**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 14, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP547** **Cir. Ct. No. 2011CV15165**

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

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**NANCY DOVIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**BHUPINDER SINGH SAINI, M.D., ADVANCED PAIN MANAGEMENT SC AND WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge.[1] *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

[1] This case was decided by the panel before Judge Dugan was appointed to the court. He has not participated in this decision in any way.

¶1 PER CURIAM. Nancy Dovin appeals an order dismissing her medical malpractice suit against Bhupinder Singh Saini, M.D. and Advanced Pain Management (collectively, Saini), and the Wisconsin Injured Patient and Families Compensation Fund (the Fund). She claims the circuit court wrongly penalized her for noncompliance with a scheduling order. We disagree and affirm.

## Background

¶2 For the second time, this case reaches us following a pretrial dismissal of Dovin's lawsuit against Saini and the Fund. We reversed a previous dismissal order in ***Dovin v. Saini*** (***Dovin I***), No. 2013AP2357, unpublished op. and order (WI App Nov. 11, 2014).[2] Our summary of the facts in ***Dovin I*** requires supplementation here. We therefore begin by discussing the relevant events underlying ***Dovin I***, and we then review the events following our remand.

¶3 Dovin was in an automobile accident in 2005. Saini treated her for her injuries during a seven-month period in 2007-08. Dovin, herself a medical doctor, filed a medical malpractice suit in September 2011 alleging negligence and lack of informed consent.

¶4 In response to a discovery demand, Dovin signed authorizations allowing Saini to obtain copies of her medical records. By February 2012, Saini had obtained such records and forwarded copies to Dovin's trial counsel. Saini deposed Dovin that same month, and she confirmed that she had reviewed her medical records to prepare for the deposition.

[2] The Honorable Mary Kuhnmuench entered the order underlying our decision in ***Dovin v. Saini*** (***Dovin I***), No. 2013AP2357, unpublished op. and order (WI App Nov. 11, 2014).

¶5 Pursuant to a scheduling order, Dovin agreed to disclose the names of her expert witnesses and provide their reports to Saini by the end of March 2012. A few days before the deadline, however, her trial counsel moved to withdraw from the case on the ground that he could not find an expert witness to support her claims. Although Dovin objected and asserted that her trial counsel had declined to speak to the experts she located, the circuit court granted the motion. Dovin thereafter proceeded *pro se* for many months. In December 2012, she advised the circuit court that she required more time to find a new attorney and that she "potentially" had an expert witness. The circuit court allowed her an adjournment but, following another postponement, Saini and the Fund moved to dismiss her action based on an alleged failure to prosecute.

¶6 Dovin's current counsel, Attorney Timothy Casper, entered the case on May 8, 2013, while the motion to dismiss was pending. The circuit court thereafter granted the dismissal, and Dovin appealed. On November 11, 2014, we summarily reversed and remanded the cause to the circuit court. *See* ***Dovin I***, unpublished op. and order at 5.

¶7 Following remittitur, the circuit court conducted a scheduling conference on February 24, 2015. Pursuant to that proceeding, the circuit court entered an order requiring Dovin to disclose her witnesses and submit reports from her experts by July 24, 2015.

¶8 On May 29, 2015, Dovin served a discovery demand on Saini, seeking her medical records and other tangible evidence in Saini's possession. Saini answered, in pertinent part:

> Defendants have produced records they have obtained regarding [Dovin's] healthcare on an ongoing basis as they have received them in response to authorizations signed by

> Dovin. The defendants will continue to do so provided that Dovin pays the costs of obtaining copies. The defendants acknowledge that Dovin has produced some materials in discovery to the defendants and are unclear if this request is intended to cause the defendant to provide Dovin with copies of items she has produced.

¶9 On July 23, 2015, Dovin moved to extend the July 24, 2015 deadline for submitting her experts' reports on the ground that Saini had "not produced the medical records of plaintiff.... It is necessary for the expert witnesses in this case to review the records in order to offer opinions."

¶10 At the hearing to address Dovin's extension motion, the circuit court questioned Casper about his progress in trial preparation. Casper advised that Dovin first retained an expert in May 2015 or June 2015, and he reiterated that Dovin's experts needed to review her medical records to formulate opinions.

¶11 Casper acknowledged that the discovery demand of May 29, 2015, was Dovin's first in this case. The circuit court then questioned Casper about the response he received to that discovery demand, specifically, the averment that Saini had previously forwarded copies of Dovin's medical records to Dovin as he received them from her treatment providers. Casper said he was "sure [Saini's counsel] is telling the truth about that." Nonetheless, Casper told the circuit court, he had not seen the records. Casper conceded he had not asked predecessor counsel for Dovin's medical records and did not know if predecessor counsel had them. Casper also conceded he had not asked Dovin directly for her records and that she had not produced any records for him.

¶12 Following additional discussion regarding the lengthy history of the litigation, the circuit court concluded that Dovin's failure to meet the deadline set forth in the February 2015 scheduling order constituted egregious conduct. The

circuit court therefore denied the motion to amend the scheduling order and reminded the parties that any witnesses who had not been named and any experts whose reports had not been filed within the existing deadlines would be barred from testifying at trial.

