

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 7, 1995

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. 94-1562

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

RICHARD A. LARSON and
BARBARA LARSON, his wife,

Plaintiffs-Appellants,

v.

WARREN E. GALL, M.D.,
RICHARD N. SMITH, M.D.,
and GUNDERSEN CLINIC, LTD.,

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Richard A. Larson and Barbara Larson appeal from a judgment dismissing their medical malpractice complaint against defendant physicians Warren E. Gall and Richard N. Smith, and Gundersen

Clinic, Ltd., and from an order denying their motion for reconsideration. The issue is whether the trial court properly dismissed the complaint after the plaintiffs failed to name an expert witness by the date set in the scheduling order. We conclude it did. We affirm.

The complaint alleged that defendants were negligent in their treatment of Richard Larson. The plaintiffs are married. The scheduling order required plaintiffs to name their expert witnesses 120 days before the pretrial conference, that is, by March 28, 1994. On March 29, 1994, defendants moved to dismiss on the ground that plaintiffs had failed to name an expert witness. On April 5, 1994, plaintiffs filed a "Response to Motion of the Defendants" which sought a ninety-day extension. The trial court heard argument and dismissed the complaint.

The standards and procedures governing pretrial calendar orders appear in § 802.10, STATS. *Schneller v. St. Mary's Hosp.*, 162 Wis.2d 296, 307, 470 N.W.2d 873, 877 (1991). It is within the trial court's discretion to amend a calendar order if it finds cause to do so. *Id.* at 308, 470 N.W.2d at 877. If the court declines to amend the order and then dismisses the action as a sanction, we must sustain the dismissal if the trial court had a reasonable basis for determining that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the noncompliance. *Id.* at 310-311, 470 N.W.2d at 878.

The Larsons argue that the court made no finding of egregiousness in this case. However, an express finding is not necessary if "the court's discussion of the case makes it clear that its decision ... was motivated by its view that the violation of the scheduling order was egregious." *Id.* at 311, 470 N.W.2d at 878-79. The Larsons argue that their conduct was not egregious because a deposition of a possible expert was scheduled to occur three weeks after the time for naming experts had expired. They assert that there was evidence from earlier statements that this expert would support their complaint. However, they do not offer a convincing explanation of why this deposition could not have been arranged earlier.

The trial court stated: "The court finds that the trial order has not been complied with; that there is no excusable neglect for failure to do so.

Basically no effort was made to contact an expert and even see[,] assuming the most favorable facts[,] if there was a case." We conclude that it is sufficiently clear from the court's discussion and the record that the court impliedly found the plaintiffs' conduct egregious, and that such a finding was reasonable.

The Larsons argue that one of their claims should not have been dismissed because no expert was required. They describe this as a claim of "lack of informed consent." The claim, as described by the Larsons, is that defendants "did not give [Larson] sufficient information so as to enable him to give an informed consent to the option of no treatment." We reject the argument. The defendants offered no treatment for Larson to consent to, and therefore this claim is more properly characterized as one for negligence in failing to diagnose or recommend treatment.

By the Court. – Judgment and order affirmed.

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