COURT OF APPEALS
DECISION
DATED AND RELEASED

May 27, 1997

NOTICE

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, STATS.

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Nos. 96-0197
96-1106

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

96-0197

WILLIAM O. MARQUIS, G/A/L FOR D.W. MARQUIS, MARY MARQUIS, L.C. MARQUIS, K.L. MARQUIS, T.P. MARQUIS AND ANN MARQUIS,

PLAINTIFF-APPELLANT,

V.

HAROLD I. BORKOWF, M.D.,

DEFENDANT-RESPONDENT,

ABC INSURANCE COMPANY, ST. MARY'S HOSPITAL OF MILWAUKEE AND DEF INSURANCE COMPANY,

DEFENDANTS.

96-1106

WILLIAM O. MARQUIS, G/A/L FOR DANIEL W. MARQUIS, MARY MARQUIS, LENOR C. MARQUIS, KATHRYN L. MARQUIS, TIMOTHY P. MARQUIS AND ANN L. MARQUIS,

PLAINTIFFS-APPELLANTS,

V.

ST. MARY'S HOSPITAL OF MILWAUKEE,

DEFENDANT-RESPONDENT,

HAROLD I. BORKOWF, M.D., ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY,

DEFENDANTS.

APPEAL from judgments of the circuit court for Milwaukee County: ROBERT C. CANNON, Reserve Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Attorney William O. Marquis, *pro se*, father of and as guardian ad litem for his son, Daniel O. Marquis, and as appellate counsel on behalf of his wife, Mary, and their children, Lenor, Kathryn, Timothy, and Ann Marquis, appeals from the trial court's judgments entered after the trial court granted summary judgments dismissing his complaint against Dr. Harold I. Borkowf, St. Mary's Hospital of Milwaukee, and their insurers. Marquis argues that the trial court's failure "to hear and/or grant plaintiff's motion to amend the scheduling order was erroneous use of discretion" and, therefore, that summary judgments were not appropriate. We affirm.

I. FACTUAL BACKGROUND

The facts relevant to resolution of this appeal are not in dispute. On April 27, 1994, Marquis filed a medical malpractice complaint alleging that Dr. Borkowf and St. Mary's were negligent during the April 30, 1984 delivery of

Marquis's son, Daniel, resulting in permanent physical and mental damage. The trial court granted summary judgments to the defendants and dismissed the action because Marquis failed to disclose expert witnesses as required by the court's pre-trial scheduling order. Details of some of the procedural steps between the filing of the complaint and the dismissal of the action are essential to our analysis.

On November 28, 1994, based on a scheduling conference conducted on November 3, 1994, the trial court entered an order requiring, *inter alia*, that "[p]laintiffs shall disclose any and all witnesses, including expert witnesses, on or before May 1, 1995."

On May 31, 1995, the plaintiffs, represented by Attorney Robert S. Sosnay, filed a motion requesting "an order extedning [sic] the plaintiffs [sic] time for discovery an additional sixty (60) to ninety (90) days."[1] In his affidavit in support of the motion, Sosnay stated that "medical malpractice is not among my specialties and that Mr. Marquis was in need of counsel and I excepted [sic] responsibility for the case with the understanding that he would attempt to find another attorney who had experience in this area." He further stated "[t]hat for several months we have been conferring with attorney Mary L. Woehrer regarding her substituting as the attorney of record for myself [sic] and she was attempting to

[1] The record does not include any order extending the earlier May 1, 1995 deadline. It is undisputed, however, that such an extension was allowed. As Sosnay's affidavit in support of his May 31 motion states, he had "asked for and received a thirty day extension for the naming of the plaintiffs [sic] experts."

Further, the brief in support of Dr. Borkowf's motion for summary judgment states that "[a]t the request of Attorney Robert Sosnay, an extension for disclosure until June 1, 1995 was granted." Dr. Borkowf's reply brief in support of his motion for summary judgment refers to a "one month ... courtesy extension given by the defendants."

have the medical reports evaluated by experts with whom she is familiar." Sosnay stated that he had "been informed that the experts evaluating these records feel they need additional information before they will in fact commit to acting as an expert in this case."

Although Sosnay filed his motion on May 31, he failed to serve the defendants and failed to obtain a date for the trial court to consider his motion. Marquis never disputed what the defendants maintained before the trial court: that the motion to extend time for discovery "had never been served on defense counsel and no date for the motion had ever been set for that to be heard ... [and] that motion has never, in fact, been ruled on by this court."

