COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2016AP356 **Cir. Ct. No. 2013CV94**

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

TAYLOR PETERSON,

PLAINTIFF-APPELLANT,

GOLDEN RULE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

GUNDERSEN CLINIC PROFESSIONAL LIABILITY INSURANCE PLAN AND ELIZABETH AULT BRINKER, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Taylor Peterson appeals the circuit court's judgment entered after a jury rejected Peterson's informed consent (medical malpractice) claim against Dr. Elizabeth Ault Brinker and Gundersen Clinic Professional Liability Insurance Plan (Gundersen Insurance). Peterson seeks a new trial for two reasons. She argues that the circuit court erred in the special verdict form and in excluding certain deposition testimony. Peterson makes a third argument that the court erred in denying her motion for discovery sanctions. We reject Peterson's arguments, and affirm.

Background

¶2 The sole cause of action before the jury was Peterson's claim that Dr. Ault Brinker failed to disclose sufficient information to allow Peterson to give informed consent. This informed consent claim related to an optic nerve tumor biopsy that Dr. Ault Brinker performed on Peterson after Peterson consented to the procedure. Peterson was 17 years old at the time, and one of her parents was involved in consenting to the procedure. We make no further references to the parent, however, because the parent's involvement does not affect our analysis.

¶3 Although it was not the only matter disputed, central to Peterson's informed consent claim was her allegation that Dr. Ault Brinker failed to disclose to Peterson that the biopsy carried a risk of vision loss. Dr. Ault Brinker asserted that she did disclose the vision loss risk to Peterson. In contrast, Peterson asserted that Dr. Ault Brinker omitted necessary information, including the omitted vision loss information, and that the omitted information was information a reasonable patient in Peterson's position would want to know in deciding whether to consent to the biopsy. Peterson testified that she would have refused the biopsy had she

been fully informed, and she presented evidence that the biopsy caused vision loss in her left eye.

¶4 As noted, the jury rejected Peterson's claim, finding in favor of Dr. Ault Brinker. We reference additional pertinent facts below.

Discussion

A. Special Verdict Form

¶5 Peterson argues that the circuit court erred by giving a special verdict form question to the jury that incorrectly restricted the jury's consideration to just one issue: whether Dr. Ault Brinker disclosed that the optic nerve biopsy posed a risk of vision loss. The question, Peterson contends, improperly allowed a verdict in favor of Dr. Ault Brinker even if the jury found that Dr. Ault Brinker failed to disclose the *likelihood* of vision loss and information about alternatives to the biopsy procedure. For the reasons below, we reject this argument.

¶6 The circuit court's choice of special verdict questions is discretionary. *See* ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶8, 294 Wis. 2d 700, 720 N.W.2d 704. "We will not interfere with the form of a special verdict unless the question, taken with the applicable instruction, does not fairly present the material issues of fact to the jury for determination." ***Id.*** Thus, the question is not whether we would have chosen the special verdict question the circuit court chose but, rather, whether the question that the court chose, *when read with the pertinent instructions*, fairly presented the issues to be tried.

¶7 Here, we begin our analysis with the instruction the jury received because there is no dispute that that instruction correctly stated the applicable law.

See ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 630-32, 545 N.W.2d 495 (1996) (summarizing the applicable informed consent standards).

¶8 The instruction here explained to the jury that a physician "has the duty to provide her patient with information necessary to enable the patient to make an informed decision about" the proposed procedure. The instruction further stated that, in order to meet this duty, the physician "must provide her patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject" the procedure. In addition, the instruction explained that the physician must inform the patient "whether alternate treatments or procedures approved by the medical profession are available," and "what the outlook is for success or failure for each alternative and the benefits and risks inherent in each alternative."

¶9 The instruction, in full, read:

> A doctor has the duty to provide her patient with information necessary to enable the patient to make an informed decision about an optic nerve biopsy and the alternative choices to an optic nerve biopsy. If the doctor fails to perform this duty, she is negligent.
>
> To meet this duty to inform her patient, the doctor must provide her patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject an optic nerve biopsy.
>
> In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting an optic nerve biopsy. The doctor must inform the patient whether an optic nerve biopsy is ordinarily performed in the circumstances confronting the patient, whether alternate treatments or procedures approved by the medical profession are available, what the outlook is for success or failure for each alternative and the benefits and risks inherent in each alternative.

¶10 Turning to the special verdict question at issue, that question read:

> Did Dr. Elizabeth Ault Brinker fail to disclose information about the risk of vision loss from an optic nerve biopsy necessary for Taylor Peterson and her father to make an informed decision?

