COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP1706 **Cir. Ct. No. 2005CV3377**

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

CHARLES SMITH,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

WESTERN INDUSTRIES, INC.,

INVOLUNTARY-PLAINTIFF,

V.

PHILLIP A. DECKER, M.D. AND MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC.,

DEFENDANTS,

JOHN A. WEIGELT, M.D. AND MEDICAL COLLEGE OF WISCONSIN, INC.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed in part; reversed in part; and cause remanded with directions.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. At issue in this case is whether John A. Weigelt, M.D., and Medical College of Wisconsin, Inc., (collectively, "Weigelt") should be required to pay Charles F. Smith $30,634.40 in costs and attorney fees related to a mistrial that was granted in February 2008. Smith cross-appeals, arguing that Weigelt should have been ordered to pay a higher amount of attorney fees related to the mistrial. We conclude that the mistrial should not have been granted and that Weigelt should not have been ordered to pay costs and attorney fees associated with the mistrial. Therefore, we reverse the final judgment and remand with instructions that the trial court enter an amended judgment consistent with this opinion. In light of that decision, we do not consider Smith's cross-appeal seeking a greater award of costs and attorney fees. In all other respects, the judgment is affirmed.

BACKGROUND

¶2 The underlying facts in this medical malpractice action are not at issue on appeal, but are recounted here for background purposes.[1] In the early morning hours of March 23, 2002, Smith was transported by ambulance to the emergency department at Froedtert Memorial Lutheran Hospital in Milwaukee

[1] These facts are taken largely from Weigelt's brief and, as noted, are provided as background. We do not attempt to identify contested issues of fact.

after suffering a gunshot wound to the abdomen and other injuries. Weigelt performed immediate surgery to repair the injuries to Smith's abdomen; he was assisted by Dr. Phillip A. Decker, a fifth-year surgical resident.

¶3 At the conclusion of the operation, just prior to closing the incision, Weigelt received a page, called a "trauma alert," notifying him that a patient with life-threatening injuries was en route to the emergency department. Hospital policy mandated that Weigelt be present in the emergency department when the patient arrived. After asking Decker to finish closing the incision, Weigelt immediately left the operating room to respond to the trauma alert.

¶4 As part of the closing process, a sponge count was conducted, in which the number of sponges found at the time of closing was compared to the number present at the beginning of the operation. One sponge was unaccounted for. The operating room was searched, and Decker searched Smith's abdominal cavity. A second sponge count was then performed, but the result was the same. Decker then ordered a portable abdominal x-ray, which, he concluded, did not show the presence of a sponge.

¶5 Decker called Weigelt and told him about the discrepancy in the sponge count and the steps that had been taken to resolve it. Weigelt instructed Decker to finish closing the patient and then come to the emergency department to assist him in caring for two new patients.

¶6 Smith recovered successfully from surgery, but after he was discharged from the hospital, he developed severe abdominal pain and returned to the emergency department on April 13, 2002. Radiologic studies of Smith's upper abdomen showed the presence of a retained sponge. Smith required surgery to

remove the sponge and developed complications that required additional hospitalization of approximately one month.

¶7 In March 2005, Smith filed this medical malpractice action against Decker and Medical College of Wisconsin Affiliate Hospitals, Inc., (collectively, "Decker") and Weigelt. Prior to trial, Smith filed a motion in limine seeking an order "[p]rohibiting the defendants, their witnesses, and their counsel from suggesting in any respect that the defendants saved Charles Smith's life." The motion in limine was heard by the Honorable Clare L. Fiorenza, along with other pretrial motions.[2] There was not extensive discussion on this particular motion in limine. Judge Fiorenza restated the motion and then began the following discussion:

> THE COURT: ... Is any expert going to testify that they saved his life?
>
> [Decker's trial counsel]: Not directly, your Honor....
>
> ....
>
> THE COURT: ... [Were] you planning on having anybody state, like, your client state that "I saved his life?"
>
> [Decker's trial counsel]: No. But I think the only thing they wanted to convey is the seriousness of the injury and not be precluded from saying ... the risk is, for example, if you prolong the surgery, and if he's under anesthesia, you increase the possible risk of it being increased.
>
> The risk of infections increases. The risk of the possibility of death increases, but not the words "We saved his life," we have no intent to do that.

[2] We identify Judge Fiorenza by name because the issues in this case involve interpretation of Judge Fiorenza's order by the Honorable Timothy G. Dugan, who was subsequently assigned the case pursuant to judicial rotation.

THE COURT: Okay. So the Motion, as you [plaintiff] have it phrased, "Prohibiting the defendant, their witnesses and counsels from suggesting," I don't know what you mean by suggesting. There's going to be testimony as to the seriousness of the [injury]. I would grant a Motion that states they cannot state they saved his life.

