

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1042

Cir. Ct. No. 2001CV885

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE MATTER OF GUARDIAN AD LITEM FEES IN C.J. POLSTER (CAHALA) V.
ANNE M. RIENDL, M.D.:**

ROBERT B. MOODIE,

APPELLANT,

v.

WAUKESHA COUNTY,

RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
PAUL F. REILLY, Judge. *Remanded with directions.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Robert B. Moodie appeals from an order denying his motion to direct Waukesha County to pay the guardian ad litem fees he

incurred as a result of his representation of the minor plaintiff, C.J. Cahala, in a medical malpractice action. The issue is whether Waukesha County is responsible for payment of the court-appointed guardian ad litem fees of the minor plaintiff in a medical malpractice action. The parties dispute certain facts relating to Moodie's representation of Cahala in the underlying malpractice action that were never presented to the circuit court. We therefore conclude that a remand is warranted for the circuit court to find the facts involving Moodie's service as Cahala's guardian ad litem and the full nature of his relationship with the plaintiffs' counsel in the underlying malpractice action.

¶2 Cahala and his mother Jody filed a medical malpractice action against various health care providers for injuries Cahala sustained incident to his birth and delivery.¹ Attorney Kenneth A. Stern represented the plaintiffs when the summons and complaint were originally filed.²

¶3 On the same date as the original summons and complaint were filed, Jody petitioned the circuit court for the appointment of a guardian ad litem for her minor son, proposing Moodie, whom the circuit court then appointed. In the original consent to act, Moodie averred to the circuit court that he:

is an attorney licensed to practice in the State of Wisconsin and competent to properly understand and protect as guardian ad litem the rights of said minor above-named in connection with the matter set forth in the foregoing petition; that he has no interest or feeling adverse to the

¹ The minor child, C.J. Cahala, was formerly known as Craig Joseph Polster; Jody Cahala was formerly known as Jody Franke. Although these name changes are inconsequential to our decision, they appear in some of the circuit court pleadings in the underlying malpractice case.

² Stern practiced law in Michigan with the firm of Stern & Associates. Stern was also licensed to practice law in Wisconsin.

ward's interest and is in no way connected in business with the adverse parties or their counsel; that he is financially responsible to answer for any liability incurred as such guardian ad litem, and that he hereby consents to act as such guardian ad litem.

Four months later, Moodie moved for an order allowing Attorneys Terrance J. Cirocco and Euel W. Kinsey of the law firm of Stern & Associates, to be admitted pro hac vice for purposes of representing the plaintiffs in the Waukesha County Circuit Court in this case. In that motion, Moodie averred that Jody and he (on behalf of Cahala) have:

retained the services of Hippenmeyer, Reilly, Moodie & Blum, S.C., to serve as counsel representing [their] interests in the above-entitled matter. The law firm of Stern & Associates, and in this particular case, Terrance J. Cirocco and Euel W. Kinsey, is plaintiffs' counsel charged with the primary trial responsibility in this action.

The circuit court's orders admitting Cirocco and Kinsey pro hac vice also do so on the conditions that they:

continue to appear in the Waukesha County, Wisconsin, Circuit Court to represent the plaintiffs, Jody Franke and Craig Polster, by his Guardian ad Litem, Robert Moodie, as long as they associate with the Law Firm of Hippenmeyer, Reilly, Moodie & Blum, S.C., or some other lawyer/Law Firm admitted to practice law in the State of Wisconsin by the Wisconsin Supreme Court.

¶4 The case was tried to a jury, which returned a defense verdict. Consequently, neither plaintiff was awarded damages. Less than two weeks after the action was dismissed, Moodie moved for an order directing Waukesha County to pay his guardian ad litem fees.³ The circuit court denied the motion. Moodie appeals.

³ Waukesha County was not a party to the underlying medical malpractice action.

¶5 In the midst of appellate briefing, Waukesha County moved this court for a remand for fact finding on whether Moodie had a fee-sharing agreement with the plaintiffs' counsel. Moodie concurred in the motion, but also sought to testify at an evidentiary hearing to rebut some of the averments and implications in the affidavit filed by Waukesha County's counsel. This court denied the motion, explaining that it would review the record as it existed at the time of the circuit court's order denying Moodie's motion to recover his guardian ad litem fees. This court continued:

[i]f, however, the parties obtain further proceedings in the circuit court on this issue, the parties may move this court to stay the pending appeal and consolidate a forthcoming appeal arising from the further proceedings with the pending appeal. We take no position on whether further proceedings should occur in the circuit court.

We then reinstated the appellate briefing schedule that had been stayed by the remand motion. *See* WIS. STAT. RULE 809.14(3).

¶6 After the briefing was completed, this appeal was taken under submission by this court. Upon reading the parties' appellate briefs, we noted that Waukesha County cited to its remand motion, noting that "[t]he precise nature of the relationship [between Moodie and the plaintiffs' out-of-state counsel] is unknown as the record is not complete in that regard"; it then noted the significance to the issue of that relationship. We have not been advised of pending circuit court proceedings. Upon reading the briefs and analyzing the issue however, we now view the absence of fact finding as problematic to our decision.⁴ We therefore conclude that the disputed facts about the relationship among the

⁴ The circuit court, not this court, finds facts. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980).

plaintiffs, their counsel, and the guardian ad litem would be helpful to our decision.

¶7 On remand, we seek fact finding on the nature of this relationship, including but not limited to whether Moodie had a fee-sharing agreement with the plaintiffs' counsel. We therefore remand this matter for further proceedings and direct the circuit court to enter its findings of fact, conclusions of law and order at the conclusion of its fact finding hearing to allow the aggrieved party to challenge that order by appeal.

By the Court.—Remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