¶13 Saini and the Fund moved for summary judgment on the ground that, without expert witnesses, Dovin could not prove her case. Dovin, by counsel, filed a belated response that the circuit court struck as untimely.[3] The circuit court went on to grant summary judgment to Saini and the Fund, and Dovin appeals.

## Discussion

¶14 Because a plaintiff in a medical malpractice action generally cannot prevail without expert testimony, *see* ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶154, 297 Wis. 2d 70, 727 N.W.2d 857, the circuit court's decision to deny Dovin additional time to name expert witnesses and to submit their reports effectively constituted an order dismissing her case with prejudice, *see* ***Schneller v. St. Mary's Hospital Medical Center***, 162 Wis. 2d 296, 305, 308, 470 N.W.2d 873 (1991). Decisions regarding whether to enlarge the deadlines imposed by a scheduling order and whether to dismiss an action are within the circuit court's discretion. *See* ***id.*** at 305. We will sustain a discretionary decision "if the circuit court has examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 306.

[3] On appeal, Dovin does not challenge the circuit court order striking her response to the motion for summary judgment. We deem the issue abandoned and discuss it no further. *See* ***Reiman Assocs. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (matters not briefed or argued are deemed abandoned).

¶15 Dismissing an action with prejudice is a particularly harsh sanction. *See* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶42, 299 Wis. 2d 81, 726 N.W.2d 898. Nonetheless, pursuant to WIS. STAT. §§ 805.03 (2015-16),[4] and 804.12(2)(a), a circuit court has discretion to impose such a sanction for failure to comply with court orders and deadlines if "the non-complying party has acted egregiously or in bad faith." *See* ***Industrial Roofing Servs.***, 299 Wis. 2d 81, ¶43.

¶16 On appeal, Dovin first asserts that the circuit court erred by dismissing her claims because it found her conduct egregious but not in bad faith. We must reject this argument. A circuit court is not required to conclude that a party acted in bad faith before imposing the sanction of dismissal; egregious conduct is sufficient. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶¶21-22, 247 Wis. 2d 501, 634 N.W.2d 553. Accordingly, we turn to whether the circuit court properly concluded that Dovin's conduct in this case was egregious and whether dismissal was an appropriate response.

¶17 "Egregious conduct is conduct that, although unintentional, is 'extreme, substantial and persistent.'" ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 666 N.W.2d 38 (citation omitted). When we assess whether a circuit court properly sanctioned a party for egregious conduct, "we examine the reasons given by the [circuit] court for its decision." *See* ***Buchanan v. General Cas. Co.***, 191 Wis. 2d 1, 9, 528 N.W.2d 457 (Ct. App. 1995). We are bound by the circuit court's factual findings "unless they are

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

'clearly erroneous.' We will reverse a circuit court's imposition of a sanction 'for noncompliance with a court order only when a party shows a clear and justifiable excuse' for the noncompliance." ***East Winds Props., LLC v. Jahnke***, 2009 WI App 125, ¶13, 320 Wis. 2d 797, 772 N.W.2d 738 (citations and one set of quotation marks omitted).

¶18 As we have seen, Dovin, by Casper, maintained that she did not provide expert reports by the July 24, 2015 deadline because Saini had not produced her medical records for the experts to review. Without the records, Casper said, the experts could not write reports. When the circuit court questioned Casper about this contention, however, he did not dispute that Saini had given copies of Dovin's medical records to her predecessor counsel, and Casper conceded he did not search for medical records in predecessor counsel's file.

¶19 The circuit court found that Casper should have examined prior counsel's file and determined its contents "back in November of 2014" after this court released its decision in ***Dovin I***. Based on Casper's concessions, the circuit court went on to find that: (1) Casper did not take steps to obtain either medical records or an expert during the time between this court's November 11, 2014 decision and the scheduling conference in February 2015; (2) Casper first served Saini with a discovery demand seeking medical records on May 29, 2015, less than two months before Dovin was required to name experts and submit their reports; and (3) Casper did not retain any experts until May or June of 2015, when the deadline for filing expert reports was so close that it was "unlikely" the experts could produce timely reports.

¶20 The circuit court also made findings about the language of the scheduling order, pointing out that the order not only imposed deadlines for

naming witnesses and producing expert reports but also provided that any extension required the permission of the court. Further, the order included language cautioning the parties that they would be sanctioned if they did not comply with its terms and that the sanctions could include dismissing claims and defenses. Given the language of the order and the long-standing problems with retaining necessary experts to support Dovin's claims, the circuit court determined that Casper should have taken steps "much sooner" than he did to comply with the July 24, 2015 deadline.

¶21 The circuit court concluded that Casper had not moved the case forward and that his inaction and delay "does constitute egregious conduct." The circuit court also recognized, however, that "it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless." *See* ***Industrial Roofing Servs.***, 299 Wis. 2d 81, ¶61. The circuit court therefore considered whether Dovin shared responsibility with her counsel for the failure to meet her deadlines in this case.

