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DISTRICT IV

December 29, 2023

To:

Hon. Stacy A. Smith
Circuit Court Judge
Electronic Notice

Alecia Pellegrini-Kast
Clerk of Circuit Court
Juneau County Justice Center
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Karen M. Gallagher
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Erik H. Monson
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Milton W. Taylor
802 North Street
Beloit, WI 53511

You are hereby notified that the Court has entered the following opinion and order:

2022AP768

Milton W. Taylor v. Douglas Bellile, Director (Retired), et al.
(L.C. # 2021CV74)

Before Kloppenburg, P.J., Blanchard, and Nashold, JJ.

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).

Milton Taylor, pro se, appeals a circuit court order that denied Taylor's motion to voluntarily dismiss his action without prejudice. The court instead dismissed the action with prejudice. Based on our review of the briefs and the record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).¹ We affirm.

Taylor is confined in the Sand Ridge Secure Treatment Center. He filed a complaint against multiple defendants in which he alleged medical malpractice and deliberate indifference to his medical needs relating to the care of his teeth and gums.

After the defendants answered and Taylor amended his complaint, the circuit court held a scheduling conference and entered a scheduling order. During the scheduling conference, the court explained to Taylor that he needed an expert to proceed and that he would be responsible for the cost of his expert. The court also explained that he would be required to designate any expert he planned to use and to file expert reports within ninety days of the scheduling conference. The court's scheduling order reflected this requirement.²

On the date that his designation of expert witnesses was due, Taylor filed a witness list with the name of a proposed expert. However, he did not provide any expert report. He instead stated that he was unable to pay for the expert's services or for a report.

The defendants moved for summary judgment. Taylor moved to voluntarily dismiss his action without prejudice, citing WIS. STAT. § 805.04 and other statutory provisions. The circuit

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

² The scheduling order stated that Taylor "shall name and file [his] designation of all expert witnesses, with reports from each expert identifying all standard of care criticisms, precisely identifying each and every defendant against whom such opinions are offered" within ninety days of the scheduling conference.

court denied Taylor’s motion and instead dismissed his action with prejudice. Taylor appeals the resulting dismissal order.

With exceptions not relevant here, WIS. STAT. § 805.04(2) provides that “an action shall not be dismissed at the plaintiff’s instance save upon order of court and upon such terms and conditions as the court deems proper.” Sec. 805.04(2). The purpose of the statute is to allow a plaintiff to freely dismiss an action as long as no other party will be prejudiced. *Clark v. Mudge*, 229 Wis. 2d 44, 49, 599 N.W.2d 67 (Ct. App. 1999). The statute “is essentially a rule of fairness to protect the defendant from prejudice when the plaintiff seeks to discontinue [the] action without an adjudication of the merits.” *Dunn v. Fred A. Mikkelson, Inc.*, 88 Wis. 2d 369, 377, 276 N.W.2d 748 (1979).

The circuit court’s decision on whether to grant the plaintiff’s motion under WIS. STAT. § 805.04(2) is discretionary. *Clark*, 229 Wis. 2d at 49. The statute provides the court with implicit authority to dismiss the plaintiff’s action with prejudice. *Bishop v. Blue Cross & Blue Shield United of Wis.*, 145 Wis. 2d 315, 319, 426 N.W.2d 114 (Ct. App. 1988). Additionally, the court has discretion to dismiss an action based on the plaintiff’s failure to comply with a scheduling order. *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553.

“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.” *Id.* “An erroneous exercise of discretion will not be found if there is a reasonable basis for a circuit court’s decision.” *State v. Hammer*, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629.

Here, the record shows that the circuit court reasonably exercised its discretion to deny Taylor's motion for voluntary dismissal without prejudice and to instead dismiss his action with prejudice. As discussed in the defendants' briefs in this court, the circuit court's decision was a reasonable exercise of discretion based on a combination of relevant factors, including each of the following: Taylor's action had already been pending for close to a year when he filed his motion for dismissal;³ Taylor had already amended his complaint twice when he filed his motion; the defendants had already expended resources filing responsive pleadings and preparing summary judgment motions; Taylor's motion appeared timed to avoid summary judgment; and Taylor failed to come forward with any expert or expert report as required by the court's scheduling order. *See Clark*, 229 Wis. 2d at 49 (summarizing factors courts may consider in deciding whether to grant a motion for dismissal under WIS. STAT. § 805.04(2)); *see also Hefty v. Strickhouser*, 2008 WI 96, ¶33, 312 Wis. 2d 530, 752 N.W.2d 820 ("A court's discretionary sanction for violation of a scheduling order is generally well grounded when a scheduling conference has taken place at which all interested parties were present to be heard.").

Taylor does not provide any argument persuading us that the circuit court engaged in an erroneous exercise of discretion. Rather, his primary argument appears to be that, due to a disability or his confinement, the court should have extended the statute of limitations for his action based on equal protection principles and WIS. STAT. §§ 893.16 and 893.18. This argument is not relevant to the grounds for the circuit court's decision, which did not involve the statute of limitations.

³ Taylor initially filed his motion for dismissal approximately eleven months after filing his action, then amended his motion approximately two weeks later.

To the extent that Taylor may be making other arguments, we decline to address them as insufficiently developed. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (explaining that we need not address issues that are inadequately briefed). Although we make some allowance for deficiencies in a pro se appellant’s briefing, “[o]ur obligation does not extend to creating an issue and making an argument for the litigant.” *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998). “We cannot serve as both advocate and judge.” *Id.*

Therefore,

IT IS ORDERED that the circuit court’s order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals