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DISTRICT IV

March 20, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP315 Gloria J. Anderson v. Bohdan K. Wasiljew, M.D. (L.C. # 2013CV623)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gloria Anderson appeals an order denying her motion for a new trial in this medical malpractice action. Anderson argues on appeal that the circuit court erred by failing to make a specific ruling on her motion to "exempt" a medical expert from testifying under WIS. STAT. § 908.04(1)(a), and by barring Anderson from testifying about that expert's out-of-court statements. Based upon our review of the briefs and the record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

Gloria Anderson sued Dr. Bohdan Wasiljew for medical malpractice, alleging that she suffered injuries as a result of surgery negligently performed by Wasiljew. The complaint alleged that Anderson's injuries required several corrective surgeries, which were performed by Dr. Gregory Kennedy. Kennedy declined to serve as an expert witness, asserting the privilege recognized in ***Burnett v. Alt***, 224 Wis. 2d 72, 589 N.W.2d 21 (1999).[2] Anderson moved the circuit court for an order "exempting" Kennedy from testifying under WIS. STAT. § 908.04(1)(a), so that Anderson could give testimony that would not be excluded as hearsay concerning alleged negative statements that Kennedy had made to her regarding Wasiljew's treatment of her. The court denied Anderson's request to testify as to Kennedy's alleged statements. The case proceeded to trial, and the jury returned a verdict in favor of Wasiljew and his insurer. Anderson moved for a new trial, and the circuit court denied the motion after a hearing. Anderson now appeals.

Anderson argues on appeal that the circuit court erred by failing to make a specific ruling on the pretrial motion she filed to "exempt" Kennedy from testifying. We reject this argument because the record shows that the court did, in fact, grant that motion. While the court may not have explicitly uttered the words "motion granted," the court stated at the final pretrial

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

[2] In ***Burnett v. Alt***, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999), the Wisconsin Supreme Court held that a physician who has asserted his or her privilege not to testify can be required to give expert testimony only if all of the following factors are present: (1) there are compelling circumstances present; (2) the party seeking the testimony has presented a plan for reasonable compensation of the expert; and (3) the expert will not be required to do additional preparation for the testimony.

conference that Kennedy was "not going to be providing his opinion testimony at trial" and acknowledged that Kennedy had a right to invoke the privilege under ***Alt***. The court then went on to consider the separate hearsay issue: whether the exception to the hearsay rule for statements of recent perception applied under the circumstances, given that Kennedy was unavailable to testify regarding his opinion. *See* WIS. STAT. § 908.045(2).

Anderson argues that the circuit court erred in barring her proffered testimony about Kennedy's statements regarding Wasiljew's treatment of her, and that the statements should have been admissible under WIS. STAT. § 908.045(2). We disagree. The hearsay exception for a statement of recent perception under § 908.045(2) applies to a statement that "narrates, describes, or explains an event or condition recently perceived by the declarant." The circuit court concluded that Kennedy's alleged statements as proffered by Anderson did not fit within the exception under § 908.045(2) because they did not explain a condition or event but, rather, gave a medical opinion. On appeal, Anderson fails to cite any precedent for applying the hearsay exception under § 908.045(2) to a statement of opinion by an expert. We are satisfied that the court did not erroneously exercise its discretion in concluding that Kennedy's statements did not qualify as statements of recent perception. *See* ***State v. Weed***, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485 (circuit court's decision regarding the admissibility of a hearsay statement is within the discretion of the circuit court, and will not be reversed absent an erroneous exercise of discretion).

Moreover, even if Kennedy's statements could be characterized as statements of recent perception, we are satisfied that the circuit court properly concluded the statements lacked the degree of trustworthiness required for admission. *See* ***Weed***, 263 Wis. 2d 434, ¶24 (discussing how, as a relatively recent and not "firmly rooted" hearsay exception, a statement of recent

perception must be supported by particularized guarantees of trustworthiness). Expert medical testimony must be offered to a reasonable degree of medical probability in order to be admissible. *See* ***Pucci v. Rausch***, 51 Wis. 2d 513, 519, 187 N.W.2d 138 (1971). As the circuit court explained on the record, Anderson could not testify as to whether Kennedy's statements met that standard. Therefore, the court properly excluded Anderson's proffered testimony. Because we conclude that the evidence was properly excluded, we reject Anderson's argument that she is entitled to a new trial.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals