OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

November 10, 2022

To:

Hon. Derrick A. Grubb
Circuit Court Judge
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
Electronic Noticde

Guy K. Fish
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Marc Benjoya
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You are hereby notified that the Court has entered the following opinion and order:

2022AP116 Melissa A. Hubbard v. Michael McGauley, D.O., and ProAssurance Casualty Company (L.C. # 2018CV1114)

Before Blanchard, P.J., Fitzpatrick, and Graham.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Melissa Hubbard appeals a circuit court order dismissing her medical negligence action against Dr. Michael McGauley and his insurer ProAssurance Casualty Company, arguing that she was not provided with sufficient notice to oppose what she characterizes as the court's grant of a motion to dismiss her operative complaint. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm because Hubbard's appeal rests on the false premise that the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

court dismissed the action based on a determination that the operative complaint failed to state a claim upon which relief could be granted.[2]

In the operative civil complaint, Hubbard alleged that in February 2018, when Dr. McGauley performed on her what she thought would be exclusively a "robotic assisted laparoscopic colon resection," he surgically removed her ovaries without her consent, allegedly breaching his duty to obtain informed consent before the procedure. One allegation in the complaint was that Hubbard would have refused surgery if she knew that it included removal of her ovaries because she and her husband were "planning and desiring to have children."

In May 2020, McGauley moved the circuit court for an order barring Hubbard "from presenting evidence of damages arising out of her inchoate belief that absent the alleged negligence she would have been able to conceive" a child. We will call this "the May 2020 motion." As part of the May 2020 motion, McGauley contended that Hubbard was required to prove "that she would have conceived" in the absence of the surgery in order to prove damages caused by the alleged negligence under case law that includes ***Ehlinger v. Sipes***, 155 Wis. 2d 1, 454 N.W.2d 754 (1990), and ***Fischer v. Ganju***, 168 Wis. 2d 834, 485 N.W.2d 10 (1992). In ***Ehlinger*** our supreme court concluded that the plaintiffs in a medical malpractice case "produced sufficient evidence to present to the trier of fact the question of whether Dr. Sipes' alleged negligence was a substantial factor in causing [plaintiffs'] injuries." ***Ehlinger***, 155 Wis. 2d at 9. McGauley argued that Hubbard lacked "evidence that [she] would have conceived

[2] In a separate, pending appeal in this court, ***Hubbard v. McGauley***, Appeal No. 2022AP1347, Hubbard appeals from the circuit court's denial, in June 2022, of a motion for reconsideration of the November 10, 2021 order that Hubbard directly challenges in the instant appeal. We will resolve Hubbard's separate appeal of the June 2022 order in a separate opinion.

a child regardless of the circumstances," and therefore the circuit court should prohibit "evidence pertaining to damages arising out of" her alleged inability to conceive.

In July 2020, Hubbard responded to the May 2020 motion with a filing that directed the circuit court to purported "evidence concerning Hubbard's ability to conceive before her surgery," which she submitted would be sufficient to support a jury determination of damages that were caused by the alleged negligence.

At a hearing in November 2020, the circuit court addressed motions that included the May 2020 motion. The court explained that it would treat it as a motion in limine and revisit it at the time of trial.

In August 2021, McGauley filed a series of motions in limine, including one numbered 44: "Motion to bar plaintiff from presenting evidence of damages for a speculative injury based on her inability to conceive." Motion in limine 44 included the assertion that "plaintiff's recovery is barred" because she could not "provide evidence" upon which "a jury could reasonably find [that] a causal nexus exists between the alleged tortious act and the resulting injury," citing ***Fischer***, 168 Wis. 2d at 857.

In September 2021, Hubbard responded in writing to motions in limine that included number 44. The gist of her response to motion in limine 44, as in her earlier response to the May 2020 motion, was that she could direct the circuit court to evidence supporting a finding that she was able to conceive before the surgery.

The court held a final pretrial conference ten days before the scheduled trial date, in October 2021, at which the court first took up McGauley's motion in limine 44. The court

identified motion in limine 44 as being "just a restatement" of the May 2020 motion, which had been "brought as a dispositive motion." The court granted motion in limine 44. Further, based on that ruling, the court determined that the court did not "see any way feasible [on] this record that Ms. Hubbard can meet her burden of production on the issue of causation," resulting in the court dismissing the operative complaint in its entirety.

Before doing so, however, the court engaged in an extended dialog with both sides about whether the court should grant motion in limine 44. At no time did counsel for McGauley raise a procedural objection to the court resolving motion in limine 44 on its merits, nor did counsel object that, *for procedural reasons*, a ruling against Hubbard on the motion in limine could not result in dismissal of the operative complaint.

After the circuit court gave an extensive explanation regarding its view of the merits, the court told counsel for Hubbard, "I'm inclined to dismiss the case … unless you can convince me otherwise why the case should continue." In response, counsel made extensive merits arguments. He made no procedural arguments.

The court expressed initial interest in the idea of reopening the discovery period, which had been closed much earlier in the case, to allow Hubbard to depose one witness further on this issue, but ultimately decided against doing so. During the course of this extended discussion regarding the potential reopening of discovery on the eve of trial, counsel for Hubbard again argued the merits at length. He again raised no procedural objections to the court dismissing the case, depending on the court's view of the merits of motion in limine 44.

Hubbard's only argument in this appeal is that the circuit court granted a motion to dismiss the operative complaint and that this was improper because she was not given notice that

the court might grant a motion to dismiss and that the court did not sufficiently "cit[e] or review[]" the operative complaint.

We assume without deciding that we should not apply the forfeiture rule against Hubbard for failing to preserve her current argument at the time the circuit court was considering its ruling.

We affirm because Hubbard's only argument on appeal rests on the faulty premise that the court granted a motion to dismiss for failure of the complaint to state a claim pursuant to WIS. STAT. § 802.06—that is, a motion testing the legal sufficiency of the pleadings. We have described the pertinent background above. It establishes that Hubbard was, or at least should have been, well aware of all the following going into the final pretrial conference: that the circuit court might at that time take up motion in limine 44; that the substance of motion in limine 44 matched the substance of the May 2020 motion and could have the same consequences; and that the May 2020 motion (which had been pending for 17 months and was never withdrawn by McGauley) would be dispositive if granted. No additional notice was required.

Hubbard suggests that the circuit court made the decision to dismiss the operative complaint sua sponte—without prior motion or request from McGauley—but that is not the case. McGauley made clear his position that Hubbard had no case to try because she could not show causation; McGauley argued that there was a fatal absence of proof, not a deficiency in pleading. Further, Hubbard fails to support the assertion that, in addressing motion in limine 44, the court was required to take into consideration aspects of the operative complaint in any manner

differently than it did. For these reasons, we have no reason to reach in this appeal Hubbard's argument that the operative complaint states a claim upon which relief may be granted.

In sum, we reject the only developed argument that Hubbard makes in this appeal, which is that the court improperly granted a motion to dismiss the operative complaint.[3]

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[3] To the extent that, for the first time on appeal in her reply brief, Hubbard intends to raise arguments going to the merits of the circuit court's decisions to grant motion in limine 44 and on that basis to dismiss the operative complaint, this comes too late. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (appellate court will generally not address arguments raised for the first time in reply brief).

Separately, we note with disapproval that counsel for the defendants improperly cites to a summary disposition order of this court and also cites to two unpublished opinions of this court dating from a time when these could not be cited as persuasive authority. We remind counsel that summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3), and also that only unpublished, authored cases issued on or after July 1, 2009, may be cited, and then only as persuasive authority. *See* RULE 809.23(3)(b).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals