IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CAMERON JAE KINGSLEY, a single man, *Plaintiff/Appellee*,

v.

G. BURT WEBB, M.D., and JANE DOE WEBB, husband and wife; GEORGE H. WEBB, M.D., and JANE DOE WEBB, husband and wife; SCOTTSDALE OB & GYN SPECIALISTS, P.C., an Arizona corporation dba SCOTTSDALE CENTER FOR WOMEN'S HEALTH; BURT WEBB, M.D., P.C., a business entity, *Defendants/Appellees*.

SCOTTSDALE HEALTHCARE CORP., an Arizona corporation dba SCOTTSDALE HEALTHCARE OSBORN MEDICAL CENTER aka SCOTTSDALE MEMORIAL HOSPITAL—OSBORN, *Defendant/Appellant*.

No. 1 CA-CV 15-0140
FILED 6-30-2016

Appeal from the Superior Court in Maricopa County
No. CV2010-016035
The Honorable Mark H. Brain, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Samuel A. Thumma joined.

H O W E, Judge:

¶1 Scottsdale Healthcare Corp. ("Hospital") appeals from orders granting a mistrial, assessing jury fees and a special jury reimbursement against it, and sanctioning it by imposing attorneys' fees and costs associated with the mistrial in favor of Cameron J. Kingsley ("Kingsley") and G. Burt Webb, M.D., and Scottsdale OB & Gyn Specialists (collectively, "Dr. Webb"). For the following reasons, we vacate the orders assessing jury fees and a special juror reimbursement against the Hospital and sanctioning the Hospital with attorneys' fees and costs and remand for proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 In 2010, Kingsley brought a medical malpractice action against the Hospital and Dr. Webb, the obstetrician who delivered Kingsley, for alleged permanent injury suffered after the use of forceps during Kingsley's birth in 1990. Kingsley's mother ("Mother") testified at deposition that the day after the delivery, Dr. Webb allegedly apologized. Mother also testified that Dr. Webb provided medical services to her after Kingsley's birth to confirm a subsequent miscarriage. Dr. Webb also delivered Kingsley's younger sister four years after Kingsley's birth.

¶3 Before trial, Dr. Webb moved in limine to preclude any evidence about his alleged apology. Kingsley in turn moved in limine to preclude any evidence that Dr. Webb "delivered [Kingsley's] sister four years after his birth." Kingsley argued that evidence about delivering his sister was prejudicial because the Hospital and Dr. Webb wanted to use this evidence to portray that, because his parents did not object to Dr. Webb's

delivery of his sister, "they must have been happy with [Kingsley's] delivery." Kingsley argued that "in reality," however, Mother talked with Dr. Webb the day after his birth and "Dr. Webb admitted he made a mistake and would do whatever it took to make things right." Consequently, Kingsley further argued, his "parents made decisions based upon Defendant Dr. Webb's admission of fault and assurances that he would take care of the consequences from [Kingsley's] birth."

¶4 Dr. Webb responded that if the trial court allowed the alleged apology in evidence, the court should permit Dr. Webb to introduce evidence that he delivered Kingsley's sister. The court granted both motions, specifically directing the parties that "[t]here won't be a mention of [Dr. Webb] delivering the sister . . . unless you get my permission during the questioning . . . . [D]on't mention the sister being delivered until you traipse up here and ask me out of the presence of the jury."

¶5 On direct examination at trial, Mother testified that she had two children and Kingsley was her firstborn. In response to questions Kingsley's attorney asked during direct examination about whether she and Dr. Webb were social friends, consistent with her deposition testimony, Mother testified about the miscarriage:

> Q: Ever go to each other's homes?
>
> A: No. Dr. Webb did, after I had a miscarriage, drop me off. We had to drive down from Flagstaff. I was having trouble with a pregnancy. He was at his office. It was towards the end of the day.
>
> My husband dropped me off. He did an ultrasound. We determined the pregnancy had failed, and he offered to drop me off on his way home after he asked where I lived, and he dropped me off.
>
> Q: Okay. Is that the only time Dr. Webb has been at your home?
>
> A: Correct—driveway.
>
> Q: Have you ever been to his home?
>
> A: No.

