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DISTRICT IV

March 8, 2013

To:

Hon. David T. Flanagan III
Circuit Court Judge
215 South Hamilton, Br 12, Rm 8107
Madison, WI 53703

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

2011AP2749 Michael Schiessle v. Dr. Stanley Karls (L.C. # 2009CV5404)

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

Michael Schiessle appeals an order dismissing his dental malpractice action. 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 (2011-12).[1] We affirm.

Schiessle argues that the circuit court erred by requiring him to elect, before trial, whether he would pursue this case on a tort theory, or instead on a contract theory. Schiessle acknowledges that the purpose of the election of remedies doctrine is to prevent double recovery, and appears to agree that both of his theories sought damages for the same facts. He asserts that double recovery could have been prevented in this case by jury instructions, but he cites no

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

authority requiring the court to choose that method over election of remedies. Therefore, we are not persuaded that the court erred.

Schiessle argues that the clerk of the circuit court erred in taxation of cost. Schiessle objected to certain costs in circuit court. However, as to costs for medical records and the amount of attorney fees, it appears that these arguments are being made for the first time on appeal, and therefore we decline to address them. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (superseded by statute on other grounds). Schiessle argues that the expert witness fee was not proper because the expert did not testify at trial, which Schiessle claims is required by WIS. STAT. § 814.04(2). The respondent points out that the statute says only "testifies," and that this particular expert testified at a deposition. Schiessle's reply brief does not dispute that the expert was deposed, and does not develop an argument that this cost is limited to *trial* testimony. Therefore, we reject the argument.

Schiessle argues that the court erred by denying his motions to amend his complaint. As to the first motion, Schiessle asserts that it was denied to "punish" him for a delay in naming an expert, but that is an incomplete description. The court's decision shows that it was based partly on the delay that had occurred in naming an expert, but was also because the claim that Schiessle proposed to add was based on facts that were or should have been known to Schiessle a year earlier. Because Schiessle does not address the court's complete reasoning, he has not shown that it erred.

Regarding the second motion, Schiessle asserts that this was denied in part because it came too close to trial, and he argues that this was "an invalid reason as amendments can be made up to, during, and after trial." While it is true that such amendments *can* be allowed, that

does not mean the court *must* allow them. Schiessle does not otherwise develop an argument that the court erroneously exercised its discretion in making this decision, and therefore he has not established that the court erred.

As to the remainder of Schiessle's arguments, we decline to address them because they are either undeveloped, due to lack of legal citations, or are patently meritless. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments); ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention").

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals