COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 6, 1995

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2076

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

DAWN ALT, MARK ALT and CODY ALT, A MINOR, BY HIS GUARDIAN AD LITEM, JAMES A. JOHNSON,

Plaintiffs-Respondents,

v.

RICHARD S. CLINE, M.D., WOMEN'S HEALTH SPECIALISTS, S.C., and APPLETON MEDICAL CENTER,

Defendants-Appellants,

CHARLES J. GREEN, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, SENTRY INSURANCE COMPANY, OUTAGAMIE COUNTY DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

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

LaROCQUE, J. This is an interlocutory appeal by the Appleton Medical Center (AMC), Richard Cline, M.D., and Women's Health Specialists, S.C. (the clinic), defendants in a medical malpractice action brought on behalf of a minor, Cody Alt, by his parents.[1] Appellants argue that the trial court erroneously exercised its discretion by imposing sanctions upon the defense. The circuit court made findings that deposition objections by AMC's attorney abused the discovery process and that the clinic's attorney engaged in ex parte communications with Dawn Alt's physician, Ernesto Acosta, M.D., in violation of the physician-patient privilege, improperly adjourned Acosta's deposition and was not allowed to represent Acosta, even though Acosta, who is not named in this lawsuit, was employed by the clinic. We reject the appellants' arguments and affirm the decision of the trial court.

BACKGROUND

Cline performed a cesarean section delivery of Cody Alt at AMC on October 2, 1989, in place of Acosta, who was not on call. The Alts allege that Cody sustained catastrophic brain injuries during the birth and subsequent resuscitation. Acosta, as treating physician, prepared the discharge summary of Dawn Alt upon her release from the hospital.[2]

The complaint alleges that in addition to Cline's negligence:

> That at all times material, physicians, nurses, or other health care providers, agents, employees or persons acting with the apparent authority of defendant, WOMEN'S HEALTH SPECIALISTS, S.C., whose identities are currently unknown to plaintiffs, were negligent in their duties to DAWN ALT and/or CODY ALT.

[1] This court granted leave to appeal by order dated August 25, 1994. *See* § 808.03, STATS.

[2] The trial court found that, in his discharge summary, Acosta set forth the opinion that during delivery the infant had been in fetal distress.

As part of the discovery process, the Alts took depositions of three AMC hospital nurses. AMC's attorney engaged in lengthy and repeated objections. The trial court found that his conduct constituted flagrant abuse of the discovery process and served to defeat its purpose, and that the nurses' depositions were "basically worthless."

The Alts also deposed Acosta.[3] The clinic's attorney, retained to represent the clinic and Cline by the clinic's insurance carrier, engaged in ex parte communications with Acosta and appeared for both the defendants and Acosta at the deposition hearing. During the deposition, counsel objected to the questions by the Alts' counsel, then unilaterally adjourned the deposition. The court found that because counsel did not and could not represent Acosta, counsel's private communications violated Dawn's physician-patient privilege and he had no right to adjourn the deposition. The court imposed sanctions, ordering that the three nurses and Acosta be redeposed, that defendants bear the costs of redeposition and that all ex parte communications be disclosed.

STANDARD OF REVIEW

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[3] The plaintiffs authorized access to the Alts' medical records at the clinic, stating:

> THIS AUTHORIZATION DOES NOT PERMIT SUCH REPRESENTATIVE TO DISCUSS THE RECORDS ... WITH ANY TREATING OR EXAMINING PHYSICIAN OF SUCH PATIENT ....
>
> ....
>
> THIS IS A LIMITED MEDICAL AUTHORIZATION. PLEASE READ. This authorization ONLY permits inspection, copying or obtaining copies of x-rays and records of the doctor or hospital to which it is directed. It does NOT authorize any doctor, nurse, clinic or hospital employee to discuss patient's case or give written report to the person, firm or company (or agent thereof) named in the authorization.

The standard of review with respect to a trial court's discovery decisions is whether the court erroneously exercised its discretion. ***Shibilski v. St. Joseph's Hospital,*** 83 Wis.2d 459, 470-71, 266 N.W.2d 264, 270 (1978). The party objecting to the trial court's decision has the burden of showing that the trial court erroneously exercised its discretion. ***Id***. We will sustain a discretionary act if the trial court examined relevant facts, applied a proper legal standard and reached a reasonable conclusion. *See* ***Beacon Bowl v. WEPCO***, 176 Wis.2d 740, 766, 501 N.W.2d 788, 798 (1993). In the absence of a clear statement of reasoning in the record, we may examine the record to determine whether the facts support the trial court's decision. *See* ***Martin v. Griffin***, 117 Wis.2d 438, 442-43, 344 N.W.2d 206, 209 (Ct. App. 1984). Trial courts have statutory and inherent discretion to sanction parties for failure to comply with procedural statutes or rules. *See* § 805.03, STATS.[4]; ***Neylan v. Vorwald***, 124 Wis.2d 85, 93-94, 368 N.W.2d 648, 653 (1985).

