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

**May 14, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP3102** **Cir. Ct. No. 2005CV2180**

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

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**NANCY FANDRICK,**

**PLAINTIFF-APPELLANT,**

**V.**

**WAUKESHA MEMORIAL HOSPITAL AND WISCONSIN PATIENTS COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS,**

**COMPCARE HEALTH SERVICES INSURANCE CORPORATION,**

**INTERVENOR.**

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APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Nancy Fandrick appeals from a judgment dismissing her personal injury claim against Waukesha Memorial Hospital on summary judgment. She argues that the discovery sanction excluding certain witnesses was a misuse of discretion and that under res ipsa loquitur her claim survives summary judgment. We affirm the judgment.

¶2 On September 12, 2002, Fandrick had outpatient surgery at the hospital's day surgery center. The surgical procedures were performed by Dr. Susan Hunter, assisted by her resident Dr. James Leonhardt. Anesthesia was administered by Dr. David Wakefield. These doctors are not employees of the hospital.

¶3 Fandrick's complaint alleges that when she went to the hospital she did not have bruises on her shoulder, buttocks, or back. Later in the evening of September 12, 2002, Fandrick observed bruises on her buttocks, right hip, and shoulder and she experienced shoulder pain. Fandrick complained to Dr. Hunter of right shoulder, hip, and back pain. Dr. Hunter saw Fandrick on September 19, 2002, and noted tenderness in her right shoulder and bruises on her thigh. Fandrick did not return to work or regular activities and underwent back surgery eights months after her outpatient surgery at the hospital. She alleged that hospital staff persons were negligent by either dropping her or mishandling her while she was unconscious.

¶4 The initial scheduling order required Fandrick to name witnesses and provide reports of expert witnesses by March 15, 2006. A pretrial conference was set for September 11, 2006, and discovery was to be completed twenty days before that conference. The hospital's first set of interrogatories was sent October 26, 2005, and Fandrick was given an additional forty-five days to answer because she

had undergone oral surgery. An additional extension was given until January 10, 2006, but the responses were not received until February 7, 2006, and were not complete. The promise to provide executed authorizations for medical, social security, and other records during the week of January 15, 2006, was not fulfilled until the hospital threatened to bring a motion to compel if the authorizations were not provided by February 3, 2006. The hospital's second set of written interrogatories were sent April 13, 2006, along with a request that the answers to the first set be made complete. On June 16, 2006, the hospital moved to compel discovery. That was followed by a June 27, 2006 motion to strike some of Fandrick's expert witnesses because the witnesses had not been made available for depositions and the August 1, 2006 deadline for naming defense experts was approaching. The pending motions were heard July 24, 2006, and Fandrick did not appear at the hearing.

¶5 The circuit court granted the hospital's discovery motions. Noting its refusal to adjourn the pretrial date, the court found no excusable neglect for Fandrick's failure to comply with the court's scheduling order. By letter objection to the proposed order, Fandrick explained her absence from the July 24, 2006 hearing, gave reasons why there had been delay in deposing witnesses, and claimed that the defense was not prejudiced because it actually subpoenaed several witnesses. The court signed an August 11, 2006 order striking five witnesses: Michelle Matson, DC; Susan Hunter, MD; Caryn Brownell, MD; Lynn Bartl, MD; and Kathy Finn, RN. Fandrick moved for reconsideration and the motion was denied at a hearing held October 23, 2006.

¶6 A circuit court has both statutory authority and inherent authority to sanction parties for the failure to timely prosecute an action or otherwise complete discovery. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470

N.W.2d 859 (1991), *overruled in part on other grounds*, ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. Such authority "is essential to the circuit court's ability to enforce its orders and ensure prompt disposition of lawsuits." ***Id.*** at 274. Restrictions on the presentation of evidence are an authorized sanction. ***Hur v. Holler***, 206 Wis. 2d 335, 343, 557 N.W.2d 429 (Ct. App. 1996). Our review is deferential in recognition that the decision to impose sanctions and the decision of which sanctions to impose are within the circuit court's discretion. ***Marquardt***, 299 Wis. 2d 81, ¶41. "A discretionary decision will be sustained 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.***

¶7 Fandrick suggests that the circuit court's discovery sanction must be reversed because her conduct with regard to scheduling depositions was not "egregious." However, the egregious conduct standard is only applied when the sanction of dismissal is imposed. *See* ***Schneller v. St. Mary's Hosp. Medical Ctr.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991) (applying the egregious conduct standard because in refusing to amend its scheduling order to permit the naming of additional experts the court effectively dismissed the Schnellers' case as a sanction for their conduct in failing to comply with the scheduling order). *See also* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶¶15, 17, 247 Wis. 2d 501, 634 N.W.2d 553 (questioning the characterization of the sanction imposed as one of dismissal). Here the sanction was imposed excluding certain witnesses and the court subsequently considered the hospital's motion for summary judgment, reviewed the affidavits in support of and opposing summary judgment, ruled against Fandrick, and entered judgment in favor of the hospital, which it was permitted to do. *See* ***id.***, ¶15. *See*

*also* ***David Christensen Trucking & Excavating, Inc. v. Mehdian***, 2006 WI App 254, ¶16, 297 Wis. 2d 765, 726 N.W.2d 689 (summary judgment granted and the decision to disregard untimely filings need not be viewed exclusively as a sanction). Fandrick did not argue before the circuit court that the exclusion of the five experts was essentially dismissal of the case. She did not establish that the excluded experts were critical to establish liability under her res ipsa loquitur theory.[1] The sanction alone did not result in the summary judgment of dismissal. We are not persuaded that we must review the court's sanction under the "egregious conduct" standard.

¶8 In exercising its discretion, the circuit court must determine whether a clear and justifiable excuse exists for a party's delay or failure to provide discovery. *See* ***Geneva Nat'l Community Ass'n, Inc. v. Friedman***, 228 Wis. 2d 572, 580, 598 N.W.2d 600 (Ct. App. 1999). The circuit court's findings underlying its determination that a clear and justifiable excuse did not exist must be sustained unless clearly erroneous. ***Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.***, 2001 WI App 205, ¶13, 247 Wis. 2d 521, 634 N.W.2d 544. When exercising its authority to control the orderly and prompt processing of a case by imposing a discovery sanction, the circuit court may consider a party's history of discovery abuse. *See* ***Mucek v. Nationwide Commc'ns Inc.***, 2002 WI App 60, ¶28, 252 Wis.

[1] At the hearing on reconsideration Fandrick only asked for the opportunity to get affidavits or the deposition of three of the excluded witnesses to "booster" her case for the purpose of seeking reconsideration of the granting of summary judgment. At the hearing on the motion for summary judgment Fandrick did not make an offer of proof on the evidence to be provided by the excluded witnesses and only stated that "[w]e believe the nature and extent of Nancy Fandrick's arthritis and physical complaints could be shown by Dr. Brownell's testimony and that has considerable import to the plaintiff in this particular case." In her reply brief in referring to the excluded witnesses Fandrick states, "Because of the nature of the Res Ipsa Loquitur theory the witnesses would not have been called to give expert opinions except for Dr. Rao who respondent deposed. Instead they would describe observations and their actions in treating the appellant."

2d 426, 643 N.W.2d 98. Here the circuit court also considered whether relief from the sanction order was appropriate under WIS. STAT. § 806.07(1)(a) (2005-06),[2] on the ground of mistake, inadvertence or excusable neglect.

¶9 Fandrick explained that she did not appear at the July 24, 2006 hearing on the hospital's motion for sanctions because counsel failed to put the hearing on his calendar. Fandrick made no written response to the hospital's discovery motions in the month before the hearing date. The circuit court found that the failure to contest the motions was not due to mistake, inadvertence or excusable neglect.

