COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1761 **Cir. Ct. No. 2012CV4112**

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

LAMONTE HAYNES, A MINOR, BY DAVID P. LOWE, HIS GUARDIAN AD LITEM,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

REBECCA A. THOUSAND, M.D., DEAN HEALTH SYSTEMS, INC., INJURED PATIENTS AND FAMILIES COMPENSATION FUND AND MMIC INSURANCE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Lamonte Haynes appeals the judgment and order of the circuit court denying him a new trial in this labor and delivery medical malpractice case. Haynes argues that during the course of trial, the circuit court erred in four respects: (1) overruling Haynes's objection to remarks defense counsel made during closing argument that allegedly misstated the law and confused the jury; (2) overruling Haynes's objections to alleged new opinion testimony by the defendant, Dr. Rebecca Thousand, and limiting Haynes's cross-examination of Thousand; (3) overruling Haynes's objections to alleged new opinion testimony from defense experts Dr. Sean Blackwell and Dr. Terrie Inder; and (4) overruling Haynes's objection to alleged hearsay testimony by defense expert Dr. Robert Zimmerman. Haynes argues that these alleged errors were prejudicial to his case and that this court should grant him a new trial. We conclude that the circuit court did not err as to defense counsel's closing argument remarks, Thousand's testimony, or Blackwell's and Inder's testimony, and that any error as to Zimmerman's testimony was harmless. Therefore, we affirm.

BACKGROUND

¶2 On February 4, 2011, Dr. Thousand delivered Lamonte Haynes by vaginal delivery. Haynes was born with severe cerebral palsy as a result of hypoxic ischemic injury to his brain and nervous system. Haynes, by his guardian ad litem, filed a complaint alleging that Thousand was negligent in failing to take actions to protect him from unreasonable risk of injury during labor and delivery and that this negligence was a substantial factor in causing his injury.

¶3 The case went to a jury trial and both parties put on testimony from numerous experts. Haynes's theory was that the hypoxic ischemic injury was caused at or near the time of birth and that the standard of care required Thousand to deliver him by cesarean section several hours before the vaginal delivery. Thousand's theory was that the injury occurred before Haynes's mother arrived at the hospital and before Thousand took over management of the labor.

¶4 At the close of the evidence, the jury received a special verdict form that included the following two questions:

> Question No. 1. Was Dr. Rebecca Thousand negligent with regard to the labor and delivery?
>
> Question No. 2. If you answered Question No. 1 "yes," then answer this question.... Was such negligence of Dr. Rebecca Thousand a cause of injury to [Haynes]?

The jury found that Thousand was not negligent, and it therefore did not reach the question on causation.

¶5 Haynes filed a motion to set aside the verdict, arguing that he was entitled to a new trial based on the four alleged errors set forth above. Following a hearing on the motion, the circuit court denied Haynes's motion and entered final judgment affirming the jury verdict. Haynes appeals.

¶6 We relate additional facts pertaining to the specific issues raised on appeal in the discussion that follows.

DISCUSSION

¶7 We review the challenged rulings of the circuit court for an erroneous exercise of discretion. ***Weborg v. Jenny***, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. "A circuit court erroneously exercises its discretion if it

applies an improper legal standard or makes a decision not reasonably supported by the facts of record." ***Id.*** (quoted source omitted).

¶8 If we conclude that the circuit court erroneously exercised its discretion, we must determine if the error was prejudicial; if the error was harmless, a new trial is not warranted. ***Id.***, ¶43. To prove prejudicial error, "there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C. R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768.

1. Closing Argument

¶9 Haynes argues that the circuit court erred in overruling his objection to defense counsel's closing argument, which Haynes alleges "misstated the law." More specifically, Haynes argues that defense counsel "misstated the law" when he "merge[d] the issues of causation and standard of care," contrary to the law as reflected by the special verdict form, which required that the jury first answer the question of whether the standard of care was violated, then move on to the issue of causation. The record refutes Haynes's argument.

