COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0160

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

VIRGINIA WUSTRACK, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WALTER WUSTRACK,

PLAINTIFFS-APPELLANTS,

V.

BEVERLY ENTERPRISES-WISCONSIN, INC., D/B/A LAKEWOOD CARE CENTER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Virginia Wustrack, as personal representative of the estate of Walter Wustrack, appeals from a judgment dismissing her complaint against Beverly Enterprises, the owner of a nursing home where Mrs. Wustrack's

husband died. Mrs. Wustrack claims that the facility negligently caused her husband's death. The trial court dismissed Mrs. Wustrack's complaint because of alleged misconduct by her lawyer during the trial. There was no misconduct; the trial court misapplied the law, and we reverse.

I. BACKGROUND

¶2 This is not the first time this case has come to us. *See* ***Wustrack v. Beverly Enterprises***, No. 96–2195, unpublished slip op. (Wis. Ct. App. May 13, 1997). The essence of Wustrack's complaint is that the facility breached its contract with her and her husband by failing to adequately care for him, that the facility was negligent in caring for her husband, and that the facility breached its fiduciary duty to her husband. As noted, the trial court asserted that during the trial Wustrack's lawyer engaged in misconduct, and set out the bases for its dismissal of Wustrack's complaint in a lengthy oral decision. We repeat here pertinent parts of the oral decision to put the trial court's reasons in context. The status and identity of the persons to whom the trial court refers are explained below.

> Yesterday afternoon during the examination of Miss Berman, Plaintiff's counsel objected to a question relating to the department surveys. And I did note the words, quote, "Objection. Because we have been precluded from going into these," end quote. And this was stated in front of the jury.
>
> And frankly, I was thinking at the time that 'You just heard the sound of the straw,' and believe me, that was it.
>
> …
>
> Then we had the issue of Glenn Ford's alleged records being referred to, and again in front of the Jury without being marked as an exhibit and without informing opposing counsel.

And then during an argument outside the presence of the Jury on that issue, we have the representation of the witness who would testify as to 50 instances of patient abuse; yet the record does not support that statement by any stretch of interpretation.

…

[C]ounsel knew the [survey] issue had been denied, and they knew it was not appropriate to raise such objection in front of the Jury; and the Court can only conclude that was done intentionally to give the Jury the impression the defendant was trying to hide something.

…

There was the incident, 'Would you ever work for the Beverly facility again.' Totally improper question. The only purpose was to cast aspersions on the defendant, was not relevant to what this witness would or would not do in 1998.

…

After that, the Court made a ruling the letter was excluded and the contents of the letter; and yet not once, but two times questions were asked of why the witness left. The question was clearly intended to elicit that very same information the Court had precluded.

…

I note that there had been continued problems with exhibits despite the instructions, the use of documents other than those that are marked as received into the record and efforts to refer to documents that have not been marked.

I think it's clear, and I think today's hearing also confirms that the plaintiff failed to make sure that all the documents they intended to use would be available, would be marked and ready to be used, so we have that violation of the pretrial orders.

…

Counsel represented they would be able to conclude by the end of business on Friday afternoon and that would be necessary so the defendant had a fair opportunity to present the defense.

…

But I think what was very troubling to the Court is to learn that Miss Berman had never been deposed, and it's clear on this record that that was a reason that her

testimony took so long because there was no idea of what her testimony would be.

…

I was troubled by the fact also that at times during the argument – this was outside the presence of the Jury – there were accusations that [the witness] was lying, but there was no evidence and there is no evidence presented to this Court to support that assertion.

…

I realize she's an adverse witness. Counsel has the opportunity to craft questions and to ask leading questions; and so it's always in counsels' court to lead the witness and to elicit the responses that counsel anticipated; but if you haven't taken a deposition, I'm not sure exactly how you accomplish that effectively.

…

And I would note that despite the ruling in June of 1998 that her testimony would be admitted this court would hear from Miss Horton, no deposition was ever taken of her; and again, that was a choice that the plaintiff made.

No one predicted that she was not going to be available for trial; but on the other hand, the issue, the relevance of her testimony to these proceedings, was crystal clear in June and no effort was made to depose her.