Q: When you said you were having trouble with a pregnancy, was it [Kingsley] or [his sister]?

A: No, it was—it was the pregnancy before [his sister].

Q: So you've been pregnant, then, the three times?

A: Actually, I've been pregnant four times. I have two children.

Q: And did you have a couple miscarriages?

A: Yes.

Q: And the time that Dr. Webb dropped you off in your driveway, did that result in a miscarriage?

A: No, I had already miscarried. I just needed to have it confirmed.

¶6 No one objected to or moved to strike this testimony. Five days later and on cross-examination, Dr. Webb's attorney asked Mother whether Dr. Webb "was always friendly" to her and whether "after your husband dropped you off at his office to confirm a miscarriage, he actually took you home, correct?" Mother responded affirmatively to both questions.

¶7 A few minutes later, the Hospital's attorney cross-examined Mother and asked about her testimony on direct about the miscarriage:

Q: I just want to ask you about your testimony from the other day and make sure I understand the context.

You said, "After I had a miscarriage, Dr. Webb dropped me off. We had to drive down from Flagstaff. I was having trouble with a pregnancy. He was at his office. It was towards the end of the day. My husband dropped me off. He did an ultrasound. We determined the pregnancy had failed, and he offered to drop me off on his way home after he asked where I lived, and he dropped me off."

Do you remember giving that testimony?

A: I do.

Q: That was a pregnancy after [Kingsley], you said?

A: Correct.

Q: And so what you were saying is that you were going to Dr. Webb at the time for medical care, correct?

A: I was. I had—actually, this was not a prenatal visit. I had just found out I was pregnant, and I was probably only six weeks along, and I hadn't even been in to see anybody yet, so I—we were up in Flagstaff. I was having trouble. I called Dr. Webb's office. He was there.

We drove down because I needed to find out if my suspicions were true, that the pregnancy had failed.

Q: So after [Kingsley] was born, when you had the next pregnancy and you had this miscarriage, you went to Dr. Webb for medical care, fair?

A: For this, yes.

¶8 Immediately after this exchange, Kingsley's attorney asked to approach the bench. Kingsley's attorney stated that the Hospital's attorney "took a piece of innocuous information incidental to the whole case and reemphasized it . . . to establish that these people maintained a relationship with Dr. Webb." Kingsley's attorney then asked for the previously-precluded apology evidence to be admitted to explain why Kingsley's parents maintained a relationship with Dr. Webb after Kingsley's birth. The Hospital's attorney argued that Mother's testimony on direct examination had opened the door to his line of questioning on cross-examination.

¶9 The trial court excused the jurors and reminded counsel of its previous rulings that precluded evidence of Dr. Webb having delivered Kingsley's sister, but that "what [the Hospital's attorney] has essentially done is introduced evidence of the same style that wasn't thought[.]" The court expressed reluctance in admitting the apology evidence because Dr. Webb's attorney did not "introduce" the evidence testified to during the Hospital's attorney cross-examination; rather, the Hospital's attorney did, on behalf of the Hospital.

¶10 The court offered a curative instruction, but Kingsley's attorney rejected it. Kingsley's attorney then claimed that the Hospital's

attorney had "established that [the miscarriage] was after [Kingsley's birth]" and asked that the court order no further reference to this issue, including in closing arguments. The court thus ordered no further evidence relating to Mother's using Dr. Webb for medical care after delivering Kingsley unless being first granted permission. The court stated that, "the limited explanation I've offered would cure the prejudice that came out of [the Hospital's] question, which was certainly against the spirit of the ruling on the motion in limine that I issued several weeks ago." Kingsley's attorney again rejected the proposed cure.

¶11 After the jury returned, Kingsley's attorney conducted redirect examination of Mother. The jury then submitted nine questions, three of which related to Mother's use of Dr. Webb's medical services. Two of the questions sought Mother's reasoning in using Dr. Webb for medical services after Kingsley's delivery. One of the questions asked whether Mother's use of Dr. Webb for medical attention relating to the miscarriage was after Kingsley's birth.

¶12 The court again excused the jurors to discuss the questions. Kingsley's attorney described the three questions as "terribly problematic." The Hospital's attorney argued that the parties had a "flawed assumption" in that "we wouldn't have gotten any questions on [Mother's] prior testimony had [Kingsley's attorney] not asked about it, because she testified very clearly that she went to Dr. Webb for medical care, received an ultrasound, determined the pregnancy had failed." The Hospital's attorney added that no reason existed "to believe that these jurors didn't hear what [he] heard and would not have asked about it." The court responded, "Well, that's an argument about whether I sanction you if I declare a mistrial, but let's, first of all, see if we can figure out what we ought to do with these that can correct where we're at given the record we've gotten now."

¶13 Kingsley's attorney asked for admission of the apology evidence or for a mistrial, claiming prejudice because the Hospital's attorney placed Mother's "innocuous statement" about a social setting into a medical setting. The court declined to admit the apology evidence. Kingsley's attorney then asked again for a mistrial, stating that he did not want a mistrial, but rather wanted Mother to testify about the apology, which was not precluded "[w]hen the door is opened for other reasons." The court again declined to admit the evidence.

¶14 Dr. Webb's attorney advised that Dr. Webb denied apologizing and asked whether, if the apology evidence came in, Dr. Webb could introduce evidence that he delivered Kingsley's sister. The court

asked counsel to discuss the matter with their clients, and Dr. Webb and Kingsley agreed to a mistrial. Rejecting the Hospital's argument that Mother's testimony on direct examination had opened the door to the line of questioning on cross-examination, the trial court stated that "that whole line was directly contrary to the spirit of my ruling." The court continued that "[e]ven if she opened the door—and I don't think she did—I think it was my job to decide that she opened the door [rather] than sitting back passively and watching it happen before my eyes."

¶15 The trial court granted a mistrial and assessed jury fees against the Hospital. Kingsley and Dr. Webb moved for reimbursement of fees and costs against the Hospital pursuant to A.R.S. § 12–349 for having caused the mistrial. The court granted the requests, finding that the Hospital's attorney caused unreasonable delay by making Mother's testimony "the sole focus" of his cross-examination. The court thus entered judgments against the Hospital for fees and costs and also ordered the Hospital to deposit funds with the court to reimburse a juror for lost wages and assessed jury fees against the Hospital. The Hospital timely appealed.

DISCUSSION

1. The Mistrial

¶16 As relevant to our disposition of this appeal, the Hospital argues that granting the mistrial was error because the Hospital's attorney did not violate the motion in limine. We review the grant of a mistrial for an abuse of discretion. *State v. Givens*, 161 Ariz. 278, 279, 778 P.2d 643, 644 (App. 1989). As pertinent here, an error of law in the process of reaching a discretionary conclusion can constitute an abuse of discretion. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455–56, 652 P.2d 507, 528–29 (1982) (supplemental opinion). Because the order granting the mistrial found that the Hospital's attorney violated the motion in limine when he did not, the court made an error of law in granting a mistrial.

¶17 "The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial." *State ex rel. Berger v. Superior Court*, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972). Here, the ruling in limine was very narrow and precluded only evidence of Dr. Webb's having delivered Kingsley's sister, not all medical care provided by Dr. Webb after Kingsley's birth. Specifically, the relevant motions and the order and oral pronouncement demonstrate that the only testimony contemplated by the parties, and therefore precluded, was Dr. Webb's having delivered Kingsley's sister. Nothing in the record

indicates that Kingsley requested or that the order dictated that *all* medical care Dr. Webb provided Mother after Kingsley's birth be precluded. Thus, Kingsley did not ask to preclude evidence of all medical care Dr. Webb provided after his birth, although he could have because Mother had testified previously at her deposition about Dr. Webb's treatment for a miscarriage. In failing to seek preclusion of all subsequent medical care evidence, Kingsley failed to advise the trial court that he believed that such evidence was so prejudicial that it could cause a mistrial.

¶18 Although the trial court acknowledged that the Hospital's attorney's questioning of Mother did not directly violate the motion in limine, it concluded that the Hospital's counsel had "*introduced* evidence of the same style that *wasn't thought of*." The record shows, however, that the Hospital's attorney had not *introduced* any evidence that was not already before the jury before Kingsley's attorney's questioning of Mother. Accordingly, the Hospital's attorney did not violate the in limine ruling. Mother testified on direct examination that she had two children, Kingsley was her first-born, and Dr. Webb did an ultrasound on Mother to confirm a miscarriage for a pregnancy before her pregnancy with Kingsley's sister. On cross-examination, the Hospital's attorney accurately repeated Mother's direct-examination testimony, which Mother confirmed as accurate. Counsel's question characterizing Dr. Webb's having performed an ultrasound as "medical care" did not introduce any additional evidence. The fact that Kingsley did not move in limine to preclude all subsequent medical care evidence, which even the court acknowledged "wasn't thought of," cannot provide a basis for sanctioning the Hospital for violating an order that Kingsley could have, but did not, seek.

¶19 The Hospital contends that Kingsley opened the door to questioning about subsequent medical care by eliciting testimony from Mother on this topic and following up with questions about the miscarriage. "[W]hen an attorney 'opens the door' to otherwise irrelevant evidence, another party may comment or respond with comments on the same subject, in the trial court's discretion." *State v. Roberts*, 144 Ariz. 572, 575, 698 P.2d 1291, 1294 (App. 1985). But because no in limine ruling precluded any miscarriage testimony here, no door was closed that had to be opened. Nothing prevented the Hospital's attorney from cross-examining Mother about her previous testimony. *See* Ariz. R. Evid. 611(b) ("A witness may be cross-examined on any relevant matter."); *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981) ("Arizona follows the English or 'wide open' rule, wherein cross-examination may extend to all matters covered by direct examination.") (citation omitted). Thus, the in limine ruling did not preclude the Hospital's counsel from reading

Mother's testimony from direct examination to her on cross-examination and conducting the cross-examination that occurred here.

¶20 Consequently, because the order granting mistrial stated that the Hospital's attorney violated the ruling on the motion in limine when he did not, the court made an error of law in granting the mistrial. Moreover, given that error, no basis exists for finding that the Hospital unreasonably delayed the proceedings by causing the mistrial to support sanctions against the Hospital under A.R.S. § 12–349.

2. Jury Fees and Juror Reimbursement

¶21 The Hospital also argues that the trial court erred in assessing jury fees and a special juror reimbursement against it. We lack jurisdiction over the judgment assessing jury fees, however, because it does not contain finality language pursuant to Arizona Rule of Civil Procedure 54(b). *See Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, 224 ¶ 8, 338 P.3d 328, 331 (App. 2014) ("[T]his court lacks jurisdiction over an appeal from a judgment that does not resolve all claims as to all parties *and* that does not include Rule 54(b) language."). However, because requiring the Hospital to obtain a signed judgment with Rule 54(b) language and file a new notice of appeal would not provide "equally plain, speedy and adequate remedy," in the exercise of our discretion, we take special action jurisdiction over the judgment for jury fees. Ariz. R. P. Spec. Acts. 1(a). In the present case, because the order granting the mistrial was error, we vacate the order assessing jury fees and a special juror reimbursement against the Hospital.

CONCLUSION

¶22 For the foregoing reasons, we vacate the orders assessing jury fees and a special juror reimbursement against the Hospital and sanctioning the Hospital with attorneys' fees and costs and remand for proceedings consistent with this decision.