

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2011AP2163

Cir. Ct. No. 2008CV643

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CHRISTINA ZAWATZKE,

PLAINTIFF-APPELLANT,

v.

**WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,
DONALD HARVEY, MD AND MIDWEST MEDICAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

GARDNER-DENVER, INC.,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In this medical malpractice case, Christina Zawatzke appeals a judgment entered for the Wisconsin Injured Patients and Families Compensation Fund after a jury found that Donald Harvey, M.D., was not negligent in his care and treatment of her.¹ Zawatzke challenges several of the trial court’s evidentiary decisions. We reject her arguments and affirm.

¶2 Dr. Harvey, an anesthesiologist specializing in pain management, treated Zawatzke with epidural steroid injections in her lumbar spine. Zawatzke reported immediate pain, then leg numbness. She was transferred from Dr. Harvey’s clinic to St. Nicholas Hospital in Sheboygan to St. Mary’s Hospital-Ozaukee, where she was treated by neurosurgeon Max Lee, M.D. Dr. Lee dictated a consultation note after that encounter.

¶3 Zawatzke’s diagnosis is paraplegia secondary to a spinal cord infarction. She alleged that Dr. Harvey negligently injected the medication into an artery instead of the epidural space. Proper placement of the epidural needle therefore was critical to demonstrating liability. One of Zawatzke’s pretrial motions in limine sought to redact a portion of Dr. Lee’s consultation note stating that the epidural injection “went without any anatomic complications as the radiographic image demonstrated adequate contrast placement and adequate placement of the epidural needle.” The parties vigorously debated whether the note was the admissible communication of a treating physician or an expert opinion the defense was trying to “backdoor” in after Dr. Lee protected himself from cross-examination by asserting his *Alt* privilege.² The trial court denied the

¹ The jury also found in favor of Dr. Harvey on Zawatzke’s informed-consent claim. She does not appeal that issue.

² See *Burnett v. Alt*, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999).

motion, the jury returned a verdict in Dr. Harvey's favor, and the court denied Zawatzke's motions after verdict seeking a new trial. This appeal followed.

¶4 Zawatzke contends that the trial court's ruling on Dr. Lee's consult note allowed critical opinion testimony that the needle placement was "adequate" but did not allow for cross-examination because, having asserted his *Alt* privilege, Dr. Lee could not be compelled to provide further opinion testimony. We disagree with Zawatzke's characterization of Dr. Lee's note and that it was error to admit it.

¶5 A trial court has broad discretion when making evidentiary determinations, and our review is highly deferential. See *Martindale v. Ripp*, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational and legally sound conclusion. See *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶6 The court properly exercised its discretion. Neither party retained Dr. Lee as an expert witness—that is, to render opinions on the standard of care and treatment provided to the patient by another physician. Rather, Dr. Lee gave deposition testimony that recounted his own observations and actions during the course of his examination, care and treatment of Zawatzke. See *Glenn v. Plante*, 2004 WI 24, ¶27, 269 Wis. 2d 575, 676 N.W.2d 413. The trial court found that Dr. Lee's consult note, including the observation about needle placement, was the historical note of a treating physician, was part of a certified medical record, was relevant and necessary for the jury to hear, and was a factual statement subject to cross-examination.

¶7 Zawatzke argues, however, that "[a] medical record containing a diagnosis or opinion ... may be excluded in the trial judge's discretion if the entry

requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based.” *Pophal v. Siverhus*, 168 Wis. 2d 533, 547, 484 N.W.2d 555 (Ct. App. 1992) (citation omitted). Accordingly, she contends, the consult note should have been excluded due to Dr. Lee’s admitted inability to explain the note because he could not recall, three years after the fact, whether he viewed the radiology films himself or based his needle-placement assessment on Dr. Harvey’s representations.

¶8 *Pophal* does not persuade us that the trial court erred. First, *Pophal* reiterates the well-known standard: that evidentiary decisions are discretionary with the trial court. Second, excluding the records in *Pophal* was held to be proper because the treating physicians did not testify to explain their entries. *Id.* Here, Dr. Lee testified and was cross-examined at his videotaped deposition. Also, the consult note was written contemporaneous to his treatment of Zawatzke and he was deposed three years after the fact. Dr. Lee’s limited recall goes to the weight of the evidence, not its admissibility.

¶9 Zawatzke next asserts that the trial court erred in failing to bar Dr. Lee’s statement that the epidural needle was “adequate[ly]” placed because the statement lacked sufficient foundation—again, because Dr. Lee could not remember if he actually reviewed the films. This issue is a nonstarter.

¶10 Dr. Harvey testified that Dr. Lee viewed the films. Zawatzke’s daughter testified similarly in her deposition and at trial. Zawatzke also could have queried Dr. Lee at his deposition or subpoenaed him to testify at trial. The *Alt* privilege does not shield a treating physician from testifying about his or her own care. See *Glenn*, 269 Wis. 2d 575, ¶34.

¶11 There was a rational basis for the trial court’s decision—at several junctures—to permit Dr. Lee’s unredacted consultation note. Having so concluded, we need not consider Zawatzke’s argument that the trial court’s error was not harmless.

By the Court.—Judgment affirmed.

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