DISCUSSION

A. DEPOSITIONS AND DISCOVERY

It is improper to make objections that disclose or suggest the attorney's strategy to the witness or suggest an answer to the witness. A "speaking" objection undermines the basic purpose of the discovery process, contaminating the ascertainment of truth set forth as the goal in ***Hickman v. Taylor***, 329 U.S. 495, 507-08 (1947), and ***State ex rel. Dudek v. Circuit Court***, 34 Wis.2d 559, 576, 150 N.W.2d 387, 397 (1967).[5] This practice is discussed in a Wisconsin State Bar publication:

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[4] Section 805.03, STATS., provides in pertinent part:

> For failure ... of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).

[5] The Advisory Committee to the Federal Rules of Civil Procedure "sought to deal with the problem of the 'speaking objection': 'Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objection and colloquy, often suggesting how the deponent should respond.'" 8A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE

> Sometimes a witness's attorney may make speaking objections. Speaking objections do not simply state the basis for the objection but also enumerate the thoughts of the witness's attorney regarding the question, in a form understandable to the witness. Such objections should not be tolerated. They undermine the deposing attorney's ability to obtain an accurate record of the witness's—and only the witness's--testimony.

WISCONSIN DISCOVERY LAW AND PRACTICE § 3.106 at 3-51 to 3-52 (1990).

The trial court examined the relevant facts within the depositions of the three nurses: Barbara Weber, labor and delivery nurse; Doreen Battermann, nursery nurse; and Patricia Kramer, surgical nurse. In its decision, the court quoted extensively from the depositions and stated:

> The court has no hesitation in finding that [counsel] obstructed plaintiffs' efforts to conduct these examinations with often lengthy, strategic interruptions replete with suggestions, statements and arguments of counsel. Such tactics constitute a flagrant abuse of the discovery process and serve to defeat its purpose. Although counsel are entitled to zealously represent their clients, [counsel's] conduct far exceeded the bounds of advocacy.

We have reviewed those portions of the depositions made part of the appeal record. The record demonstrates that the witnesses' answers were frequently responsive to suggestions made in the objections. The circuit court's finding that on a number of occasions counsel suggested answers to the witnesses is supported by that record and the finding is not clearly erroneous.

(..continued)
§ 2113 at 96 (1994). Federal rules now direct that objections be "'stated concisely and in a non-argumentative and non-suggestive manner.'" ***Id***. at 97.

The record also demonstrates that counsel made an inordinate amount of inappropriate objections. During the three depositions, counsel interrupted over 100 times to lodge several hundred objections, including dozens based on lack of relevancy, competence, foundation and form.

The scope of discovery is set forth in § 804.01(2)(a), STATS., which provides in part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action .... It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The questions to which counsel lodged numerous relevancy and foundation objections sought information reasonably calculated to lead to the discovery of admissible evidence. There was no basis to attack the competency of the witnesses. Further, counsel repeatedly objected that the question was repetitive, but the partial transcripts of the depositions do not support the objection. Similar objections that questions were argumentative, vague, overbroad or called for speculation are unsupported by the deposition transcripts.

Pretrial discovery is meant to facilitate the ascertainment of truth, and pretrial rules of civil procedure are to be construed liberally.[6] *See* ***Hickman***, 329 U.S. at 507-08; ***Dudek***, 34 Wis.2d at 576, 150 N.W.2d at 397; Judicial Council Committee's Note to § 804.01 (1974). Discovery rules make the distinction between the right to take statements and the right to use them: "The utmost freedom is allowed in taking depositions; restrictions are imposed upon their use."[7] 8 WRIGHT & MILLER, *supra* § 2007 at 96 n.11.

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[6] Wisconsin's discovery procedures are analogous to federal discovery procedures. ***Albert v. Waelti***, 133 Wis.2d 142, 147, 394 N.W.2d 752, 754-55 (Ct. App. 1986).

[7] At trial, a deposition or part of a deposition may be used only so far as it is admissible under

The record reflects the circuit court's examination of relevant facts, application of the proper standard of law, a rational process and a conclusion a reasonable judge could reach, and it did not erroneously exercise its discretion by imposing the sanctions.

B. DUAL REPRESENTATION

The statutory physician-patient privilege belongs to the patient, and only the patient may dictate the extent of any waiver. ***Steinberg v. Jensen***, 186 Wis.2d 237, 255, 519 N.W.2d 753, 760 (Ct. App. 1994). With the commencement of a lawsuit, there is a limited exception to the physician-patient privilege where a plaintiff's medical condition is an element of a claim. *See* § 905.04(4)(c), STATS.[8] However, the privilege is not waived so as to allow opposing counsel to have informal conferences with treating physicians, unless the privilege is lost due to unrelated exceptions.[9] ***State ex rel. Klieger v. Alby***, 125 Wis.2d 468, 473, 373 N.W.2d 57, 60 (Ct. App. 1985). Under the § 905.04(4)(c) exception, disclosure of matters within the physician-patient privilege is restricted to standard discovery procedures as set forth in § 804.01(1), STATS. *See* ***Wikrent v. Toys "R" Us, Inc.***, 179 Wis.2d 297, 304, 507 N.W.2d 130, 133 (Ct.

