

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2807

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
EVAN M.S., A PERSON UNDER THE AGE OF 18:**

PIERCE COUNTY,

PETITIONER-RESPONDENT,

V.

BILLIE JO S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Reversed and cause remanded.*

CANE, C.J. Following a jury trial, Billie Jo S. appeals the original and amended orders terminating her parental rights to her minor son, Evan. She argues that the trial court erroneously exercised its discretion and violated her due process rights when it excluded her expert from testifying at trial. Additionally, she requests a discretionary reversal under § 752.35, STATS., because the

exclusion of her expert's testimony prevented the real controversy from being fully tried. This court concludes that the trial court erred when it excluded Billie Jo's expert's testimony. Because this exclusion prevented the real controversy from being fully tried, the trial court's orders are reversed and the matter is remanded for a new trial.

I. BACKGROUND

In January 1998, Pierce County filed a petition to terminate Billie Jo's parental rights due to Evans' continuing need for protection or services. In February, the County filed a discovery demand based on § 971.23, STATS., the criminal discovery statute which is incorporated in § 938.293(2), STATS. A trial was originally scheduled for March, but at the request of the guardian ad litem and the parties, the trial court granted a continuance. Billie Jo requested an adjournment of the April 15 trial date, however, so that her expert, Dr. John Hamann, could complete his evaluation of her. On May 4, Billie Jo filed a motion seeking release of additional medical records for Hamann's review, and the trial court granted the order.

On May 19, the day before the rescheduled May 20 trial date, the County filed a motion to prohibit Billie Jo from presenting expert testimony at trial on grounds that she failed to comply with its discovery request for a copy of a written summary of Hamann's findings under § 938.293(2), STATS. In response to the request, Billie Jo sent the County a letter from Hamann; the letter listed the materials he reviewed, the tests he administered, and his opinion that Billie Jo's parental rights not be terminated. The letter further noted that "[d]etermination proceedings have been in process for a long time and last year Billie Jo [S.] has made some reasonable progress in therapy."

The County argued that the letter was insufficient to comply with its discovery demand because it contained "bold generalizations and conclusions" and no foundation or basis for Hamann's opinion. Further, the County complained that § 971.23, STATS., "entitled [it] to more" than the letter and that it could not prepare for cross-examination. In addition, the County insisted that denying its motion would be equivalent to an "ambush." In response, Billie Jo explained that Hamann would offer

general statements as to her present state, which I don't really think is at issue here. I think the State's position is going to be based on her history ... they have low expectations for the future. And I don't think that Dr. Hamann[s] [testimony is] going ... to be able to foretell the future, he is just pretty much commenting on her present condition which I just don't see is going to be a major issue of controversy here.

While the trial court expressed its concern for "cutting the guts out of" Billie Jo's case and indeed considered a continuance, it noted that it either had to permit the County to "get bushwhacked by a doctor who hasn't given [it] any information" or grant a continuance in a case in which a four-year-old child had been in foster care for three-and-a-half years. Ultimately, the trial court excluded Hamann's testimony without stating a statutory basis for its decision to grant the motion.

When Billie Jo later renewed her objection, the trial court noted that it had granted two continuances so that Hamann could evaluate Billie Jo and that its

job is to try to provide the jury with as easy a job of making a fair decision ... they can't make a fair decision if one side is hamstrung in their attempts to bring out the truth of the matter through effective cross-examination. ... And since Dr. Hamann after repeated attempts to give him an

opportunity to do this didn't provide anything more than a very conclusory piece of paper to [the County] yesterday afternoon I don't think [the County] can fairly be given an adequate opportunity to cross examine And I don't think a further continuance is appropriate because I have bent over backwards to grant the continuances in this case and .. the child ... and the state deserves [their] day in court ... so that's why I am precluding Dr. Hamann from testifying *because ... the defense hasn't complied with the requirements to discover his opinion so that they can adequately prepare their case.* (Emphasis added.)

The County's expert, Dr. Michael Murray, was the psychiatrist who treated Billie Jo for three years. He testified that Billie Jo's schizo affective disorder and alcohol abuse prevented her from parenting Evan. Although Murray recognized that Billie Jo had been sober for over one year and had not been hospitalized during the seven months before the trial, he opined that Billie Jo would not be able to parent Evan within the next twelve months following the trial. A county social worker, Jeanne Follstad, testified that although Billie Jo's condition had improved, she did not believe Billie Jo would make substantial progress or be able to parent Evan within the next twelve months.

