COURT OF APPEALS DECISION DATED AND FILED

April 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP822

Cir. Ct. No. 2012CV784

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

RUTH WHITE,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY PLAINTIFF,

UNITED HEALTHCARE OF WISCONSIN, INC.,

INTERVENOR,

V.

RICHARD A. RASNER, GREAT WEST CASUALTY COMPANY,
J&R SCHUGEL TRUCKING, INC. AND XYZ INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. A semi-truck driven by Richard Rasner, owned by J&R Schugel Trucking, Inc., and insured by Great West Casualty Company, collided with a minivan driven by Ruth White. White brought this personal injury action against Rasner, J&R Schugel, and Great West, alleging that Rasner was negligent and that his negligence was a cause of the injuries that White sustained as a result of the collision. The case proceeded to trial, and the jury returned a verdict in favor of the defendants. On appeal, White asserts ten claims of error by the circuit court before, during, and after trial, and asks that this court order a new trial in the interests of justice. We conclude that the circuit court did not err with respect to nine of White's claims, that any error as to the remaining claim was harmless, and that White is not entitled to a new trial in the interests of justice. Therefore, we affirm.

BACKGROUND

¶2 It is undisputed that at approximately 5:15 on a snowy morning in February, the driver-side front of the semi-truck driven by Rasner hit the rear passenger side of the minivan driven by White on I-94/90/39 near exit 115 in Poynette, Wisconsin. Rasner and White provided two different versions of what took place prior to the collision.

¶3 Rasner provided a statement to a state trooper who arrived at the scene in response to a dispatch call reporting the accident, and testified at a subsequent discovery deposition taken by White's counsel. To summarize, Rasner stated that as he was driving northbound in the right through-lane of the interstate, a car ahead of him was sliding out of control; when the car moved toward the left lane and drove on, Rasner saw the backup lights on a minivan in the right through-

lane ahead of him; he went toward the shoulder to pass the minivan on the right, when the minivan stopped and turned right toward the exit ramp, and his semi-truck and the minivan "impacted."

¶4 White provided a statement to a different state trooper who interviewed her in the hospital a couple of hours after the accident, testified at a subsequent discovery deposition, and testified at trial. To summarize, White stated that she never backed up but was travelling in the right through-lane and slowing to take the exit ramp when she saw a semi-truck coming up fast behind her with its right turn signal on; she pulled into the "V" portion between the exit ramp and the continuation of the highway to get out of the semi-truck's way; she "kind of turned a little bit" so that she could proceed up the ramp after the semi-truck passed her, and the semi-truck hit her.

¶5 Pertinent to the issues on appeal, three witnesses testified in person at trial: White's accident reconstruction expert, the state trooper who first arrived at the scene of the accident and took Rasner's statement, and White. The jury also saw a video recording of a deposition of the state trooper who interviewed White in the hospital. In addition, portions of Rasner's discovery deposition testimony were read to the jury.

¶6 The jury found both Rasner and White negligent, but found that Rasner's negligence was not a cause of the accident and that White's negligence was a cause of the accident. The jury entered $5,000 for past pain and suffering, and nothing for future pain and suffering. The circuit court awarded White $5,000 as a discovery sanction against the defendants and denied White's motion for a new trial.

¶7 The ten claims of error on appeal are fact-intensive, and we set out additional relevant facts in our discussion of each claim.

DISCUSSION

I. Evidentiary Errors

¶8 The first three claims of error challenge the circuit court's evidentiary decisions. We review the circuit court's decision to admit or exclude evidence under the erroneous exercise of discretion standard. ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶151, 297 Wis. 2d 70, 727 N.W.2d 857. "'An appellate court will uphold an evidentiary ruling if it concludes that the [circuit] court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.' Therefore, this court will not find an erroneous exercise of discretion if a reasonable basis for the [circuit] court's determination exists." ***Id.*** (quoted source and citation omitted).

¶9 "Evidence erroneously admitted is subject to the harmless error rule." ***State v. Harris***, 2008 WI 15, ¶85, 307 Wis. 2d 555, 745 N.W.2d 397. Following that rule, "the improper admission of evidence is not grounds for reversing a judgment or granting a new trial unless, after an examination of the entire action, it shall appear that the error 'affected the substantial rights of the party' seeking to reverse the judgment or secure a new trial. In order for an error to affect the substantial rights of a party ... 'there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Weborg v. Jenny***, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191 (citations, footnote, and quoted source omitted); *see*

also ***Harris***, 307 Wis. 2d 555, ¶¶42-43 (articulating the same harmless error test).[1] "We review the totality of the circumstances to determine harmless error." ***Id.*** at ¶48. "Application of the harmless error rule presents a question of law that [the appellate] court reviews de novo." ***Weborg***, 341 Wis. 2d 668, ¶43.