In a motion dated June 28, 1995, Dr. Borkowf moved for summary judgment and, by letter of July 11, 1995, St. Mary's "joined in the motion for dismissal filed on behalf of Dr. Harold Borkowf."[2] Both the motion and letter were supported by an affidavit from Todd M. Weir, one of the attorneys for St. Mary's. The affidavit stated, *inter alia*:

> 3. That on April 28, 1995, affiant was contacted by Attorney Robert Sosnay who requested an additional thirty days for the disclosure of expert witnesses. During said conversation Mr. Sosnay indicated that he had referred the case to several consultants, and that if the consultants to whom the matter had been referred indicated there was no viable case[,] he would be dismissing the action.
>
> 4. To date, plaintiffs have failed to disclose any expert witnesses and no additional extensions of time have been granted for the disclosure of expert witnesses.

[2] The motion was filed July 19, 1995 but St. Mary's apparently was aware of it before the filing date.

On July 27, 1995, Attorney Marquis, *pro se*, filed an answer to the summary judgment motion, together with an affidavit in which he stated "[t]hat upon discussion with Attorney Mary Woehrer he is aware of ... doctors, nurses and economist being contacted," and specifically named seven witnesses including Dr. William Buggy who, according to the affidavit, "[w]ill testify that Dr. Borkowf was negligent."[3] The affidavit reiterated the information in Sosney's affidavit regarding "Attorney Mary Woehrer ... substituting as attorney of record and also that Attorney Woehrer was then attempting to have the medical reports evaluated by experts with whom she was familiar and that has been done." Marquis's affidavit then went on to state:

> 5. That Attorney Sosnay has essentially turned over the case to Attorney Woehrer....
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> ....
>
> 7. That the sole basis for defendant Borkowf's Motion seems to be that experts had not been named while indeed your affiant believes that the attorney for Harold Borkowf was well aware that a Notice of Motion and Motion had been filed by Attorney Sosnay explaining the situation (i.e. the substituting of Attorney Woehrer and that experts were being sought and need more time).

On August 24, 1995, a stipulation and order was filed substituting Mary Woehrer and Christopher Stawski for Robert Sosnay as attorneys for the plaintiffs. The trial court then held the first of two hearings on the summary judgment motions.

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[3] Marquis's answer also included an affidavit of Dr. Buggy, dated July 26, 1995, stating that he is a physician specializing in obstetrics and gynecology and that, based on his education and experience and on his review of the relevant records, it is his opinion that Dr. Borkowf "was negligent in the medical treatment he rendered to Mary Marquis at St. Mary's Hospital and in the delivery of the infant Daniel Marquis on April 30, 1984," and that Dr. Borkowf's negligence "caused severe asphyxia ... and caused permanent injuries to Daniel Marquis."

At the August 24, 1995 hearing, the trial court heard arguments from Attorney Mark Larson on behalf of Dr. Borkowf, Attorney Todd Weir on behalf of St. Mary's, and from Attorneys Stawski and Marquis on behalf of the plaintiffs. Stawski conceded that "the granting of summary judgment under the circumstances of this case ... is a discretionary call on the court's part[,]" but argued that "dismissal of this action is a very drastic remedy." Counsel contended that "[t]here's been no showing of any intentional disregard of the scheduling order," and that "[c]ertainly there has been no egregious conduct of any sort demonstrated."

The attorneys and trial court focused on several issues including: (1) whether and when the plaintiffs were represented by Marquis, Sosnay, or Stawski and Woehrer; (2) whether, within the thirty-day courtesy extension, Sosnay had filed a motion to extend the time to name experts; and (3) whether, in the trial court's words, "apparently Sosnay screwed this whole thing up" and "loused up on this thing, one way or the other."

The trial court seemed to reach several tentative conclusions but ultimately adjourned the hearing because "the only way that [summary judgment] can be avoided is have Mr. Sosnay explain why he let this thing go as he did." The trial court stated that "if Sosnay doesn't have a good, legitimate reason for not doing what he was supposed to have done in conformance with the statute, then—the motions may be granted." The trial court also commented twice that, appreciating the gravity of the case, it was "bending over backwards" to ensure that the plaintiffs have their "day in court."

