COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-3095

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

TYRONE HILL, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARY E. HILL, DECEASED,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES,

PLAINTIFF,

V.

DEAN MEDICAL CENTER, S.C., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. This medical malpractice case arises from events surrounding a spinal operation performed on Mary Hill, who alleged negligence by one of her surgeons, Dr. Walter Baranowski.[1] A jury found that Baranowski had not been negligent in his care and treatment of Hill. This appeal ensued.

Hill's first arguments involve two rulings regarding the testimony of Dr. John Lubicky, an expert witness for the plaintiffs who testified in a videotaped deposition. Before allowing the jury to view Lubicky's testimony, the court ordered stricken the portion of the deposition where Lubicky read the following from a report he had written:

> [M]y reason for getting involved in medical-legal cases is really in a sense altruistic. Many so-called experts used by attorneys are not legitimate experts in the field at all and are just people who are willing to testify to anything if the price is right.... My main interest is to provide what I believe is a truthful evaluation of the case which may or may not be favorable to your position.

Expert testimony must be relevant and must assist the trier of fact "to understand the evidence or to determine a fact in issue." Section 907.02, STATS.; ***State v. Pittman***, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79 (1993). The decision to admit or exclude expert testimony is a matter of trial court discretion, review of which is limited to determining whether the court examined "the relevant facts, applied a proper legal standard, and used a rational process to reach a reasonable decision." ***State v. Rodgers,*** 203 Wis.2d 83, 91, 552 N.W.2d 123, 126-27 (Ct. App. 1996). It is well established that expert testimony is not relevant if it merely conveys the expert's own beliefs regarding the veracity of another

[1] Although Hill died shortly before trial, the matter went forward following a stipulation by the parties substituting Hill's son, Tyrone, as plaintiff.

witness. ***Pittman,*** 174 Wis.2d at 267, 496 N.W.2d at 79; *see also* ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). It follows that testimony from expert witnesses regarding their *own* credibility beyond setting out their professional qualifications is similarly irrelevant.

The stricken portion of Lubicky's testimony was not relevant to any fact at issue and addressed nothing but his own credibility. We are unable to conclude that the court, by excluding it, erroneously exercised its discretion.

Hill argues that excluding this portion of Lubicky's testimony was unfairly prejudicial because an expert witness for the defense, Dr. Michael Jerva, was subsequently permitted to testify regarding *his* philosophy and motives for testifying in malpractice cases. Unlike Lubicky's testimony, however, Jerva's statements were in response to a juror's written, and rather argumentative, questions. We find the difference in context to be compelling and cannot conclude that the court erroneously exercised its discretion by permitting Jerva's testimony. We note, in any event, that Hill never objected to the introduction of Jerva's testimony.

Hill further argues that the circuit court erred by excluding another portion of testimony wherein Lubicky stated that he would have handled Hill's postoperative care differently than Baranowski had. Striking such testimony was an appropriate exercise of the court's discretion. Evidence that another physician might have acted differently is not relevant to the issue of negligence. ***Francois v. Mokrohisky***, 67 Wis.2d 196, 200-01, 226 N.W.2d 470, 472 (1975); *see also* ***Gilbert v. Medical Examining Bd.***, 119 Wis.2d 168, 197, 349 N.W.2d 68, 81 (1984); WIS J I—CIVIL 1023 (1996). It was incumbent upon Hill to establish that Baranowski's treatment did not comport with approved medical practice under the

circumstances. *See* ***Trogun v. Fruchtman***, 58 Wis.2d 569, 584, 207 N.W.2d 297, 305 (1973). Lubicky's testimony was not relevant on this point and thus it was properly excluded.

Hill also argues that the circuit court erroneously excluded certain deposition testimony of another expert witness, Dr. John Whiffen. We disagree. In the stricken testimony, Whiffen discusses alternative surgical techniques that might have offered a greater likelihood of success than did the technique Baranowski employed for Hill's operation. Again, such testimony was irrelevant on the issues of negligence and causation and thus it was properly excluded. *See, e.g.,* WIS J I—CIVIL 1023.

Next, Hill argues that the circuit court erroneously exercised its discretion by denying a last-minute request to amend responses to the defendants' requests for admissions. Hill sought to amend his responses in order to add a new cause of action based on the doctrine of informed consent. In Hill's view, ***Johnson v. Kokemoor,*** 199 Wis.2d 615, 545 N.W.2d 495 (1996), which was decided just weeks before his request to amend, created a new opportunity for pleading the cause of action based on informed consent. We disagree. ***Johnson*** simply expanded the scope of admissible evidence in an informed consent case. ***Id.*** at 623, 545 N.W.2d at 498. Had Hill chosen to pursue informed consent in this litigation he could have done so prior to ***Johnson***. In addition, Hill's request was made less than a week before the trial was to begin. Had he been permitted to pursue an entirely new cause of action at that late date, prejudice to the defendants would have been substantial and possibly incurable. *See* § 804.11(2), STATS. We cannot conclude that denial of Hill's request was an erroneous exercise of the circuit court's discretion.

Hill also asserts that the testimony of a defense expert witness, Dr. Joseph Cusick, was so misleading and patently "wrong" that we should order a new trial pursuant to § 752.35, STATS.[2] We reject the assertion, first, because Hill never objected to Cusick's testimony. Second, as the circuit court observed during a hearing on Hill's post-verdict motions, Cusick was extensively cross-examined, and Hill had every opportunity to impeach his testimony. If Cusick's conclusions differed from those of other expert witnesses, it remained for the jury to assess his credibility. *See* ***Haseltine***, 120 Wis.2d at 96, 352 N.W.2d at 676.

Hill next argues that the circuit court erred by refusing his request to sequester Jerva. We agree, but conclude that the error was harmless. Section 906.15, STATS., provides in part:

> **906.15 Exclusion of witnesses.** At the request of a party the judge ... shall order witnesses excluded so that they cannot hear the testimony of other witnesses .... This section does not authorize exclusion of ... a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Sequestration of a witness upon a party's motion is mandatory, except where the court finds that the witness's presence in the courtroom is "essential" to present the opposing party's case. ***Bagnowski v. Preway, Inc.***, 138

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[2] Section 752.35, STATS., provides:

> **752.35 Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record[,] and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis.2d 241, 250, 405 N.W.2d 746, 750 (Ct. App. 1987). Although the court discussed the general benefits of allowing expert witnesses to hear the testimony of other experts, there was no showing that Jerva's presence in the courtroom was essential to present the defendants' case, and Hill's request for sequestration should have been granted. ***Id.***

We cannot say, however, that but for the failure to sequester Jerva, the jury's determination would have been different. ***Id.*** at 251, 405 N.W.2d at 750-51. To the contrary, the record suggests that being present for the questioning of Dr. James Stoll, another expert witness for the defense, had little, if any, effect on Jerva. Jerva, a neurosurgeon, and Stoll, an orthopedic surgeon, practice different medical specialties. By the time he arrived, Jerva heard only a fraction of Stoll's testimony, and he testified that Stoll's testimony did not influence him. Therefore, the error was harmless, and Hill's request for a new trial on this ground is denied.

Finally, Hill asks us to remand this matter for a new trial pursuant to § 752.35, STATS., because the real controversy has not been tried and justice has miscarried. In light of the foregoing, we reject Hill's arguments, decline his request for a new trial and affirm the judgments of the circuit court.

By the Court.—Judgments affirmed.

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