

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 3, 1997

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.

**NOTICE**

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

**No. 96-1611**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**JANICE JOHNSON KUHN, MILWAUKEE  
AUCTION GALLERIES, LTD., CHESTNUT  
COURT APPRAISAL ASSOCIATES, LTD.,  
THE OFFICERS OF THE ABOVE CORPORATIONS,  
THE ADVISORY BOARD OF MILWAUKEE  
AUCTION GALLERIES, LTD. AND THE  
CONSIGNORS OF MILWAUKEE AUCTION  
GALLERIES, LTD.,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**CHARLES V. JAMES, D/B/A FITZGERALD,  
CLAYTON, JAMES & KASTEN, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Reversed and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Janice Johnson Kuhn, Milwaukee Auction Galleries, Ltd., and Chestnut Court Appraisal Associates, Ltd., (Kuhn) appeals from the trial court judgment, based on its order for judgment granting summary judgment to and dismissing her action against Charles V. James, d/b/a Fitzgerald, Clayton, James & Kasten, Inc. Kuhn argues that the trial court erred (1) in denying her motion for a continuance to obtain counsel and an expert witness, and (2) in granting summary judgment. Because the record offers no basis on which we could conclude that the trial court exercised discretion in denying Kuhn's request for a continuance to obtain counsel, we reverse.

## I. BACKGROUND

On May 3, 1995, Kuhn, *pro se*, filed a complaint alleging that the defendants, an insurance broker and insurance brokerage firm, breached their duty to properly insure her auction business. She claimed that they acted negligently and in bad faith by failing to protect her interests under various commercial insurance policies.

The case was scheduled for a hearing on the defendants' motion for summary judgment and for trial on March 25, 1996. On March 19, however, Kuhn wrote a letter to the trial court requesting an adjournment of the summary judgment hearing and trial for "a few days" to have counsel represent her, and requesting permission to designate a University of Wisconsin professor as an expert witness. The letter stated, in part: "I am making these requests so that I can be represented by the law firm of Anderson, Kill, Olick & Oshinsky. The Anderson Kill firm has agreed to represent me if the Court grants the requested

delay and if Professor Anderson is permitted by the Court to be designated as an expert witness."

On March 25, when the trial court called on Kuhn to respond to the defendants' arguments for summary judgment, she again requested an adjournment to have counsel represent her.

MS KUHN: Your Honor, I sent two letters<sup>1</sup> to the Court last week asking if I could be represented by the firm of Anderson & Kill and have Professor Dan Anderson as an expert witness. And I would like to ask if we could address that issue first, because I would prefer to have Mr. Zickman answer this summary judgment rather than myself.

THE COURT: Is he here?

MS KUHN: Pardon?

THE COURT: Is he here?

MS KUHN: He cannot be here today. He is available by telephone. But he asked in the letter that we sent if it could be adjourned several days until he could be here.

The court then declared, "Not going to be adjourned. We're set for trial this afternoon if the Court doesn't grant this [summary judgment] motion." Kuhn responded, "I would prefer to have an attorney argue the summary judgment." The court replied, "Well, today is the day, ma'am, to hear this. We can't delay anything further. If I don't, if I deny the Motion for Summary Judgment, we have a trial this afternoon."

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<sup>1</sup> The record reflects that a faxed copy of Kuhn's March 19 letter was filed on March 20, and that the original copy was filed on March 22.

After arguing in response to the summary judgment motion, Kuhn again requested an adjournment to have counsel represent her, stating:

And I have an attorney willing to take this case,... Mr. Zickman from Anderson, Kill in New York. If it can be adjourned for several days, because today he had to be in Tampa. He could begin on Thursday if your Honor would allow that, or he could begin next Monday or Tuesday if that's possible.

The trial court denied her request stating:

There will be no adjournment. This is the day in court. This matter has been on this Court's calendar, on some courts' calendars for long periods of time. Today [if] the Court would not grant a Motion for Summary Judgment, we would have our trial this afternoon. There is [sic] always reasons for requests for adjournments. Any adjournment would be denied. So we're not going to adjourn this matter to have anybody else come in and deal with this matter. The Court will deal with it today.

## II. ANALYSIS

The supreme court has explained:

It is well established in Wisconsin that a continuance is not a matter of right. Rather, the decision to grant or deny a continuance lies within the discretion of the trial court. Accordingly, the trial court's ruling on this issue will be set aside only if there is evidence of an abuse of discretion. An abuse of discretion exists if the trial court failed to exercise its discretion or if there was no reasonable basis for its decision.

*Robertson-Ryan & Assocs., Inc. v. Pohlhammer*, 112 Wis.2d 583, 586-87, 334 N.W.2d 246, 249 (1983) (citations omitted).