"Suggestion" is such a dubious word. I don't want to get anyone into trouble at trial. I don't know what, you know, it's subject to interpretation, I guess.

[Smith's trial counsel]: Sure. And I understand their approach to this, your Honor, the nature of the surgery and the fact that it was a surgery, that of course, I don't object to that coming in. But just as long as that—I guess that Motion could be reworded that it prohibits the defendants, their witnesses and their counsels from saying that one or both defendants saved Charles Smith's life.

Get away from the suggesting because I'm not saying that they can't say it was emergency surgery. I just want to make sure that they don't try to prejudice the jury by saying they saved his life basically.

THE COURT: So we're clear, the defendants, their witnesses will not state, the defendants, whatever ones we're talking about, will not state "I saved his life by doing this surgery."

[Smith's trial counsel]: And counsel as well won't say that during opening statements. They won't say, "My client saved his life."

THE COURT: I'll be looking for the words "saved his life" during trial. And we won't be using those words. Okay.

[Decker's trial counsel]: Fair enough. Thank you, Judge.

THE COURT: Okay. I'll keep a keen ear for that. I do not expect to hear those words "saved his life" during trial. Okay. Does that address your concern?

[Smith's trial counsel]: I trust that defense counsels will not go back to their dictionaries to try to figure out what are synonyms for saving life. So that's fine, your Honor.

THE COURT: All come on. [Sic.] Okay. With respect to th[is motion in limine], it's really being modified. You'll

> modify it to not suggesting, but no one will state that they saved your client's life and with that, it's granted....
>
> ....
>
> ... But clearly there's going to be testimony with respect to the seriousness of the ... injury, I should state, with respect to the action that was taken when your client came to the hospital.

¶8 Judge Fiorenza thereafter signed a written order granting certain motions in limine. The order provided in relevant part:

> Defendants, their counsel, and defense witnesses will be precluded from testifying that the defendants saved Charles Smith's life. Defendants, their counsel, and witnesses, however, may testify at the time of trial regarding the seriousness of the injury which Mr. Smith sustained, that it required immediate surgery, and that as a result of the injury, he was susceptible to certain risks and complications associated with the gunshot wounds, as well as the surgery itself, including, but not limited to death, infection, bleeding, and subsequent bowel obstruction.

¶9 The case proceeded to trial before a jury. On the fifth day of the jury trial, Weigelt testified in his own defense. On direct examination, trial counsel asked Weigelt about Smith's injuries. Then Weigelt's trial counsel asked the question that ultimately led the trial court to grant a mistrial:

> [Weigelt's trial counsel]: Were the injuries that [Smith] received life threatening?
>
> [Weigelt]: Most gunshot wounds to the abdomen have the potential to be life threatening, and when we have a patient with [a] gunshot wound to the lower abdomen ... we always worry about injuries to these vessels because ... if you have an injury to those vessels that is definitely not only life threatening but it is limb threatening.
>
> [Smith's trial counsel]: Your Honor, I'm going to ask for a side bar at this point in the discussion.

¶10 Outside the jury's presence, Smith's trial counsel argued that Weigelt's trial counsel had violated Judge Fiorenza's order, stating:

> Everybody in this case has known that the issue of the life[-]threatening nature of Mr. Smith's wounds ... [was] highly prejudicial and had to be excluded in order for Mr. Smith to receive a fair trial. That is why counsel for all parties discussed this many times. That's why we discussed it with the judge. That's why the judge entered an order that defendants, their counsel and defense witnesses will be precluded from testifying that [Weigelt] saved Charles Smith's life. Everybody understood what that would do to his ability to get a fair trial.
>
> ....
>
> ... By [allowing this witness] ... to talk about the life[-]threatening injuries that means, Your Honor, his life is threatened, his life could end. The reason they are performing surgery is to end that threat to his life, to stop him from dying. They're doing it to save his life.

¶11 Smith's trial counsel moved for a mistrial based on the question asked and the answer given, even though he did not object before or while the answer was given. Trial counsel asserted that "[t]here is no curative instruction ... that's going to keep this jury from knowing in their deliberations that the defendants in this case ... saved Mr. Smith's life." Smith's counsel further argued that Weigelt's trial counsel had intentionally "violat[ed] the [c]ourt's order to help his client win this case."

