COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 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. 2010AP403 **Cir. Ct. No. 2007CV130**

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

HOLLY TESKE, PERSONALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF GARY TESKE,

PLAINTIFF-APPELLANT,

V.

WAUSAU HEART & LUNG SURGEONS, S.C., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, JOHN A. JOHNKOSKI, M.D. AND WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Holly Teske, personally and as special administrator of the Estate of Gary Teske, appeals a judgment and order denying

her pretrial evidentiary motions, post-trial motions for a new trial, and her motion to supplement the appellate record. Teske argues the circuit court erred by prohibiting her from: (1) introducing insurance policy evidence; (2) using defense counsel's deposition questions and lack of objections as admissions by a party opponent; and (3) supplementing the record with a video not used at trial. Teske also asserts she is entitled to a new trial in the interest of justice because the real controversy has not been tried. We affirm.

BACKGROUND

¶2 Dr. John Johnkoski performed coronary artery bypass surgery on Gary. David Nash, a physician's assistant, assisted with the surgery. Nash was responsible for removing a vein from Gary's leg to be used for the bypass. Once removed, a vein contains "side branches" that must be sealed with surgical clips before the vein can be used for the bypass. Usually, the physician's assistant cuts and clips all the side branches and the surgeon inspects the vein to ensure all the side branches are sealed. Occasionally, an assistant will encounter a complicated side branch, and in those situations, the surgeon will cut and clip the branch.

¶3 Johnkoski testified no complications arose during surgery and following surgery Gary's prognosis was good. However, a few hours after surgery, Gary experienced complications and died while Johnkoski performed emergency surgery. An autopsy revealed the seal on one of the clipped side branch openings failed, causing internal bleeding.

¶4 Teske brought suit against Johnkoski for negligence and wrongful death. Prior to trial, Teske deposed Johnkoski and Nash on two occasions. During their initial depositions, Teske asserts Johnkoski and Nash testified Nash cut and clipped the leaking side branch. However, during their subsequent

depositions, both Johnkoski and Nash testified that Johnkoski had cut and clipped the leaking side branch because it was an anatomical variation known as a "dual system."[1]

¶5 Teske argued before the circuit court that she believed Johnkoski and Nash changed their testimony for the benefit of their insurance carrier. Nash and Johnkoski were covered by separate $1 million insurance policies. If Nash had cut and clipped the leaking side branch, both policies would be implicated; however, if Johnkoski cut and clipped the branch, only Johnkoski's policy would be implicated. Although Teske never explored this theory in any form of discovery, she moved the court for an order allowing her to introduce evidence of the insurance ramifications in order to show the jury the perceived change in testimony was a financially motivated defense conspiracy.

¶6 The circuit court denied the motion, reasoning Teske's theory was speculative and lacked foundation. The court also determined that pursuant to WIS. STAT. § 904.03,[2] the probative value of the insurance information would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, would cause an undue delay, and be a waste of time.

¶7 Additionally, Teske moved to introduce defense counsel's deposition questions and instances where defense counsel did not object to Teske's questions as evidence that Johnkoski and Nash changed their stories.

[1] According to Nash, a dual system is a vein that divides for a short distance and then comes back together.

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

Teske argued defense counsel's questions and silence constituted admissions by party opponents under WIS. STAT. § 908.01(4)(b).

¶8 The circuit court denied Teske's motion reasoning counsel's deposition questions and lack of objections were not "statements" as defined by WIS. STAT. § 908.01. The court also determined the case law holding an attorney's action constituted an admission was distinguishable from the present situation because those cases involved "pleadings by an attorney, letters by an attorney, or … a statement by a former attorney outside of court and not in a deposition-type format." The court concluded that in those cases the attorneys made a "conscious attempt … to set forth a key issue of fact," whereas in this situation, the attorneys were engaged in deposition discovery. The circuit court found that "to allow questions that may have been asked by a party's attorney or the silence of that attorney to be an admission by that party opponent would deter rigorous or legitimate advocacy" and thus adversely affect the discovery process and the attorney-client privilege. The court, however, informed Teske that she was free to attack Johnkoski's and Nash's credibility with any perceived inconsistencies and examine their reasons for the change in testimony.