Billie Jo's employer, Margaret Downing, testified positively about Billie Jo's work supervising eight clients with the intelligence of one to six-year-olds. Crystal Fern, a registered nurse and Billie Jo's sister, described her sister's improved condition. In addition, Billie Jo testified that she is doing well, feels capable of parenting Evan, and wants to be reunited with her son. A jury concluded that: (1) the County made a diligent effort to provide the ordered services; (2) Billie Jo failed to demonstrate substantial progress toward meeting the conditions established for Evan's return; and (3) there was substantial likelihood that she would not meet these conditions in the next twelve months. Two jurors dissented on each question.

At the dispositional hearing, the trial court permitted Hamann to testify, and he offered the opinion that Billie Jo was capable of parenting, especially given her support system, and that he saw no reason why Evan and Billie Jo should be separated. On cross-examination, Hamann acknowledged that Murray was perhaps in a better position to offer an opinion on her "long-term future range prediction." The trial court then terminated Billie Jo's parental rights, and this appeal followed.

II. ANALYSIS

The County and the guardian ad litem concede that the County's discovery demand and motion in limine cited the wrong statute, § 938.293, STATS., and that the correct discovery statute for a termination of parental rights proceeding under ch. 48, STATS., is § 48.293(4), STATS., which provides that the civil discovery procedures in ch. 804, STATS., apply to ch. 48 proceedings. Nevertheless, the County contends that, because Billie Jo failed to object that the County had cited the wrong law in its discovery request, she is utilizing a "form over substance argument." In this way, the County argues, Billie Jo has waived any objection to the exclusion of her expert's testimony because she makes her objection for the first time on appeal. It further reasons that the "bottom line" is that the County was entitled to this material, that Billie Jo should have provided it and that her failure to object constitutes waiver.

This court first addresses the County's waiver argument. While the County correctly notes that Billie Jo never objected at or before trial to the County's claim that it had a right to the discovery demand, it does not follow that Billie Jo waived the right to raise this issue. The County asserts that pursuant to

§ 804.12(4), STATS., Billie Jo needed to apply for a protective order under 804.01(3), STATS. This court disagrees.

Section 804.12(4), STATS., provides that if a party fails to appear at a deposition, answer interrogatories, respond to a request for production of documents, or supplement or amend a response as required, such failure to act may not be excused on the ground that discovery is objectionable unless the party failing to act applies for a protective order. However, the County did not make such requests. Rather than deposing Hamann, the County demanded a written report to which it was not entitled. Section 804.12(4) does not require a party to apply for a protective order when the opposing party is seeking discovery not required by statute. Accordingly, there is no "failure to act" to be excused.

Next, this court addresses whether the trial court misused its discretion by excluding Hamann's testimony. A trial court's decision on the admissibility of expert testimony is a matter within the trial court's sound discretion. *See State v. Morgan*, 195 Wis.2d 388, 416-17, 536 N.W.2d 425, 435 (Ct. App. 1995). We will not reverse unless the trial court erroneously exercises its discretion or bases its decision on an erroneous view of the law. *Id.*

Billie Jo argues that the trial court erroneously exercised its discretion because its ruling was based on its erroneous view that § 971.23, STATS., applies in TPR proceedings. The County and the guardian ad litem reply that the trial court never cited a specific statutory basis for its decision and that the court properly exercised its discretion when it reasoned that: (1) Billie Jo had ample time to provide the material; (2) rescheduling the trial would cause undue delay; (3) it was not in Evan's best interest to reschedule; and (4) the unfairness to the County of being "bushwhacked" by Hamann's testimony outweighed any harm

to Billie Jo because her expert, who had only met her twice and was not her therapist, was only going to conduct a document review.

Based on a review of the record, this court concludes that the trial court's decision reflects its understanding that the County was indeed entitled to the written summary the County demanded in its recovery request. The trial court stated that it was excluding Hamann's testimony because Billie Jo had not complied with the "requirement to discover his opinion so that they can adequately prepare their defense." Understandably, the trial court was frustrated with Billie Jo's failure to cooperate with the County. However, § 804.01(2)(d), STATS., sets forth the required procedure for discovery of an expert's facts and opinions. The statute provides that a party may discover an expert's opinions through written interrogatories or by deposition. Section 804.01(2)(d)1, STATS. On motion, the court may order further discovery by other means. *Id.*

This court agrees with the County that Hamann's potential opinions regarding Billie Jo's mental health were relevant and discoverable, but the County failed to utilize the discovery methods under § 804.01(2)(d)1, STATS. In contrast to the § 971.23(2m)(am), STATS., requirement, which is inapplicable here, § 804.01(2)(d)1 does not require an expert to prepare a written summary for the County. If the County wanted to discover Hamann's opinions and the facts upon which he relied to form those opinions, it could have deposed him or sent him interrogatories. It did not. Additionally, the County did not seek a court order for discovery by other means. *See* § 804.01(2)(d)1, STATS.