A. Use of Rasner's discovery deposition at trial

¶10 White argues that the circuit court erroneously allowed defense counsel to read to the jury portions of Rasner's discovery deposition testimony. As we explain, the circuit court properly exercised its discretion in allowing defense counsel to read to the jury portions of Rasner's discovery deposition testimony at trial under WIS. STAT. § 804.07(1)(c)1.e.

¶11 White's counsel took the deposition of Rasner as part of discovery prior to trial; the deposition consisted solely of Rasner's answers to questions posed by White's counsel. The day before trial, defense counsel filed a motion to use "those portions of [Rasner's discovery deposition] transcript relevant to the

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[1] *See also* WIS. STAT. § 805.18(2) (2013-14), which provides:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial;

and WIS. STAT. § 901.03(1), which provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

case, in lieu of his live testimony" because defense counsel, despite his own efforts and those of a private investigator over the five days before trial, was unable to locate Rasner. An investigator retained by White's counsel two days before trial was also unable to locate Rasner.

¶12 At the hearing on defense counsel's motion on the morning of trial, the circuit court questioned White's counsel: "And yesterday the Court indicated to you in our conversation that the Court was inclined to grant the request and allow the deposition to be used. In light of that potential, the Court suggested that, you know, an adjournment might be a possible option here whether everybody wants this person to be in court, and you've opted not to seek that option, is that right?" Counsel responded: "I don't want him in court. I don't want him to appear at all. I'd just as soon read in his portions of the deposition that are helpful to us, but I do not wish the Court to adjourn this matter because he does not appear."

¶13 Under WIS. STAT. § 804.07(1)(c)1.e., any part or all of a deposition "may be used against any party who was present or represented at the taking of the deposition" as follows:

> (c) 1. The deposition of a witness other than a medical expert, whether or not a party, may be used by any party for any purpose if the court finds any of the following:
>
> ….
>
> e. Upon application and notice, that exceptional circumstances exist that make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

¶14 The circuit court granted defense counsel's motion to use Rasner's deposition at trial. The court found that defense counsel had diligently but unsuccessfully attempted to locate Rasner, that Rasner's deposition consisted solely of adverse questioning by White's counsel, that it was important for the jury to hear from the two drivers involved in the accident in the absence of any other eye-witnesses in order to fairly decide the negligence issues, and that neither party requested the "very real remedy" of adjournment. Reviewing the facts, the court found that "there are exceptional circumstances that exist here that warrant this matter going forward," that "this testimony is important," and that "it's fair under these circumstances to allow the deposition to be used."

¶15 White argues that the circuit court erred because: (1) "[t]he exceptional circumstances [under WIS. STAT. § 804.07(1)(c)1.e.] that occurred here were caused by [Rasner]" and (2) White's having to choose between going to trial without Rasner or adjourning trial "at great hardship and expense" was fundamentally unfair.[2]

¶16 We reject White's arguments as unpersuasive. White does not argue that the circuit court failed to examine the facts, apply the correct law to those facts, and reach a reasoned decision. Rather, each of her arguments is no more than a disagreement with the court's exercise of discretion.

[2] White argues, in the alternative, that if the circuit court allowed the use of Rasner's testimony on the basis of WIS. STAT. § 908.04(1)(e), concerning an exception to the hearsay rule, then the circuit court erred in finding that Rasner was "unavailable" under that statute. Because the relevant statute here is WIS. STAT. § 804.07, and not § 908.04, we do not address this argument.

¶17 White's first argument, that the circuit court erroneously found there were exceptional circumstances warranting use of Rasner's discovery deposition at trial, is a disagreement with the court's characterization of those circumstances—the "extraordinary" efforts by defense counsel to locate Rasner, the significance of his absence in light of the nature of the dispute centering on Rasner's and White's differing versions of the events leading to the accident, and that "neither party has asked for an adjournment to try to find out why Mr. Rasner's not here or procure his presence and participation"—so as to warrant use of Rasner's discovery deposition.

¶18 White's second argument, that it was unfair for her to have to choose between proceeding to trial without Rasner and adjourning the trial to find Rasner, is a disagreement with the circuit court's consideration of the factors going to "the interest of justice"—the diligent efforts by counsel to try to locate Rasner, the deposition being conducted only by White's counsel, the importance to the jury of hearing from the only two eye-witnesses to the accident, and White's declining the offer of adjournment—and weighing those elements against White.

¶19 White relatedly argues that the interests of justice required that both White and Rasner appear in person so that the jury could assess their credibility. Having declined the offer of adjournment in order to obtain Rasner's appearance, White waived her challenge on appeal to proceeding without Rasner's appearance. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'waiver is the intentional relinquishment or abandonment of a known right'" (quoted source omitted)). Moreover, the court read the curative "absent witness" jury instruction, WIS JI—CIVIL 410, which informed the jury that it could infer from the fact of Rasner's absence that his testimony would have been unfavorable to the defense.

¶20 In sum, White does not persuade us that the circuit court erroneously exercised its discretion in granting the defense motion to read portions of Rasner's discovery deposition at trial.

B. State trooper's accident investigation testimony and accident report

¶21 White argues that the circuit court erroneously allowed State Trooper Brett Manke, who responded to investigate the accident, to provide what White asserts was expert reconstruction testimony about the accident because Manke did not observe the accident and was not qualified to testify as an expert on accident reconstruction. Specifically, White objects to: (1) the portion of Manke's testimony that "the left front corner of the semi-impacted approximately the passenger side rear wheel of the van"; and (2) the Wisconsin Motor Vehicle Accident Report prepared by Manke, specifically the "diagram of the accident reconstruction."

¶22 Whether opinion evidence is admissible is a discretionary determination for the circuit court. ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994). As we explain, the circuit court properly exercised its discretion to allow both the testimony and the accident report as falling within Manke's duty to investigate and prepare a report on the accident based on what he observed and on the two drivers' statements.

¶23 Manke testified that he had been a state trooper for three years at the time of the accident, that he had investigated from ten to forty "reportable crashes" each year, and that he had not been further trained as an accident reconstruction expert. He testified that he responded to a dispatch call to investigate the accident, arriving at the scene of the accident less than ten minutes after he received the call. He observed and took photographs of the damaged semi-truck and minivan, the

tracks on the road, and the area where the semi-truck and minivan collided. He took a statement from Rasner, but not from White who was semi-conscious. He prepared his report based on his personal observations, Rasner's statement, and White's statement made to another state trooper at the hospital two hours after the accident. Manke represented in his report and in his trial testimony that White's minivan was at an angle approaching broad side to the semi-truck when the two vehicles collided, and was located in the "V" area where the exit ramp veered off from the through lanes of the highway. While he opined that the physical evidence was consistent with Rasner's statement and not with White's statement, he also testified that there was no physical evidence showing how the minivan arrived at the point of impact, whether by travelling over the shoulder, pulling off the side of the road, or backing up.

¶24 The circuit court first overruled White's counsel's objection, based on lack of qualifications, to Manke's testimony as to the location and position of the vehicles at impact because "that door's already open," in that Manke had already been asked, and answered, about the impact and where it occurred before the objection was lodged. However, the court also explained that the objection could not stand because Manke was not being held out as a reconstruction expert, but "as a traffic officer who's investigating a [traffic accident] and required to make reports and draw diagrams. So the jury understands his perspective ...." The court reiterated that explanation in its response to White's post-trial motion:

> The trooper's not held out as an accident reconstruction expert. He is in fact a traffic investigator, and he's required by regulations and so on to draw a diagram of the accident and listen to people's statements and so on and conclude how he believed the accident occurred. The jury heard the qualifications of the plaintiff's expert, who was an engineer, who had a lot of experience in reconstruction of accidents and so on. They also heard the trooper and his qualifications and training and so on, and they had his

> experience as a traffic investigator to consider.... He was never held out as a trained engineer or an accident reconstruction expert. He was held out as a trooper who investigated an accident and was required to complete a diagram as part of his work and so on and gave the basis for how he reached the conclusions he did with respect to how the accident had happened.

¶25 As noted above, White argues that the circuit court erred because "[e]xpert testimony is necessary to establish the point of impact of an automobile accident," and Manke neither saw the impact nor was "qualified to give testimony as an expert witness on accident reconstruction." However, White fails to explain why this portion of Manke's testimony regarding the point of impact mattered here, where the parties did not dispute the point of impact. Rather, White's expert similarly concluded that "the accident took place with the front of the [semi-truck] contacting the right rear side of the [minivan]," and that "[a]t the time of impact, the [minivan] was oriented to the northeast and was positioned primarily on the paved shoulder area … [and the semi-truck] was northbound on the shoulder to the east of the northbound lanes."

¶26 Moreover, the case law cited by White does not stand for the broad legal proposition she asserts, that only experts can testify as to the point of impact. White relies upon ***Wester***, 190 Wis. 2d at 318-20, to support this proposition. However, in that case, unlike here, the officer was asked to opine, "'to a reasonable degree of scientific probability,'" as to the point of impact along the street based on gouge and skid marks and debris, in order to determine which party "crossed the center line causing a head-on collision." ***Id.*** at 316, 313. The question in that case, then, was whether the officer was qualified by knowledge, training, and education to "assess the point of impact from gouge and skid marks and debris at the accident scene." ***Id.*** at 319. That assessment required "an understanding of technical and scientific accident reconstruction principles." ***Id.***

But here, Manke was not asked to make such a technical and scientific assessment from limited physical evidence such as "gouge and skid marks and debris at the accident scene." ***Id.*** Rather, Manke properly testified as to his personal observations of the type and nature of the damage of the vehicles and the tracks on the road, as well as his understanding of the undisputed point of impact from the physical evidence and statements made by Rasner and White. *See* ***id.*** at 318 (stating that an officer may testify as a lay witness "about his personal observations of the scene of the accident, the location of debris and the type and nature of the damage of the vehicles").

¶27 White also argues that the circuit court erred in allowing the accident report prepared by Manke, and more specifically, the diagram contained in that report, to be presented at trial. White seems to suggest that the standard Wisconsin Motor Vehicle Accident Report prepared by Manke, and any diagram contained within it, constituted "expert reconstruction testimony," and therefore, was inadmissible. However, none of the case law cited by White supports such a proposition; nor does the record support the factual predicate of White's proposition.

¶28 Manke did not testify as an expert witness on accident reconstruction, but rather, as the circuit court properly found, as an officer charged to investigate and diagram the accident based on what he personally saw and on what the two drivers stated. He testified that what he saw showed where the semi-truck and the minivan were located when they collided and where the damage was on each vehicle, but did not show how the minivan arrived at the point of impact. He explained how he reached his conclusions as to how the semi-truck and the minivan collided, and how the two drivers' statements corresponded with what he saw. In short, the circuit court reasonably exercised its discretion in finding that

Manke testified in his capacity as an officer charged to investigate accidents. The jury heard his qualifications as compared with the qualifications of White's accident reconstruction expert, and was able to weigh their testimony accordingly. Any arguable infirmities in Manke's testimony went to the weight of his opinion and not its admissibility.

¶29 In sum, the circuit court examined the relevant facts, applied the proper standard of law, and reached a reasonable decision to allow Manke's testimony and accident report, and White does not persuade us to the contrary.

C. History in hospital record

¶30 White argues that the circuit court erroneously allowed defense counsel to read into evidence certain parts of the history portion of White's hospital record upon her admission to the emergency room. As we explain, we assume without deciding that the court erroneously admitted certain parts of the history portion of White's hospital record. However, we conclude that the error was harmless.

¶31 During cross-examination of White, the defense introduced the following portion of White's emergency room hospital record:

> CHIEF COMPLAINT: Motor vehicle collision.
>
> HISTORY: The patient is a 33-year-old female who was traveling from Racine to Stanley, Wisconsin, and it was apparently a snow-covered with light snow. The patient was attempting to get off on the Poynette exit, apparently went past it and then was backing up when a semi came around the corner on the other side of the overpass and did not see her until it was too late and hit the back of her minivan. She does not remember what happened. She was forced off the road and into the ditch alongside the exit ramp. She does not think she had loss of consciousness but she is not sure. She complains of pain and headache. She

> complains of pain in the right shoulder and right hand, some neck pain, some low back pain, some chest discomfort, and quite a bit of abdominal discomfort. There is significant bruising across the abdomen and thighs from the seat belt. She was belted.

¶32 WISCONSIN STAT. § 908.03(4) provides that,

> The following are not excluded by the hearsay rule, even though *the declarant* is available as a witness:
>
> ....
>
> (4) ... Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(Emphasis added.)[3]

¶33 The circuit court admitted the exhibit as a statement for purposes of medical diagnosis. White argues that the circuit court erroneously admitted, and allowed the defense to cross-examine White about, the part of the history that reads, "The patient was attempting to get off on the Poynette exit, apparently went past it and then was backing up when a semi came around the corner on the other side of the overpass and did not see her until it was too late and hit the back of her minivan." White argues that: (1) there was no evidence that "White was the source of that history," in other words, that she was the declarant; and (2) the information was not reasonably related to medical diagnosis or treatment.

[3] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is inadmissible, unless an exception applies. WIS. STAT. § 908.02.

¶34 As to whether White was the declarant, Rasner points to White's deposition testimony in which she acknowledged that certain portions of the history were known only to her, and that some portions of the history are true; White points to her deposition testimony that her mother and sister-in-law also talked to hospital staff, and to her trial testimony that she did not give that information to the hospital staff, that the only person she remembered talking to was the officer, and that she did not back up as stated in that part of the history.

¶35 We assume without deciding that Rasner failed to prove that White was the declarant so as to qualify the objected-to portion of the hospital record history as an exception to the hearsay rule, and that the circuit court, therefore, erroneously admitted into evidence and allowed the defense to cross-examine White about that portion.[4] However, we conclude that the error was harmless.

¶36 At the most, the objected-to portion of the hospital record history repeated the statement made by Rasner to Trooper Manke. White consistently denied providing the objected-to information, denied the truth of that information, stated she remembered nothing that occurred before she spoke with a different trooper in the emergency room, and provided a different version of the events to that trooper, consistent with the version she provided in her deposition and at trial.

¶37 The version that White *was* backing up was stated by Rasner to Trooper Manke and in his deposition. The version that White *was not* backing up was stated by White to a different trooper in the hospital, in her deposition, and at trial. The jury heard White deny that she provided the "backing up" information

[4] Accordingly, we do not resolve the dispute whether the objected-to portion of the history was reasonably pertinent to diagnosis or treatment.

to the hospital staff, and heard her statements, in her deposition, at trial, and to the trooper in the hospital, that she did not back up. The objected-to portion of the hospital record history was merely cumulative to Rasner's statement, and its accuracy was expressly called into question by White's testimony at trial. Regardless of the history, the jury was left to weigh the credibility of Rasner and White in light of their own testimony (at deposition and at trial), as well as the testimony of White's accident reconstruction expert, Trooper Manke who interviewed Rasner, and the trooper who interviewed White.

¶38 Moreover, even without any evidence at all suggesting that White had been backing up before the accident, White's own testimony and that of her own expert indicated that, just before the collision, she had turned the minivan right at a forty-five degree angle in the paved shoulder area in the path of the oncoming semi-truck. In addition, the second trooper who responded to the scene of the accident and interviewed White at the hospital testified that, in his opinion, going in that "V" area as White did was not safe. Such testimony sufficed in and of itself to support the jury's verdict that White was negligent, that her negligence was a cause of the accident, and that Rasner's negligence was not. *See* ***Johnson v. American Family Mut. Ins. Co.***, 93 Wis. 2d 633, 644, 287 N.W.2d 729 (1980) (a jury verdict "will not be upset if there is any credible evidence to support it," especially "where, as here, the verdict has the approval of the [circuit] court" (quoted source and internal citations omitted)).

¶39 In sum, for the reasons stated above, we conclude that there was no reasonable possibility that the admission of the history portion of the hospital record contributed to the outcome of the proceeding so as to undermine confidence in that outcome.

II. Submitting the Negligence of Rasner and White to the Jury

¶40 White argues that the circuit court erroneously failed to find Rasner causally negligent as a matter of law, and that the court erroneously allowed the question of White's negligence to be submitted to the jury. White bases both arguments solely on the assumption that the court erroneously admitted Rasner's discovery deposition, Trooper Manke's testimony about the accident, and the history portion of White's hospital record. White maintains that without this evidence, "there was no evidence that Rasner was not 100% causally negligent" and there was "no evidence to show that Ruth White was negligent." Because we have concluded that Rasner's discovery deposition and Trooper Manke's testimony were not admitted in error, and that the admission of the history portion of White's hospital record was harmless error, there is no foundation for White's arguments. Accordingly, we do not address them further.

III. Spoliation of Evidence

¶41 White argues that the circuit court erroneously failed to direct a verdict on liability for White as a sanction for the defense's spoliation of evidence, namely, the semi-truck's black box data. As we explain, the circuit court properly exercised its discretion when it gave the spoliation instruction to the jury and determined that the appropriate sanction was to award White $5,000 in attorney's fees and costs.

¶42 A party or potential litigant has a duty to preserve evidence essential to a claim that is being or likely will be litigated. ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶21, 319 Wis. 2d 397, 768 N.W.2d 729. The intentional destruction, alteration, or concealment of such evidence is known as "spoliation." ***Id.*** There is a wide range of options available to deal with the spoliation of

evidence, including through discovery, with jury instructions, or by the dismissal of claims. ***Id.***, ¶42. Severe sanctions such as dismissal are appropriate sanctions for spoliation only when the party in control of the evidence acted egregiously in destroying it. *See* ***id.*** Egregious behavior means a "'conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.'" ***Id.*** (quoted source omitted). Once the circuit court has made a spoliation determination, it has broad discretion to decide whether a sanction is warranted, and if so, what sanction to impose. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). We will uphold the circuit court's decision to impose a particular sanction so long as the court has 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.***; ***Golke***, 319 Wis. 2d 397, ¶43.

¶43 Here, the evidence that had not been preserved comprised data from the semi-truck's electronic control module, or "black box." The black box data can show the wheel speed and brake status just before and after a sudden deceleration through the forceful application of brakes. The black box in the semi-truck driven by Rasner stored data from only the three most recent sudden deceleration events. The black box data was not extracted after the White/Rasner accident. When White requested the black box information in discovery two and one-half years after the accident, the semi-truck had been sold and the three sudden deceleration events recorded in the black box were not related to the accident. White's expert estimated in his report and testimony the semi-truck's speed at impact and where and when Rasner began to brake, based on other information available to him.

¶44 The circuit court first found that the black box data constituted relevant evidence that the defense had the obligation to preserve, but which the defense had not intentionally concealed. The court reviewed the evidence showing that the semi-truck was sold after it was repaired, that trucking industry repair workers do not attend to black box data when making repairs because the data do not relate to their repair work, that it would not be reasonable to require that the truck be impounded until the data could have been recovered, that it was debatable whether the defense should have realized that litigation might occur, and that the defense cooperated once the issue of spoliation was raised. The circuit court instructed the jury, "consistent with the record," that it could infer from the defense's failure to preserve the black box data that it did so "because producing that evidence would have been unfavorable to the" defense.

¶45 However, reviewing the affidavits and testimony by the experts and trial witnesses, the circuit court also found that the data would not likely have provided helpful or significant information. The court explained that the data that would have been recorded could have helped to corroborate portions of the witnesses' testimony, but would not have shown the vehicles' positions or lane changes on the roadway, their steering movements, or the "split second timing about who turned when," and, therefore, the data "would not have been of great significance as relates to the" disputed facts of the case. The court noted that White's counsel had at the court's request itemized his spoliation-related costs and fees as totaling $12,151.53. Based on all the facts that it considered, the circuit court awarded $5,000 in attorney's fees and costs to White as a sanction for spoliation.

¶46 White argues that the circuit court erroneously found that the defense's conduct was not egregious, and suggests that the failure to download the

black box data before repairing the truck amounted to intentionally destroying the data, and that the data itself was essential to resolving what took place before the collision. However, White disregards the court's findings, supported by evidence to which the court referred, that the defense's conduct was not intentional and that the data, relating at most to the truck's wheel speed and length of braking, would not likely resolve the key disputes at trial as to where the vehicles were before the collision and how they got there. Both White's expert and Trooper Manke acknowledged that there was no physical evidence to support either White's version or Rasner's version of what happened before the collision, and White does not on appeal explain how the black box data would plug that gap.

¶47 The circuit court noted that the issue of an appropriate spoliation sanction "is a matter of degrees here.... [N]othing in this record would support this Court finding that there was an intentional effort on the part of the defendant trucking company to conceal or destroy evidence. What happened is time passed. The truck got sold. It moved on. The recording device itself only records devices or incidents that relate to a particular period of time until other significant events occur that ... bump recorded data off the system." The court also noted that "there is a responsibility on the part of a trucking company to preserve what evidence it might have that might reflect what happened during the accident." The court found that while the missing data would not have likely been significant and the defense was cooperative, it was nevertheless important to send "a message to people in commerce that they must preserve data that exists when an accident occurred, particularly where it's a personal injury accident." We conclude that, in giving the spoliation jury instruction and imposing the $5,000 sanction, the circuit court rationally applied the proper standard of law to established facts to reach a reasonable result.

IV. Placing Amount of Special Damages on the Verdict Form

¶48 White argues that the circuit court erroneously placed the amount of past health care expenses and the amount of past loss of earnings on the verdict form. While the parties agreed to both amounts, White argues that the circuit court should have placed, "answered by the court," instead of the specific amounts. White asserts that placing the actual numbers confused and likely prejudiced the jury against White by misleading the jury "into believing that Ms. White would recover those amounts of money regardless of how they answered the other questions on the verdict."

¶49 The formulation of the special verdict form is left to the circuit court's discretion. ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 721. As Rasner notes, it is proper for the court to enter an undisputed amount of damages on the special verdict form. *See* ***Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys.***, 2005 WI 124, ¶97, 285 Wis. 2d 1, 700 N.W.2d 201 (stating that the circuit court should have entered the undisputed amount of funeral expenses on the special verdict form in a medical malpractice case). The case that White cites to the contrary, ***Bell v. Duesing***, 275 Wis. 47, 80 N.W.2d 821 (1957), is inapposite. In that case, the court ruled that the *question* of the negligence of the minor plaintiff's parents should not have been placed on the special verdict form because the issue of the parents' negligence had neither been raised in the pleadings nor addressed by any evidence since. ***Id.*** at 53. White fails to point to any language in that case that precludes a circuit court from placing an *answer* on a special verdict form based on undisputed evidence of the answer. In sum, White fails to show that the circuit court erroneously exercised its discretion with respect to the special verdict form.

V. Perverse Verdict

¶50 White argues that the circuit court erred in declining to find it was perverse for the jury to award nothing for White's future pain and suffering. "[T]he [circuit] court's finding that a low verdict as to damages awarded does not indicate perversity is to be given great weight." ***Dahl v. K-Mart***, 46 Wis. 2d 605, 613, 176 N.W.2d 342 (1970).

¶51 The circuit court found that the issue of White's damages for future pain and suffering was one of credibility, and that there was "a basis for [the jury] to conclude based upon primarily the plaintiff's medical history, [and] past instances of injury in various ways" that White's continuing pain and suffering resulted from events preceding this accident. White herself acknowledges her past instances of injury "to the same parts of her body in a 2007 car accident," and she provides no legal authority to support her argument that the verdict was perverse because the jury weighed that and other evidence differently than she hoped. Moreover, because the jury's verdict for the defense on liability is, as we have concluded, properly supported, that the jury did not enter damages to White does not render the verdict perverse. *See* **Sell v. Milwaukee Auto. Ins. Co.**, 17 Wis. 2d 510, 519-20, 117 N.W.2d 719 (1962) ("The rule is that where a jury has answered other questions so as to determine that there is no liability on the part of the defendant, which finding is supported by credible evidence, the denial of damages or granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse."); ***Voeltzke v. Kenosha Mem'l Hosp., Inc.***, 45 Wis. 2d 271, 283-85, 172 N.W.2d 673 (1969) (discussing the rule stated in ***Sell***).

VI. Quashing Post-Trial Subpoena of Rasner

¶52 White argues that the circuit court erroneously quashed her post-trial subpoena of Rasner. After trial, White located Rasner and served him with a subpoena to testify at a deposition, at which White intended to ask him why he had not appeared at trial. The circuit court granted Rasner's motion to quash the subpoena because before trial White had been offered but did not take the opportunity to adjourn the trial in order to find Rasner and require him to attend the trial, and because once the jury issued its verdict it did not matter why Rasner had not attended.

¶53 "We review the circuit court's discovery order for an erroneous exercise of discretion." ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶19, 251 Wis. 2d 68, 640 N.W.2d 788. White argues the court erred because if the defense "had encouraged or prevented Rasner from appearing at trial," then his deposition could not have been used. However, this is sheer speculation, and White points to no evidence on which the circuit court could have relied to support a reasoned decision on that basis. White also argues that "[i]t was fundamentally unfair to not at least give her the opportunity to learn why Rasner had failed to appear." However, as the circuit court noted, White had that opportunity before trial and chose not to take it.

¶54 In sum, White fails to show that the circuit court erroneously exercised its discretion in quashing her post-trial subpoena of Rasner.

VII. Default Judgment Based on Defects in Answers

¶55 White argues that the circuit court erroneously denied her motion for a default judgment based on the answers filed by the defense. She argues that she

was entitled to a default judgment because it was a fundamental defect for the answer to the initial complaint to have been signed by an attorney on behalf of another attorney appearing for the defense. She also argues that she was entitled to a default judgment as to J&R Schugel Trucking because in the answer to the amended complaint the attorney did not state that he was representing J&R Schugel. We conclude that the circuit court properly exercised its discretion in denying White's motion for a default judgment.

¶56 The standard of review of a circuit court's decision to deny a motion for a default judgment is well established:

> The decision to grant or vacate a default judgment is within the discretion of the trial court. However, the law views default judgments with disfavor, and "prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." An appellate court will not reverse a discretionary decision unless the trial court has abused its discretion. This court will find an abuse of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard.

