

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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. 99-1700

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MELODY KNUDSON,

PLAINTIFF-APPELLANT,

v.

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
GROUP HEALTH COOPERATIVE OF SOUTH CENTRAL
WISCONSIN AND UNIVERSITY HEALTH CARE, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Melody Knudson appeals from an order dismissing her action against State Farm Mutual Automobile Insurance Company, Group Health Cooperative of South Central Wisconsin, and University Health Care, Inc. She commenced the action to enforce the underinsured motorists provision of her

auto insurance policy from State Farm. Because the policy provided for arbitrating disputes, the trial court stayed proceedings and referred the matter to an arbitration panel. After that panel dismissed Knudson's claim for failure to prosecute, State Farm moved to confirm that determination. The trial court initially agreed to stay entry of a confirmation order to allow Knudson the opportunity to seek reconsideration from the arbitration panel. The court then reversed its ruling, confirmed the award and dismissed Knudson's complaint. Knudson alleges various errors in the trial court's disposition of her action. We affirm.

¶2 The arbitration panel issued a dismissal for Knudson's failure to prosecute on October 23, 1998. One month later State Farm moved to confirm the award and set the matter for a January 22, 1999 hearing. On January 19, Knudson retained counsel who appeared at the hearing and moved to stay confirmation. The trial court denied the motion as untimely. However, the court also raised this question:

[W]hether it wouldn't be appropriate for you to reapply to the arbitrators with whatever evidence you have to ask them to modify or vacate their decision.... I guess if we were to dismiss this case today and you successfully persuaded the arbitrators that they dismissed this case in error, I don't think [State Farm's counsel] would have much of a basis to oppose a motion to reopen this case if they were persuaded that they had wrongfully dismissed it in the first instance.

After some discussion, State Farm's counsel insisted on its right to a confirmation and dismissal order, but proposed that the court simply stay its order of dismissal for a period of time, rather than dismiss and then reopen if the arbitration panel reconsidered. Consequently, the court ordered the action dismissed, but stayed

entry of its order for forty-five days to allow further proceedings before the arbitration panel.

¶3 A few days later State Farm moved to set aside the stay and ordered immediate dismissal of the action. At the hearing on this motion, State Farm argued that the arbitration panel had no lawful authority to reconsider its decision. The trial court agreed and vacated the stay. The court also concluded that Knudson had shown no grounds under WIS. STAT. ch. 788 (1997-98)¹ to oppose the court's confirmation of the award.

¶4 Knudson takes this appeal from the order dismissing her action. She contends that the trial court erred by denying her initial motion to stay the confirmation proceeding, by reversing its decision to stay entry of the dismissal order, and by violating her constitutional right to due process and her rights under the Federal Disability Law.

¶5 The decision whether to grant or delay a continuance is discretionary, and we reverse only for an erroneous exercise of that discretion. *Brezinski v. Barkholtz*, 71 Wis. 2d 317, 320-21, 237 N.W.2d 919 (1976). The trial court properly exercised its discretion in denying Knudson's continuance motion as untimely. The court considered that Knudson had two-months notice of the confirmation hearing, yet retained counsel just three days before it occurred. Counsel, in turn, waited until during the hearing to request the continuance. These inadequately explained delays provide reasonable grounds for the court's decision. Additionally, through subsequent proceedings, including her reconsideration

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

motion, Knudson was fully able to present her defenses to confirmation and dismissal. The denial of her motion therefore proved harmless in any event.

¶6 Knudson has not shown error in the trial court's decision to vacate its order staying entry of the confirmation and dismissal orders. She contends that State Farm was estopped from moving to vacate the stay order because it stipulated to that order. However, State Farm stipulated to a delayed entry of the orders solely as a convenient means of implementing the court's determination that Knudson could seek reconsideration from the arbitration panel. It never stipulated to that determination and therefore retained the right to challenge its legal basis.

¶7 Knudson also contends that the arbitration decision was subject to reconsideration because it was not a final determination on the merits. The arbitration agreement provided that State court procedural rules would apply to the arbitration proceeding. Under those rules, a dismissal for failure to prosecute is an adjudication on the merits. WIS. STAT. § 805.03.

¶8 Knudson waived her arguments based on due process and Federal Disability Law. She did not raise them in the trial court. We therefore decline to address them. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

By the Court.—Order affirmed.

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