(..continued)
the rules of evidence applied as though the witness were present and testifying. Section 804.07(1), STATS. Objections to admissibility may be made at trial for any reason that would require the exclusion of the evidence if the witness were present and testifying. Section 804.07(2), STATS.

[8] Section 905.04(4)(c), STATS., reads as follows:

> *Condition an element of claim or defense*. There is no [physician-patient] privilege under this section as to communications *relevant to or within the scope of discovery* examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense .... (Emphasis added.)

[9] The physician-patient privilege is provided in § 905.04(2), STATS., which states in pertinent part that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained ... for purposes of diagnosis or treatment of the patient's physical ... condition ...."

App. 1993). Permissible methods of discovery do not include informal ex parte conferences. ***Klieger***, 125 Wis.2d at 473, 373 N.W.2d at 60.

The purpose of the ***Klieger*** rule is to preserve the confidential and fiduciary relationship between a physician and patient, and to allow the patient to retain control of the physician-patient privilege by restricting communications between defense attorneys and treating physicians to the controlled conditions of formal discovery. *See* ***Steinberg***, 186 Wis.2d at 257, 519 N.W.2d at 761-62. This court has adopted the reasoning that the physician-patient privilege is so sacrosanct that prejudice and improper conduct can be inferred from the fact that a patient's treating physician engaged in ex parte conferences with the patient's legal adversaries, without the patient's consent. ***Id***. at 257-58, 519 N.W.2d at 761. The problem with informal ex parte communications is that there is no record of what transpired. ***Id***. at 263, 519 N.W.2d at 763. To allow treating physicians to be the sole judge of when and where they may communicate about their patients once litigation is initiated "would render the rules of discovery and the physician-patient privilege meaningless." ***Id***. at 266, 519 N.W.2d at 764.

The clinic argues that the unique circumstances of this case render the cases cited inapplicable. It points to the allegation that other unnamed physicians and employees of the clinic were also negligent, and that the negligence included not only the labor and delivery process but in the management of plaintiff's pregnancy. We conclude that the pleadings cannot be read to reasonably implicate Acosta, the treating physician before and after the child's birth, as one of those whose "identities are currently unknown to plaintiffs" who were negligent.

Further, under the "entity rule" as expressed by SCR 20:1.13,[10] where a lawyer represents a corporation, the client is the corporation, not the corporation's constituents. ***Jesse v. Danforth***, 169 Wis.2d 229, 239, 485 N.W.2d 63, 66 (1992). The purpose of the entity rule is to "enhance the corporate lawyer's ability to represent the best interests of the corporation without

[10] Supreme Court Rule 20:1.13 provides in part: "Organization as client. (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The Comment to SCR 20:1.13 defines "constituent" to be the corporation's officers, directors, employees and shareholders.

automatically having the additional and potentially conflicting burden of representing the corporation's constituents." ***Id***. at 240, 485 N.W.2d at 67. The comment to SCR 20:1.7 states that loyalty, an essential element in the lawyer's relationship to the client, is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities. A lawyer representing an organization may also represent any of its constituents, but only if, as provided by SCR 20:1.7, the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents in writing after consultation.[11]

Acosta, who was Dawn's treating physician, is also an employee of the clinic. However, except for financial interests he shares as a constituent of the clinic, Acosta's interests cannot be reconciled with the defendants' interests as required by SCR 20:1.7. He is not a defendant. He was not present at the birth; he is not an unidentified clinic employee whose prenatal care was allegedly negligent.

We conclude that the mere fact that doctors are members of the same medical service organization, such as the clinic, must yield to the physician-patient privilege where a clinic employee is a non-defendant treating physician. Therefore, we affirm the trial court's decision that Acosta may not be represented by the defendant clinic's lawyer.

The court further concluded that counsel had no right to adjourn Acosta's deposition, did so to protect the defendants and effectively precluded plaintiffs' counsel from exploring the basis of Acosta's opinion relating to an

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[11] Supreme Court Rule 20:1.13 provides in pertinent part: "(e) A lawyer representing an organization may also represent any of its ... employees ... subject to the provisions of Rule 1.7."

Supreme Court Rule 20:1.7 provides in part:

Conflict of interest: general rule. (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

issue relevant to the case. The unilateral termination of Acosta's discovery deposition was separate grounds to impose sanctions. The court's decision does not represent an erroneous exercise of discretion.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.