

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 27, 1995

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. 95-0505

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RAYMOND L. SCHNEIDER,

Plaintiff-Respondent,

v.

JACQUELINE G. WATLEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County:
SUSAN E. BISCHEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Jacqueline Watley appeals a judgment that dismissed her dental malpractice counterclaim for failure to prosecute. The trial court ordered dismissal after she failed to name expert witnesses who indicated they intended to provide testimony supporting her malpractice allegation. The expert witnesses she named had no opinions critical of her dentist. Watley argues that the trial court should have granted her additional time to seek new counsel and obtain expert witnesses. Watley filed her counterclaim on January 13, 1993. The trial court's May 20, 1993, scheduling order initially set September 1, 1993, as the deadline for naming expert witnesses. Watley eventually

revealed her expert witnesses at a January 5, 1994, hearing. Watley then had from February 10, 1994, when her counsel withdrew, until May 12, 1994, dismissal hearing, to obtain new counsel. She had neither new counsel nor experts who attested to the malpractice at the time of the dismissal hearing.

The trial court correctly held this sequence of events to constitute a failure to prosecute the counterclaim. The trial court made a discretionary decision. *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). It could dismiss Watley's counterclaim if her noncompliance with the court order was egregious and without justifiable excuse. *Id.* Litigants pursuing claims and counterclaims have an obligation to name expert witnesses who will testify in favor of their claim or counterclaim and to comply with scheduling orders. Those defending against claims and counterclaims have a right to depose such experts within the time constraints set by the trial court's scheduling order. Such scheduling orders inherently contemplate that the parties must name experts who furnish opinions supporting their claims or counterclaims.

Here, Watley's failure to provide malpractice attesting experts was a violation of the trial court's scheduling order. Watley provided no adequate basis for further delaying the naming of such experts from September 1, 1993, as extended to January 5, 1994, until sometime beyond the court's May 12, 1994 dismissal hearing. Watley indicated to the trial court that she had trouble obtaining new counsel and that her expert witnesses were reluctant to testify before she obtained new counsel. We have reviewed Watley's explanations. The trial court could reasonably conclude that Watley had not made a diligent effort to prepare her expert witnesses or obtain counsel. Watley therefore provided no justifiable excuse for the delay. Under these circumstances, the trial court had no obligation to allow her more time to get expert witnesses or new counsel.

By the Court.—Judgment affirmed.

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