…

So on the record, there is a basis to grant a mistrial based on misconduct of counsel.

…

And moreover, this Court is satisfied that the plaintiff's conduct has been egregious. There has been no clear and justifiable excuse for the plaintiff's noncompliance with the Court's orders; and the Court, therefore, will enter judgment dismissing this action on the merits.

II. DISCUSSION

¶3 A trial court's decision to dismiss an action for misconduct is vested in the trial court's discretion. *See* WIS. STAT. § 805.03 (1997–98); ***Johnson v.***

Allis Chalmers Corp., 162 Wis. 2d 261, 273, 470 N.W.2d 859, 863 (1991).[1] A trial court appropriately exercises its discretion if it acts as a reasonable judge might act, in accordance with the governing legal principles. *See* ***Kerans v. Manion Outdoors Co., Inc.***, 167 Wis. 2d 122, 130, 482 N.W.2d 110, 113 (Ct. App. 1992). A trial court may not dismiss a case as a sanction for misconduct unless: (1) the misconduct is egregious, and (2) there is no clear and justifiable excuse for the party's conduct. *See* ***Chevron Chem. Co. v. Deloitte & Touche***, 176 Wis. 2d 935, 947, 501 N.W.2d 15, 20 (1993). Here there was no misconduct. We analyze each of the trial court's stated reasons in turn.

A. Improper Objection

¶4 First, the trial court cited an alleged improper objection made by plaintiff's counsel as a basis for dismissing Wustrack's action. Prior to trial, the court granted the defendant's motion *in limine* to preclude Wustrack from introducing state surveys that indicated substandard care at the facility. The trial court ruled that there would be "no reference" to the surveys. During trial, defense counsel asked a witness whether the facility had been inspected by the state periodically, and plaintiff's counsel objected:

> [Defense Counsel:] Now did you also have inspections episodically from the State of Wisconsin?
>
> [Witness:] Yes.
>
> [Defense Counsel:] And --
>
> [Plaintiff's Counsel:] Your Honor, I'm going to object.
>
> THE COURT: Basis?

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> [Defense Counsel:] We have been precluded from going into these by the Court and any surveys by the State, and he's --
>
> THE COURT: Counsel, I'm going to overrule that objection. Be seated.

The trial court found counsel's objection to be misconduct, concluding "that it was done intentionally to give the jury the impression the defendant was trying to hide something."

¶5 The objection made by plaintiff's counsel was not misconduct. Certainly what was a preclusion aimed at the plaintiff should not have been used by the defendant to imply that the surveys exonerated the facility. Thus, plaintiff's lawyer had a right to object, and the trial court specifically asked the lawyer to give a basis for the objection. His compliance with the trial court's request was not misconduct.

B. Failure to Depose Witness Jan Horton

¶6 Second, the trial court also cited plaintiff's counsel's failure to depose Jan Horton as a basis for dismissing Wustrack's action. Horton, a Department of Health and Social Services employee, investigated Wustrack's complaints and found them to be unsubstantiated. Plaintiff sought to preclude these findings but the trial court denied the motion, ruling that Horton could be called as a witness to explain the shortcomings of the investigation. Wustrack planned on calling Horton at trial. Horton was not deposed, however, and died unexpectedly two weeks prior to trial. The trial court found, "[D]espite the ruling in June of 1998 that her testimony would be admitted … no deposition was ever taken of her; and again, that was a choice that the plaintiff made."

¶7 Plaintiff's counsel's failure to depose Horton was not misconduct. Although WIS. STAT. §§ 804.01, 804.05 allow parties to obtain discovery by deposition, there is no requirement that attorneys depose each witness before trial. While § 804.05 does not limit the number of depositions that a party may take, Rule 333 of the Circuit Court Rules for Milwaukee County does. Moreover, depositions add expense to a lawsuit for both sides, and, additionally, a lawyer may strategically choose not to depose someone so as to not telegraph punches.