¶10 The closing argument remarks by defense counsel that Haynes argues misstated the law are as follows: "I'm going to start out with Question No. 2 on the verdict, the causation question. The reason for that is this. If the [cerebral palsy] was not caused during the labor, then Dr. Thousand didn't miss anything. Dr. Thousand could not have violated the standard of care." Defense counsel also displayed this information visually by means of a PowerPoint slide that read, "If the brain damage didn't occur during Dr. Thousand's shift, she didn't violate the standard of care."

¶11 Haynes objected to the remarks and slide "as misstatement of the law." The circuit court overruled the objection, and defense counsel proceeded in his closing argument to describe how the evidence presented at trial established that the injury that caused the cerebral palsy occurred before labor started, and how there was no evidence of an acute event that could have caused the injury so as to require intervention during labor. A short time later in his closing argument, defense counsel again reviewed the evidence that he argued showed that the injury causing the cerebral palsy preceded the labor. Defense counsel summed up his review of the evidence by asking, "[W]hat did Dr. Thousand miss during the labor? Nothing."

¶12 At the post-trial hearing, the circuit court rejected Haynes's motion for a new trial based on defense counsel's allegedly prejudicial misstatement of law, stating:

> [Defense counsel's closing argument] was not a statement of the law at all, let alone a misstatement of the law.... It was so obvious to me that [defense counsel] was arguing the facts of his case within the context of the standard of care and how the facts unfolded in this case.... It was not a statement of the law. It was [a statement that] in this case, because there was no [major] event ... there was nothing for [Thousand] to catch. There was no negligence. There's nothing here for [Thousand] to see that would have put her on notice that this child was in distress in the manner in which the case ultimately developed.... It was a statement of the application of the law to these facts, or more particularly, how the facts fit in with the standard of care here.

¶13 We agree with the circuit court that the remarks challenged by Haynes, viewed in the context of defense counsel's entire closing argument, did not misstate the law, but were a statement of how the facts related to the law—what the evidence presented at trial meant under the law—from a perspective

favorable to the defense. Because defense counsel was stating the facts in a manner that did not misstate the law, the circuit court did not misuse its discretion in overruling Haynes's objection to defense counsel's closing argument remarks.[1]

2. Dr. Thousand's Testimony

¶14 Haynes argues that the circuit court erred in allowing Thousand to give opinion testimony at trial that added to testimony given in a pretrial deposition and in limiting Haynes's cross-examination of Thousand at trial. The record establishes that the court did not misuse its discretion in either respect.

¶15 First, we address Haynes's argument that Thousand gave new opinion testimony, which calls for a few additional uncontested facts. Haynes took a pretrial video deposition of Thousand, during the course of which, Thousand testified that she did not recall Haynes's mother's labor and delivery. Haynes did not ask Thousand during the deposition any questions about her normal customs and practices in delivering babies, either with respect to obstetric care generally or with respect to the circumstances of this case, such as would be reflected in the medical chart of Haynes's mother's labor and delivery. At trial, in plaintiff's case-in-chief, Haynes called Thousand adversely by playing a two-and-one-half-hour portion of the deposition. Then, during the defense case, Thousand testified in person and was questioned by counsel for both sides.

[1] Haynes argues that "[t]he Record does not reflect any sort of reasoning" by the circuit court at the time it overruled Haynes's objection, because the court simply stated, "Overruled." However, Haynes cites no law indicating that the court must do more absent a party's contemporaneous request for a sidebar. Moreover, the court's explanation at the post-trial motion hearing confirms that the court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion using a demonstrated rational process.

¶16 In addition, before trial, the circuit court granted Haynes's motion barring "new opinion testimony of defense witnesses and experts at trial." The court clarified that the parties agreed "to no new opinion testimony from any expert, either side," and reiterated that "[t]here aren't going to be any new opinions" from the experts. The court denied Haynes's separate motion seeking to bar Thousand from offering new opinions at trial as "premature," stating, "[I]f she's going to change her tune, you can raise your objection then."

¶17 With that background, Haynes argues that the circuit court erred in overruling his objections to defense questioning of Thousand during her in-person trial testimony, because the court allowed her to give opinions that were not previously disclosed, contrary to WIS. STAT. §§ 802.10(7) and 804.12(2)(a)2. (2015-16) and to the circuit court's pretrial orders.[2] Specifically, Haynes argues that the court should have sustained his objections to the defense asking Thousand five questions, because those five questions improperly sought opinion testimony by Thousand. Assuming without deciding that Haynes is correct that Thousand was barred from offering new opinion testimony at trial, we conclude that the circuit court properly exercised its discretion on this issue.

¶18 We now explain the nature of the five challenged questions posed to Thousand by defense counsel. During the defense's case-in-chief, defense counsel stated to Thousand, "And I know you don't have a specific recollection, so I will ask you to tell the jury when I ask you questions based both upon what the chart [of the mother's labor and delivery] shows and what that means to you based upon

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

your habit and practice. In other words, how you would typically handle something like this, what will the chart tell you about that." Defense counsel proceeded to ask numerous questions pertaining to Thousand's customs and practices both generally and specifically with respect to the information in the medical chart. In overruling Haynes's objections to these questions as improperly seeking opinion testimony, the circuit court repeatedly asserted that the answers were based on Thousand's customs and practices in delivering babies.

¶19 Haynes argues that the circuit court erred in overruling five of his objections, on the following topics: Thousand's expectation as to the mother's progress in labor, the effect of epidurals on the mother's progress in labor, why Thousand did not perform a cesarean section at a certain time during the labor, Thousand's use of monitoring data to try to avoid cesarean sections, and Thousand's reliance on the nurse's interpretation of the monitoring data in this case. We agree with the circuit court that none of these topics related an opinion of Thousand but instead inquired as to her customs and practices, either generally or specifically with respect to the information in the medical chart of Haynes's mother's labor and delivery. That is, as to each topic, Thousand was explaining to the jury what she would do and what the information presented meant to her based on her customs and practices. Thus, the circuit court correctly concluded that this testimony involved facts not opinions. We conclude that, because Thousand did not give opinion testimony, the circuit court did not misuse its discretion in overruling Haynes's objections to her testimony on the basis that she was giving new opinions.

¶20 Haynes next argues that the circuit court erred in limiting his cross-examination of Thousand at trial, specifically on the topic of her inability during the pretrial deposition to define certain terms of obstetrical care, which Haynes

wanted to use at trial in an attempt to undermine her customs and practices testimony.[3] Again, we conclude that the circuit court properly exercised its discretion on this topic.

¶21 During Thousand's pretrial deposition, Haynes asked Thousand extensive questions about how she would define certain obstetrical terms, which she testified she could not answer. As noted above, when the defense called Thousand in its case-in-chief, defense counsel asked her about her customs and practices. During Haynes's subsequent cross-examination of Thousand, he began to ask her a question about a definition of a particular obstetrical term. Defense counsel objected to Haynes's question and the court dismissed the jury to discuss the objection.

¶22 The circuit court explained that Haynes was "entitled to cross-examine [Thousand] for additional information on the things she has testified to" during her in person direct examination at trial—that is, her customs and practices—but that Haynes was "not entitled to re-cover what [he] covered in the deposition," specifically, obstetrical definitions that the jury had already watched him go over with Thousand during the video deposition. The court explained that Haynes was "not entitled to re-cover what [he] covered in the deposition," because Haynes had called Thousand adversely by playing the deposition that he had taken. Through use of the recorded deposition, Haynes was "doing your cross-examination without the benefit of a direct. Now we have a direct, and you can't replow the same ground."

[3] Haynes does not argue that he was prohibited from questioning Thousand directly about her customs and practices testimony at trial.