Kuhn argues that the trial court erred in denying her request without any consideration of the criteria of *Phifer v. State*, 64 Wis.2d 24, 218 N.W.2d 354 (1974). Although *Phifer* is distinguishable in two important respects, Kuhn's argument is essentially correct.

*Phifer* was a criminal case. Further, *Phifer* involved a motion by a defendant, represented by counsel, for a continuance to obtain substitute counsel. Still, *Phifer* provides criteria that are appropriate for a trial court's consideration of a *pro se* party's request for a continuance to obtain counsel in a civil case.

*Phifer* reiterates that "[t]he granting or denial of a continuance is within the discretion of the trial court." *Id.* at 30, 218 N.W.2d at 357. *Phifer* concluded that "a balancing test is appropriate to review the exercise of a trial court's discretion," with consideration of the "right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice." *Id.* at 31, 218 N.W.2d at 358 (quoting *Giacalone v. Lucas*, 445 F.2d 1238, 1240 (6th Cir. 1971)). The factors to be balanced include: (1) length of the requested delay; (2) availability of competent counsel; (3) whether the party had requested and received other continuances; (4) convenience or inconvenience to the parties, the witnesses, and the court; (5) whether the request is legitimate or dilatory; and (6) other relevant circumstances. *Id.* at 31, 218 N.W.2d at 358.

Moreover, and of particular importance given the scarce record in the instant case, *Phifer* explained that while "no mechanical tests" determine whether a continuance is appropriate, "[t]he answer must be found in *the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied.*" *Id.* at 31, 218 N.W.2d at 357-58 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)) (emphasis added). Here, however,

the record reveals little if any information related to the *Phifer* criteria, including the reasons underlying Kuhn's request and the circumstances surrounding its timing.

Without any apparent consideration of the appropriateness of Kuhn's request under the *Phifer* criteria, the trial court declared that "any adjournment would be denied." Other than asserting that "[t]his matter has been on this Court's calendar, on some courts' calendars for long periods of time," the trial court provided no explanation for its decision and, indeed, the trial court's assertion seems dubious given that the case had been filed less than eleven months earlier and had never before been scheduled for trial.

As the respondents point out, this court may independently review the record to determine whether it provides a basis for the trial court's discretionary decision. *See Schmid v. Olsen*, 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). Here, however, the record fails to provide an adequate basis for this court to uphold the trial court's denial of Kuhn's request. We note that Kuhn had not previously requested a continuance. We also note that when Kuhn requested the continuance to obtain counsel, she did so in writing approximately one week before trial, and she specified that she had arranged for counsel whose name and telephone number she provided in the letter. Then, on March 25, Kuhn reiterated her request and specified dates within the next week when, she said, counsel would be available for the motion and trial.

### III. CONCLUSION

Accordingly, we reverse and remand for a hearing at which the trial court shall consider Kuhn's request for a continuance to obtain counsel. The trial court shall evaluate the facts and circumstances as they existed on March 25, 1996

and, applying the appropriate criteria, shall determine whether Kuhn's request should have been granted. Although the trial court shall focus on the facts and circumstances as they existed on March 25, 1996 when Kuhn appeared *pro se*, Kuhn may be represented by counsel at the hearing on remand, if she so desires.

If the trial court concludes that Kuhn's request for a continuance should have been granted, the trial court shall allow Kuhn reasonable time, if needed, to make arrangements for counsel, and shall allow counsel reasonable time to prepare for the hearing on the summary judgment motions and, if necessary, the trial.

Given this court's conclusion and the resulting possibility of additional summary judgment litigation, this court will not address Kuhn's arguments regarding summary judgment. We clarify, however, that if, on remand, the trial court concludes that Kuhn's motion for a continuance should not have been granted (thus leaving the summary judgment record as it currently stands), Kuhn would not be precluded from pursuing another appeal of the summary judgment based on the summary judgment record through March 25, 1996. If, however, the trial court concludes that Kuhn's request for a continuance should have been granted, and if after further litigation the trial court grants summary judgment for either party, any future challenge to the summary judgment would relate to the full record as developed in the subsequent summary judgment

litigation.<sup>2</sup>

*By the Court.*—Judgment reversed and cause remanded with directions.

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

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<sup>2</sup> We also note that Attorney James E. Bauman cited an unpublished opinion of this court at page eleven of his brief, in violation of RULE 809.23(3), STATS., which prohibits the citation of unpublished opinions, "except to support a claim of res judicata, collateral estoppel, or law of the case." "[V]iolations of the noncitation rule will not be tolerated." *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis.2d 536, 563, 327 N.W.2d 55, 67 (1982). We therefore impose a \$50 penalty on Attorney James E. Bauman, payable to the clerk of this court within twenty days of the date of this opinion. *See* RULE 809.83(2), STATS. We further admonish Attorney Bauman that when citing an unpublished federal case, as he has done at page six of his brief, he should acknowledge that it is unpublished.



