COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP613

Cir. Ct. No. 2008CV762

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

MARY JO BROOKS AND DON BROOKS,

PLAINTIFFS-APPELLANTS,

SENTRY INSURANCE, A MUTUAL COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.
AND BAYCARE CLINIC, L.L.P.,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 VERGERONT, P.J. Mary Jo Brooks filed this medical malpractice action against BayCare Clinic, L.L.P. and Physicians Insurance Company of Wisconsin, Inc. (collectively, BayCare), alleging that BayCare's employee, Dr. Shawn Hennigan, failed to obtain her informed consent prior to performing a surgical procedure for frozen shoulder and that he was negligent in performing this procedure. The jury found that Dr. Hennigan did not fail to disclose information about the surgery necessary for Brooks to make an informed decision and that he was not negligent in performing the surgery. The circuit court denied Brooks' motions after verdict to change the jury's answer on informed consent and denied her request for a new trial because of asserted errors in evidentiary rulings relating to the negligence claim.

¶2 On appeal of the circuit court's dismissal of the action, Brooks contends the court erred in denying her motions after verdict. For the reasons we explain below, we affirm the circuit court's denial of the motions after verdict and affirm the judgment of dismissal.

BACKGROUND

¶3 Brooks first sought treatment from Dr. Hennigan in 2004 for pain in her right shoulder. Dr. Hennigan is a board certified orthopedic surgeon. In 2006 Brooks chose to pursue surgical treatment. During an office visit in January 2006, Dr. Hennigan had a discussion with Brooks regarding the procedures he intended to perform. At that time, her diagnoses were impingement syndrome (bone spurs growing under the acromion bone), partial tear of the rotator cuff tendon, and AC joint arthritis.

¶4 Dr. Hennigan performed surgery on Brooks' right shoulder on April 20, 2006. That morning, prior to the surgery, Brooks signed a form titled "Informed Consent for Operation or Other Procedures." This document specifically identified the procedures of "right shoulder arthoscopy, subacromial decompression [to address the impingement syndrome], distal clavicle resection [to address the AC joint arthritis] and possible rotator cuff repair."[1] The document also addressed "unforeseen conditions" occurring "during the course of the operation or procedure(s)." We discuss this document in more detail later in the opinion.

¶5 After Brooks was placed under general anesthesia, Dr. Hennigan performed a physical examination of the shoulder joint that involved maneuvering the joint and arm. He does this before he performs surgery on any shoulder. As a result of this physical examination, he diagnosed frozen shoulder.[2] He decided to treat the frozen shoulder by performing a "capsular release" in addition to performing the procedures he had already discussed with Brooks. After the surgery, Brooks' shoulder pain worsened and she was unable to return to her job. She saw another physician, Dr. John Orwin, who performed two more capsular releases.

¶6 Brooks' complaint alleged that Dr. Hennigan did not obtain informed consent for the capsular release he performed on her frozen shoulder and that he was negligent in performing this procedure.

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[1] "Arthoscopy" means that an arthroscope, a viewing device inserted through a small incision, is used in performing the other procedures.

[2] The medical name for frozen shoulder is "adhesive capsulitis," and it is characterized by pain and restricted range of motion.

¶7 At the trial to the jury, it was undisputed that Dr. Hennigan did not discuss with Brooks the capsular release procedure or any other treatment for frozen shoulder before the surgery. There was no claim or evidence by Brooks that Dr. Hennigan should have anticipated the frozen shoulder before he discovered it. There was conflicting expert testimony on whether Dr. Hennigan should have proceeded to perform the capsular release for the frozen shoulder along with the planned procedures or, instead, should have brought Brooks out of the general anesthesia and discussed at a later office visit the treatment alternatives for frozen shoulder. There was also conflicting expert testimony on whether Dr. Hennigan adhered to the standard of care in performing the capsular release.

¶8 The jury answered "no" to special verdict question 3 which asked: "Did Dr. Hennigan fail to disclose information about the surgery necessary for [Brooks] to make an informed decision?" The jury also answered "no" to the question: "Was … Dr. Shawn Hennigan negligent in performing his April 20, 2006 surgery upon [Brooks]?"

¶9 In her motions after verdict, Brooks contended there was no evidence to support the jury's answer to question 3 and asked that the court answer "yes" to this question, as well as two related questions.[3] Part of Brooks' argument

[3] Because the jury answered "no" to question 3, it did not answer the following two questions, which were to be answered only if question 3 was answered "yes:"

> QUESTION NO. 4: If a reasonable person, placed in [Brooks'] position, had been provided necessary information about the surgery, would that person have refused surgery?
>
> QUESTION NO. 5: Was the failure of Dr. Hennigan to disclose necessary information about the surgery a cause of injury to [Brooks]?

on this point involved a challenge to the admissibility of the signed consent form. The circuit court concluded Brooks had waived this objection but also decided that, even if the objection was not waived and the form was not admissible, there was other evidence that supported the jury's answer.

¶10 Brooks also sought a new trial on the negligence claim because of two evidentiary rulings the court made: (1) excluding Brooks' treating physician's testimony on the standard of care; and (2) allowing testimony that other physicians had performed a capsular release in circumstances similar to those facing Dr. Hennigan. The court concluded there was no reason to change these rulings and denied the request for a new trial.

DISCUSSION

¶11 On Brooks' appeal we address these issues: (1) Is Brooks entitled to a new trial in the interest of justice on the ground the signed consent form should not have been admitted? (2) Is Brooks entitled to judgment as a matter of law that Dr. Hennigan violated the informed consent statute, WIS. STAT. § 448.30 (2009-10)?[4] (3) Is there sufficient evidence to support the jury's answer to special verdict question 3? (4) Did the circuit court erroneously exercise its discretion when it excluded standard of care testimony by Dr. Orwin, Brooks' treating physician? (5) Did the circuit court erroneously exercise its discretion in allowing testimony that other physicians had performed capsular releases in circumstances similar to those facing Dr. Hennigan? We resolve each of these issues against Brooks.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

I. New Trial in the Interests of Justice—Admissibility of the Signed Consent Form

¶12 Brooks argues that the consent form she signed was inadmissible for two reasons: it is irrelevant and it is a hospital form.[5] She is apparently conceding that she did not make this objection in the circuit court. Indeed, the record shows that this was among the exhibits she stipulated could be admitted. Brooks asks us to exercise our discretionary power of reversal under WIS. STAT. § 752.35 because, she asserts, allowing the jury to consider the inadmissible signed consent form prevented the real controversy from being fully tried.

¶13 This court has the authority under WIS. STAT. § 752.35 to grant a new trial in the interest of justice when it appears that the real controversy has not been fully tried.[6] ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The party seeking a new trial on this ground need not show a probable likelihood of a different result on retrial. ***Id***. When, as here, a request for a discretionary reversal rests on the admission of evidence that was not objected to, courts have

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[5] Brooks also argues, for the first time in her reply brief, that the signed consent form is an impermissible exculpatory contract. We do not generally address issues raised for the first time in a reply brief and decline to do so here. *See* ***Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers of Racine***, 192 Wis. 2d 481, 492, 531 N.W.2d 419 (Ct. App. 1995).

[6] WISCONSIN STAT. § 752.35 provides:

> 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.

concluded the real controversy has not been fully tried when the jury had before it "evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted). Because we conclude the signed consent form was properly admitted, its admission did not prevent the real controversy from being fully tried.

¶14 As already noted, the consent form identified only those procedures Dr. Hennigan proposed to perform to address the diagnoses he had already made. The consent form addressed unforeseen conditions in this way:

> I recognize and understand that during the course of the operation or procedure(s) unforeseen conditions may necessitate additional, alternative or different procedures than those set forth previously herein. Because it is in my best interest, therefore, I further authorize, request and direct that [Dr. Hennigan] … perform such alternative, additional and different procedures as are, in his professional judgment, necessary and desirable, and in accordance with the best recognized medical procedure….

¶15 Brooks first argues that the signed consent form is irrelevant to the capsular release because the frozen shoulder was not diagnosed "during the course of the operation or procedure(s)," but before the start of "the operation." Therefore, according to Brooks, the signed consent form does not authorize any treatment for the frozen shoulder. In support of this argument, Brooks relies on the operating room nursing record. This record indicates a "surgery start time" of 7:54. Dr. Hennigan diagnosed frozen shoulder after Brooks was under general anesthesia but prior to this "surgery start time."

¶16 Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." WIS. STAT. § 904.01. Irrelevant evidence is inadmissible as a matter of law. § 904.02.

¶17 We will assume for purposes of argument that the consent form would be irrelevant if the phrase "during the course of the operation or procedure(s)" did not include anything that happened prior to the recorded "surgery start time." But the testimony at trial does not support this construction. Dr. Hennigan testified that he does not know how surgery start times for operating room nursing records are determined, but that he considers a procedure to begin when the patient is anesthetized. Dr. Guido Marra, one of BayCare's experts, testified that he considers a procedure to start during the physical examination when the patient is under anesthesia. Brooks did not present any contrary evidence to show that an operation or procedure does not begin until the "surgery start time" indicated in operating room nursing records.

¶18 Brooks next contends the signed consent form is a hospital form, and Dr. Hennigan cannot rely on the form as evidence that he obtained informed consent because a physician's duty under WIS. STAT. § 448.30 is non-delegable. Brooks points to the heading of the form, which reads "Aurora BayCare Medical Center," and claims that Dr. Hennigan is not a party to this form. Therefore, Brooks claims, Dr. Hennigan's use of this hospital form is an attempt to delegate his non-delegable duty pursuant to § 448.30.

¶19 Brooks is correct that WIS. STAT. § 448.30 by its terms imposes the obligation to obtain informed consent on physicians. The statute provides that "[a]ny physician who treats a patient shall inform the patient about the availability

of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments."[7] ***Id.*** We have held that this language means that the duty to obtain informed consent lies with the physician, and the hospital does not have a duty to obtain informed consent. ***Mathias v. St. Catherine's Hosp., Inc.***, 212 Wis. 2d 540, 549, 552, 569 N.W.2d 330 (Ct. App. 1997). However, this legal proposition does not make the consent form Brooks signed inadmissible.

¶20 The evidence shows that Dr. Hennigan had the discussion with Brooks on the procedures identified in this form, and this form authorizes him to perform these procedures, as well as additional ones as described in the

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[7] WISCONSIN STAT. § 448.30 provides:

> Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
>
> (1) Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
>
> (2) Detailed technical information that in all probability a patient would not understand.
>
> (3) Risks apparent or known to the patient.
>
> (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
>
> (5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
>
> (6) Information in cases where the patient is incapable of consenting.

There is no contention in this case that there was an emergency situation (fifth exception), and neither party discusses whether the sixth exception applies when a patient is under general anesthesia.

"unforeseen circumstances" paragraph. Although the name "Aurora BayCare Medical Center" appears in the heading of the form, so does the name "BayCare Clinic," of which Dr. Hennigan is an employee. The form is signed by Brooks and witnessed by "S. Schneider RN." Brooks provides no authority for the proposition that the physician himself or herself must obtain the patient's signature on a consent form.

¶21 The consent form Brooks signed is without doubt relevant to the issues before the jury. Accordingly, it was properly admitted and Brooks is not entitled to a new trial under WIS. STAT. § 752.35 on this ground.

II. Violation of WIS. STAT. § 448.30 as a Matter of Law

¶22 Brooks contends that as a matter of law Dr. Hennigan violated WIS. STAT. § 448.30 and therefore the circuit court should have changed the answer to special verdict question 3 from "no" to "yes." We understand her argument as follows: because it is undisputed that Dr. Hennigan had not discussed treatment for a frozen shoulder with her, this was a new diagnosis; and, because he had not yet begun to make any incision when he made this diagnosis, as a matter of law he was required to bring her out of the anesthesia and discuss the treatment alternatives for this new diagnosis before performing any procedure on her shoulder.[8] Brooks relies on ***Schreiber v. Physicians Insurance Co.***, 223 Wis. 2d

