

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 97-1172

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DALE G. LATUS,

PLAINTIFF-APPELLANT,

v.

JAMES JOHNSON AND GERALD CUTSFORTH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:
MARK GEMPELER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Dale G. Latus appeals from a judgment dismissing his complaint against James Johnson and Gerald Cutsforth for tortious interference with his contract with American Family Mutual Insurance Company (American). The dismissal occurred after the trial court barred Latus and his expert from

testifying regarding damages. Because the trial court properly exercised its discretion in barring evidence of damages, we affirm.

Latus was terminated as a career contract agent with American in November 1990. Although Latus released American from all claims arising out of the termination, he later sued Johnson and Cutsforth, his superiors at American, who allegedly acted outside the scope of their employment when they terminated him as an agent and tortiously interfered with his contract with American. The suit was filed in November 1992. The first trial date of April 18, 1994, was adjourned at the request of the parties. The trial date was adjourned several times thereafter. In April 1994, Latus filed a supplemental witness list which identified Steven Rozansky, a certified public accountant, as a potential expert witness on damages. In September 1995, Johnson and Cutsforth (hereinafter Johnson) served discovery upon Latus which requested information on the subject matter and substance of the testimony of the experts identified in Latus's supplemental witness list, along with documents upon which the experts relied. Latus was deposed later that month and claimed damages of \$8.4 million. Johnson then served additional discovery requesting detailed information about Latus's claimed financial losses due to Johnson's alleged interference with his contract with American.

Despite numerous requests from Johnson, the discovery responses were outstanding until July 1996, when Johnson filed a motion to compel a response to the discovery. The trial court granted Johnson's motion, and on August 21, 1996, three months before the scheduled trial date, Latus served his responses. In response to an interrogatory asking Latus to identify all damages he sustained, Latus responded "not applicable." Although Johnson had asked Latus to produce his state and federal income tax returns for the years 1985 through

1994, Latus only produced his Schedule C profit and loss statements for the years 1982 through 1992. In response to an interrogatory which asked him for the substance of the expert's expected testimony, Latus stated that "[a]n analysis will be done as to past and future earnings, comparison of income and testimony will be elicited as [sic] the effect of the loss of 3400 accounts on income."

Johnson attempted to schedule Rozansky's deposition on numerous occasions in August and September 1996. After noticing the deposition and agreeing on a date, Latus canceled Rozansky's deposition appearance. On October 28, 1996, less than one month before the scheduled trial, Johnson moved the trial court in limine to exclude Rozansky's testimony due to Latus's failure to itemize his damages and produce his expert on damages for deposition.

With the motion in limine pending, Rozansky was deposed five days before trial. Rozansky offered over 100 different damages calculations as representing Latus's lost income but was unable to opine whether any one of the calculations was more representative of Latus's lost earnings than the others. At a November 1996 hearing on the motion in limine, the court excluded Rozansky's testimony from trial because Latus had failed to timely itemize his damages despite numerous trial dates, and Rozansky's testimony prejudiced Johnson given the numerous and extensive damages calculations he offered "at the eleventh hour" which did not provide Johnson with any idea of the theory of damages Latus intended to assert at trial. The trial was adjourned to February 1997.

Latus was deposed regarding damages four days before the February 10, 1997, adjourned trial date. At that deposition, Latus testified that he gave his tax returns and the annual rate at which his American business had been increasing prior to his termination to Rozansky, who then computed Latus's lost

earnings. Latus relied on Rozansky's calculations in testifying about lost earnings. However, Latus did not observe Rozansky perform the calculations, did not discuss the completed calculations with Rozansky and did not perform the calculations himself. Latus offered the same figures Rozansky had offered in his deposition. Latus could not say how Rozansky's calculations had been made but reiterated that he based his testimony on damages upon them.

On the morning of trial, the trial court entertained Johnson's motion to bar Latus from testifying regarding damages. Johnson argued that all of Latus's deposition testimony regarding damages was based upon information and calculations provided by Rozansky and that Latus merely proposed to present the opinion of an expert whose testimony had been stricken. In response, Latus's counsel reviewed in detail an exhibit to Latus's deposition which showed the lost earnings calculations upon which Latus was going to rely. Counsel conceded that the calculations were made by Rozansky.

The trial court began its ruling by referring back to its reasons for excluding Rozansky's testimony: Johnson did not have adequate notice of Latus's damages and the information was disclosed outside of the deadlines set by the court's scheduling order, thereby depriving Johnson of discovery, an important tool in civil litigation. The court found that the testimony Latus intended to offer would make him Rozansky's "alter ego" and would circumvent the court's earlier ruling which excluded Rozansky's testimony as a discovery sanction. The court would not permit what it characterized as expert testimony to be presented by Latus. Being unable to prove his damages, Latus asked the trial court to dismiss the case so that he could appeal the trial court's rulings.