Oostburg State Bank v. United Savings & Loan Assn., 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986) (quoted source, internal citations, and footnote omitted).[5]

¶57 White argues that the circuit court erroneously declined to grant a default judgment based on the first error alleged by White, the signature on the answer to her initial complaint by an attorney licensed to practice in Wisconsin on behalf of another attorney licensed in Wisconsin. The only case that White cites

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[5] Our supreme court subsequently changed the terminology used in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion." *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

in support of her first argument is inapposite. White states that in ***Schaefer v. Riegelman***, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d 715, "the court held an attorney may not sign pleadings for another attorney." White mischaracterizes the holding in that case, and her mischaracterization unmoors her argument.

¶58 ***Schaefer*** involved a summons and complaint signed on behalf of a Wisconsin-licensed attorney by an attorney who was not licensed in Wisconsin. ***Id.***, ¶2. Our supreme court held that the lack of a signature *from a Wisconsin-licensed attorney* was a fundamental defect in violation of WIS. STAT. § 802.05(1)(a), which requires that every pleading be signed by "at least one attorney of record." ***Id.***, ¶¶16-17, 25. The court stated that an attorney not licensed in Wisconsin cannot appear as an attorney of record. ***Id.***, ¶17.

¶59 Unlike in ***Schaefer***, the answer here was signed by an attorney licensed in Wisconsin on behalf of another attorney licensed in Wisconsin. White does not explain how the holding properly stated in ***Schaefer*** applies here. Nor does White cite any legal authority that properly supports her argument, and, therefore, we do not consider it further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[a]rguments unsupported by legal authority will not be considered").

¶60 White's second argument involves the answer to her amended complaint. In her amended complaint, White added J&R Schugel Trucking, Inc. as a defendant. The answer to that amended complaint had the proper caption including J&R Schugel with the other defendants, and the body of the answer referred throughout to "defendants." However, below the attorney's signature on the answer to the amended complaint, only the defendants listed in the original complaint were named, not J&R Schugel. White argues that because the attorney

did not name J&R Schugel in the signature block, no attorney appeared or answered on behalf of J&R Schugel, and the circuit court should have therefore entered a default judgment against J&R Schugel.

¶61 The circuit court framed the issue as being whether the use of the term "defendants" in the plural throughout the answer, following the inclusion in the caption of J&R Schugel as one of the defendants, sufficed "to give notice to the parties involved that all of the defendants named on this list of defendants is in fact ... who are responding." The court answered in the affirmative:

> I think that a common reading of the pleadings themselves create the context and create the list of who the parties are who are answering, and it indicates that [the attorney] is answering on behalf of the defendants plural. The defendants are listed in the complaint, and I think that's sufficient.... [I]t's fair under these circumstances to look at the pleadings in their entirety and to make a common sense reading of the documents. The word defendants are used. The defendants are all listed on the document. I am satisfied that it's sufficient to put the parties on notice ....

¶62 White's argument, that the circuit court erred because in the answer the attorney did not state under his signature that he was representing J&R Schugel, is a disagreement with the court's consideration of the established facts, under the proper standard of law. In sum, White fails to persuade us that the circuit court erroneously exercised its discretion in denying her motion for default judgment.

VIII. New Trial in Interests of Justice

¶63 Finally, White argues that this court should order a new trial in the interests of justice. White asserts that the controversy was not fully tried, and that justice miscarried, because of the three evidentiary errors addressed at the start of this opinion: the use of Rasner's discovery deposition testimony, the admission of

Trooper Manke's accident investigation testimony, and the admission of the history portion of White's hospital record. The circuit court denied White's motion, relying on its prior rulings on these issues. The court reiterated that this case centered on credibility, and the court concluded that the record supported the jury's conclusions.

¶64 "The [circuit] court's ruling on a motion for a new trial is highly discretionary and will not be reversed on appeal in the absence of a showing of an abuse of discretion." ***Johnson***, 93 Wis. 2d at 649-50. As to the three alleged errors that White argues entitle her to a new trial, we have concluded that the circuit court did not erroneously decide two of the issues, and that if the court did erroneously decide the third issue, it was harmless. Accordingly, White points to, and we find, nothing in the record that indicates that the circuit court erroneously exercised its discretion in denying White's motion for a new trial in the interests of justice.[6]

CONCLUSION

¶65 For all the reasons stated above, we conclude that the circuit court did not err with respect to nine of White's ten claims, that any error as to the tenth claim was harmless, and that White is not entitled to a new trial in the interests of justice. Therefore, we affirm.

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[6] Rasner filed a motion for leave to file a sur-reply, or in the alternative, to strike portions of the reply brief. In light of our discussion in this opinion, and consistent with the December 17, 2014 order of this court, we see no need to address the motion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.