COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1427

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

ADOLPH F. CEBULA AND SANDRA CEBULA,

PLAINTIFFS-APPELLANTS,

v.

THOMAS COTTER AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marquette County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

Before Roggensack, Deininger and Lundsten, JJ.

¶1 DEININGER, J. Adolph and Sandra Cebula appeal an order dismissing their claims against Thomas Cotter and his insurer, American Family

Insurance Company.[1] The Cebulas assert that the circuit court erred in conducting a summary judgment motion hearing less than twenty days after the motion was filed, allegedly in violation of WIS. STAT. § 802.08(2) (1999-2000).[2] We conclude that the circuit court did not erroneously exercise its discretion in scheduling the hearing, and that it properly proceeded to a disposition of the summary judgment motion. Because the Cebulas fail to develop any substantive arguments regarding the merits of the court's decision, we do not address it further. Accordingly, we affirm the order of dismissal.

BACKGROUND

¶2 The Cebulas filed suit in March 1996 against their insurance agent, Thomas Cotter, claiming that Cotter failed to obtain proper coverage limits for their property prior to a fire which damaged their garage and its contents. Specifically, the Cebulas allege that they asked Cotter to inspect their property, he failed to do so, and they relied on their belief that Cotter would inspect the premises.

¶3 At issue in this appeal are the events leading up to the court's dismissal of the Cebulas claims against Cotter.[3] On April 28, 1999, Cotter filed a "Motion to Dismiss on Summary Judgment," asserting that the Cebulas could not prove their claims because they needed expert testimony to do so and the court had

[1] We will refer to the respondents, collectively, as "Cotter."

[2] All statutory references are to the 1999-2000 version unless otherwise noted.

[3] The Cebulas frame the issue in their reply brief as follows: "[T]he narrow issue to be decided on this appeal is whether the court[']s dismissal of Cebulas['] cause of action on the basis of [a] motion to dismiss is appropriate or not." As we discuss, we conclude that the trial court granted summary judgment to Cotter, and did not erroneously exercise its discretion in hearing Cotter's motion when it did.

precluded them from presenting expert testimony.[4] The motion did not specify a date for hearing, reciting that it would be heard "at a date and time to be determined by the Court." On April 30, the court issued a briefing schedule and a notice setting the motion hearing for May 14. The court directed the Cebulas to file a response to the motion by May 7, but they did not do so. On May 12, the Cebulas submitted a motion for continuance of the trial, then scheduled for June 23-25, 1999, and a motion to reconsider the court's decision precluding them from presenting expert testimony.

¶4 At the May 14 hearing, the court denied the Cebulas' motions for reconsideration and for a continuance, stating that they had not shown a basis for either motion. The court next addressed Cotter's "Motion to Dismiss on Summary Judgment." The Cebulas objected to the timeliness of the motion, arguing that it was not filed at least twenty days prior to the date set for hearing as required by WIS. STAT. § 802.08(2). The court noted that it, not Cotter, had set the hearing date, and that the Cebulas did not object until the time of the hearing. The court granted Cotter's motion, dismissing all of the Cebulas' claims. Cotter subsequently dismissed his counterclaim, and the Cebulas appeal the court's order granting Cotter's "Motion to Dismiss on Summary Judgment."

[4] In an order dated April 6, 1999, the court had "precluded [the Cebulas] from submitting any expert evidence or testimony in prosecution of or in defense of any claims in this matter." The order was based on the Cebulas repeated delays in naming an expert and their failure to make him available for deposition, in violation of scheduling orders. The Cebulas do not argue that the court erred in exercising its discretion to preclude their use of expert testimony, and we do not address that issue.

ANALYSIS

¶5 We must first establish the basis for the trial court dismissal of the Cebulas' claims, so that we may then consider whether it committed any procedural errors. The court granted Cotter's "Motion to Dismiss on Summary Judgment," but deemed it a "motion for dismissal," not necessarily encompassing a motion for summary judgment under WIS. STAT. § 802.08. The Cebulas argue that the court improperly treated it as a motion to dismiss. Cotter responds that the court properly dismissed the Cebulas' claims, regardless of whether his motion is characterized as a motion to dismiss or one for summary judgment.

¶6 The motion Cotter presented to the court was a motion for summary judgment. It was denominated as such, citing WIS. STAT. § 802.08, and it was accompanied by supporting affidavits and discovery excerpts. Cotter essentially asked the court to dismiss the case because the Cebulas had been precluded from presenting expert testimony, which he asserted they needed as a matter of law in order to prove their claims. We conclude that what the court granted was in fact summary judgment. The motion raised none of the grounds for dismissal under WIS. STAT. § 802.06(2), and the court relied on matters outside the pleadings in dismissing the Cebulas' claims, specifically, its previous order precluding the Cebulas from presenting expert testimony. *See* WIS. STAT. § 802.06(2)(b) & (3) ("[I]f … matters outside the pleadings are presented to and not excluded by the

court" when deciding a motion to dismiss or for judgment on the pleadings, the "motion shall be treated as one for summary judgment.").[5]

¶7 The Cebulas argue that the circuit court erred when it allowed the summary judgment motion hearing to proceed less than twenty days after Cotter filed his motion, contrary to WIS. STAT. § 802.08(2), which provides that "[u]nless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing." Cotter responds that the circuit court properly exercised its inherent power in scheduling the hearing in a shorter time period than provided by statute, and that the Cebulas were not prejudiced by the slightly shortened time frame. We agree with Cotter.

¶8 The court, not Cotter, scheduled the hearing on the motion for summary judgment, and trial courts may, in their discretion, shorten statutory notice requirements for motions. *See* ***Schopper v. Gehring***, 210 Wis. 2d 208, 215, 565 N.W.2d 187 (Ct. App. 1997). Circuit courts have inherent authority to control their dockets to achieve economy of time and effort, and the manner in which a court exercises this authority is committed to its discretion. *See* ***Lentz v. Young***, 195 Wis. 2d 457, 465-66, 536 N.W.2d 451 (Ct. App. 1995). We will uphold a circuit court's exercise of discretion in permitting a party to move for summary

[5] After granting the motion, in a letter to counsel, the court gave an additional rationale for dismissing the Cebulas' claims. The court stated that the dismissal "was equivalent to a sanction being imposed for noncompliance with a scheduling order," since the Cebulas' inability to prove their case stemmed from the previous sanction order. (See footnote 4, above). We conclude, however, that implicit in the court's decision to grant Cotter's motion was its legal conclusion that the Cebulas were required to present expert testimony to prove their claim, and since they could not do so, Cotter was "entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2). Although the previous sanction order precluding expert testimony was one of the matters relied on by Cotter in support of his motion, the court's decision to dismiss was based on legal considerations beyond the propriety of additional sanctions for the Cebulas' dilatory conduct.

judgment outside of the time restrictions specified in WIS. STAT. § 802.08, so long as the opposing party is not prejudiced thereby. *See* ***id***. at 466. "[S]tatutory provisions for notice time required for motions do not limit the trial court's ability to schedule a motion so long as each party has a fair opportunity to prepare and be heard." ***Schopper***, 210 Wis. 2d at 215.

¶9 Although WIS. STAT. § 802.08(2) directs a party to serve a motion for summary judgment at least twenty days before a scheduled hearing date, the statute does not preclude a court from exercising discretion to allow the motion to be heard on shorter notice. We conclude that the statute prescribes the time when a party may, as a matter of right, serve and file a motion for summary judgment. This also means that a party may move for summary judgment on shorter notice only with the court's permission. A contrary reading would undermine the circuit court's inherent authority to control its calendar, which we noted in the preceding paragraph.

¶10 We conclude that the trial court did not erroneously exercise its discretion in taking up Cotter's summary judgment motion on less than twenty days notice. The court had previously issued a general scheduling order, but it did not specify a time for hearing motions for summary judgment. The scheduling order did, however, set a final, "in person" pretrial conference for May 14, 1999. Upon receipt of Cotter's summary judgment motion, the court immediately sent the parties an order setting a briefing schedule and calendaring a hearing on the motion to coincide with the scheduled pretrial. The order provided the Cebulas a full week to respond to Cotter's motion, and it was issued two weeks before the date of the hearing/pretrial conference.

