

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 25, 1996

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. 95-3170

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RICHARD JOHN KUSCH,

Plaintiff-Appellant,

v.

**JAMES PALMQUIST, M.D.
and RIVER FALLS
MEDICAL CLINIC,**

Defendants-Respondents,

**MICHAEL RETHWILL, M.D.
and RIVER FALLS
AREA HOSPITAL,**

Defendants.

APPEAL from an order of the circuit court for Pierce County:
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Richard Kusch appeals a trial court order that dismissed his medical malpractice lawsuit for failure to prosecute. Despite a trial court order, Kusch failed to answer interrogatories concerning expert witnesses. The trial court ruled that Kusch failed to prosecute his lawsuit by failing to obtain expert witnesses to substantiate his claim of medical malpractice. On appeal, Kusch argues that he had no obligation to obtain expert witnesses and that the trial court should have appointed expert witnesses for him at the public expense in lieu of dismissal. We reject these arguments and affirm the trial court order.

The trial court made a discretionary decision when it dismissed Kusch's lawsuit for failure to prosecute. See *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). It could dismiss Kusch's lawsuit if his noncompliance with the court's order was egregious and without justifiable excuse. See *id.* Here, Kusch failed to comply with the trial court's discovery order. There is an obligation to supply expert witnesses in a medical malpractice case involving matters beyond jurors' knowledge as laypersons. See *Froh v. Milwaukee Medical Clinic, S.C.*, 85 Wis.2d 308, 317, 270 N.W.2d 83, 87 (Ct. App. 1978). His inaction was egregious, without justifiable excuse and warranted dismissal.

Last, the trial court had no obligation to appoint expert witnesses for Kusch at the public expense in his civil case. We know of no Wisconsin case in which a trial court has made such an appointment. Although § 907.06, STATS., permits trial courts to appoint experts in special circumstances, they are limited. Parties must supply their own experts first, and those experts must first demonstrate a substantial difference of opinion. See Judicial Council Committee's Note, 1974, § 907.06. No such difference arose in this case. The statute does not furnish an omnibus fund that any civil litigant may tap for expert witness costs.

By the Court. – Order affirmed.

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