COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 99-0101

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

MARK B. WATTS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF VICKY L. WATTS,

PLAINTIFF-APPELLANT,

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

INVOLUNTARY-PLAINTIFF,

V.

THE MEDICAL PROTECTIVE COMPANY, SHERRY L. PROWATZKE, PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., BETH ANN LUX, AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

WISCONSIN INSURANCE CORPORATION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Mark B. Watts, individually and as the special administrator of the estate of his late wife, Vicky L. Watts, appeals from a judgment dismissing medical malpractice claims against the physicians who treated Vicky and their insurers. The claims on appeal relate to the jury's determination that the physicians were not negligent, the calculation of damages, and recusal of the trial judge. Because we affirm on the negligence-related issues, we do not reach the damages-related issues. We also affirm the trial judge's refusal to recuse herself.

¶2 Vicky was seen at Dr. Sherry Prowatzke's clinic by a nurse practitioner on October 12 and 19, 1992. Dr. Prowatzke, an obstetrician/gynecologist, allegedly failed to diagnose Vicky's diabetes. Vicky was treated on October 20 in a hospital emergency room by Dr. Beth Ann Lux who allegedly did not properly evaluate Vicky before treating her. The emergency room treatment was allegedly inappropriate for Vicky's condition and, according to the plaintiff, caused her death. The jury did not find either physician negligent.

¶3 Watts argues that the circuit court erroneously instructed the jury as to the negligence of Dr. Prowatzke. A circuit court has broad discretion with regard to jury instructions and must give instructions whose overall meaning correctly states the law. *See* ***Johnson v. Agoncillo***, 183 Wis. 2d 143, 148, 515 N.W.2d 508 (Ct. App. 1994). The instructions must also be related to the evidence. *Cf.* ***Brown v. Dibbell***, 220 Wis. 2d 200, 211, 582 N.W.2d 134 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 28, 595 N.W.2d 358 (1999).

¶4 The parties debated the instruction about Dr. Prowatzke's standard of care. The court ultimately instructed the jury as follows:

> Dr. Prowatzke … [was] required to use the degree of care, skill and judgment which reasonable doctors who in the case of Dr. Prowatzke specialize in OB/GYN, … having due regard for the state of medical science at the time Vicky Watts was treated.

¶5 Watts objected to this instruction and argued that Dr. Prowatzke should have been required to use the degree of care, skill and judgment of a reasonable doctor who specializes in obstetrics/gynecology but is engaged in the practice of primary medical care and treatment. In other words, according to Watts, Dr. Prowatzke should have been held to the standard of a reasonable obstetrician/gynecologist who treats a person with a primary health care need. For this proposition, Watts relies upon ***Johnson***. Watts claims that ***Johnson*** holds that a doctor treating a patient outside of his or her specialty is held to the standard of care of a reasonable doctor in that specialty who treats a patient with a medical condition outside of the specialty. Watts is wrong.

¶6 In ***Johnson***, the plaintiffs attempted to hold a family practitioner treating a high-risk obstetrical patient to the standard of an average physician treating such high-risk patients, rather than to the standard of the average family practitioner who treats such patients. *See* ***Johnson***, 183 Wis. 2d at 150. We rejected the plaintiffs' proposed standard, explaining that the family practitioner's decision to treat a high-risk obstetrical patient did not transform the family practitioner into a physician who treats high-risk obstetrical patients. *See* ***id.*** at 152. The family practitioner remained a family practitioner who treated obstetrical patients and was '"required to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances' by the

average physician in that class." ***Id.*** (quoted source omitted). As an example of the application of this standard, the court observed that a cardiologist who treats a cancer patient is held to the standard of care applicable to a cardiologist, not to the standard of care applicable to an oncologist. *See* ***id.*** at 151-52.

¶7 ***Johnson*** does not stand for the proposition offered by Watts. The court correctly instructed the jury regarding Dr. Prowatzke's standard of care.