¶11 Before granting Cotter's motion, the court discussed the timing of the hearing and the Cebulas' objections to it:

> There has been no response to the motion for summary judgment. There has been no previous expression of concern for the non-compliance with the 20-day order. The briefing schedule was filed on counsel. There has been no objection to that. The untimeliness of the filing of the motion for summary judgment was not raised until this hearing. And while the Court is not minimizing the statutory requirements, the Court notes this as yet one more example of the apparent neglect or non-compliance with what the Court would believe to be at least courtesy if not procedure. The Court obviously set this with the expectation that it would be heard at an in-person pretrial at which counsel, the Court, would all travel to Marquette County.[6] And it was the expectation that because that gathering had already been previously scheduled, that all parties were experiencing that cost and inconvenience, that it would be a logical time to resolve any remaining issues if there were any. Also, that's the purpose of a pretrial conference. The Court believes the plaintiffs could have raised the 20-day issue immediately upon receipt or it was a defense pursuant to the briefing schedule or in some way raised the issue at an earlier time which would have allowed us to adjourn the pretrial conference to permit adequate preparation for this hearing. The Court notes that the plaintiff has failed to file a response by the May 7 date and, in fact, as of today, May 14, the Court has received no response, so the Court has not heard any complaint that the time limits were insufficient to permit the response, and there was no request to file a late response, simply an objection to the time limit….

¶12 The Cebulas have not asserted, let alone established, that they were prejudiced by the court's setting an expedited schedule for briefing and hearing Cotter's motion, and we conclude that both parties had a fair opportunity to prepare and be heard. *See* ***Lentz***, 195 Wis. 2d at 466; ***Schopper***, 210 Wis. 2d at

[6] The record reflects that, although scheduled to coincide with a previously set "in person" pretrial conference, the May 14 hearing was actually conducted by phone. Counsel for both parties and the presiding judge were all from outside the county of venue.

215. Although they failed to submit a response to Cotter's motion and supporting materials, they did submit two motions of their own two days before the hearing. The Cebulas did not claim in the trial court that they did not have adequate time to prepare for the hearing, nor do they do so on appeal. Rather, they rely solely on the statutory time limit for their claim of error. We conclude that it was reasonable for the court to exercise control over its calendar by scheduling the motion to be heard at the same time as the previously scheduled pretrial conference, especially given the fact that the case was to be tried the following month.[7] In short, the court did not err in taking up Cotter's motion when it did.

¶13 The Cebulas summarily assert that if the court had applied proper summary judgment methodology, their claim against Cotter should not have been dismissed. They fail to develop any argument on this point, however. The sum total of their argument on the merits of the court's decision is as follows:

> If the court were to apply summary judgment standards to the proceeding, the appellants contend that the motion would have to be denied. The court acknowledged that [the Cebulas] stated [they] had asked [Cotter] for additional coverage and that … Cotter denied that that request was made.[8] … Based upon the claims of the complaint this would be a material issue and would certainly [be] in dispute, thus the summary judgment motion should have been denied….

[7] The court noted in its decision that "[t]he issue was raised because we are fast approaching the trial, and the parties are entitled to know whether this case goes forward or not."

[8] See footnote 9, below, for the court's remarks in this regard, as well as their context. Our review of the record indicates that the Cebulas' claim is not based on an assertion that they requested a specific, higher amount of coverage which Cotter neglected to obtain, but that they expected Cotter to inspect their property to determine whether additional coverage was needed.

The Cebulas thus completely fail to address the court's primary basis for granting the motion—their need for expert testimony in order to prove their claim.[9] Instead, they assert, without citation to evidence in the record, that there is a genuine issue of material fact.

¶14 Even if there is a factual dispute regarding whether Cotter agreed to inspect the Cebulas' property, however, it is not material if the circuit court correctly concluded that the Cebulas could not prove their claim without expert evidence to establish the scope of Cotter's professional duties and applicable standards of care. The Cebulas offer no argument whatsoever on this question of law. We consider the issue inadequately briefed and decline to review it. *See* ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 865-66, 541 N.W.2d 803 (Ct. App. 1995) (citation omitted). Thus, having addressed the Cebulas' claim that the trial court erred procedurally in its disposition of Cotter's motion, we affirm the court's decision.

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[9] The court stated:

> The primary issue … is whether or not, absent the ability to call an expert, whether the plaintiffs would have the ability to meet [their] burden of proof…. [A] genuine dispute has been offered to exist in relation to the original assertion of the plaintiff that he asked for increased coverage, and the record is complete that the defendant has denied that that request was made…. The Court does not believe that that bald assertion made in the complaint and simply maintained through the three-year duration of the pendency of this case satisfies the Court that there is in fact a genuine issue of material fact. If there is in fact the existence of that controversy, it would be the Court's view that an expert would be necessary to establish industry or community standards, a practice in the profession, or by some other standard to meet its duty—its requirement to establish the duty and the standard that that duty must reach in order to constitute a recoverable event.

CONCLUSION

¶15 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.