not done negligently. It was nothing wrong with what was done. And, now, that is why I limited you.

¶21 The trial court applied the proper legal standard to the evidence and reached a reasonable conclusion. As we have seen, the Grazianos' expert testified that Dr. Allen was negligent only with respect to the radial keratotomies. There was no testimony that Dr. Allen breached the standard of care when he performed the automated lamellar keratoplasties. Thus, it was proper for the trial court to exclude Dr. Born's letter addressing the automated lamellar keratoplasties. *See* ***Pucci v. Rausch***, 51 Wis. 2d 513, 519, 187 N.W.2d 138, 142 (1971) (testimony must be to a reasonable degree of medical probability to be admissible).

2. Promotional Brochures

¶22 Next, the Grazianos argue that the trial court erroneously exercised its discretion when it excluded promotional brochures from Dr. Allen's office. The trial court determined that the brochures were not material to the issue of whether Dr. Allen met the standard of care:

> There is no issue here as to informed consent. Mr. Graziano does not contest that he knew the ramifications of the surgery and risks of it. That is, indeed, the only issue before this jury on liability is whether or not he performed up to the standard of care … I was never presented with any specific language in the brochures in any argument that would show to me what the -- was not argued to me, any specific language that would go to standard of care.

We agree.

¶23 Relevant evidence is evidence that tends to make the existence of a material fact more or less probable that it would be without the evidence. WIS.

STAT. RULE 904.01 (2001–2002).[3] On appeal, the Grazianos offer nothing to establish any error in the trial court's ruling. That is, they do not allege how the brochures are relevant to the standard of care. Indeed, their entire argument is two paragraphs long and does not cite to any legal authority. We will not review claims that are amorphous and insufficiently developed. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

3. Promotional Videotape

¶24 The Grazianos also claim that a "promotional videotape" should have been admitted into evidence. The trial court allowed the Grazianos to play part of the tape, but did not allow the entire tape into evidence because it determined that the tape was not relevant to the standard of care:

> [M]y ruling is [the tape] doesn't have any materiality to this, Mr. Graziano. The issue is whether or not [Dr. Allen] met the standard of care, not what his video shows. That is not the issue in the case, and there -- it would be an issue in the case if this was an informed consent case, but that is not what -- that is not the kind of case we are trying here, and it's not for the video to act as a witness other than to show generally what the type of surgeries are we are talking about.

Again, the Grazianos do not allege how the tape is relevant to the standard-of-care issue. As with the brochures, they rely on the same two-paragraph

[3] All references to the Wisconsin Statutes are to the 2001–2002 version unless otherwise noted. WISCONSIN STAT. RULE 904.01 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

argument to make their case. Thus, the Grazianos again do not provide us with enough information to allow us to meaningfully assess their claim. *See* ***Barakat***, 191 Wis. 2d at 786, 530 N.W.2d at 398.

4. Offer to Loan Money for Medical Expenses

¶25 Finally, the Grazianos allege that the trial court erroneously excluded Dr. Allen's offer to loan money to Joseph Graziano for treatment from Dr. Ruiz. The trial court ruled that the offer was inadmissible under WIS. STAT. RULE 904.09, which provides: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."

¶26 The Grazianos argue that Dr. Allen's offer is admissible under WIS. STAT. RULE 904.08 to show that Dr. Allen was biased.[4] Again, the admission or exclusion of evidence is within the trial court's discretion. The trial court properly applied the direct command of WIS. STAT. RULE 904.09 and rejected the Grazianos' attempt to shoehorn the evidence into an exception in RULE 904.08.

[4] WISCONSIN STAT. RULE 904.08 provides:

> **Compromise and offers to compromise.** Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

The Grazianos do not explain, other than their understandable disagreement with what the trial court did, how, as a legal matter, the trial court erroneously exercised its discretion in applying the two rules. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶86, 235 Wis. 2d 325, 611 N.W.2d 659 (the exceptions listed in RULE 904.08 are permissive, not mandatory); *see also* ***Barakat***, 191 Wis. 2d at 786, 530 N.W.2d at 398.

By the Court.—Judgment affirmed.

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