

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 17, 2002**

Cornelia G. Clark  
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. 02-0839  
STATE OF WISCONSIN**

Cir. Ct. No. 98CV005136

**IN COURT OF APPEALS  
DISTRICT I**

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**ARCHIE N. JOHNSON,**

**PLAINTIFF-APPELLANT,**

**v.**

**DENIS L. LAURENCIN, M.D.,  
AND WISCONSIN PATIENTS  
COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Archie N. Johnson, *pro se*, appeals from the circuit court's order dismissing his medical malpractice action against Denis L. Laurencin, M.D., and the Wisconsin Patients Compensation Fund. He argues that

the court erred in concluding that he had no justifiable excuse for his violation of the scheduling order. We affirm.

## I. BACKGROUND

¶2 On July 1, 1998, Johnson, *pro se*, filed a complaint against Dr. Laurencin. On February 16, 1999, Johnson filed an amended complaint, adding the Wisconsin Patients Compensation Fund as a defendant. The circuit court entered a scheduling order on August 10, 1999, with a deadline for naming witnesses, and for submitting expert reports, a permanency report, and an itemized list of damages. Johnson then moved for an extension of this deadline and for leave to file a second amended complaint. The court granted the motion for an extension, establishing March 7, 2000 as the new deadline, but denied the motion for leave to file a second amended complaint.

¶3 Johnson timely filed his witness list; however, he did not file expert reports, a permanency report, or an itemized list of special damages. Dr. Laurencin filed a motion *in limine* on April 11, 2000, requesting that the circuit court enter an order precluding Johnson from introducing evidence of special damages and permanency and from calling any expert witnesses. Johnson filed a response opposing the motion, advising the circuit court of the circumstances hindering his ability to meet the court's prior deadlines in a timely fashion.<sup>1</sup>

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<sup>1</sup> Johnson advised the court that he was a Wisconsin prisoner incarcerated at a privately operated correctional facility in Tennessee. He explained that he was delayed in filing a motion for an extension of time to meet the court's scheduling order establishing a January 10, 2000 deadline to name expert witnesses and submit reports because the correctional facility was on lockdown from November 19, 1999, to January 11, 2000. Johnson further explained that he had no access to his legal materials during the lockdown and that the correctional facility did not have a copy of Wisconsin's rules of civil procedure.

¶4 Dr. Laurencin's motion was scheduled for a hearing before Judge Dominic S. Amato on April 24, 2000. Johnson, who had been transferred to a correctional facility in Wisconsin on March 31, 2000, was available by telephone but was not contacted. A hearing was held and on May 3, 2000, the circuit court entered an order dismissing the case for Johnson's failure to follow the court's previous orders "in good faith." The circuit court denied Johnson's motion for reconsideration and he appealed.

¶5 On March 14, 2001, we summarily reversed the circuit court's dismissal of Johnson's action and remanded for proper consideration under the standards of *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 275, 470 N.W.2d 859 (1991). On remand, the case was assigned to Judge William A. Haese, who held a hearing on September 24, 2001, and found that Johnson's "violations of the scheduling order in respect to naming witnesses, by failing to provide expert reports, a permanency report, a list of itemized damages, and by requesting leave of court to amend pleadings, does not constitute excusable neglect." Nevertheless, Judge Haese issued another scheduling order, giving Johnson a second chance to comply. The order provided, in detail, that Johnson was required to submit the names of expert witnesses, expert reports, a permanency report, and an itemized statement of damages on or before November 24, 2001. Johnson failed to comply. Thus, on December 17, 2001, the circuit court issued a written decision dismissing Johnson's action and, on March 5, 2002, the court entered the final order from which Johnson appeals.

## II. DISCUSSION

### A. Standard of Review

¶6 A circuit court may dismiss a plaintiff’s action for noncompliance with discovery or scheduling orders where the conduct is either egregious or in bad faith and where there is no “clear and justifiable excuse.” See *Johnson*, 162 Wis. 2d at 275 (quoted source omitted). Such a decision is committed to the sound discretion of the circuit court and will not be reversed by this court unless the circuit court erroneously exercised discretion. See *id.* at 273. A discretionary decision will be upheld on appeal if the record demonstrates that it is the product of a rational mental process by which the facts of record and law relied upon were stated and considered together for the purpose of achieving a reasoned and reasonable determination. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). An appellate court will find an erroneous exercise of discretion if the record shows that the circuit court failed to exercise discretion, that the facts do not support the circuit court’s decision, or that the circuit court applied the wrong legal standard. *Oostburg State Bank v. United Sav. & Loan Ass’n*, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986). “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.” *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553.

### B. Circuit Court’s Dismissal of Appellant’s Action

¶7 This is Johnson’s second appeal involving the same issue—the circuit court’s dismissal of his claim due to his failure to comply with a scheduling order. On the first appeal, we remanded, thereby giving the circuit court the

opportunity to properly consider Johnson’s explanation for his failure to comply. On remand, Judge Haese found that Johnson’s excuse—that he was unable to comply because he was in prison on lockdown—was unsubstantiated. On appeal, Johnson offers nothing to refute this.

¶8 Despite finding that Johnson’s explanation did not establish excusable neglect, Judge Haese gave Johnson another chance. Judge Haese issued another scheduling order, but Johnson again failed to comply. Again, Judge Haese determined that Johnson’s excuses did not establish excusable neglect and, accordingly, he dismissed the case.

¶9 On appeal, Johnson claims that he did not know from the language of Judge Haese’s order that he was required to submit written reports from each expert witness, and that he was unsure of the deadline. He claims that the language of the order is ambiguous because he was unsure as to whether he was to produce reports written by his expert witnesses or whether he was to produce summaries of what his expert witnesses would report. He argues that a misunderstanding of the requirements of a scheduling order constitutes excusable neglect. His argument is unavailing.

¶10 Judge Haese’s scheduling order specifically provides that Johnson shall submit “the names, addresses, and resumes together with a *written report for each expert named ... on or before 11-24-01[.]*” (Emphasis added.) The deadline is clear, and even if Johnson did not understand whether he was to submit the experts’ reports or his summaries of what they would say, the fact remains that Johnson submitted neither. Thus, Johnson’s argument is frivolous, as are several others he presents but does not develop. See *State v. Waste Mgmt. of Wis., Inc.*,

81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

¶11 We have thoroughly examined the record. It supports the circuit court’s finding that Johnson’s conduct was egregious and in bad faith. Judge Haese’s eight-page written decision carefully lays out the circumstances surrounding the dismissal of Johnson’s action and it reflects a careful exercise of discretion. We affirm the circuit court’s dismissal and we adopt the circuit court’s memorandum decision and order as our own additional statement of the case. *See* WIS. CT. APP. IOP VI(5)(a) (Sept. 27, 2001).<sup>2</sup>

*By the Court.*—Order affirmed.

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

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<sup>2</sup> A copy of the circuit court’s memorandum decision is attached and incorporated in this decision.

To obtain a copy of the circuit court Decision and Order referred to in this Per Curiam, please contact the Clerk of the Court of Appeals located at 110 E. Main Street, Suite 215, Madison, WI 53703.