C. Improper Questioning of Witness Kathleen Barron

¶8 Third, the trial court also cited counsel's improper questioning of Kathleen Barron, a former employee of the facility, as a basis for dismissing Wustrack's action. Barron's resignation letter characterized the patient care at the facility as "practicing nursing on roller skates" because of staffing shortages. The trial court indicated, in response to a defense motion *in limine*, that the letter was not admissible because it was not listed as an exhibit. While the court precluded Barron's resignation letter from evidence, and ruled that the letter "cannot be referred to in the testimony," it did not order that Barron not testify regarding her experiences at the nursing home. On direct examination, plaintiff's counsel asked Barron why she resigned. The trial court sustained defense counsel's objection to this question. On cross-examination, however, the defendant elicited testimony that the facility hired a lot of people during the last several weeks of Barron's employment. On redirect, plaintiff's counsel again tried to elicit Barron's testimony as to why she left the facility:

> [Plaintiff's Counsel:] Miss [Barron], why did you leave this facility?
>
> [Defense Counsel:] Your Honor, I objected to that before.
>
> THE COURT: Thank you, Counsel.

> That was the precise question that was already asked. An objection was sustained, and I think you're finished with your redirect; is that correct?

When the trial court announced its decision dismissing the plaintiff's case, it noted: "[T]he court made a ruling the letter was excluded and the contents of the letter" and "two times questions were asked of why the witness left," which were "clearly intended to elicit that very same information the Court had precluded."

¶9 It was not misconduct for plaintiff's counsel to ask Barron about the reasons for her resignation from the facility. The record does not support the trial court's finding that it had excluded the underlying information in Barron's resignation letter. Rather, the record reflects that the court merely precluded reference to the letter itself. Plaintiff's pretrial report revealed that Barron would testify "regarding the working conditions" she experienced at the facility. Moreover, according to the trial court's own statement, the sole reason for preclusion of the resignation letter was the fact that it was "[not] listed on the exhibit lists," thereby acknowledging its relevance. Additionally, defendant's question to Barron and her answer that staff was hired during the last weeks of her employment opened the door as to what she knew about the alleged short-staffing at the facility.

D. Preparation & Examination of Witness Sharon Berman

¶10 Fourth, the trial court's decision to dismiss Wustrack's action was also based on plaintiff's counsel's preparation and examination of Sharon Berman, a past administrator of the facility. There was a dispute between the trial court and plaintiff's counsel as to how long the adverse examination of Berman would take. The court gave plaintiff's counsel 15 minutes to finish his examination of Berman, stating "[Y]ou've not deposed a witness and you expect me to tolerate your

deposing the witness in front of the jury." When it dismissed Wustrack's action, the trial court explained that plaintiff's counsel "represented they would be able to conclude by the end of business on Friday afternoon" and that the court found it "very troubling … to learn that Miss Berman had never been deposed." The trial court erroneously determined that this was misconduct. As noted, there is no requirement that attorneys depose each witness before trial. Additionally, counsel's erroneous estimate about how long it would take to examine the nursing home's former administrator is also not misconduct. *See* ***Chevron***, 176 Wis. 2d at 947, 501 N.W.2d at 20 (sanction of dismissal "should be imposed only under extraordinary circumstances").

E. Improper Attempt to Impeach Witness Sharon Berman

¶11 Fifth, the trial court also cited counsel's attempt to impeach Berman with documents that were not on the exhibit list as a basis for dismissing Wustrack's action. Wustrack's case was based, in part, on allegations of abuse. A police blotter obtained by plaintiff's counsel indicated that nursing assistant Glen Ford was arrested on July 16, 1990, for allegedly abusing a patient. Defendant's responses to discovery indicated that Ford was not discharged until September 11, 1990. Berman testified on cross-examination, however, that the facility fired Ford immediately after discovering "that [Ford] had physically abused a resident." The trial court prevented plaintiff's counsel from introducing the police blotter and the facility record to impeach Berman because the blotter was not marked as an exhibit. The trial court determined that plaintiff's counsel's attempt to impeach the witness amounted to misconduct and was also troubled by his accusations that Berman was lying when "there is no evidence presented to this Court to support that assertion."

