COURT OF APPEALS
DECISION
DATED AND RELEASED

January 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1229

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

CHAVIS J. SHERIFF, a minor, by JOSEPH A. BRADLEY, his Guardian ad Litem, KAREN SHERIFF and CHAVIS T. SHERIFF,

Plaintiffs-Appellants,

v.

EDWARDO G. ARELLANO, M.D., CORAZONE P. ARELLANO, M.D., THE MEDICAL PROTECTIVE COMPANY, a foreign corporation, and THE WISCONSIN PATIENTS COMPENSATION FUND, a statutory entity,

Defendants-Respondents,

PETER W. TIMMERMANS, M.D., FRANCISCAN SISTERS HOSPITAL, INC., d/b/a WAUPUN MEMORIAL HOSPITAL, a domestic corporation, PHYSICIANS INSURANCE COMPANY OF WISCONSIN, a domestic corporation, WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN, a domestic corporation, DENNIS KUCHENBECKER, C.R.N.A., and STATE OF WISCONSIN

DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Defendants.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Chavis J. Sheriff, a minor, by Joseph A. Bradley, his guardian ad litem, Karen Sheriff and Chavis T. Sheriff (the plaintiffs) appeal from a judgment dismissing their medical malpractice claims. On appeal, they challenge the trial court's evidentiary and discovery rulings and contend that the trial judge failed to disclose his former professional association with defense counsel. Because we discern no reversible error, we affirm.

The plaintiffs' complaint alleged that various attending physicians and the hospital negligently cared for Chavis Sheriff (the child) before and after his birth. After a scheduling conference on August 5, 1992, the trial court issued a scheduling order requiring the plaintiffs to disclose their expert witnesses by December 11, 1992, and the defendants to disclose their experts by July 16, 1993. The matter was set for a jury trial on January 4, 1994. Thereafter, the plaintiffs sought an extension of time from defense counsel to disclose experts to January 31, 1993. The defendants agreed to the extension provided the plaintiffs' experts would be produced promptly for discovery depositions and that the defendants

could have until September 1, 1993, to disclose their experts. The plaintiffs agreed.

During the first week of February 1993, the plaintiffs filed a list of their witnesses. In early June 1993, the plaintiffs moved the court to amend the scheduling order to enlarge the time for naming their experts to July 30, 1993, and to permit the defendants until October 29, 1993, to disclose their expert witnesses. The portion of that motion which is relevant to this appeal sought to add Dr. Mary Ann Radkowski, a pediatric radiologist, to give an opinion as to when the child was injured, i.e., in utero or after birth.

After hearing argument, the court permitted the plaintiffs to use Radkowski, but limited her testimony to her expertise as a radiologist, rather than as a pediatrician, because the plaintiffs had already named an expert pediatrician. Because the court felt that it would be "nearly impossible" to limit the examination of Radkowski at trial to the allowed area of expertise, the court required Radkowski to testify on videotape, which the court could then edit if necessary. The court made clear that the videotaped testimony would be a deposition for trial purposes and that any testimony outside the allowed area of expertise would be stricken before viewing by the jury. The court essentially fashioned a compromise which permitted the plaintiffs to use Radkowski but protected the defendants from having her testify as an expert in pediatric medicine. The plaintiffs' counsel indicated his pleasure with the court's ruling.

In November 1993, the plaintiffs moved the court to amend the scheduling order to substitute another pediatric neurologist for Radkowski or to

permit them to use Radkowski's discovery deposition at trial in lieu of the videotaped deposition required by the trial court's earlier order. As grounds, the plaintiffs stated that Radkowski had recently indicated that she was unwilling and unable to continue in the case due to an increase in her professional duties. Because Radkowski would not participate in the videotaped testimony required by the court order, the plaintiffs sought to introduce her discovery deposition at trial. The defendants objected because they had not attended the August 6, 1993, discovery deposition of Radkowski with an expectation that the deposition would be used at trial. Rather, they had relied upon the trial court's order that the discovery deposition would not be used at trial and that Radkowski's testimony would be videotaped and edited by the court for use at trial. Additionally, the defendants questioned the fairness of having to produce their expert radiologist before the plaintiffs made their proposed substitute radiologist available for discovery.

The trial court denied the plaintiffs' request to use Radkowski's discovery deposition at trial for the following reasons: (1) allowing the plaintiffs to replace Radkowski would unduly jeopardize the availability of the trial court date and interfere with discovery; (2) the plaintiffs had not made a satisfactory showing that Radkowski was unable to testify because the plaintiffs' allegations regarding Radkowski's workload and complaints of stress did not amount to a "bona fide inability to proceed;" and (3) defense counsel realistically expected that Radkowski's discovery deposition was preliminary and would not be used at trial, and justifiably relied upon the earlier trial court order which required Radkowski's trial testimony to be videotaped.

The plaintiffs ultimately procured and presented Radkowski's videotape testimony at trial. However, they complained that Radkowski was reluctant and hostile in her testimony and unwilling to reiterate the opinions she gave in her discovery deposition. Nevertheless, the plaintiffs argued that because she was their expert, they were forced to use the videotape testimony at trial to their great prejudice.

On appeal, the plaintiffs argue that the trial court erroneously exercised its discretion in precluding the use of Radkowski's discovery deposition at trial. The plaintiffs maintain that Radkowski's discovery deposition should have been admissible at trial under § 804.07(1)(c), STATS., which states that "[t]he deposition of a medical expert may be used by any party for any purpose without regard to the limitations otherwise imposed by this paragraph." Section 804.07(1) permits the use at trial of "any part or all of a deposition, so far as admissible under the rules of evidence ...."

Decisions regarding the conduct of discovery, scheduling and control of a trial court's docket are within the trial court's discretion. *See* ***Lentz v. Young***, 195 Wis.2d 457, 465-66, 536 N.W.2d 451, 454-55 (Ct. App. 1995); ***Earl v. Gulf & Western Mfg. Co.***, 123 Wis.2d 200, 204, 366 N.W.2d 160, 163 (Ct. App. 1985). We will uphold the trial court's exercise of discretion if the record reveals the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case. ***Earl***, 123 Wis.2d at 204-05, 366 N.W.2d at 163.

The plaintiffs' arguments regarding § 804.07(1), STATS., seem to ignore the factual backdrop to the trial court's decision to exclude Radkowski's

discovery deposition. In granting the plaintiffs' motion to amend the scheduling order to permit the late addition of Radkowski, the trial court fashioned a remedy which met the parties' concerns. At that time, the plaintiffs agreed to the requirement that Radkowski testify on videotape. That this arrangement subsequently proved to be disadvantageous did not require the trial court to abandon its previous discretionary determination to preclude use of Radkowski's discovery deposition at trial.[1]

Section 804.07(1), STATS., premises the use of a deposition at trial on admissibility. Here, the trial court had already exercised its discretion in precluding the discovery deposition in favor of videotaped testimony which the trial court could monitor to assure compliance with its order circumscribing the expert testimony. The plaintiffs do not challenge the trial court's decision to do so; in fact, they acquiesced in it. Finally, in excluding Radkowski's discovery deposition, the trial court was exercising its discretionary authority under § 906.11, STATS., to control "the mode and order of interrogating witnesses and presenting evidence ...." Section 906.11(1). The trial court gave its reasons for excluding Radkowski's discovery deposition, and we see no misuse of discretion.

We turn to the plaintiffs' second appellate issue. One of the defendants' expert witnesses, Dr. John Kenny, was one of the child's treating physicians after he was injured. The plaintiffs moved in limine to bar Kenny's

[1] We note that the trial court advised the plaintiffs that they could bring additional information to the court which would indicate that it was impossible for Radkowski to give videotaped testimony. Apparently, they did not do so in a manner which satisfied the trial court.

testimony after learning that counsel for Drs. Edward G. and Corazone P. Arellano had contacted Kenny directly and conducted an ex parte interview regarding the child's course of treatment and medical condition.[2] At a discovery deposition, the plaintiffs learned that Kenny had discussed hospital and treatment records with counsel for the Arellanos and had given opinions regarding the treatment rendered to the child by Corazone Arellano prior to his involvement. Further deposition testimony revealed that during the six months preceding the trial, defense counsel had corresponded with Kenny six times and provided him with information regarding the case. Neither the child nor any representative had authorized Kenny to discuss the facts and circumstances of the case with defense counsel. For that reason, the plaintiffs moved the trial court to exclude Kenny's testimony as a sanction for his allegedly inappropriate ex parte contacts with counsel for the Arellanos.

At the hearing on the plaintiffs' motion, counsel for the Arellanos argued that he did not breach the patient-physician privilege. He stated that he specifically admonished Kenny in his first contact with him not to discuss anything with him other than Corazone Arellano's treatment and the opinions of other experts in the case. Counsel told Kenny not to discuss any of his contacts with the child or anything that he learned from his treatment of the child.