The County argues that under § 805.18(2), STATS., the exclusion of Hamann's testimony was "at the most harmless error" because the exclusion did not prejudice Billie Jo and, even if the trial court applied the wrong statute to

exclude the evidence, the trial court's conclusion was correct and the evidence was of marginal significance. An evidentiary error is subject to a harmless error analysis and requires reversal or a new trial only if the improper ruling has affected the substantial rights of the party seeking relief. *State v. Britt*, 203 Wis.2d 25, 41, 553 N.W.2d 528, 534 (Ct. App. 1996); *see also* § 805.18(2), STATS. "We reverse only where there is a reasonable possibility that the error contributed to the final result." *State v. Kourtidias*, 206 Wis.2d 574, 586, 557 N.W.2d 858, 863 (Ct. App. 1996). In making this determination, we weigh the effect of the trial court's error against the totality of the credible evidence supporting the verdict. *See id.*

This was decided by a ten/two margin. This court concludes that there is a reasonable probability that the exclusion of Hamann's testimony contributed to the final result because the jury could have believed and relied upon Hamann's testimony to find that Billie Jo was stable and capable of parenting. *See State v. Johnson*, 60 Wis.2d 334, 341-42, 210 N.W.2d 735, 738-39 (1973). For these reasons, this court rejects the County's harmless error argument because the admission of the expert testimony may have had a substantial influence in bringing about a different verdict. *See id.*

Billie Jo also argues that she is entitled to a new trial in the interest of justice because the exclusion of Hamann's testimony prevented the real controversy from being tried. In response, the guardian ad litem argues that Hamann's testimony was cumulative to Follstad's testimony that Billie Jo had been stable for several months before trial, had not been hospitalized for her mental illness for several months, and had remained sober and cooperative for several months. Therefore, it reasons that the exclusion of the expert's testimony did not

prevent the real controversy from being tried. The County's response is similar to its harmless error argument.

Section 752.35, STATS., provides that the appellate court may grant a new trial in the interest of justice if it appears from the record that the real controversy was not fully tried or whenever it is probable that justice has miscarried. When reviewing a record to determine if the real controversy was not fully tried, this court need not determine that there exists a substantial probability of a different result on retrial. See *Vollmer v. Luety*, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990). Our courts have granted discretionary reversal when important evidence was erroneously excluded and deprived the jury of the opportunity to hear important testimony bearing on an important issue in the case. *Id.* (discussing cases). This court has already determined that the trial court erred by excluding Hamann's testimony. The issue is whether this exclusion deprived the jury of hearing important testimony on an important issue.

The special verdict form asked the jury to answer three questions¹: (1) Did the County make a diligent effort to provide the services the court ordered; (2) has Billie Jo failed to demonstrate substantial progress toward meeting the conditions established for Evan's return to her home; and (3) is there a substantial likelihood that Billie Jo will not meet these conditions within the twelve-month period following the conclusion of this hearing? The jury answered all questions in the affirmative, with two jurors dissenting on each question.

¹ The first question asked if Evan was in need of protection and services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law. The trial court answered that question "yes."

At the disposition hearing, Hamann stated that he saw no reason for Billie Jo and Evan to be separated and that Billie Jo has the capability of parenting. This testimony contradicts the County's position that Billie Jo would be incapable of parenting within the twelve months after the trial. The trial court's exclusion of this important expert testimony prevented the case from being fully tried because the jury was not given the opportunity to hear this expert testimony, assess the reliability of Hamann's opinions, and weigh it against the County's evidence. This evidence was not cumulative or repetitive to Follstad's because, unlike Follstad, Hamann believed Billie Jo was capable of parenting Evan, and there was no reason to separate mother and child. Thus, the jury was deprived of hearing important testimony on Billie Jo's stability and parenting skills. Accordingly, Billie Jo is entitled to a new trial.²

By the Court.—Orders reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

² Because this case is remanded for a new trial, Billie Jo's due process argument need not be addressed. *See Grogan v. PSC*, 109 Wis.2d 75, 77, 325 N.W.2d 82, 83 (Ct. App. 1982) (constitutional issues not decided if resolution of other issues dispose of appeal).