¶10 Aside from her reasons for not appearing at the hearing, Fandrick did not explain why there had been months of inaction on the hospital's repeated requests to depose her experts. Fandrick did not demonstrate what efforts were made to schedule depositions after receipt of the hospital's April 18, 2006 letter requesting depositions. The scheduling order was amended by the parties' stipulation to extend the time for the hospital to name experts and to file dispositive motions because the hospital had not been able to complete discovery depositions of Fandrick's witnesses. The hospital's June 2, 2006 letter seeking a second stipulation to modify the time to name expert witnesses refers to continued delays in getting depositions done. The hospital's counsel indicated that at one point he had his assistant calling Fandrick's counsel on a daily basis trying to get all the depositions scheduled. On July 6, 2006, the circuit court refused to further extend the scheduling order deadlines on a second stipulation of the parties. The hospital was then compelled to

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

subpoena several of the experts.[3] The circuit court found that answers to the hospital's first set of interrogatories were not complete by the July 24 hearing, and that answers to the second set were never made. Notably reports from Fandrick's experts had not been provided. It also found that the delays in discovery were occurring as the time for the defense to name their witnesses and file dispositive motions was quickly approaching.

¶11 We conclude that the circuit court properly exercised its discretion in imposing a sanction in the absence of a clear and justifiable excuse. There was a pattern of delay by Fandrick with respect to discovery. The sanction excluding certain expert witnesses for whom no reports had been provided and who had not been timely deposed was a reasoned response and consistent with the court's authority to ensure the prompt disposition of lawsuits.

¶12 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no

[3] Fandrick argues that because depositions of the experts were scheduled, via subpoena, for the afternoon of July 24 and on July 25, 2006, that it was no longer necessary for her to make any efforts to produce the experts and the hospital's claim that it was not allowed to depose the experts was false. The witnesses were subpoenaed after the discovery sanction motion was filed and after the circuit court refused to further modify the scheduling order. The hospital's complaint was that they had not timely been provided with requested discovery, including reports of the experts and the opportunity to depose them. The circuit court noted, "We have the additional situation with today being the 24th of July, and in order to comply with the August 1st date, I don't think you would physically be able to prepare a proper motion and brief in order to comply with the modified scheduling order here." Implicitly the court found that depositions conducted on July 24 and 25 did not constitute timely and meaningful discovery. Further, the court agreed with the hospital's assessment that "witnesses don't like being subpoenaed … and they are typically unhelpful."

genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2).

¶13 It is undisputed that Fandrick relies on res ipsa loquitur to establish the hospital's liability. The doctrine of res ipsa loquitur permits an inference of the defendant's negligence without any direct testimony as to the defendant's actual conduct at the time such negligence occurred. ***Hoven v. Kelble***, 79 Wis. 2d 444, 449, 256 N.W.2d 379 (1977). The required showings for application of the doctrine are: "(1) The event must be a kind which ordinarily does not occur in the absence of someone's negligence, and (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant." ***Id.*** at 451. Whether the requisite showing is made is a legal issue that we determine de novo. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 17, 496 N.W.2d 226 (Ct. App. 1993). Fandrick believes that she makes this showing because she was bruise and injury free before her outpatient surgery at the hospital and bruised and injured after leaving the hospital.

¶14 The nurses attending to Fandrick on the day of the surgery indicated by affidavit that Fandrick was not dropped or mishandled and if she had been, the occurrence would have been charted. The affidavit of Dr. James Stiehl indicated that prior to the surgery Fandrick suffered advanced degenerative arthritis in her neck and back which could explain the right shoulder pain she complained of after the surgery. Her shoulder pain could also have been due to the dissipation of gas injected into her abdomen during the surgery. He also indicated that normal minor manipulations during the surgery could have aggravated the preexisting arthritis and that it would be possible for a patient to experience the type of bruising Fandrick experienced as a result of the position she was in during the surgery. Dr. Hunter also indicated that the type of bruising Fandrick experienced on her right flank is common after the type

of surgery performed, could be from the position Fandrick was in during surgery, and could have been sustained outside the hospital in the course of daily living. Dr. Rao, Fandrick's back surgeon, acknowledged that bruising can result from the position a person is in during surgery. Although she filed no affidavits in opposition to the motion for summary judgment, Fandrick relied on the deposition testimony of Dr. Rao that her herniated disc could have and most likely occurred as a result of trauma. The doctor could not pinpoint when the disc herniated.