¶22 The circuit court found that Dovin is "a doctor, she knows the need for medical records." Additionally, the circuit court noted, the judge who presided over the matter during the time that Dovin represented herself explained to her on the record that she must have an expert to pursue her claims. The circuit court also took into account that Dovin had personally looked for medical experts during the pendency of the case and had the background to assist in finding them. Further, the circuit court determined, the events leading up to the first order dismissing the case put Dovin on notice that "there are problems in this case, it needs to be moving forward, everybody should be acting expeditiously." The court went on to find that, notwithstanding such notice, Dovin took no action

herself to obtain records or retain experts after we released ***Dovin I*** and reinstated her claims. The circuit court concluded: "this isn't just conduct by counsel, but also by [Dovin]."

¶23 A circuit court may properly conclude that a party's conduct was egregious if the court considered relevant facts and assessed them under the appropriate legal standard. *See* ***Schneller***, 162 Wis. 2d at 312. Our inquiry is whether the circuit court properly exercised discretion, and, if the circuit court did so, we must uphold its decision even if we might have ruled differently. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Here, the circuit court concluded that Dovin, personally and by counsel, failed to take necessary steps to advance the case over a significant period of time, without an excuse for the conduct and despite having notice of the need to act. In light of the record, we cannot say that the circuit court erroneously viewed Dovin's conduct as egregious.

¶24 Dovin nonetheless argues that the circuit court erred by dismissing her case because, she says, her failure to comply with the scheduling order was not "repeated." We are not persuaded. A party's failure to comply with a pretrial order, particularly when that failure persists over time without correction or adequate excuse, may support a circuit court's conclusions that the party's behavior reflects a "disregard of responsibilities" and warrants dismissal of the party's action. ***Trispel v. Haefer***, 89 Wis. 2d 725, 734-35, 279 N.W.2d 242 (1979) (citation and one set of quotation marks omitted). In ***Trispel***, the circuit court dismissed the plaintiff's case as a sanction when the plaintiff failed to meet a deadline for complying with a pretrial order, and the supreme court upheld the sanction as a proper exercise of discretion. *See* ***id.*** Here, the circuit court concluded that Dovin's failure for many months to seek out the documents she

needed to comply with the 2015 scheduling order was unjustifiable under the totality of the circumstances. Those circumstances included nearly four years of litigation during which neither Dovin nor her lawyers ensured that she had the expert evidence required for a successful claim of medical malpractice. As our case law has repeatedly confirmed, circuit courts have a duty "to discourage protraction of litigation," *see* ***Trispel***, 89 Wis. 2d at 733, and "must be able to control their calendars to ensure 'the orderly administration of justice,'" *see* ***East Winds Props.***, 320 Wis. 2d 797, ¶15 (citation omitted).

¶25 In sum, the record shows the circuit court assessed the relevant facts, considered the applicable law, and reasonably concluded that Dovin engaged in conduct that was egregious, that is, '"extreme, substantial and persistent.'" *See* ***Teff***, 265 Wis. 2d 703, ¶14 (citation omitted). Because Dovin did not demonstrate a clear and justifiable excuse for the conduct, we are satisfied that the circuit court properly exercised its discretion when it dismissed her claims as a sanction.

¶26 We turn to Dovin's contention that the circuit court denied her constitutional right to due process because, she says, the circuit court did not give her "adequate notice" that "failing to produce expert reports would lead to dismissal." Saini and the Fund assert that Dovin forfeited this argument because she did not raise it in the circuit court. *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 (issues not raised in circuit court normally will not be considered for the first time on appeal).

¶27 Dovin does not dispute her failure to raise her due process claim during circuit court proceedings. We deem that point conceded. *See* ***O'Connor v. Buffalo Cty. Bd. of Adjustment***, 2014 WI App 60, ¶31, 354 Wis. 2d 231, 847 N.W.2d 881. Dovin nonetheless argues in her reply brief that we should address

her due process challenge to the circuit court's actions because, in her view, she was unable to pursue that challenge until after the circuit court dismissed her case and it reached this court on appeal. As a rule, we do not consider arguments presented for the first time in a reply brief. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256. Further, Dovin's argument is puzzling: it lacks any explanation of why Dovin could not offer her due process challenge in a timely response to the summary judgment motion.

¶28 Moreover, the record simply does not support Dovin's due process challenge. She asserts she was not afforded adequate notice of the sanctions and penalties she faced for noncompliance with a court order and was "not warned that failing to produce expert reports ... would result in dismissal of her case." In fact, the scheduling order explicitly warned that failure to comply with its terms would lead to sanctions and that "[s]anctions may include entry of judgment or dismissing claims or defenses." Language in a pretrial order alerting the parties to the likelihood of dismissal for noncompliance is sufficient to satisfy the due process requirement of fair and adequate warning about possible sanctions and penalties. *See* ***Trispel***, 89 Wis. 2d at 736-37. For all of the foregoing reasons, we affirm.

*By the Court.*—Order affirmed.

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