On October 12, 1995, the hearing continued with testimony from Sosnay. He explained:

> Number one, I spoke with Mr. Weir regarding an extension of time in which to find and name certain witnesses. Mr. Weir and counsel for the other defendant agreed to a 30-day extension, which I believe moved it to the end of May. As I think everyone involved in the case knows, I've never handled a case like this. Mr. Marquis was without counsel. I agreed to do it because he needed counsel to serve in that capacity with the understanding that we would attempt to find someone better skilled in this area than myself [sic].
>
> Because of that, I had been in contact with Ms. Woehrer, who has experience, and she had indicated that the essential thing was getting the reports to experts and getting a report or something to be able to substantiate or present in court. I had made contact with her. She was making those efforts.
>
> ....
>
> I think towards the end of May–and I'm not sure of the exact date–Ms. Woehrer wrote to the attorneys for the defendant about obtaining another extension in that she had submitted the documents to be reviewed to a number of doctors and was awaiting their responses. She indicated to me that she had got a negative reply, and they cited the 30-day informal extension granted to me. In response to that, I prepared and filed a motion in which the relief I was seeking was an extension of time to name witnesses.
>
> Now, I prepared the motion like I've always prepared motions; namely, leaving blank the day of the motion and the time. And I took it up to the clerk's office, the Chief Judge's office, and was told to leave it there because Judge Cannon didn't have a clerk and someone would get back to me with the date. I called back on at least one and I think two occasions, and I was given that information. I never sent a copy to the other counsel because it had–I had no date to tell them. I never expected that it would take the time period it took for this matter to come to light. In the interim, you [Mr. Stawski] and Ms. Woehrer substituted for me.

At the hearing, Stawski conceded that Sosnay's motion to extend had not been served on the defendants, but Stawski also stated that although "what Attorney Sosnay did maybe wasn't technically correct," the trial court still "can grant that motion, grant us

additional time to name experts." Stawski then declared: "We have experts that we're prepared to name very soon, and we can comply with the Court's order in that regard and name the experts...."

At the conclusion of the October 12 hearing, the trial court, granting summary judgment, commented, *inter alia*:

> [F]irst of all, this case has been very disturbingly mishandled.... [I]t seems to me that [Mr. Marquis's] choice of attorney [Sosnay], under these circumstances, was a very, very bad choice when you're fooling around with statutes and timeliness of statutes. Mr. Marquis has been involved in the case. Mr. Sosnay gets in, and he's relying on Mr. Weir granting him an extension of time.
>
> The fact that I wasn't available doesn't make any difference. It was incumbent upon him to notify Mr. Weir immediately [that he (Sosnay) has] been up in the Chief Judge's office and Judge Cannon isn't there and [he's] got to get an extension ... from the Chief Judge if [from] no other person so that this matter–the statute can be tolled.
>
> The fact that an affidavit has been interposed here saying that you're going to name somebody as a witness and you're not telling them what they are going to testify to, whether they are going to testify as to the negligence of the hospital in any way was the causation of the problem which occurred to the plaintiff here, as far as the Court is concerned, there's just no discretion left....
>
> And under these circumstances, Bill, I feel sorry for you. I really do. And I just don't know what you were thinking of....
>
> ....
>
> [I]f I could turn the pages over and change the wording of the statute, I would do it for you.... I'm going contrary to my feelings. I feel so sorry for you, and I really do. But as you can see, counsel, the mistake was made when Sosnay was brought in....
>
> And now you come in and you've got to try to make up for all of the problems that were created, and all Sosnay had to do was– First of all, he's gone beyond the thirty

> days. There's no two ways to that.... [He had] to get an extension of time. But everything was– You had nothing. You had no experts of any kind at that time. You were shooting in the dark....

On October 23, 1995, the trial court entered an order finding "that the plaintiffs failed to timely name expert witnesses pursuant to court order and further failed to properly or timely seek leave of the court for relief from the scheduling order," and concluding that Dr. Borkowf was entitled to summary judgment. On December 4, 1995, the trial court entered a judgment dismissing the action against Dr. Borkowf. On January 19, 1996, the trial court entered a judgment dismissing the action against St. Mary's.

II. DISCUSSION

"Testimony from medical experts is essential to establish a cause of action for medical malpractice." ***Kasbaum v. Lucia***, 127 Wis.2d 15, 20, 377 N.W.2d 183, 185 (Ct. App. 1985). Thus Marquis does not dispute that the failure to disclose expert witnesses, necessarily precluding plaintiffs' introduction of expert testimony at trial, properly would have required summary judgments for the defendants.[4] *See* § 802.08, STATS.