¶15 The circuit court concluded that Fandrick did not establish that her post-surgery complaints of bruising, shoulder pain, and back pain ordinarily do not occur in the absence of negligence. Based on the summary judgment record, that conclusion is correct. The doctrine applies in a medical malpractice case only "where a layman is able to say as a matter of common knowledge that the consequences of the professional treatment are not those which ordinarily result if due care is exercised." ***Froh v. Milwaukee Medical Clinic, S. C.***, 85 Wis. 2d 308, 314, 270 N.W.2d 83 (Ct. App. 1978). Here it was established that the bruising and pain Fandrick experienced could be the result of the surgical procedure even if due care was exercised. Fandrick offered no evidence to exclude other possible explanations of her bruising, shoulder pain, and eventual back problems. Thus, alternative non-negligent sources of the injury preclude the application of res ipsa loquitur.

¶16 The circuit court also concluded that Fandrick had not established that the hospital had exclusive control over the instrumentality of injury. The "significant moment" at which exclusive control is assessed is "the time at which the alleged negligence causing the injury occurs." ***McGuire v. Stein's Gift & Garden Center, Inc.***, 178 Wis. 2d 379, 391, 504 N.W.2d 385 (Ct. App. 1993). The hospital's nurses assisted in Fandrick's care and transportation but were not

the only persons with access to Fandrick while she was unconscious. Although Wisconsin has rejected a literal interpretation of exclusive control such that shared control might permit the application of the res ipsa loquitur doctrine, the plaintiff must demonstrate that "'other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence.'" ***Hoven***, 79 Wis. 2d at 452 (quoted source omitted). *See also* ***Richards v. Mendivil***, 200 Wis. 2d 665, 676, 548 N.W.2d 85 (Ct. App. 1996) (despite possible shared control between surgeon and radiologist, res ipsa loquitur applied because there was credible evidence that there had not been any other intervening acts on the part of others that could have caused the injury); ***McGuire***, 178 Wis. 2d at 390-91 (recognizing that res ipsa loquitur has been applied in situations where multiple defendants have jointly exercised control of the instrumentality or agency that caused injuries). Fandrick has not eliminated the possibility that it was the conduct of one of the physicians, persons not named as defendants and not employees of the hospital, that was the source of her alleged injuries. Thus, it has not been established that the "apparent cause of the accident" is such that the hospital "would be responsible for any negligence connected with it."[4] ***Hoven***, 79 Wis. 2d at 453.

[4] Physicians are not vicariously liable for the negligence of hospital employees. ***Lewis v. Physicians Insurance Company of Wisconsin***, 2001 WI 60, ¶1, 243 Wis. 2d 648, 627 N.W.2d 484. The hospital is not liable for the acts of a physician over whom it lacks the right and opportunity for physical control of the person's conduct. ***Pamperin v. Trinity Memorial Hosp.***, 144 Wis. 2d 188, 200-01, 423 N.W.2d 848 (1988).

¶17 This is not a res ipsa loquitur case. Since that is Fandrick's only theory of liability, summary judgment dismissing her action was proper.[5]

*By the Court.*—Judgment affirmed.

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

[5] Fandrick's appendix does not include a copy of the circuit court's summary judgment ruling. Thus, Fandrick's appellate counsel has filed a false appendix certification. *See* ***State v. Bons***, 2007 WI App 124, ¶¶23, 25, 301 Wis. 2d 227, 731 N.W.2d 367. Because the transcript of the circuit court's decision is found in the hospital's appendix, we do not impose a penalty on Fandrick's counsel.