Discovery sanctions are within a trial court's discretion. See ***B&B Invs. v. Mirro Corp.***, 147 Wis.2d 675, 688, 434 N.W.2d 104, 110 (Ct. App. 1988). A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. See ***Breuer v. Town of Addison***, 194 Wis.2d 616, 625, 534 N.W.2d 634, 638-39 (Ct. App. 1995). A court has discretion to exclude the testimony of a witness if a party is prejudiced by opposing counsel's failure to name the witness. See ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 211 Wis.2d 296, 302, 564 N.W.2d 766, 768 (1997). By analogy, a trial court has discretion to exclude a witness's testimony if the party offering the witness does not timely comply with discovery requests relating to that witness. See ***State v. Ronald L.M.***, 185 Wis.2d 452, 466, 518 N.W.2d 270, 275 (Ct. App. 1994).

Latus contends that the trial court erroneously based its exclusion of his expert's testimony on his failure to adhere to the scheduling order because the parties had agreed numerous times to act outside of the deadlines imposed in that order (which contemplated an April 1994 trial). He argues that the delay in obtaining his expert's opinion regarding damages was attributable to Johnson, who did not notice Rozansky's deposition until many months after Latus identified him as an expert.

Latus's argument overlooks that expert opinion regarding damages had been the subject of numerous discovery requests propounded by Johnson. Johnson repeatedly requested by interrogatories and requests for document production elaboration of an identified expert's opinion of Latus's damages. Rozansky was not deposed until after Latus was compelled to provide financial information which Johnson's counsel could use to prepare for Rozansky's

deposition. Deposition methods may be employed in any sequence. *See* § 804.01(4), STATS. We reject Latus's suggestion that Johnson was required to depose Rozansky before pursuing other discovery relating to Rozansky's opinions. We also reject Latus's contention that Johnson took no action in response to Latus's April 1994 designation of Rozansky as an expert witness. Johnson served discovery in response to that designation.

Latus's argument that a continuance would have been an appropriate remedy is also unavailing. The case had been pending since November 1992, the trial had been adjourned several times and Johnson had repeatedly sought information regarding damages. Under the circumstances of this case, the trial court properly exercised its discretion in not granting a continuance. Furthermore, the record indicates that the court was never asked to continue the case in order to permit further discovery in lieu of barring testimony regarding damages.

Latus contends that the trial court erroneously concluded that expert testimony was necessary to present Latus's claim for damages. Latus mistakenly emphasizes this aspect of the trial court's ruling. The trial court found that Latus intended to parrot his expert's excluded testimony and, having barred the expert, reasonably ruled that Latus would not be permitted to offer testimony which had been previously excluded. The trial court's finding of fact as to the nature of Latus's proposed testimony on damages is not clearly erroneous on the record before this court. *See* § 805.17(2), STATS.

Latus argues that he would have testified from his Schedule C (profit or loss from business) regarding his lost income. However, at the hearing on the motion to exclude Latus's testimony, Latus's counsel focused on the computations in an exhibit prepared by Rozansky to explain how Latus would testify. The trial court

was not presented with an argument that Latus could testify from his own tax returns without the need for expert testimony. Latus never asked the court for the opportunity to present his tax returns to the jury as a layperson. Because this issue is raised for the first time on appeal, it is waived. *See Seagall v. Hurwitz*, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).¹

We agree with Latus that excluding damages testimony was a drastic step. However, the record supports the trial court's exercise of discretion and the trial court made a reasonable decision under all of the circumstances.²

By the Court.—Judgment affirmed.

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

¹ Because we have upheld the trial court's exercise of discretion, we will not address another ground cited by the trial court for excluding Latus's testimony regarding damages—that such evidence needed to be presented by expert testimony. On appeal, Latus argues that the trial court erroneously relied upon *Brain v. Mann*, 129 Wis.2d 447, 385 N.W.2d 227 (Ct. App. 1986), in excluding his testimony regarding damages. Our review of the transcript does not reveal that the trial court relied upon *Brain* in that way. Rather, the trial court referred to *Brain* as a preface to its discussion of Latus's failure to give discovery on damages.

² Having affirmed the trial court's discretionary decision to bar evidence regarding damages, we need not address the parties' contentions regarding what should have occurred on summary judgment.