[8] Brooks frames this argument as supporting a change of the answer to special verdict question number 3. However, a motion to change an answer to a verdict question challenges the sufficiency of the evidence, as we discuss in the next section. ***Langreck v. Wisconsin Lawyers Mut. Ins. Co.***, 226 Wis. 2d 520, 523, 594 N.W.2d 818 (Ct. App 1999). Brooks' argument here appears more appropriately framed as a motion for judgment notwithstanding the verdict, which "does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law." ***Logterman v. Dawson***, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994). However, we address the substance of her argument without resolving the proper vehicle for raising it.

417, 588 N.W.2d 26 (1999), which held that a patient's express withdrawal of consent to a particular treatment is a substantial change of circumstances, which triggers a physician's duty to conduct a new informed consent discussion. According to Brooks, there is no dispute that the frozen shoulder is a substantial change in medical circumstances that requires a new informed consent discussion. We reject this argument for the following reasons.

¶23 First, Brooks' argument overlooks a more recent case on the meaning of "a substantial change in medical circumstances," ***Hageny v. Bodensteiner***, 2009 WI App 10, 316 Wis. 2d 240, 762 N.W.2d 452. There we gave more definition to this term, concluding that "a second informed consent discussion is not necessary unless the medical conditions change such that the patient faces risks not disclosed prior to the procedure." ***Id.***, ¶12. Here, none of the physicians were specifically asked at trial to compare the risks of capsular release with the risks Dr. Hennigan had already disclosed to Brooks regarding the planned procedures. However, their testimony and reasonable inferences from their testimony present conflicting views on this issue. The testimony of Brooks' expert, Dr. Peter Ihle, may be reasonably viewed as supporting the view that there were risks for treating the frozen shoulder surgery that had not been disclosed. In contrast, the testimony of the two defense experts, Dr. Marra and Dr. Dean Ziegler, reasonably supports the view that there were no risks associated with the capsular release that had not already been explained to Brooks by Dr. Hennigan in discussing the planned procedures.

¶24 Second, Brooks' argument ignores the fact that she was under general anesthesia and ignores the medical testimony from Drs. Ziegler and Marra that it was not appropriate medical care to bring her out of the anesthesia simply to discuss the frozen shoulder with her. True, Dr. Ihle disagreed with this testimony,

but this conflict was for the jury to resolve. It cannot be decided as a matter of law.

¶25 Third, Brooks' argument also ignores the consent form she signed and the testimony showing that the requirement in the form for treating an unforeseen condition is met: that the procedure to treat the unforeseen condition was in Dr. Hennigan's "professional judgment necessary and desirable, and in accordance with the best recognized medical procedure." Again, Dr. Ihle disputed this, and again, this conflict was for the jury to resolve. If Brooks means to argue that a form consenting to procedures for unforeseen conditions arising during surgery may not be considered as part of the informed consent analysis, she has not presented a developed argument to support this—beyond the arguments that we have addressed and rejected in the preceding section.

III. Sufficiency of Evidence

¶26 We understand Brooks' argument that she is entitled "as a matter of fact" to a change in the answer to special verdict question 3 to be a challenge to the sufficiency of the evidence to support that answer.[9] A motion to change a jury's answer challenges the sufficiency of the evidence to sustain the answer. ***Langreck v. Wisconsin Lawyers Mut. Ins. Co.*** 226 Wis. 2d 520, 594 N.W.2d 818 (Ct. App. 1999).

[9] Brooks also argues that she is entitled to a "yes" answer to questions 4 and 5, *see **supra*** ¶9 n.3. However, because the jury was instructed not to answer them if it answered "no" to question 3, and because we conclude there is sufficient evidence to support that answer, we do not address questions 4 and 5.