[2] Kenny had repeatedly refused to discuss the facts and circumstances of the case with the plaintiffs' counsel.

The trial court found that counsel violated the prohibition on ex parte contacts because the child had not waived the patient-physician privilege. Turning to the appropriate remedy for the violation, the trial court considered the disclaimer letter sent to Kenny by counsel for the Arellanos, Kenny's deposition testimony, defense counsel's affidavit in opposition to the motion, and the central concern of cases addressing whether opposing counsel can speak with treating physicians, i.e., the potential for disclosure of privileged information. The trial court found that defense counsel and Kenny did not discuss any patient confidences and denied the plaintiffs' motion to strike Kenny.[3]

Our supreme court's most recent pronouncement on the question of whether opposing counsel may communicate ex parte with a treating physician is set forth in ***Steinberg v. Jensen***, 194 Wis.2d 440, 534 N.W.2d 361 (1995). In ***Steinberg***, the defendant physician met with two other consulting physicians upon the advice of defense counsel. ***Id***. at 450, 534 N.W.2d at 364. The attorney was not present for the meeting where the physicians discussed the litigation and the treatment the patient had received. ***Id***. at 450-51, 534 N.W.2d at 364. The Steinbergs claimed that the defendant physician had engaged in ex parte communications with other physicians without their

[3] At the same hearing, which was held one day before trial, the trial court revisited the plaintiffs' complaints regarding Radkowski's unwillingness to give videotaped testimony. The court found that the plaintiffs had not yet exercised all of their legal options to compel Radkowski to provide videotaped testimony. The trial court noted that there had been no follow-up request for sanctions and no additional presentation to the court of evidence showing Radkowski's medical or mental disability. Therefore, the trial court continued to preclude the plaintiffs' use of Radkowski's discovery deposition. Radkowski's videotaped trial testimony was finally obtained midtrial.

consent and sought to ban the consulting physicians from testifying at trial. ***Id.*** at 452-53, 534 N.W.2d at 365. Later, defense counsel admitted that he spoke with another consulting physician to address scheduling concerns and answer the physician's inquiry about what he should review prior to testifying at trial. ***Id***. at 455, 534 N.W.2d at 366.

While the supreme court in ***Steinberg*** held that "defense counsel may engage in *limited* ex parte communications with a plaintiff's treating physicians so long as the communications do not involve the discussion of confidential information," ***id***. at 473, 534 N.W.2d at 373 (emphasis in original), the court recognized that under the law existing at the time of the ex parte contact, previous court of appeals cases governed. *See* ***id***. at 474, 534 N.W.2d at 374. Accordingly, we decide the controversy involving Kenny under pre-***Steinberg*** law.

Applying pre-***Steinberg*** law, the supreme court noted that defense counsel had assured the court that he was not attempting to engage in ex parte discovery of the physician; the trial court found this assurance credible. ***Id***. at 475, 534 N.W.2d at 374. The court further noted that the Steinbergs never established that the communication involved the discussion of any confidential information. ***Id***.

Here, the trial court found that defense counsel and Kenny did not discuss any confidential information. This finding is supported by the record. Therefore, we hold, as did the supreme court in ***Steinberg***, that defense counsel "did not contravene the public policy that underpins the physician-patient

privilege and the physician's ethical duty of confidentiality" in the course of engaging in ex parte contacts with Kenny. ***Id***. The trial court did not misuse its discretion in permitting Kenny to testify. *See* ***Gonzalez v. City of Franklin,*** 137 Wis.2d 109, 139, 403 N.W.2d 747, 759 (1987) (evidentiary rulings are discretionary with trial courts).

Turning to the final issue raised on appeal, the plaintiffs argue that the trial judge should have either recused himself or advised the parties of his former professional association with one of the attorneys for the defendants, Steven P. Sager, who represented Dr. Peter W. Timmermans. The plaintiffs allege that the trial judge and Sager had a prior business relationship, but they do not elaborate. We note that at the close of the plaintiffs' case, the parties stipulated to dismissing Timmermans. Additionally, the plaintiffs make no showing of prejudice or bias resulting from this alleged former professional relationship. Issues which are inadequately briefed or which merely offer conclusions unsupported by reasoning and facts are not considered by this court. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985) (we will not independently develop a litigant's argument).

By the Court.—Judgment affirmed.

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