¶11 As noted, Peterson argues that this special verdict question improperly restricted the issue before the jury to whether Dr. Ault Brinker disclosed that the optic nerve biopsy posed a risk of vision loss. According to Peterson, the special verdict question prevented the jury from additionally considering whether Dr. Ault Brinker failed to disclose the *likelihood* of vision loss and other pertinent information, including information about alternatives to the biopsy procedure. Peterson further argues that the special verdict question conflicts with the instruction. We disagree.

¶12 First, the special verdict question was not as narrow as Peterson asserts. The question did not merely ask, as Peterson's argument implies, whether Dr. Ault Brinker simply informed Peterson that the biopsy carried a risk of vision loss. Rather, the question more broadly asked whether Dr. Ault Brinker disclosed "*information about the risk* of vision loss from an optic nerve biopsy *necessary for Taylor Peterson … to make an informed decision*" (emphasis added). This phrasing plainly encompasses information about the *likelihood* of vision loss as well as other risk-of-vision-loss information necessary to make an informed decision.

¶13 Second, although the special verdict question, read in isolation, might be considered ambiguous as to whether it encompasses disclosure of information *in addition* to risk-of-vision-loss information, such as available alternatives, we conclude that the question and instruction, read as a whole, make

clear that such additional information is included. That is, we disagree with Peterson that the special verdict question conflicts with the instruction. Rather, the most reasonable way to read the two together—and the way any reasonable juror would have understood them—is that they explain that the jury needed to consider not only whether Dr. Ault Brinker disclosed risk-of-vision-loss information but also whether Dr. Ault Brinker disclosed other information that a reasonable person in Peterson's position would want to know.

¶14 For example, the instruction stated: "*In answering this question*, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting an optic nerve biopsy." (Emphasis added.) The instruction goes on to say that such information includes the alternatives and the risks and benefits of the alternatives. This language serves no purpose except to clarify what the jurors should consider in answering the special verdict question.

¶15 We note that Peterson does *not* argue that the circuit court restricted the *evidence or arguments* at trial to only whether Dr. Ault Brinker disclosed risk-of-vision-loss information. On the contrary, Peterson tells us that the court *admitted* the other categories of evidence that Peterson claims the jury needed to consider in answering the special verdict question. From the jury's point of view, the presentation of such evidence would make no sense if the evidence was not relevant to the verdict question addressing whether Dr. Ault Brinker had provided sufficient information to Peterson.

B. Excluded Deposition Testimony

¶16 Parts of videotaped deposition testimony of two Mayo Clinic physicians who treated Peterson subsequent to the biopsy were presented to the jury. Peterson argues that the circuit court erred by excluding relevant parts of this

videotaped testimony.[1] We review this asserted error for an erroneous exercise of discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 344-45 & n.8, 340 N.W.2d 498 (1983). For the reasons that follow, Peterson fails to persuade us that the excluded deposition testimony was relevant to her informed consent claim. As a result, Peterson fails to persuade us that the circuit court erred in excluding the testimony.

¶17 At the time Peterson was referred to Dr. Ault Brinker, Peterson had undergone tests, including an MRI, showing that Peterson had a mass on her left optic nerve. There is no dispute that, at that time, the tumor was believed to be a type of tumor called a glioma, but that diagnosis was not 100% certain.

¶18 As we understand it, Peterson argues that the excluded physician deposition testimony was relevant to whether Dr. Ault Brinker failed to disclose that a medically viable alternative to a biopsy was to omit a biopsy and proceed directly to treatment options for glioma. In an apparent reference to this asserted alternative, Peterson argues that the excluded testimony showed that "other physicians might approach the situation differently," and that this was information that a reasonable patient would want to know.

¶19 We agree with Peterson that there is logic to the idea that a reasonable patient in her position, facing the possibility of an optic nerve biopsy, would want to know if other qualified physicians would recommend omitting the biopsy and proceeding directly to treatment options for glioma. However, we

[1] The trial transcript indicates that parts of this videotaped deposition testimony were played for the jury without having been transcribed. Peterson supplies a transcription of pertinent parts of the testimony in her briefing. Dr. Ault Brinker and Gundersen do not dispute the accuracy of Peterson's transcription, so we rely on that transcription.

need not weigh in on the merits of this theory of relevance.[2] Even assuming that this theory has merit, we conclude that here there is a disconnect between the theory and the excluded testimony. We now explain.