In ***Schneller v. St. Mary's Hospital Medical Center***, 162 Wis.2d 296, 470 N.W.2d 873 (1991), the supreme court explained:

> The decision of whether a scheduling order will be modified is within the circuit court's discretion, and its decision will only be reversed for an abuse of discretion.

[4] Marquis does argue that defendants' summary judgment motions were untimely. He failed, however, to raise that argument in the trial court and, therefore, we decline to address it. *See* ***Lenz Sales & Serv., Inc. v. Wilson Mut. Ins. Co.***, 175 Wis.2d 249, 257, 499 N.W.2d 229, 232 (Ct. App. 1993) ("It is well established that Wisconsin appellate courts will generally not review an issue raised for the first time on appeal.").

> Similarly, the circuit court's decision to dismiss an action is discretionary and will not be disturbed unless the party claiming to be aggrieved establishes that the circuit court has abused its discretion. A discretionary decision will be sustained if the circuit 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. at 305-06, 470 N.W.2d at 876 (citations omitted). Further, "'we will sustain the sanction of dismissal [of the action] if there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no "clear and justifiable excuse" for the party's non-compliance.'" ***Id.*** at 311, 470 N.W.2d at 878 (quoting ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 276-77, 470 N.W.2d 859, 865 (1991)).

In most cases, a trial court's "reasonable determination that the moving party had not shown cause for amending the scheduling order would be sufficient" basis for our affirmance. ***Id.*** at 308, 470 N.W.2d at 877. However, when a denial of a motion to amend has the severe effect of causing the ultimate dismissal of the plaintiff's case, appellate courts "must further evaluate the [trial] court's actions under the standards set forth in ***Johnson*** [***v. Allis Chalmers Corp.***, 162 Wis.2d 276, 470 N.W.2d 261 (1991) (governing dismissal of action as sanction for party's failure to comply with court orders).] ***Id.***

In ***Johnson***, the supreme court stated that "the nominal nature of some violations of court orders may make dismissal inappropriate despite the lack of a clear or justifiable excuse," and further directed reviewing courts to consider "whether there was a reasonable basis for the circuit court's determination that the party's conduct in failing to comply with a court order was egregious." ***Johnson***, 162 Wis.2d at 276, 470 N.W.2d at 865. Additionally, we note, "[a]n implicit finding of egregious conduct or bad faith by the circuit court in dismissing a cause

of action is sufficient if the facts provide a reasonable basis on review for the court's conclusion." ***Schneller***, 162 Wis.2d at 311, 470 N.W.2d at 879.

The circumstances and procedural timeline of ***Schneller***, which affirmed a trial court's denial of a motion to extend the time to identify expert witnesses, were remarkably similar to those of the instant case. In ***Schneller***, seven years after the birth of their son, the plaintiffs began their action against three doctors and St. Mary's Hospital alleging medical malpractice involving the birth. ***Id.*** at 302, 470 N.W.2d at 874. In July 1986, they filed their court action and, on September 2, 1987, the trial court issued a pretrial order requiring the plaintiffs to name their expert witnesses by February 29, 1988. ***Id.*** at 302-03, 470 N.W.2d at 874-75. The plaintiffs filed an expert witness list on February 29, but it named only experts on damages, not on liability. ***Id.*** at 303, 470 N.W.2d at 875. On February 29 the plaintiffs also moved the court to extend the already-expired deadline to name expert witnesses an additional thirty to forty-five days. ***Id.*** They failed, however, to pursue the motion. ***Id.*** Pursuant to a courtesy agreement, St. Mary's allowed the plaintiffs additional time to produce a liability expert for deposition, but the plaintiffs failed to name or produce an expert witness, and failed to seek a further extension of the time for naming experts. ***Id.*** On May 4, 1988, however, new counsel for the Schnellers moved to extend the deadline and, on May 5, named two liability experts. ***Id.***

Similarly, in the instant case, although some circumstances remain uncertain, several factors are undisputed: (1) Mr. Marquis was responsible for what he termed "a striation of duties"–fluctuating and confusing representation carried out (or neglected) by several lawyers; (2) many years had passed since the child's birth, and more than one year had passed between the time the plaintiffs' had filed their action and the deadline by which they were required to name experts; (3) another month–the courtesy extension–passed and the plaintiffs still had failed to name their

experts; (4) Sosnay never served the defendants with his motion seeking additional time to locate and disclose expert witnesses; and (5) even by the time of the summary judgment motion hearing, some uncertainty remained regarding whether the plaintiffs had any expert witnesses or whether, as Attorney Stawski said at the final hearing, they merely were "prepared to name [experts] very soon."

Although in the instant case the parties could debate whether plaintiffs' counsels' conduct was slightly more or less responsible than that in ***Schneller***, the supreme court's comments in ***Schneller*** are equally applicable here:

> The [circuit] court viewed the Schnellers' failure to comply with the scheduling order as an egregious violation in large part because of the integral role liability experts play in a medical malpractice case. The court emphasized that after over two years of litigation the Schnellers had apparently not verified the basis for their entire action. The Schnellers' original counsel was fully informed by the terms of the scheduling order that these experts needed to be produced by February 29 and that sanctions, including dismissal, could be imposed for failing to comply with the scheduling order. St. Mary's cautioned the Schnellers' counsel of the consequences for failing to name liability experts and gave the Schnellers a grace period to name the experts. Despite the obvious consequences of failing to comply with the scheduling order, the Schnellers' counsel did not take advantage of the grace period or pursue an extension beyond that requested in the original motion to enlarge time.
>
> These facts present an adequate basis to sustain the circuit court's implicit finding that the Schnellers' counsel's conduct in failing to comply with the discovery order was egregious and merited dismissal. As the circuit court emphasized, "[p]laintiffs' original counsel made no serious attempts to meet the specified deadlines." The scheduling order was not nominal; it involved naming experts who were necessary to substantiate the Schnellers' cause of action.
>
> The circuit court's primary basis for denying the motion, its concern that granting the motion would "encourage dilatory behavior by counsel" and interfere with the court's capacity "to control disposition of cases on its

> docket with economy of time and effort," is entirely justified given the integral role liability experts play in a medical malpractice action. If a litigant refuses to take a court's scheduling order seriously when it is apparent to all that the failure to name experts as required by the order will prove fatal to the litigant's case, it is reasonable for the circuit court to conclude that only a drastic sanction such as dismissal will effectively convey to the litigant and future litigants that scheduling deadlines must be obeyed.

Id. at 313-14, 470 N.W.2d at 879-80 (second alteration in original).

Mr. Marquis, as *pro se* litigant, attorney, guardian ad litem, and plaintiff, ultimately was responsible for the overall "striation of duties" he dictated. Indeed, it is undisputed that Sosnay never filed a written notice of appearance and, as Marquis acknowledges in one of his reply briefs to this court: "It was the plaintiff's duty to see that experts were gained no matter who the duties was [sic] delegated to, not Attorney Sosnay's." This "striation" resulted in representation by an attorney admittedly unqualified to handle a medical malpractice action, and further resulted in delays and the failure to locate expert witnesses by the court-ordered deadline. Under these circumstances, although *Sosnay* offered what some might stretch to consider a plausible explanation for *his* conduct at the very last point where he failed to obtain a hearing date, his account falls far short of what ***Johnson*** and ***Schneller*** termed the "'clear and justifiable excuse' for the party's non-compliance." ***Schneller*** , 162 Wis.2d at 311, 470 N.W.2d at 878 (quoting ***Johnson***, 162 Wis.2d at 276-77, 470 N.W.2d at 865.)

Accordingly, we conclude here, much as the supreme court concluded in ***Schneller***, that the trial court "was within its discretion in dismissing [plaintiffs'] case because there was a reasonable basis for the court to determine

that [plaintiff's counsels'] conduct was egregious and without a clear and justifiable excuse." ***Id.*** at 312, 470 N.W.2d at 879.[5]

By the Court.–Judgments affirmed.

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

[5] The parties also argue about whether St. Mary's status is somehow distinct from Dr. Borkowf's. We see no merit to Marquis's contention that St. Mary's should not have been allowed to join in Dr. Borkowf's motion for summary judgment. We need not reach any issue of St. Mary's potentially distinct status because, Marquis conceded, with respect to the expert witness issue, both defendants were in the same position. At the August 24, 1995 hearing, attorney Marquis stated:

> [Counsel for St. Mary's] is not before the court in any different posture than the other defendant because he did a tag along by letter [joining in Dr. Borkowf's motion for summary judgment], and the basis for the motion for summary judgment is basically that we have not followed the discovery demand. So he's in no better posture than the other defendants.

Thus, our resolution of this case on the basis of the plaintiffs' failure to comply with the trial court scheduling order and failure to establish a clear and justifiable basis for their failure to name expert witnesses obviates the need to further address St. Mary's status in any separate manner. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).