¶23 Haynes fails to develop any argument contrary to our conclusion that the circuit court properly exercised its discretion. Haynes argues that he did not call Thousand adversely when he played her deposition in his case-in-chief, because he did not call her in person and she "could not recall the case," but he does not explain why these two separate and unrelated ideas mean that he did not call Thousand adversely. Haynes also argues that the circuit court's prohibiting him from questioning Thousand during cross-examination as to what he had covered during her deposition "is completely contradictory to Wisconsin law," but he does not cite any such law. Because Haynes does not develop either of these arguments with citations to relevant legal authority, we decline to consider them further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

3. Dr. Blackwell and Dr. Inder

¶24 Haynes argues that the circuit court erred in overruling his objections to what he alleges was opinion testimony given at trial by defense experts Dr. Blackwell and Dr. Inder, because those opinions had not been "disclosed" during their pretrial depositions. Haynes's argument fails because he does not address the circuit court's reasoning in allowing the testimony and explain why that reasoning is erroneous.

¶25 Prior to trial, the defense disclosed Blackwell's and Inder's identities and their conclusions, and Haynes took depositions of both. At trial, both experts testified to topics that had not been covered in their depositions, and the circuit court overruled Haynes's objections to the testimony as opinions that should have been disclosed prior to trial. The gravamen of the court's reasoning was that the challenged testimony consisted of reasoning that supported the experts' previously

disclosed conclusions and Haynes had not asked questions at the depositions that would have elicited the challenged testimony. At trial, the court explained that Haynes had a full opportunity to discover any information during the depositions and that the experts were not "limited to deposition testimony that they give when the question isn't asked." At the post-trial motion hearing, the court explained its reasoning more fully: "You present your expert ready with a final opinion, and then you let the other side have at it. And they question and they question and they pin down and they run down into various rabbit holes every bit of the deposition testimony until they have squeezed every last bit of information out of the expert."

¶26 On appeal, Haynes identifies five items that he asserts are opinions given at trial that were not previously disclosed, but he does not address the circuit court's findings that the challenged trial testimony consisted of aspects of the experts' previously disclosed conclusions that Haynes could have, but failed to, examine during the depositions. Haynes admitted at the post-trial motion hearing that he did not ask during the depositions the questions that "elicit[ed]" the challenged testimony at trial. He was also unable to identify to the circuit court, and fails to identify on appeal, what it was about the challenged testimony that was an opinion that differed from the experts' deposition testimony, or any instance in which the experts admitted at the deposition that they did not have an opinion on a topic, and then provided an opinion on that topic at trial.

¶27 We address one of Haynes's objections as an example of how all five missed the mark. Haynes objected to Inder's testifying about unpublished studies supporting her use of certain information to reach a conclusion as to the timing of the brain injury. At Inder's deposition and during cross-examination at trial, Haynes asked Inder whether there had been any *published* articles supporting

her use of that information to reach that conclusion, and she testified that she was not aware of any published articles. On redirect examination, defense counsel asked if she was aware of any *unpublished* information, and she testified that she was and described that information. The circuit court overruled Haynes's "new opinion" objection to this testimony because it was not a new opinion in that Haynes had not asked Inder about unpublished studies during her deposition.

¶28 In sum, Haynes fails to show that the circuit court misused its discretion in overruling his "new opinion" objections to Blackwell's and Inder's testimony.

4. Dr. Zimmerman's Testimony

¶29 Haynes argues that the circuit court erred in overruling Haynes's objection to alleged hearsay testimony by defense expert Dr. Richard Zimmerman.[4] Haynes argues that the defense elicited hearsay in the form of Zimmerman's testimony on redirect examination about the current opinion of Dr. James Barkovich, an author of a 1997 article that defense counsel used to impeach Zimmerman, based on Zimmerman's personal communications with Barkovich. We assume without deciding that Zimmerman's testimony constituted hearsay, and conclude that any error in overruling Haynes's objection to that testimony was harmless.