¶8 Watts next complains about the circuit court's decisions regarding the testimony and questioning of expert witnesses. The court precluded Dr. Sanford Mallin, Watts's endocrinology expert, from testifying as to whether Dr. Prowatzke met the standard of care in treating Vicky. During direct examination, the court required Watts's counsel to lay a foundation for Dr. Mallin's opinion about the standard of care applicable to Dr. Prowatzke, an obstetrician/gynecologist. Dr. Mallin conceded that he is not an expert in the field of obstetrics and gynecology. Because Dr. Mallin did not have the requisite basis for rendering an opinion about the standard of care to be met by an obstetrician/gynecologist, the court precluded his testimony on that question.[1]

¶9 Whether a witness is qualified to render an expert opinion is within the circuit court's discretion. *See* ***Leathem Smith Lodge, Inc. v. State***, 94 Wis. 2d 406, 418, 288 N.W.2d 808 (1980). We conclude that the court applied a proper legal standard to the available facts about Dr. Mallin's areas of expertise and reached a reasonable decision. Watts did not lay a foundation for Dr. Mallin's expertise in the field of obstetrics and gynecology. Dr. Mallin testified that his

[1] Dr. Mallin was permitted to render numerous other opinions which were within his area of expertise.

experience in the field was limited to a portion of his one-year internship which occurred more than forty years before. Because Watts did not offer any evidence that Dr. Mallin was familiar with the standards of practice of obstetrician/gynecologists, the court properly precluded this testimony because Dr. Mallin lacked the requisite expertise. *See* ***Kerkman v. Hintz***, 138 Wis. 2d 131, 149, 406 N.W.2d 156 (Ct. App. 1987), *aff'd in part, rev'd in part*, 142 Wis. 2d 404, 418 N.W.2d 795 (1988) (Medical doctors can testify regarding the conduct of other physicians "if there is a sufficient factual showing that the medical witness is qualified by 'knowledge, skill, experience, training, or education' ... to give the required opinion.") (citation omitted).

¶10 Watts next complains that Dr. Diane Elson, a defense endocrinologist, was erroneously permitted to testify that Dr. Prowatzke had complied with the standard of care even though Dr. Elson was not qualified to render such an opinion. We do not address this appellate issue because Watts did not object to this testimony at trial. Therefore, this issue is waived on appeal. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990) (we correct errors made by the circuit court; we do not rule on matters never considered by that court).

¶11 Watts also complains that his cross-examination of Dr. Elson was hampered because his counsel was not able to confine Dr. Elson's answers to a "yes" or "no" response. The scope of cross-examination is within the circuit court's discretion, and we will not reverse unless an erroneous exercise of discretion affected Watts's substantial rights and probably affected the outcome of the trial. *See* ***Peissig v. Wisconsin Gas Co.***, 155 Wis. 2d 686, 702, 456 N.W.2d 348 (1990).

¶12 While counsel may seek relief from the court if a witness's testimony does not respond to the question, Watts does not offer any authority for the proposition that counsel has the right to control a witness on cross-examination to the extent that the witness may only answer "yes" or "no" to counsel's questions. The court reminded counsel that if he felt Dr. Elson's answer was not responsive to the question, he could move to strike the answer. We see no misuse of the court's discretion in its handling of Dr. Elson's testimony. *Cf.* ***id.*** (scope of cross-examination is within court's discretion).

¶13 Watts also challenges the court's refusal to permit him to read to the jury certain portions of a discovery deposition taken of Dr. John Dunn, an emergency room physician who was an expert on behalf of Dr. Beth Ann Lux. Dr. Lux treated Vicky in a hospital emergency room and allegedly did not properly evaluate Vicky before treating her. The emergency room treatment was allegedly inappropriate for Vicky's diabetic condition and caused her death. While the court allowed Watts to read some portions of Dr. Dunn's deposition in response to those portions offered by Dr. Lux, Watts argues that under WIS. STAT. § 804.07(1) (1997-98),[2] he was entitled to read any deposition portions he chose.

