COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2162 **Cir. Ct. No. 2005CV2966**

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

ARTHUR F. YOUNG,

PLAINTIFF-APPELLANT,

V.

DENIS J. TONSFELDT, M.D. AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Arthur F. Young appeals from the judgment after a jury trial, dismissing his claims against Denis J. Tonsfeldt, M.D., and Physicians Insurance Company of Wisconsin, Inc., in this medical malpractice action for the death of his wife. Young argues that the circuit court erred when it would not

allow him to introduce the deposition testimony of another doctor, Dr. Terry A. Zarling, and when it denied his motion for a mistrial. We conclude that even assuming the circuit court erred when it would not allow Young to read in Dr. Zarling's deposition testimony, the error was harmless, and that the circuit court did not err when it denied the motion for a mistrial. Consequently, we affirm.

¶2 In 2002, Young's wife, Janet Young, went to the emergency department at Waukesha Memorial Hospital with symptoms that included heart palpatations. This was on a Friday. She was examined in the emergency room by Dr. Tonsfeldt. Dr. Tonsfeldt also learned that Mrs. Young had an appointment with a cardiologist scheduled for the following Tuesday. Mrs. Young had an electrocardiogram (EKG). Dr. Tonsfeldt then spoke with the on-call cardiologist, Dr. Zarling. Dr. Tonsfeldt then sent Mrs. Young home with instructions to call Dr. Zarling in the morning because he was ordering another EKG for her. This was the only time Dr. Tonsfeldt saw Mrs. Young. Mrs. Young had the EKG the next morning, Saturday, and spoke with Dr. Zarling by phone that afternoon. Mrs. Young died on Sunday from a heart abnormality.

¶3 Young eventually brought this action against Dr. Tonsfeldt and Dr. Zarling alleging that they were negligent in the care and treatment they provided to Mrs. Young when she came to the emergency room, resulting in her death. Young dismissed Dr. Zarling from the case before trial because Dr. Zarling's deposition testimony established that Dr. Zarling was not a consultant for Mrs. Young's emergency room visit. Young contended that Dr. Tonsfeldt was negligent because he did not appropriately respond to the symptoms Mrs. Young presented in the emergency room on that Friday night.

¶4 In his deposition, Dr. Zarling testified that his discussion with Dr. Tonsfeldt while Mrs. Young was in the hospital was a "curbside," which is "a discussion to facilitate patient care." During cross-examination, Dr. Tonsfeldt testified that his purpose in calling Dr. Zarling was to use Dr. Zarling's expertise so that between the two of them they could decide whether to admit Mrs. Young to the hospital or send her home. Young's counsel asked Dr. Tonsfeldt if he had consulted with Dr. Zarling. Dr. Tonsfeldt testified that it was not a formal consult, because that "involves the consultant coming and getting their own history, doing their own physical exam, examining the same data and then coming to their conclusions." Dr. Tonsfeldt denied that the conversation was "a curbside," but rather characterized it as "calling for advice and input from [the] specialist."

¶5 Counsel then attempted to read in Dr. Zarling's deposition testimony in which Dr. Zarling said the phone call was "a curbside." Defense counsel objected. The court found that the testimony was hearsay because it was being offered for the truth of the matter asserted, that Dr. Zarling was not being called to testify, and that Young's counsel was not asking questions about the testimony, but rather just wanted to read it into the record. The court would not allow Young's counsel to read the deposition testimony.

¶6 Young argues that the circuit court erred when it would not allow his counsel to read Dr. Zarling's deposition testimony into evidence during the cross-examination of Dr. Tonsfeldt. He argues that under WIS. STAT. § 804.07(1)(c)2. (2007-08),[1] the deposition testimony of a medical expert can be read at trial. We

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

do not reach the question of whether the testimony was admissible under § 804.07, but we assume without deciding that it was admissible. We affirm, however, on the basis that the court's decision not to allow counsel to read the deposition testimony was harmless error. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on grounds different than those relied on by the trial court).

¶7 The standard for harmless error is whether there is a reasonable possibility that the error contributed to the outcome of the action. ***Martindale v. Ripp***, 2001 WI 113, ¶71, 246 Wis. 2d 67, 629 N.W.2d 698. We are not convinced that the testimony that was excluded made a difference in the outcome of the case. First, the testimony that counsel wanted to read in was not expert testimony but testimony about the facts. More importantly, however, we conclude that the factual dispute was minimally relevant to the outcome of the case. No one disputes that after talking with Dr. Zarling, Dr. Tonsfeldt told Mrs. Young to come in the next day for an EKG, and she did. She talked to Dr. Zarling the next afternoon after she had the EKG. Dr. Tonsfeldt, as the emergency room doctor, was no longer involved at this point: Mrs. Young was being cared for by others at the time she died. Consequently, the dispute about how to characterize the discussion the two doctors had on Friday night was hardly determinative of the ultimate question of whether Dr. Tonsfeldt's negligence caused Mrs. Young's death.

¶8 Young also argues that the circuit court erred when it denied his motion for a mistrial. Young argues that Dr. Tonsfeldt's counsel improperly argued facts that were not in evidence during closing argument. Specifically, Young argues that counsel misstated the cause of Mrs. Young's death, and said that Dr. Zarling "took over" Mrs. Young's care. The circuit court denied the

motion, finding that it was argument, and there was evidence on both sides of the issue. We agree.

¶9 The decision whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The trial court must consider whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. ***Id.*** The parties disputed throughout what actually caused Mrs. Young's death. During closing, Dr. Tonsfeldt's counsel made an argument based on the evidence that supported his position. This was not error. Further, while counsel's statement that Dr. Zarling "took over" Mrs. Young's care may have been a slight misstatement of the facts, this also was completely harmless. Counsel's point, that Dr. Tonsfeldt was no longer involved in caring for Mrs. Young, was supported by the evidence. We conclude that the circuit court properly exercised its discretion when it denied Young's motion for a mistrial based on an improper closing argument. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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