¶20 At trial, Dr. Ault Brinker testified that Peterson's optic nerve tumor was a "very large tumor and much larger than any tumor in that area that I had seen in a very long time." Dr. Ault Brinker admitted that the tumor was most likely a glioma. But she also testified that there were several features of the tumor and circumstances in this case that were "not typical" for a glioma and these atypical circumstances caused her to become concerned and recommend a biopsy. These included: Peterson's age and a prior lack of vision problems, suggesting to Dr. Ault Brinker that the tumor might be growing quickly; the tumor was extending into Peterson's brain cavity; and the tumor was positioned such that it put *both* of Peterson's eyes at risk. Dr. Ault Brinker testified that "you couldn't clearly say it was a glioma." As far as we can tell, Peterson does not challenge Dr. Ault Brinker's characterization of Peterson's tumor at that time as atypical for a glioma.

¶21 Turning to the allegedly improperly excluded physician deposition testimony, we repeat that Peterson argues that this testimony showed that a

[2] The authority cited by Peterson to support this theory is a supreme court opinion that did not garner a majority of votes. *See* ***Jandre v. Wisconsin Injured Patients & Families Comp. Fund***, 2012 WI 39, ¶¶134-35, 340 Wis. 2d 31, 813 N.W.2d 627 (lead opinion of Abrahamson, C.J.); ***id.***, ¶202 (Prosser, J., concurring in the decision to affirm but declining to join the lead opinion). Peterson also directs our attention to ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 641-42, 545 N.W.2d 495 (1996), but the different issue there was whether a reasonable patient would want to know information relating to a physician's experience or lack of experience. *See* ***id.***; *see also* ***id.*** at 621-23, 642-43, 647-48.

reasonable patient would want to know that "other physicians might approach the situation differently."

¶22 The flaw in Peterson's argument is that it does not take into account Peterson's atypical circumstances. More specifically, the excluded deposition testimony does not address Peterson's atypical circumstances. Rather, it is general testimony consisting of the physicians' opinions that they *generally* would not advise performing a biopsy on optic nerve tumors known or believed to be glioma because the risks outweigh the benefits. There would have been no indication to the jurors that these opinions applied to Peterson's particular atypical situation.

¶23 Our reading of the excluded deposition testimony is supported by other parts of the same physicians' testimony that the court admitted. In those admitted parts of the testimony, the physicians both acknowledged that, depending on the circumstances, opinions might differ as to the advisability of a biopsy. In other words, although the excluded parts of the two physicians' deposition testimony might be read to suggest that the physicians were providing opinions covering Peterson's situation, the admitted parts of their testimony clarified that they were not.

¶24 Thus, we fail to see how the excluded deposition testimony fits Peterson's relevance theory as evidence of how other physicians would have approached Peterson's situation. Accordingly, we reject Peterson's argument that the court erred in excluding the testimony.

¶25 Peterson makes a second argument relating to the excluded testimony that we briefly address. Peterson argues that, in excluding parts of the Mayo Clinic physician deposition testimony favorable to her while admitting parts favorable to Dr. Ault Brinker, the court caused prejudice to her case by providing

the jury with a "distorted and inaccurate view" of the physicians' overall opinions. For reasons already explained, we disagree. That is, the court could have reasonably determined that the excluded parts should be kept from the jury so that the jury would not be misled to believe that these physicians were offering opinions on Peterson's particular situation. We note that Peterson does not argue that, having excluded the testimony Peterson contends the court should have admitted, the court somehow separately erred by admitting only parts of the testimony. Therefore, we do not address that topic.

C. Peterson's Motion For Discovery Sanctions

¶26 We turn to Peterson's argument that the circuit court erred in denying her motion for discovery sanctions. The circuit court's decision whether to impose discovery sanctions is also discretionary. ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553; ***Paytes v. Kost***, 167 Wis. 2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992). Here, as with her other arguments, Peterson fails to persuade us that the circuit court erroneously exercised its discretion.

¶27 Peterson's sanctions motion related to her requests for admissions. We need not discuss the substance of those requests. Our focus here is on the procedural history of what happened with those requests. That history will set the backdrop for Peterson's more specific argument.

¶28 Dr. Ault Brinker and Gundersen Insurance (hereinafter collectively "Gundersen") provided legal objections to the requests at issue and, on the basis of those objections, refused to fully answer the requests. The parties began litigating the merits of Gundersen's objections eight months before trial, when Peterson

filed a motion to compel discovery challenging Gundersen's objections. For reasons that are not clear, the circuit court declined to rule on that motion.

¶29 About five months before trial, Peterson filed a second motion to compel, again challenging Gundersen's objections. Again, for reasons that are not clear, the circuit court did not rule on that motion either.

