

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 27, 2001**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 00-3160**

**Cir. Ct. No. 99-CV-261**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ALAN MAINS AND WISCONSIN MEDICAL ASSISTANCE,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**ST. MARY'S HOSPITAL OF SUPERIOR, JOSEPH  
RICHARDS, M.D., AND ROBERTA DEMOURE,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from orders of the circuit court for Douglas County:  
JOSEPH A. McDONALD, Judge. *Affirmed.*

Before Cane, C.J., Peterson and Lundsten, JJ.

¶1 PER CURIAM. Alan Mains and Wisconsin Medical Assistance (“Mains”) appeal from orders granting the motions of St. Mary’s Hospital of Superior, Joseph Richards, M.D. and Roberta DeMoure (collectively “the hospital”) to dismiss a medical malpractice claim that Mains filed against them.

Mains argues that: (1) the circuit court erroneously exercised its discretion by dismissing his claim for failing to request mediation pursuant to WIS. STAT. § 655.445; and (2) Section 655.445 is unconstitutional as applied to this matter.<sup>1</sup> We reject these arguments and affirm the orders.

### **BACKGROUND**

¶2 The following facts are undisputed. On September 7, 1999, Mains filed a medical malpractice claim against the hospital. In its answer, the hospital alleged that Mains had failed to request mediation pursuant to WIS. STAT. § 655.445. The hospital subsequently sent two letters to Mains, dated December 20, 1999, and January 27, 2000, requesting information on his intentions with regard to § 655.445. Mains responded on April 10, 2000, inquiring how the hospital “wished to arrange for the mediation procedure” and what information was needed to discuss settlement. By letter dated April 12, the hospital informed Mains that the procedure for mediation was governed by statute and specifically informed Mains that the mediation process could not be commenced until Mains filed a formal request for mediation. Mains neither responded to the April 12 letter nor filed a request for mediation.

¶3 Consequently, in September, the hospital filed a motion to dismiss Mains’ claim for his failure to request mediation pursuant to WIS. STAT. § 655.445. The circuit court granted the motion to dismiss and this appeal followed.

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<sup>1</sup> All statutory references are to the 1999-2000 version unless otherwise noted.

## ANALYSIS

### A. Failure to Request Mediation

¶4 Mains argues that the circuit court erred by dismissing his claim for failing to request mediation. We disagree. A circuit court has power, both inherent and statutory, to prevent unwarranted delay and proliferation of stale lawsuits. *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 395, 497 N.W.2d 756 (Ct. App. 1993). WISCONSIN STAT. § 805.03 provides:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions ... the court in which the action is pending may make such orders in regard to the failure as are just. Any dismissal under this section operates as an adjudication on the merits unless otherwise [specified].

¶5 Dismissal for failure to prosecute is a matter left to the circuit court's discretion. *Hlavinka*, 174 Wis. 2d at 392. "A discretionary decision will not be disturbed if a 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." *Anderson v. Circuit Court for Milwaukee County*, 219 Wis. 2d 1, 9, 578 N.W.2d 633 (1998). Further, one attempting to show that dismissal is an erroneous exercise of the circuit court's discretion must demonstrate a clear and justifiable excuse for the delay in prosecuting the case or the failure to comply with statutory procedures. *Buchanan v. General Cas. Co.*, 191 Wis. 2d 1, 528 N.W.2d 457 (Ct. App. 1995).

¶6 Here, the circuit court dismissed Mains' claim for his failure to comply with WIS. STAT. § 655.445(1), which provides that:

any person ... having a claim or a derivative claim under this chapter for bodily injury or death because of a tort or breach of contract based on professional services rendered

or that should have been rendered by a health care provider shall, within 15 days after the date of filing an action in court, file a request for mediation.

¶7 In *Eby v. Kozarek*, 153 Wis. 2d 75, 450 N.W.2d 249 (1990), our supreme court, recognizing that the purpose of the mediation process is to provide “informal, inexpensive and expedient means for resolving disputes,” *id.* at 81, concluded that “the statutory requirement is mandatory with respect to the requirement to file a request for mediation.” *Id.* at 77. The court concluded, however, that the statutory requirement is “directory with respect to the time limitation within which the request is filed.” *Id.* To that end, the *Eby* court held that the failure to request mediation within 15 days of filing an action does not necessarily deprive the circuit court of competency to exercise its jurisdiction.<sup>2</sup> *Id.* at 79.

¶8 The court stated, however, that “defendants faced with a dilatory plaintiff are not without relief.” *Id.* at 81. “If it could be shown under some ... set of facts that the plaintiff refused to promptly comply with the statutory requirements, the mediation panel administrator and the courts retain discretion to determine the proper sanctions to be applied.” *Id.* at 82.

¶9 Here, the circuit court noted that at the time of the hearing on the hospital’s motion to dismiss, Mains had still not filed a mediation request. Further, Mains did not file a brief in response to the motion to dismiss but rather, requested at the hearing that the court send the parties to mediation in lieu of dismissal. The circuit court recognized that the purpose of mediation is to avoid

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<sup>2</sup> In *Eby v. Kozarek*, 153 Wis. 2d 75, 450 N.W.2d 249 (1990), the plaintiff filed his request for mediation thirty days after filing his complaint.

expenses and intimated that Mains' failure to request mediation had already resulted in great expense to the hospital. Additionally, this court's review of the record fails to reveal any clear and justifiable excuse for Mains' failure to request mediation. *See Stan's Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995) ("We may independently review the record to determine whether additional reasons exist to support the court's exercise of discretion."). We therefore conclude that the trial court reasonably exercised its discretion by dismissing the claim for Mains' failure to request mediation pursuant to WIS. STAT. § 655.445.

#### B. Constitutional Challenge to WIS. STAT. § 655.445

¶10 For the first time on appeal, Mains challenges, without citation to authority, the constitutionality of WIS. STAT. § 655.445 as applied to the present case. Generally, this court will not consider arguments unsupported by legal authority. *See State v. Shaffer*, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980). Additionally, it appears that Mains has failed to notify the attorney general of his constitutional challenge to the statute. When a constitutional challenge to a statute is made, the attorney general must be "served with a copy of the proceeding and be entitled to be heard." WIS. STAT. § 806.04(11); *see Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979) (holding that § 806.04(11) applies to all constitutional challenges of laws and not just declaratory judgments). Moreover, "[t]his court has consistently held that it will not entertain a constitutional issue raised for the first time on appeal unless there [are] some compelling reasons for doing so." *Sambs v. Brookfield*, 66 Wis. 2d 296, 314, 224 N.W.2d 582 (1975).

¶11 Because Mains failed to serve the attorney general or raise his constitutional challenge to WIS. STAT. § 655.445 in the trial court and, because we do not find on the record before us a compelling reason for doing so, we do not address that issue.

*By the Court.*—Orders affirmed.

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