¶12 Weigelt's trial counsel denied that he violated the court's pretrial order, explaining:

> My understanding of the [c]ourt's order is that ... we were to be precluded [from] either having a witness testify or having [counsel] ... state that the defense saved Charles Smith's life but that we were, however, permitted to have our witnesses and their counsel ... discuss the seriousness of his injury; that it required immediate surgery; that as a result of the injury he was susceptible to certain risks and complications associated with the gunshot wounds as well

> as the surgery itself, including but not limited to death, infection, bleeding and subsequent bowel obstruction.
>
> I believe that what I've asked the witness is completely consistent with that language. It was not calculated to violate any order but calculated to comply with it.
>
> The order specifically states that I can ask and that our witnesses can testify that as a result of the injury he was susceptible to certain risks associated with gunshot wounds including but not limited to death.

¶13 Decker's trial counsel agreed with Weigelt's trial counsel's understanding of the pretrial order:

> We could talk about the nature and extent of the gunshot wounds, and I remember arguing this motion and saying to the judge ... all of that's necessary so the jury really understands the nature and extent ... of the amount of the injuries here....
>
> This gentleman because of these gunshot wounds and the seriousness of them was bleeding from several different areas of his body.... [T]hat's an important element of the case because that explains why ... some of these sponges and things—they're vigorously working on this gentleman to deal with a life[-]threatening injury, they've got to use these sponges and they've got to move....
>
> So my understanding was [the same as Weigelt's trial counsel's], that we were precluded from having the doctors at any point testify that they saved Mr. Smith's life or argue the point, but I think that was the limit of the order.

¶14 The trial court questioned how the jury could hear that Smith had life-threatening injuries and lived and not conclude that the doctors saved his life. The trial court concluded that the question and the manner in which it was asked violated Judge Fiorenza's pretrial order. The trial court said that some remedy was required because the doctor was asked a leading question—whether the injuries were life-threatening—and the only "clear conclusion" a jury could draw

is that because Smith "had life[-]threatening injuries and he survived, somebody saved his life."

¶15 To counteract what the trial court found was a violation of Judge Fiorenza's order, the trial court asked the parties to propose language for a curative instruction. After extensive discussion, including a break during which the parties attempted to draft a curative instruction, the trial court ultimately concluded that no curative instruction could cure the prejudice to Smith and that a mistrial should be declared. The jury was dismissed and the case was subsequently rescheduled for a second jury trial.

¶16 Smith asked the trial court to order Weigelt to pay his costs and attorney fees associated with the first trial. Smith sought $85,258.10, but the trial court awarded him only $30,634.40, to be paid by "Weigelt and/or the Medical College of Wisconsin."

¶17 Weigelt sought leave from this court to appeal the trial court's nonfinal order granting a mistrial, and he also filed a separate appeal from the order awarding Smith costs associated with the proceedings leading to the mistrial. In an order dated October 20, 2008, we concluded that the order for costs was nonfinal and therefore not appealable as of right, and we denied the petition for leave to appeal the nonfinal order granting a mistrial. In doing so, we noted:

> [T]he order for costs does not dispose of any issues in litigation between the parties and the order for mistrial simply continues the case. Even if the mistrial order was incorrect, the remedy—a new trial with a new jury—is the same as if it were correct. The court concludes that once the entire case has been resolved, the issue of the costs awarded in the mistrial can be raised even if the defendants are ultimately successful at trial.

¶18 At the second trial, the jury found that neither Weigelt nor Decker had been negligent. Smith did not file any post-verdict motions. The trial court entered judgment in favor of Weigelt and Decker, dismissing Smith's claims with prejudice and awarding Weigelt and Decker costs. The appeal and cross-appeal follow.

DISCUSSION

¶19 Weigelt has appealed from the final judgment in this case in order to challenge two nonfinal orders: the first granting the mistrial and the second ordering Weigelt to pay costs and attorney fees associated with the mistrial. We consider each in turn. But first, we reject Smith's argument that the nonfinal order granting the mistrial is not properly before this court for appellate review because Weigelt's notice of appeal did not reference it, even though it referenced the nonfinal order requiring Weigelt to pay $30,634.40 in costs and attorney fees. Weigelt has appealed from the final judgment. Because we have jurisdiction over the final judgment, we also have jurisdiction over all nonfinal rulings adverse to Weigelt and favorable to Smith, including both the nonfinal order granting the mistrial and the nonfinal order directing Weigelt to pay costs and attorney fees related to the mistrial. *See* WIS. STAT. RULE 809.10(4) (2007-08)[3] ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.").

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

I. The mistrial should not have been granted.

¶20 We begin with Weigelt's argument that the trial court erred when it granted the mistrial. "The decision whether to grant a mistrial motion lies within the sound discretion of the trial court." ***Jensen v. McPherson***, 2004 WI App 145, ¶29, 275 Wis. 2d 604, 685 N.W.2d 603. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** We will reverse a trial court's decision on a motion for a mistrial "only on a clear showing of an erroneous use of discretion by the trial court." ***Id.*** Appellate courts will uphold a trial court's exercise of discretion if the trial court: "(1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrably rational process, reached a conclusion that a reasonable judge could reach." ***State ex rel. Robins v. Madden***, 2009 WI 46, ¶9, 317 Wis. 2d 364, 766 N.W.2d 542.