¶9 At trial, the jury found Johnkoski not negligent in his care and treatment of Gary. Teske moved for a new trial, alleging the court erred by denying her pretrial motions to introduce insurance evidence and evidence of defense counsel's deposition questions and silence. She also moved for a new trial in the interest of justice. The court denied her motions. Teske then moved to supplement the record with a videotape of Johnkoski's deposition. Teske asserted it would assist this court in understanding the surgical aspect of this case and allow the appellate court to determine there was a change in testimony. The circuit court denied Teske's motion reasoning in part that the video was not introduced at trial,

and by withdrawing her request to use the video at trial, the court did not have an opportunity to rule on Johnkoski's objections to the video.

DISCUSSION

¶10 On appeal, Teske asserts the circuit court erred by excluding evidence of the insurance policies and defense counsel's deposition questions and lack of objections, and refusing to supplement the record with a video not introduced at trial. Teske also argues she is entitled to a new trial in the interest of justice because the real controversy has not been tried.

I. Admissibility of Evidence

¶11 "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will affirm the circuit court's exercise of discretion if it applied the correct law to the facts of the record and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Id.*** "We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision." ***Id.***, ¶29.

Insurance Evidence

¶12 Teske argues the circuit court erred by excluding the insurance policy evidence. The court denied Teske's motion because she failed to provide any foundational support for her "insurance motive" theory and her intended use was unduly prejudicial, would be confusing to the jury, cause an undue delay, and be a waste of time. At the pretrial motion hearing, the court reasoned her theory was speculative:

> There's nothing in the record [showing] that the defendant's witness[es] knew or should have known the insurance ramifications if they change[d] their version of what happened or that they knew or should have known the financial impact to themselves or to the corporation if they change[d] their version of what happened.

The court also determined the insurance evidence's probative value would be substantially outweighed by its prejudicial effect because:

> Fundamentally, insurance coverage is not a factor that the jury should consider. I do understand the argument that an instruction could be drafted to indicate to the jury, this is only to be considered from a factual standpoint.
>
> Nevertheless, I believe that this issue, and the way it would be presented, could be confusing to the jury. And in terms of undue delay or waste of time, this particularly goes to the financial impact of the defendants.
>
> Would this go to Dr. Johnkoski? Would it go to Mr. Nash, would it go to both of them? Would it go to the corporation and how would this financial impact … be addressed at trial?
>
> Would it be just insurance premium increases which then would bring insurance back into the issue, or would it be salaries or some other financial impact[?]
>
> This has the potential of becoming a battle of accountants, financial consultants, or insurance consultants.
>
> Where this will all end is a question that I believe addresses the undue delay or wasted time.

At the post-trial motion hearing, the court affirmed its previous ruling for the same reasons and noted, "this theory was not … pursued by [Teske] during discovery."

¶13 On appeal, Teske argues the evidence was relevant to prove the "motive" for the change in stories and it was not unduly prejudicial because the

defense "created the second version [of testimony]."[3] However, she fails to appreciate our standard of review. As stated above, we will affirm the circuit court's exercise of discretion if it applied the correct law to the facts and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *See* ***Martindale***, 246 Wis. 2d 67, ¶28.

¶14 Here, the circuit court excluded the evidence because it lacked foundation, was unduly prejudicial, would be confusing to the jury, cause an undue delay, and be a waste of time. After reviewing the record, we conclude the circuit court did not erroneously exercise its discretion—it considered the proper legal standards, demonstrated a rational process, and reached a reasonable conclusion. *See* ***State v. Whitaker***, 167 Wis. 2d 247, 263, 481 N.W.2d 649 (Ct. App. 1992) ("A trial court may not admit evidence under [WIS. STAT. §] 901.04(1), … unless it is satisfied by a preponderance of the evidence that a sufficient foundation has been laid."); *see also* WIS. STAT. § 904.03 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time ...."). We conclude there was no foundation for the proffered evidence. The time to have raised this defense and lay a foundation for this speculative theory was during the second depositions or at subsequent discovery over the months before trial.

[3] The circuit court refused to conclude there was a change in testimony because "the Court is not the trier of fact to determine whether or not there are two versions or if there is one version. … That is up to the jury to decide."

Admissions by Party Opponents

¶15 Teske next argues the circuit court erred by excluding defense counsel's deposition questions and lack of objections as admissions by party opponents. She argues the evidence proves Johnkoski and Nash changed their stories.

¶16 The court concluded the questions and silence were not "statements" under WIS. STAT. § 908.01. Section 908.01 defines a statement as "(a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion." Utilizing Black's Law Dictionary and Webster's New College Dictionary to define "assertion,"[4] the court concluded defense counsel's deposition questions and silence did not rise to the level of a "statement" under § 908.01.

¶17 The court continued its analysis and concluded the case law cited by Teske in support of her motion was distinguishable. The court reasoned:

> The plaintiff has cited many cases to support [her] position, but those cases deal[] with pleadings by an attorney, letters by an attorney or, in one particular case, a statement by a former attorney outside of court and not in a deposition-type format, all of these cases … involve a very conscious attempt by an attorney to set forth a key issue of fact.

Finally, the court determined there would be serious public policy implications to the discovery process and the attorney-client relationship if counsel's deposition questions and silence constituted an admission by a party opponent.

[4] Black's Law Dictionary defines "assert" as "to state as true; declare; maintain." BLACK'S LAW DICTIONARY 116 (6th ed. 1990).

¶18 On appeal, Teske fails to present any meaningful analysis explaining how the court erred. Her argument is undeveloped and fails to appreciate the deference given to the circuit court on evidentiary admissions. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may reject arguments inadequately briefed); *see also* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (appellate court will not address arguments raised for first time in reply brief). However, from our review of the record, we are satisfied the circuit court examined the applicable law, demonstrated a rational reasoning process, and reached a reasonable conclusion. Again we conclude Teske failed to develop the necessary foundation for the court to even consider her theory.

Deposition Video

¶19 Teske asserts the trial court erred by refusing to supplement the record with a video of Johnkoski's first deposition. Teske contends the video has two purposes—first, it shows us that Johnkoski in fact changed his testimony; and second, it can assist us in understanding the surgical process.

¶20 The circuit court denied Teske's motion, reasoning: (1) the video was not introduced at trial; (2) because Teske withdrew her request to introduce the video at trial, the court did not have the opportunity to rule on Johnkoski's objections; (3) the record already contained magnified photographs that the jury relied on to understand the surgical procedure; and (4) granting Teske's motion

would open a floodgate of supplemental requests. We conclude the circuit court appropriately exercised its discretion.[5]

II. New Trial

¶21 Finally, Teske argues she is entitled to a new trial in the interest of justice because the real controversy has not been tried. Although we may grant a new trial when the real controversy has not been tried, our discretionary reversal power is formidable. ***State v. Watkins***, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244. We exercise it sparingly and with great caution. *See* ***id.***

¶22 Teske contends the real controversy has not been tried because the jury was erroneously deprived of the opportunity to consider both the insurance evidence and defense counsel's deposition questions and silence. She reasons that without this evidence the jury could not determine who cut the side branch and which story was true. Because we concluded the circuit court did not err by excluding this evidence, the jury was not deprived of any evidence needed for its determination. Therefore, discretionary reversal is inappropriate.

¶23 Additionally, it appears Teske may be asserting she is entitled to a new trial in the interest of justice because her expert was more credible than Johnkoski's expert. Although we may grant a new trial in the interest of justice if the verdict is contrary to the weight of evidence, *see* ***Kubichek v. Kotecki***, 2011 WI App 32, ¶29, 796 N.W.2d 858, Teske merely offers limited facts, which she

[5] To the extent Teske asks us to view the video so that we can make a factual determination of whether Johnkoski changed his testimony, we note that fact finding is not an appellate court function. *See* ***Bulik v. Arrow Realty, Inc.***, 154 Wis. 2d 355, 361, 453 N.W.2d 173 (Ct. App. 1990).

contends show her expert was more credible than Johnkoski's. Credibility determinations, however, are for the jury. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996).

¶24 Moreover, Johnkoski responds to Teske's argument with a detailed recitation of all the evidence supporting the jury's verdict. In her reply brief, Teske fails to respond to Johnkoski's assertion that the evidence sufficiently supports the verdict. *See* ***Madison Teachers, Inc. v. Madison Metro. Sch. Dist.***, 197 Wis. 2d 731, 751, 541 N.W.2d 786 (Ct. App. 1995) (proposition asserted by respondent on appeal and not disputed by appellant's reply is taken as admitted).

By the Court.—Judgment and order affirmed.

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