

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0362

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**LINDSAY MOSHER, A MINOR, BY HER GUARDIAN AD
LITEM THOMAS M. FITZPATRICK, WILLIAM MOSHER,
JR., AND RHONDA MOSHER,**

PLAINTIFFS-APPELLANTS,

**PEPSI COLA HEALTH CARE PLAN AND NORTHWESTERN
NATIONAL LIFE INSURANCE COMPANY,**

PLAINTIFFS,

V.

**PHYSICIANS INSURANCE COMPANY OF WISCONSIN,
INC., DAVID L. NELSON, M.D., AND THE WISCONSIN
PATIENTS COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS,

SKEMP CLINIC, LTD.,

DEFENDANT.

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Lindsay Mosher and her parents (collectively the Moshers) appeal from the circuit court’s dismissal of their summons and complaint against Dr. David Nelson and his liability insurance carrier for medical malpractice, after a jury returned a verdict finding Nelson not negligent. The Moshers moved for a new trial claiming that the circuit court erred in refusing to allow the Moshers to present the deposition of Dr. Paul Dvorak and the testimony Dr. Lawrence Lockman. Because we conclude that the defendants did not inject any new matters or new facts in its presentation of the evidence and the excluded testimony was not necessary to achieve justice, we affirm the circuit court’s exercise of discretion in refusing to admit the testimony.

BACKGROUND

¶2 The Moshers brought suit against Nelson and his liability insurance carrier for medical negligence after Lindsay suffered profound brain and kidney damage. The Moshers retained Dr. Michael Mauer and Dr. Lawrence Lockman as expert witnesses. The defendants retained Dr. Paul Dvorak and Dr. Michael Radetsky as their experts.

¶3 During the course of the trial, defense counsel indicated repeatedly that Dvorak would testify for the defense. However, after the Moshers had closed their case-in-chief, defense counsel decided not to call Dvorak as a witness. As a result, the Moshers requested the court to allow them to either re-open their case-in-chief to present portions of Dvorak’s deposition or to allow them to present it

on rebuttal. They asserted that the only reason they did not present Dvorak's deposition in their case-in-chief was because of defense counsel's representations that Dvorak would testify for the defendants. Defense counsel argued that after he reviewed the testimony given by Radetsky, one of the experts the defense retained, he determined Dvorak's testimony was not needed. Additionally, the defendants asserted that the issues which the Moshers wanted to bring out on rebuttal were all topics previously covered by Mauer in the Moshers' case-in-chief and that the defense had not presented any new facts or theories which warranted rebuttal testimony. The circuit court agreed that the decision not to call Dvorak was a strategic decision by defense counsel that he was free to make and it also determined that no new matters or facts had been introduced by the defense. Therefore, it denied the admission of Dvorak's deposition¹ as an addition to the Moshers' case-in-chief or as rebuttal testimony.

¶4 The Moshers also sought to call Lockman as a rebuttal witness, to discuss the significance of Lindsay's CT scan. The Moshers asserted that the defendants raised a new matter when Radetsky interpreted the CT scan because Radetsky had been deposed only as an infectious disease expert and pediatrician, and not as an expert qualified to interpret radiographic films. The circuit court denied the Moshers' request to allow Lockman as a rebuttal witness, stating that there had been no new matters or new facts injected by the defendants in their presentation of the evidence. The circuit court also determined that the matters to

¹ The circuit court later allowed the Moshers to re-open their case-in-chief to receive a few exhibits which the Moshers intended to introduce through Dvorak. The circuit court noted that it had the discretion to admit or deny the exhibits. It then stated that it would exercise its discretion and allow the exhibits.

which Lockman would testify had already been testified to by Mauer, an expert retained by the Moshers.

¶5 At the end of the trial, the jury returned a verdict finding Nelson not negligent. The Moshers moved the circuit court for an order vacating the jury verdict and a new trial arguing that the court erred in refusing to allow the testimony of Lockman and Dvorak. The Moshers' post-verdict motions were denied and the defendants' motion for judgment on the verdict was granted. The Moshers appeal.

DISCUSSION

Standard of Review.

¶6 We review a circuit court's decision to refuse further testimony after a party's case-in-chief has closed and to disallow the proffered testimony as rebuttal testimony, under the erroneous exercise of discretion standard. *See Pophal v. Siverhus*, 168 Wis. 2d 533, 554-55, 484 N.W.2d 555, 563 (Ct. App. 1992). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997), *review denied*, 217 Wis. 2d 518, 580 N.W.2d 689 (1998).

Rebuttal Testimony.

¶7 “Rebuttal is appropriate only when the defense injects a new matter or new facts.” *Pophal*, 168 Wis. 2d at 555, 484 N.W.2d at 563. However, the rule is flexible, and an exception can be made when rebuttal evidence is necessary to

achieve justice. *See id.* Because the Moshers make only a vague assertion that the defendants injected new matters in their presentation of the evidence, we interpret their argument as a claim that the rebuttal evidence was necessary to achieve justice.² Therefore, we look to whether the rebuttal evidence is so crucial that the trial court erroneously exercised its discretion when it refused to admit it. *See id.*

¶8 In their offer of proof, the Moshers stated that Dvorak's deposition³ would be used to rebut Radetsky's testimony regarding four matters: (1) whether hyponatremia⁴ can cause brain damage, (2) whether the decline in sodium can, in and of itself, be a cause of fluid entering the cells and a cause of seizures, (3) whether Hemolytic-uremic Syndrome (HUS) typically causes brain damage, and (4) whether HUS causes kidney damage. The Moshers also sought to call Lockman as a witness to rebut Radetsky's testimony regarding three matters: (1) whether hyponatremia does, in and of itself, cause permanent brain damage, (2)

² In their brief, the Moshers argue that these witnesses should have been allowed to testify based on principles of equity and fairness. The only claim of a "new matter" referenced by the Moshers is with respect to Radetsky's competence to interpret the CT scan. The competency of an expert witness is within the sound discretion of the circuit court. *See Simpson v. Madison Gen. Hosp. Ass'n*, 48 Wis. 2d 498, 509, 180 N.W.2d 586, 592 (1970). The Moshers fail to explain how Radetsky's competence in interpreting the CT scan, a test which had been previously discussed by their own expert, qualifies as an injection of a new matter or fact. The Moshers also fail to cite an authority for this proposition. We decline to consider an argument that is undeveloped by legal reasoning. *See Truttschel v. Martin*, 208 Wis. 2d 361, 369, 560 N.W.2d 315, 319 (Ct. App. 1997).

³ The Moshers develop no legal argument about why the circuit court erred by not permitting the Moshers to re-open their case-in-chief to read-in parts of Dvorak's deposition. Rather, they assert they were surprised by defense counsel's decision not to call him on behalf of the defense. But they cite no authority for the proposition that not granting their motion to re-open their case-in-chief was legal error. Instead, they contend the circuit court erred by not permitting the use of Dvorak's deposition as rebuttal testimony. Therefore, we, too, shall focus our discussion on whether it was error to exclude the use of Dvorak's deposition as rebuttal testimony.

⁴ Hyponatremia is a deficiency of sodium in the blood. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1116 (1993).

whether Lindsay's CT scan shows intracranial hemorrhage, and (3) whether the true cause of Lindsay's brain damage was hyponatremia, and HUS was, at best, a factor that may have made Lindsay more susceptible to hyponatremia. The defendants claimed that Mauer covered these matters at length in the Moshers' case-in-chief and that this was an attempt by plaintiffs to "tell their story twice." The circuit court concluded that there had not been "an injection of new matters or new facts by the defendants in their presentation of evidence" and therefore, declined to allow either witness to testify on rebuttal.

¶9 We agree with the circuit court that no new matter or fact had been injected by the defendants because the issues about which the Moshers sought to elicit testimony were previously covered by Mauer in the Moshers' case-in-chief. For example, Mauer had previously testified that hyponatremia caused the seizures that led to Lindsay's brain swelling and eventual brain damage. Mauer testified that it was Lindsay's "low sodium [that] caused the seizures." He further testified that because of the low sodium, Lindsay suffered "severe brain swelling," which caused her to become comatose and develop inadequate blood pressure. It was his opinion that as a result, Lindsay's kidneys shut down and she suffered permanent brain and kidney damage.

¶10 Mauer also testified about whether HUS typically causes brain or kidney damage. He stated that although one can have brain damage or kidney damage with HUS, it is "an unusual but conceivable outcome that is rare." Finally, Mauer also expressed an opinion about what the CT scan showed. He testified that after the seizures began, Lindsay had a CT scan "which showed swelling of the brain and increased pressure inside of her head"

¶11 Because the matters which the Moshers sought to address through Dvorak's deposition and Lockman's testimony were all matters that were previously testified to by Mauer, we conclude that excluding the testimony of these witnesses was not error. There was no reason for the circuit court to provide the Moshers with another chance to prove their case. The circuit court properly exercised its discretion.⁵

CONCLUSION

¶12 Because we conclude that the defendants did not inject any new matters or new facts in its presentation of the evidence and the excluded testimony was not necessary to achieve justice, we affirm the circuit court's exercise of discretion in refusing to admit the testimony.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁵ The Moshers assert the circuit court considered an improper factor in deciding to exclude Lockman's testimony because the court stated that medical malpractice cases often "tend to go on too long because it becomes such a battle of experts ... [a]nd at some point there has to be an end" Even if we were to agree with the Moshers that this statement by the court evinced consideration of an improper factor, it is clear that the court made its decision based upon the proper legal standard. The court explicitly stated that it was applying *Pophal v. Siverhus*, 168 Wis. 2d 533, 484 N.W.2d 555 (Ct. App. 1992), and that there had been no injection of new matters by the defendants. The Moshers also ask us to conclude the court erroneously exercised its discretion because the court stated that it had "a problem" with the Moshers using the defendants' experts as their rebuttal witnesses. However, in the very next sentence, the court explains that was due to the procedural history of the case, *i.e.*, because the Moshers sought to bring this testimony in on rebuttal instead of in their case-in-chief. The court then reasoned that there was no new matter or new fact injected by the defense to warrant introducing this testimony on rebuttal. We see no error in the court's comments.