¶21 Although granting a mistrial motion is within the trial court's discretion, we agree with Weigelt that whether a given question and answer violated a prior judge's written order presents a question of law that we review *de novo*. *See* ***Park Manor, Ltd. v. DHFS***, 2007 WI App 176, ¶13, 304 Wis. 2d 512, 737 N.W.2d 88 ("The meaning of an order is ... a question of law.... We interpret an order in the same way we interpret a contract; that is, we construe the language of the order as it stands, attempting to give meaning to every provision.") (citation omitted); *see also* ***City of Wisconsin Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995) (while appellate court will "not set aside the trial court's findings of fact unless they are clearly erroneous[,] ... to the extent the determination of contempt involves an interpretation of the injunction, that is a question of law that we review *de novo*").

¶22 We have carefully considered the trial court's oral ruling in this case. The trial court focused most of its comments on the question asked, and in particular, its inclusion of the term "life-threatening." Ultimately, the trial court appeared to find that both the question asked and the answer given violated Judge Fiorenza's order.

¶23 In the course of discussing Smith's motion for a mistrial, the trial court referenced discussions that it had with the parties prior to trial concerning Judge Fiorenza's pretrial order. The trial court noted:

> It was my clear understanding from the discussions we had before the start of the trial when this issue was raised that the concern that [Judge Fiorenza] had expressed in rendering her decision was the very fact that the jury should not be presented with the fact that these doctors saved his life and how ungrateful the plaintiff is to then come back and sue them, and that I believe is substantial prejudice and that's clearly what Judge Fiorenza intended to preclude and what I believe the effect of the question is.

The discussions referenced above were not transcribed or summarized on the record prior to trial. To the extent Smith implies that these discussions resulted in the amendment of Judge Fiorenza's written pretrial order, we reject this suggestion because it is not supported by the record. The trial court did not state on the record prior to trial, or during its oral decision on the mistrial, that it had amended Judge Fiorenza's pretrial order. Rather, the trial court's comments about its pretrial discussions with the parties are consistent with the discussions Judge Fiorenza and the parties had at the motion hearing and with the written order itself. Where we part ways with the trial court is with its conclusion that trial counsel's question violated the pretrial order.

¶24 We do not agree that the question—"Were the injuries that [Smith] received life threatening?"—and Weigelt's answer violated Judge Fiorenza's

order. The written order specifically precluded "[d]efendants, their counsel, and defense witnesses ... from testifying that the defendants saved Charles Smith's life." Neither the question asked nor the answer given referenced saving Smith's life.

¶25 Further, we reject Smith's suggestion that any question that hinted at the seriousness of Smith's injury was forbidden. The order *explicitly provided* that the defense could present testimony

> regarding the seriousness of the injury which Mr. Smith sustained, that it required immediate surgery, and that as a result of the injury, he was susceptible to certain risks and complications associated with the gunshot wounds, as well as the surgery itself, including, but not limited to death, infection, bleeding, and subsequent bowel obstruction.

We conclude that asking whether an injury was "life-threatening" was consistent with the pretrial order. Further, we conclude that Weigelt's answer addressed the seriousness of the injury and did not violate the pretrial order.

¶26 In summary, neither Weigelt nor his trial counsel violated the pretrial order. Therefore, we conclude that the trial court erroneously exercised its discretion when it granted a mistrial on that basis.

II. Weigelt is not liable for costs and attorney fees related to the mistrial.

¶27 The trial court ordered Weigelt to pay costs and attorney fees as a sanction for asking the question that led to the mistrial. Under WIS. STAT. § 814.036, the imposition of costs occasioned by a mistrial is a matter within the trial court's discretion. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). Because we have concluded that the trial court erroneously exercised its discretion when it granted the mistrial, we likewise

conclude that the trial court erroneously exercised its discretion when it directed Weigelt to pay costs and attorney fees associated with the mistrial.

CONCLUSION

¶28 Because the question asked, and the answer given, did not violate the applicable pretrial order, we conclude that the trial court erroneously exercised its discretion when it granted Smith's motion for a mistrial and subsequently ordered Weigelt to pay costs and attorney fees associated with the mistrial. Therefore, we reverse the final judgment and remand with instructions that the trial court enter an amended judgment consistent with this opinion. In light of that decision, we do not consider Smith's cross-appeal seeking a greater award of costs and attorney fees. In all other respects, the judgment is affirmed.

By the Court.—Judgment affirmed in part; reversed in part; and cause remanded with directions.

Not recommended for publication in the official reports.