¶27 In reviewing the denial of a motion to change a jury's answer, we analyze the challenge to the sufficiency of the evidence in the context of the instructions given the jury. ***Kovalic v. DEC Int'l, Inc.***, 161 Wis. 2d 863, 873 n.7, 469 N.W.2d 224 (Ct. App. 1991). We view evidence in the light most favorable to the verdict and affirm the jury's answer if it is supported by any credible evidence. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659; WIS. STAT. § 805.14(1). We search the record for credible evidence that sustains the jury's verdict, and if the evidence gives rise to more than one reasonable inference, we accept the inference the jury reached. ***Id.***

¶28 The jury in this case was given the general instruction that "the party who wants you to answer a question yes has the burden of proof as to that question." With respect to special verdict question 3, the jury was instructed as follows:

> [A] doctor has the duty to provide his patient with information necessary to enable the patient to make an informed decision about a procedure and alternative choices of treatment. And if a doctor fails to perform this duty, he is negligent.[10] [Footnote added.]
>
> To meet this duty to inform his patient, the doctor must provide the patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject the medical treatment. 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 a medical treatment or procedure. The doctor must inform the patient whether the

[10] The informed consent instruction refers to negligence because a claim that a physician failed to disclose risks associated with a certain treatment is founded in a negligence theory of liability. *See* ***Bubb v. Brusky***, 2009 WI 91, ¶49, 321 Wis. 2d 1, 768 N.W.2d 903. However, in this opinion we use the term "negligence claim" to refer to Brooks' claim that Dr. Hennigan failed to conform to the standard of care in performing the capsular release, as distinguished from her claim that he failed to obtain informed consent before performing the procedure.

> treatment or procedure is ordinarily performed in the circumstances confronting the patient, whether alternative treatments or procedures approved by the medical profession are available, and what the outlook is for success or failure of each alternative treatment or procedure and the benefits and risks inherent in each alternative treatment or procedure. However, the [doctor's] duty to inform does not require disclosure of risks apparent or known to the patient.
>
> If Dr. Hennigan offers you an explanation as to why he did not provide information to Ms. Brooks, and if this explanation satisfies you that a reasonable person in her position would not have wanted to know that information, then Dr. Hennigan was not negligent.
>
> You may consider the signed consent form along with all the other evidence in this case when discussing your answer to question 3.

¶29 Viewing the evidence most favorably to the verdict in the context of these instructions, we conclude there is sufficient evidence to support the jury's "no" answer to the question: "Did Dr. Hennigan fail to disclose information about the surgery necessary for [Brooks] to make an informed decision?"

¶30 Dr. Hennigan's notes and testimony provided evidence that he discussed the risks and benefits of the subacromial decompression, the distal clavicle resection, and the rotator cuff repair. With respect to the capsular release, the following evidence supports a finding that a reasonable person in Brooks' position would not want to know additional information about treatment for the frozen shoulder. In the form Brooks signed, she gave Dr. Hennigan consent, if there were "unforeseen conditions" to "perform such alternative, additional and different procedures as are, in his professional judgment, necessary and desirable, and in accordance with the best recognized medical procedure." Dr. Hennigan's testimony and that of Drs. Zeigler and Marra supported a finding that performing the capsular release along with the planned procedures was necessary and

desirable in Dr. Hennigan's judgment and in accordance with the best medical procedure.

¶31 Specifically, Dr. Hennigan testified that, had he not surgically addressed all of the problems with Brooks' shoulder, his only options would have been to wake her up without conducting the surgery and fixing any of her shoulder problems, or to continue with the original surgery and tell her afterward that he had discovered an additional problem but did not address it because he did not have specific consent for the additional procedure. In his view, not addressing all of the problems would likely have led to an additional surgery and a two-to-three year recovery process.

¶32 Dr. Ziegler testified that there is a "downside" to stopping the surgery and waking the patient due to the inherent risks of general anesthesia. When the unforeseen condition is "[as here] something that we could take care of … and isn't a huge alteration from what we were doing," it "is going to be much worse for [the patient]" to stop the surgery.

¶33 Dr. Marra testified that a surgeon should not simply wake up a patient under general anesthesia to inform the patient of an unforeseen problem, but should perform a risk/benefit analysis. The addition of a capsular release in the context of arthroscopic surgery does not "add[] additional significant morbidity," meaning adverse risks. On the other hand, there are risks in having a second induction of the anesthetic because there are potential risks from the anesthetic, such as possible strokes, cardiac events, or heart problems. These risks are low but significant.

¶34 The jury could reasonably conclude from this testimony that a reasonable patient in Brooks' position would not want a doctor to wake him or her

up in order to provide information on the capsular release but, instead, would want the doctor to perform that procedure along with the planned procedures.

¶35 It is true that Dr. Ihle disagreed with the defense witnesses, testifying that, when Dr. Hennigan diagnosed a frozen shoulder, he should have performed no procedure—not the capsular release nor the planned procedures—but should have woken Brooks up and discussed the treatment options for frozen shoulder. In Dr. Ihle's view, nonsurgical treatment was preferable and Brooks should have been advised of this. However the jury was free to credit the contrary testimony of the defense witnesses.

IV. Exclusion of Dr. Orwin's Testimony on the Standard of Care

¶36 Brooks contends the circuit court erroneously exercised its discretion in deciding that the late disclosure of Dr. Orwin, Brooks' treating physician, as an expert witness warranted precluding him from testifying on the standard of care for the negligence claim. We disagree and conclude the circuit court properly exercised its discretion.

¶37 The factual background on this issue is as follows. The deadline under the scheduling order for Brooks to disclose the names and addresses of expert witnesses was December 1, 2008. On November 22, 2008, Brooks submitted "Plaintiff's List of Expert Witnesses" in which she identified Dr. Orwin as "treating physician."[11] There were other physicians listed without this

[11] A treating physician is a fact witness who testifies regarding his or her own observations regarding the care and treatment provided to the patient. *See* ***Glenn v. Plante***, 2004 WI 24, ¶27, 269 Wis. 2d 575, 676 N.W.2d 413. In contrast, expert witnesses render opinions on the standard of care and treatment provided to the patient by another physician. ***Id.*** *See also* ***Burnett v. Alt***, 224 Wis. 2d 72, 83, 589 N.W.2d 21 (1999).

identification, including Dr. Ihle. On December 3, 2008, BayCare served interrogatories on Brooks requesting identification of any experts who would be giving opinion testimony at trial and to specify their opinions on the standard of care. Brooks responded by identifying only Dr. Ihle and a vocational expert and attaching their reports.

¶38 Dr. Orwin was deposed in July 2009. At the beginning of his deposition Brooks' counsel stated that Dr. Orwin "was designated as an expert in terms of his care and treatment and in that capacity only, not on standard of care." Approximately three months later—two weeks before the close of discovery, and one month before trial—BayCare received a report in which Dr. Orwin offered his opinions on the standard of care and causation. This report had been recently prepared. Dr. Orwin had presented no report at his deposition, although the notice of deposition had requested that he produce any reports or other written materials he had authored regarding his opinions.

¶39 Upon receipt of Dr. Orwin's report, BayCare moved to bar Dr. Orwin's testimony as an expert, arguing that BayCare had had no notice that Brooks intended to call Dr. Orwin as a standard of care expert and had deposed him only as a treating physician.

¶40 At the hearing on the motion, Brooks' counsel acknowledged that Dr. Orwin was named only as a witness who was to testify on his treatment of Brooks and this is what he told defense counsel at the deposition. He stated that the late submission of Dr. Orwin's expert report was prompted by an interrogatory response from BayCare indicating an opinion that Dr. Orwin's surgeries had nothing to do with Dr. Hennigan's surgery. According to Brooks' counsel, when

he spoke to Dr. Orwin about this opinion, they discussed Dr. Orwin testifying as an expert and decided that he would.

¶41 The circuit court granted the motion to bar Dr. Orwin's testimony as a standard of care expert. The court determined that Brooks had made clear to BayCare that Dr. Orwin was going to testify only as a treating physician, not a standard of care expert. The court viewed Brooks' change in that position as a violation of the scheduling order and concluded that Brooks had not provided a good reason for this violation. The court reasoned that the need for an expert opinion on causation should have been no surprise to Brooks and, in any event, did not explain why Brooks decided to seek that opinion from the treating physician, a fact witness, rather than from the doctor who was going to testify as an expert on the standard of care. The court considered it significant that, if Dr. Orwin did not testify as an expert, Brooks still had an expert witness to testify on standard of care. Finally, the court viewed it as unrealistic and unfair to expect BayCare to be able to prepare for and depose Dr. Orwin a second time and then prepare its experts in response, all on the timetable necessitated by the pending trial date.

¶42 In granting the motion, the circuit court rejected Brooks' argument that BayCare asked some standard of care questions at Dr. Orwin's deposition and could have asked more because Dr. Orwin said he would answer anything. The court viewed it as unfair to expect BayCare to have treated Dr. Orwin as an expert witness in view of Brooks' counsel's statements that he was not.

¶43 Circuit courts have inherent and statutory power to control their dockets. *See* ***Hefty v. Strickhouser***, 2008 WI 96, ¶31, 312 Wis. 2d 530, 752 N.W.2d 820; WIS. STAT. § 802.10(3). Consistent with this power, the court "has broad discretion in deciding how to respond to untimely motions to amend

scheduling orders because that broad discretion is essential to the court's ability to manage its calendar."[12] ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶29, 265 Wis. 2d 703, 666 N.W.2d 38. This broad discretion includes the ability to impose sanctions for violations of scheduling orders. § 802.10(7). The decision to impose sanctions and the decision of which sanctions to impose are also within a circuit court's discretion. ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. A circuit court has properly exercised its discretion if it "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** (citation omitted).

¶44 We conclude the circuit court applied the correct law to the relevant facts and reached a reasonable result. The court reasonably concluded that Brooks did not provide a good reason for deciding, so late in the process, to use Dr. Orwin as an expert. The court took into account appropriate factors, including prejudice to both sides. Significantly, Brooks did not contend that Dr. Orwin could testify as an expert on a topic on which Dr. Ihle could not testify.

¶45 Relying on ***Jenzake v. City of Brookfield***, 108 Wis. 2d 537, 322 N.W.2d 516 (Ct. App. 1982), Brooks contends the circuit court erroneously exercised its discretion in excluding Dr. Orwin's expert testimony because a continuance was the appropriate remedy and because the court did not require BayCare to show that it was unfairly surprised by the testimony. These were

[12] BayCare argues that the excusable neglect standard set forth in WIS. STAT. § 801.15 governs motions to enlarge scheduling order deadlines. We rejected this argument in ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶19, 317 Wis. 2d 460, 767 N.W.2d 272.

factors we considered in ***Jenzake*** in upholding that circuit court's exercise of discretion to allow an expert to testify despite a discovery violation. ***Id.*** at 543-44.

¶46 We do not agree that ***Jenzake*** requires the conclusion that the circuit court here erroneously exercised its discretion. In ***Jenzake***, we held that a circuit court acted reasonably in allowing an expert to testify and in granting a continuance to mitigate the prejudice to the other party. ***Id.*** at 544-45. A holding that a circuit court in one case acted reasonably, based on particular facts, is not authority for the proposition that a circuit court in a different case acts unreasonably, even if the facts are similar. In addition, the facts here are easily distinguished from those in ***Jenzake***. The circuit court here found that BayCare would be prejudiced if the testimony was not excluded, that Brooks already had one expert witness, and that a scheduling order was involved. Moreover, we do not agree with Brooks that the court here did not find that BayCare was unfairly surprised. The court did make this finding.

V. Testimony Regarding What Other Physicians Did in Similar Circumstances

¶47 Brooks challenges the circuit court's rulings allowing testimony on what other physicians did when faced with an unanticipated finding of frozen shoulder while performing other procedures on a shoulder. The challenged testimony falls into two categories: Dr. Marra's and Dr. Ziegler's testimony that they had on occasion performed a capsular release in the same circumstances as had Dr. Hennigan, and Dr. Hennigan's testimony that he had assisted other physicians performing a capsular release in similar circumstances.

¶48 The circuit court's evidentiary rulings on both points are discretionary decisions. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 (generally decisions on the admissibility of evidence are

committed to the circuit court's discretion). We conclude the circuit court properly exercised its discretion in making both rulings.

¶49 With respect to the testimony of Drs. Ziegler and Marra, the circuit court allowed this testimony to rebut testimony from Brooks and her husband that, after the surgery, Dr. Hennigan told them that the surgery was a "crapshoot" and none of his colleagues would have agreed with him. The circuit court had advised Brooks at a pretrial hearing that, if she and her husband testified in this way, Drs. Ziegler and Marra would be allowed to testify that in similar circumstances they had done what Dr. Hennigan did. The court reasonably decided that it would be unfair to BayCare to deprive it of an opportunity to show the jury that Dr. Hennigan would not have said what was attributed to him because it was not true.

¶50 Brooks asserts that standard of care experts are not allowed to testify regarding what they personally would have done in the same situation. She relies on ***Johnson v. Agoncillo***, 183 Wis. 2d 143, 515 N.W.2d 508 (Ct. App. 1994), and ***Zintek v. Perchik***, 163 Wis. 2d 439, 471 N.W.2d 522 (Ct. App. 1991). In ***Zintek***, we held that evidence that another physician might have acted differently and that there were alternate procedures available did not establish negligence. ***Zintek***, 163 Wis. 2d at 457. In ***Johnson***, we upheld a ruling excluding an expert's answer to the question how he would have treated the plaintiff if she were his wife because, the circuit court had reasoned, there was no foundation that made his practice material to the standard of the average physician. ***Johnson***, 183 Wis. 2d at 153-54. Neither case supports the proposition that it was unreasonable for the court here to admit the experts' testimony on what they had done for the limited purpose of showing that Dr. Hennigan did not make the statement attributed to him.

¶51 With respect to Dr. Hennigan's challenged testimony, the circuit court allowed it for the same purpose—to rebut the Brookses' testimony that Dr. Hennigan said the surgery was a "crapshoot" and none of his colleagues would have agreed with him. Dr. Hennigan testified that, when he was a fellow with Drs. Gerald Williams and Joseph Iannotti, he assisted them in performing capsular release surgeries in circumstances similar to Brooks' situation. The court overruled the relevance objection. At the hearing on post-trial motions, the court explained that, while this testimony might otherwise be irrelevant, it was relevant given the Brookses' testimony, which they could have chosen not to present. The court also concluded the probative value outweighed any prejudice. *See* WIS. STAT. § 904.03. For the reasons we have already discussed with respect to the testimony of Drs. Ziegler and Marra, we conclude the court acted reasonably in permitting Dr. Hennigan's testimony.

¶52 Brooks also raises a hearsay objection to Dr. Hennigan's testimony that he observed other surgeons performing capsular releases in similar circumstances. Brooks did not make this objection during the trial. She did raise it in her motions after verdict, but the court did not address it. Because Brooks did not make this objection during the trial, she has forfeited the right to raise it on appeal. *See* WIS. STAT. § 901.03(1)(a). However, we address it briefly to show that it has no merit.

¶53 Hearsay is an out-of-court statement "offered into evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). A statement can be nonverbal conduct "if it is intended by the person as an assertion." § 908.01(1). Brooks contends that Dr. Hennigan's testimony attributes nonverbal assertions to Drs. Williams and Iannotti. Brooks contends that BayCare intended this testimony to serve as assertions that Drs. Williams and Iannotti would have behaved in the

same way as did Dr. Hennigan. However, for purposes of this hearsay exception, it is irrelevant what BayCare intended in eliciting this testimony. The nonverbal conduct must be intended as an assertion *by the speaker* and it is the burden of the party claiming hearsay on this ground to show "that a particular expression of fact, opinion, or condition was intended by the speaker." ***State v. Kutz***, 2003 WI App 205, ¶46, 267 Wis. 2d 531, 671 N.W.2d 660. Brooks has presented no evidence and makes no argument on this point.

CONCLUSION

¶54 We affirm the circuit court's denial of the motions after verdict, and we affirm the judgment of dismissal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.