¶30 Zimmerman testified on direct examination that MRI imagery indicated that the hypoxic ischemic brain injury had to have occurred between

[4] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3).

sixteen hours and five days before delivery, which was before Thousand was managing the labor and delivery. During cross-examination, Haynes tried to impeach Zimmerman by means of Barkovich's 1997 article, which opines that MRI's are capable of imaging hypoxic ischemic brain injury within hours after the injury occurred, indicating that Haynes's injury could have occurred close to the time of birth. After introducing the article and its conclusion, Haynes stated, "That's contrary to your opinion, correct?" Zimmerman responded, "I think it's contrary to [Barkovich's] opinion today." Haynes did not move to strike this statement and continued the cross-examination with another line of questioning.

¶31 During redirect examination, defense counsel addressed Barkovich's article. Defense counsel asked Zimmerman, "[Y]ou were shown, I think, an article of Dr. Barkovich that carried a date of 1997, and you said that what was shown to the jury is no longer his opinion. What do you mean by that?" Zimmerman responded, "I mean, I know [Barkovich] pretty well and we've discussed hypoxic ischemic—" Haynes then objected based on hearsay, and the circuit court overruled the objection. Zimmerman continued, "I don't believe [Barkovich] believes that it takes [only] a couple of hours for hypoxic ischemic injury to show up on [MRI imagery]." Zimmerman explained that this was based on communications he had had with Barkovich during conferences. At the motion hearing, the circuit court ruled that Zimmerman's testimony was not hearsay.

¶32 Assuming without deciding that the circuit court erroneously overruled Haynes's hearsay objection to Zimmerman's testimony during redirect examination, we conclude that any error was harmless, and thus a new trial is not warranted. *See* ***Weborg***, 341 Wis. 2d 668, ¶43. During Haynes's cross-examination of Zimmerman, Haynes had already elicited that Barkovich's current opinion was contrary to the opinion Barkovich held in 1997. Therefore, as the

circuit court noted, the evidence about Barkovich's current opinion on redirect examination was cumulative: it was "just a reiteration of the statement that Dr. Zimmerman said on questioning [by Haynes's counsel] which was not objected to and moved to strike and so was before the jury in any event." In other words, had the court sustained the objection, the evidence of Barkovich's current opinion, and its potential effect on Haynes's attempt to impeach Zimmerman through Barkovich's 1997 opinion, would still have been before the jury. Haynes's argument that he was prejudiced because he lost the opportunity to attack the credibility of Zimmerman's opinion through Barkovich's 1997 article ignores this fact.

¶33 Moreover, it is unlikely that the jury would have put much weight on Barkovich's 1997 opinion when, as the circuit court found, "all of the evidence in this case suggests that ... the field of medicine evolves substantially and may even in certain fields turn over completely, in terms of some of the assumptions within four or five years." Additionally, as a matter of common sense, after almost three weeks of expert testimony, the jury could not reasonably have given much weight to one statement by one expert witness that another expert had developed a new opinion twenty years after holding a different opinion.

¶34 In sum, we conclude that even if the circuit court erred in overruling Haynes's hearsay objection to Zimmerman's testimony about Barkovich's current opinion during redirect examination, the error was harmless.

5. Reversal in the Interest of Justice

¶35 WISCONSIN STAT. § 752.35 permits this court to order a new trial "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." Haynes asks that we

order a new trial, arguing that the real controversy was not tried here because the circuit court misused its discretion "numerous times throughout the course of trial" in allowing testimony to which Haynes objected and which "prejudiced [Haynes] and undermined the outcome of the trial." However, we have concluded that the court either did not misuse its discretion or that any error was harmless. Therefore, Haynes fails to show that this is an "exceptional case" warranting discretionary reversal. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469 ("We exercise our authority to reverse in the interest of justice under WIS. STAT. § 752.35 sparingly and only in the most exceptional cases.").

By the Court.—Judgment and order affirmed.

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