¶12 Clearly, plaintiff's counsel was using the documents to rebut an unexpected statement by the witness that did not comport with the facts as reflected by the documents. Nonetheless, the trial court prevented him from using those documents and chastised him for not pre-marking them as exhibits. Rebuttal documents, like rebuttal witnesses, need not be disclosed, however. *See* ***Federal Aviation Admin. v. Landy***, 705 F.2d 624, 632 (2nd Cir. 1983); *cf.* WIS. STAT. § 971.23(1)(d) (criminal cases). In addition, the record reflects that plaintiff's counsel was correct when he stated that Berman's testimony about when Ford was fired from the facility was untrue. The trial court erroneously exercised its discretion when it found that these actions were misconduct.

F. Misrepresentation of the Record

¶13 Sixth, the trial court also cited counsel's misrepresentation of the record as a basis for dismissing Wustrack's action. Specifically, plaintiff's counsel advised the court, outside the presence of the jury, that there were at least 50 instances of patient abuse at the facility when the record did not support such a statement. The next morning, plaintiff's counsel apologized to the court, explaining that he had checked the deposition transcript and discovered his mistake.[2] There is nothing in the record that indicates that plaintiff's counsel was trying to mislead the trial court. This lapse of memory was not misconduct.

---

[2] Plaintiff's counsel informed the court:

> I misspoke, your Honor, and I apologize. I'll give you the references and the deposition.
>
> Page 117, line 1, et sequel, and the question was: 'Well, you said you don't remember. Can you remember whether there were more than 50? Can you remember whether there were more than 50 while you were Director of Nurses or less than 50?'
>
> And she answered: 'I didn't count them.'

(continued)

G. Preparation of Documents

¶14 Seventh, the trial court also cited counsel's poor handling of documents as a basis for dismissing Wustrack's claims as a sanction. The trial court believed that plaintiff's counsel had violated its pretrial orders by "fail[ing] to make sure that all the documents they intended to use … would be marked and ready to go," and that "much time has been wasted in this court room due to counsel's poor handling of exhibits." This, in what the trial court noted was "a very document intense case," is not misconduct worthy of a dismissal sanction. As we have seen, the sanction of dismissal "should be imposed only under extraordinary circumstances." ***Chevron***, 176 Wis. 2d at 947, 501 N.W.2d at 20.

H. Improper Questioning of Witness Francine Henderson

¶15 Eighth, the trial court also based its finding of misconduct on an alleged improper question posed by plaintiff's counsel to a former facility employee. Wustrack's claims were based, in part, on the allegation that the defendant failed to adequately staff its facility with sufficient personnel. Plaintiff believed that Francine Henderson, a former facility employee, resigned because of inadequate staffing. Plaintiff's counsel asked Henderson, "Would you ever work for the Beverly facility now?"[3] The trial court noted this incident in its decision to

> And then on page 118, line 8 through 11 is where the question was: 'Could it have been as many as 10, as many as 10 employees while you were Director of Nurses that were fired due to physical abuse or verbal abuse of the residents?'
>
> And the answer was: 'Could have been.'
>
> And I apologize, your Honor, that I said 50 and it wasn't.

[3] The trial court misquotes plaintiff's question in its oral decision as "Would you ever work for the Beverly facility again?"

dismiss, finding the question "[t]otally improper." Counsel's question was not misconduct.

I. Plaintiff's Repeated Challenge of Court Rulings

¶16 Finally, the trial court cited plaintiff's repeated challenges as a basis for dismissing Wustrack's action as a sanction, noting "I think that we have revisited almost every motion that was raised; and most of the time it's been raised in front of the Jury." The court also stated: "It's frustrating to have to repeat work that has been done; but when the challenges to the rulings of the Court are made in front of the Jury, I think that is contemptuous."

¶17 The record does not support the trial court's conclusion that plaintiff's motions were raised in front of the jury "most of the time." The trial court erroneously exercised its discretion when it found that plaintiff's challenges were misconduct.

By the Court.—Judgment reversed and cause remanded.[4]

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Beverly Enterprises asks that we find Wustrack's appeal to be frivolous. *See* WIS. STAT. § 809.25(3). We deny the motion.