¶14 We disagree with Watts's premise. Whether and which portions of a deposition will be read to the jury is a discretionary decision for the court. *See* ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 139, 403 N.W.2d 747 (1987) (evidentiary decisions are within circuit court's discretion). WISCONSIN STAT. § 804.07(1)(d) provides that "[i]f only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." We restrict our analysis to the three deposition excerpts Watts discusses on appeal.[3] Looking to the excerpts introduced by Dr. Lux, we conclude that the court properly exercised its discretion in denying Watts's request for these excerpts.

¶15 One excerpt deals with the ease of diagnosing diabetes and its symptoms, another excerpt deals with the importance of a patient's medical history in diagnosing diabetes, and the final excerpt deals with specific symptoms of diabetes such as fatigue, vaginal yeast infection, and urinary urgency and frequency. Watts claims that these excerpts were necessary to address the diagnosis of diabetes, which related to Dr. Prowatzke's care. The court sustained the objections to these excerpts because the deposition did not reveal that Dr. Dunn had the necessary qualifications to address the standard of care for a reasonable obstetrician/gynecologist such as Dr. Prowatzke. The court found that while Dr. Dunn was familiar with the diagnosis of diabetes, his current professional experience in emergency medicine and his previous family practice experience did not qualify him to render an opinion regarding the standard of care for an obstetrician/gynecologist. *See* ***Kerkman***, 138 Wis. 2d at 149. Fairness under WIS. STAT. § 804.07(1) did not dictate introducing excerpts of deposition testimony which lacked the necessary foundation. The record supports this discretionary determination.

[3] Watts states that several other excerpts were barred by the court. We will only consider those passages specifically argued on appeal. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1981) (we will not independently develop a litigant's argument).

¶16 Watts next argues that the circuit court erroneously precluded him from using learned treatises to examine Drs. Prowatzke, Lux and Carmella Barr (a defense expert).[4] We review the circuit court's learned treatise rulings for misuse of discretion. *See* ***Broadhead v. State Farm Mut. Auto. Ins. Co.***, 217 Wis. 2d 231, 245, 579 N.W.2d 761 (Ct. App. 1998). A learned treatise is admissible if "a witness expert in the subject testifies, that the writer of the statement in the treatise … is recognized in the writer's profession or calling as an expert in the subject." WIS. STAT. § 908.03(18).

¶17 We will assume, without deciding, that the circuit court erroneously barred the use of learned treatises with the various witnesses. However, we conclude that any such error was harmless because Watts was able to make use of the learned treatises in another fashion. *See* ***Heggy v. Grutzner***, 156 Wis. 2d 186, 196-97, 456 N.W.2d 845 (Ct. App. 1990) (an error is harmless if there is no reasonable possibility that the error contributed to the result).

¶18 Watts called Dr. Lux adversely. During adverse examination, Watts handed Dr. Lux an excerpt from *Williams on Endocrinology*. Dr. Lux stated that she was not familiar with the treatise. Watts offered to read some of the material to Dr. Lux to see if she agreed with the statements contained in it. Dr. Lux's counsel objected on foundation grounds. The court sustained the objection because Dr. Lux was not familiar with the treatise and did not recognize it as a learned treatise. Watts then asked Dr. Lux if she was familiar with *Joslin's on Diabetes.* She stated that she had not read the book and was not qualified to

[4] Watts's expert, Dr. Mallin, an endocrinologist, testified that the treatises were learned treatises in the field of endocrinology.

answer whether *Joslin's* is considered the "Bible of the textbook on diabetes by endocrinologists."

¶19 Later, on cross-examination of Dr. Lux, Watts handed Dr. Lux a portion of an article from *Williams* and they discussed its contents and whether Dr. Lux agreed with it. There was no objection. Therefore, Watts was not prejudiced by the circuit court's learned treatise ruling because he made use of a treatise anyway.

¶20 Watts also tried to cross-examine Dr. Barr, Dr. Prowatzke's expert obstetrician/gynecologist, using *Joslin's*. Counsel objected on foundation grounds. The court sustained the objection and gave Watts a chance to lay foundation. Although Dr. Barr stated that she had not heard of *Joslin's*, Watts asked Dr. Barr questions based on the information contained in *Joslin's,* and she answered them. Watts circumvented Dr. Barr's lack of familiarity with *Joslin's* by questioning her using information gleaned from that treatise without referring to the source of that information. Therefore, Watts was not prejudiced by the circuit court's learned treatise ruling.

¶21 During cross-examination, Watts attempted to direct Dr. Prowatzke to a passage from *Joslin's* which related to one of the decedent's symptoms, but was barred by the court because Dr. Prowatzke was not familiar with the treatise. Assuming that this ruling was error, the result was nevertheless correct. *See* ***Mueller v. Mizia***, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967) (we will not reverse a correct decision even though the reason for the decision may have been erroneously expressed). The treatises were entered into evidence through the testimony of Dr. Mallin who was not permitted to opine on the standard of care for

obstetrician/gynecologists like Dr. Prowatzke.[5] Therefore, the treatises were not properly linked to Dr. Prowatzke.

¶22 Watts argues that the trial judge was biased because she knew Dr. Lux's prior and present husbands, often ruled in favor of the defense in disputed matters, and acted as an advocate, rather than an impartial decision maker, during trial. Because we have upheld the circuit court rulings challenged by Watts, we cannot conclude that these rulings evidenced bias.

¶23 We turn to Watts's claim that the trial judge's acquaintance with Dr. Lux's prior and present husbands should have been a basis for recusal. At the hearing on postverdict motions, the trial judge noted her contacts with Dr. Lux's current husband, a police chief, when the judge served as an assistant district attorney prior to taking the bench in 1988. As to Dr. Lux's previous husband, the judge stated that he was an assistant corporation counsel while the judge was an assistant district attorney. They did not work on the same cases, and the judge supported his opponent in a judicial race several years before the Watts trial. The judge stated that she had no affinity for him and did not consider him a coworker or a social contact. The judge stated that she had no personal interest in any of the parties in this case.

¶24 We agree with the trial judge that Watts has not demonstrated grounds for recusal under WIS. STAT. § 757.19(2)(f) and (g). The standard for recusal of a judge under § 757.19(2)(f) is an objective one, *see* ***State v. American TV & Appliance***, 151 Wis. 2d 175, 181-82, 443 N.W.2d 662 (1989), and depends on whether the judge "has a significant financial or personal interest in the

[5] We upheld this ruling earlier in this opinion.

outcome of the matter." Section 757.19(2)(f). Here, the trial judge found that she did not have any financial or personal interest. This finding is not clearly erroneous.

¶25 Watts also alleges that the judge should have recused herself because "he or she cannot, or it appears he or she cannot, act in an impartial manner." WIS. STAT. § 757.19(2)(g). This basis for recusal "concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind." ***American TV***, 151 Wis. 2d at 182. This is a subjective determination for the judge himself or herself to make. *See* ***id.*** at 183.

¶26 Here, the trial judge thoroughly explained the extent of her acquaintance with Dr. Lux's previous and present husbands and determined that this knowledge did not render her less than impartial. This is sufficient under ***American TV***, *see* ***State v. Harrell***, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996), and we must abide by the judge's subjective assessment of her impartiality. *See* ***American TV***, 151 Wis. 2d at 186. Because we conclude that the trial judge was not required to recuse herself, we reject Watts's request for a new trial on the basis that the judge presided over the trial.[6]

By the Court.—Judgment affirmed.

[6] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Management of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

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