¶30 Post-trial, about nine months after Peterson's first motion to compel, Peterson filed her discovery sanctions motion under WIS. STAT. § 804.12(3), which applies to requests for admissions.[3] In that motion, Peterson sought sanctions in the form of expenses for Gundersen's failure to answer Peterson's requests, arguing that Gundersen's legal objections were invalid. Thus, Peterson's

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. WISCONSIN STAT. § 804.12(3) provides:

> **(3)** EXPENSES ON FAILURE TO ADMIT. If a party fails to admit … the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves … the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that
>
> (a) the request was held objectionable pursuant to sub. (1), or
>
> (b) the admission sought was of no substantial importance, or
>
> (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (d) there was other good reason for the failure to admit.

WIS. STAT. § 804.12(3) (formatting modified).

sanctions motion raised the same issue as her prior motions to compel—the validity of Gundersen's objections.

¶31 The court denied Peterson's sanctions motion in a brief oral ruling that, at least on its face, appears difficult to understand and provides fodder for Peterson's argument on appeal. As we shall see, however, when we read the circuit court's ruling in concert with Gundersen's circuit court briefing, it is apparent that Peterson's appellate argument fails to meaningfully address the court's reasoning, a failure that leads us to reject Peterson's argument that the court erroneously exercised its discretion.

¶32 In arguing that the circuit court erred, Peterson focuses on a statement that the court made in its oral ruling, namely, that it was "far too late" for Peterson to be making the argument made in her sanctions motion. Peterson argues that there are two problems with the court's "far too late" justification for denying her sanctions motion. To quote Peterson's argument:

> First, it ignores the fact that [Peterson] did, in fact, file motions for relief before trial. The trial court simply declined to hear or rule on the motions. Second, there is nothing in the statute [apparently meaning WIS. STAT. § 804.12(3)] to suggest that such motions [apparently meaning § 804.12(3) sanctions motions] cannot be heard after trial.

Peterson goes on to quote part of WIS. STAT. § 804.12(3), and asserts that, contrary to the circuit court's ruling, the statutory language plainly contemplates that sanctions motions under this subsection may be heard *after* trial.

¶33 As to both parts of Peterson's argument, we disagree with her characterization of the circuit court's ruling. That is, we disagree that the court's post-trial decision ignored her pretrial motions or that the court denied her

sanctions motion based on a belief that a WIS. STAT. § 804.12(3) sanctions motion must be heard before trial. Rather, when we read the court's "far too late" statement and its other oral statements in the context of the briefing before that court, the far more logical conclusion is that the court was indicating its agreement with a more nuanced procedural argument that Gundersen put before the court. That Gundersen argument, as it would have been understood by a reasonable circuit court, was that Peterson's sanctions motion should be denied because: (1) Peterson failed to take advantage of a pretrial procedure available to her under WIS. STAT. § 804.11(1)(c) to challenge the sufficiency of Gundersen's objections, (2) Peterson instead filed motions to compel but failed to press for rulings on one or both of those motions, and (3) Peterson otherwise proceeded to conduct discovery in a manner that made an award of sanctions inequitable.[4]

¶34 Peterson fails to address whether *this* reasoning provides a basis for denying Peterson's sanctions motion. Instead of addressing the circuit court's apparent adoption of Gundersen's procedural argument, Peterson characterizes the circuit court ruling in a way that is most easily attacked. In doing so, Peterson fails to present a developed argument rebutting what we deem to be the apparent justification for denial that was adopted by the circuit court.

[4] WISCONSIN STAT. § 804.11(1)(c) provides:

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. Section 804.12(1)(c) applies to the award of expenses incurred in relation to the motion.

¶35 In her reply brief, albeit too late, Peterson provides a partial discussion addressing Gundersen's procedural argument. Peterson asserts that the WIS. STAT. § 804.11(1)(c) pretrial procedure is not mandatory and that she unequivocally notified Gundersen before trial that she intended to seek sanctions. But it is not apparent to us why these assertions, even if accurate, would have required the circuit court to award sanctions.

¶36 Alternatively, Peterson may mean to argue in her reply brief that her pretrial motions to compel triggered the pretrial procedure under WIS. STAT. § 804.11(1)(c) and that she should not be blamed for the circuit court's decision not to follow through on that procedure. Section 804.11(1)(c) provides: "Unless the court determines that an objection is justified, it *shall* order that an answer be served." (Emphasis added.) If this is Peterson's argument, we reject it because we disagree that Peterson's pretrial motions to compel alerted the court that Peterson might be seeking pretrial relief under § 804.11(1)(c). Neither those motions nor the supporting briefing made any reference to § 804.11(1)(c).

¶37 In sum, for the foregoing reasons, we reject Peterson's argument that the circuit court erred in denying her sanctions motion.

Conclusion

¶38 For the reasons above, we affirm the judgment entered after the jury found against Peterson on Peterson's informed consent claim.

By the Court.—Judgment affirmed.

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