COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2332 **Cir. Ct. No. 2006CV873**

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

ALICE L. JOHANNES,

PLAINTIFF-APPELLANT,

V.

PETER H. BAEHR, D.C., BAEHR CHIROPRACTIC CENTER, S.C. AND NCMIC INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Reversed*.

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

¶1 ANDERSON, P.J. We granted Alice L. Johannes' petition for leave to appeal, WIS. STAT. § 808.03(2) (2005-06),[1] seeking to challenge the circuit court's order limiting the scope of discovery by barring her from learning the names of individuals who had complained that Dr. Peter H. Baehr had touched them inappropriately during the course of chiropractic adjustments. The circuit court held that Baehr had a privilege under state and federal law not to identify names of patients who had complained about inappropriate touching. The court also held that complaints involving other patients would be inadmissible other acts evidence. We now reverse the circuit court because it erroneously exercised its discretion.

¶2 Johannes commenced this action against Baehr alleging that during treatment for a lower back injury Baehr unhooked her bra and touched and massaged her breast for five minutes. Johannes pled three causes of action: (1) chiropractic negligence, (2) failure to obtain informed consent, and (3) offensive bodily contact. She sought compensatory and punitive damages.

¶3 Approximately seven months after suit was commenced Baehr filed a motion for a protective order under WIS. STAT. § 804.01(3). The motion stated that the catalyst for the request was that

> [a]t the recent telephone scheduling conference with the Court, plaintiff's counsel suggested that he plans to discuss at depositions other acts where Dr. Baehr may have touched female patients inappropriately. During the telephone conference, Judge Weinke indicated that he normally does not admit "other acts" evidence in civil cases.

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

¶4 In the motion, Baehr asserted that Johannes was seeking to discover other acts evidence that would be inadmissible at trial; the evidence would be unfairly prejudicial; discovery would violate the privacy laws found in the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 (HIPAA)[2]; and the evidence would be annoying, embarrassing, unduly burdensome and expensive. Baehr did not file any evidentiary affidavit in support of his motion.[3]

¶5 In a response brief, Johannes asserted, "It is public knowledge based on multiple newspaper reports that at least one dozen women have complained to local law enforcement about Dr. Baehr."[4] She relied on ***J.W. v. B.B.***, 2005 WI App 125, ¶¶20-26, 284 Wis. 2d 493, 700 N.W.2d 277, for the proposition that complaints against a doctor for inappropriate touching are discoverable, subject to a protective order. She also contended that WIS. STAT. § 804.01(2)(a), permits broad discovery as long as it might lead to the discovery of admissible evidence.

[2] It is worthy of note that Baehr does not invoke physician-patient privilege under WIS. STAT. § 905.04.

[3] As the party seeking the protective order, Baehr had the burden to establish good cause for an order protecting him "from discovery that would result in annoyance, embarrassment, oppression, or undue burden or expense." ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 272, 306 N.W.2d 85 (Ct. App. 1981). To fulfill that burden, Baehr should have filed evidentiary affidavits to present facts that backed up his legal argument. *See* ***id.*** at 271-72 (facts must exist to support a circuit court's discretionary act). *See* WIS. STAT. § 802.01(2)(b).

[4] Johannes did not file any evidentiary affidavit supporting this assertion; therefore it is not a fact of record and we will ignore this groundless assertion. There are certain basic requirements for form and documentation with regard to motions. Among those requirements are that a motion must be supported by evidentiary support if alleging facts for the court to consider. *See* WIS. STAT. §§ 802.01(2) and 802.05(2)(c). Johannes included several spurious documents in the appendix to her brief filed in this court, including portions of interrogatories, a criminal complaint, a copy of a newspaper article and the transcript of the deposition of Baehr. We will not consider these documents because they were not part of the record before the circuit court, ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991), and we strike any references to these documents from Johannes' briefs.

She argued that other acts evidence is relevant to her claim for punitive damages. Finally, she contended that privacy issues under state and federal law can be addressed with a limited protective order.

¶6 The court granted Baehr's motion in a brief order:

> 1. Dr. Baehr has a privilege under applicable state and federal law to not identify the names of other patients, the treatment provided to such other patients, and whether there have been any complaints made by any other patients in regard to the pending litigation.
>
> 2. The Court finds that the alleged other complaints involving other patients are inadmissible other acts evidence. Any minimal probative value of such evidence is outweighed by the danger of unfair prejudice, confusion of the issues, and the potential to mislead the jury.

We granted Johannes' petition for leave to appeal challenging the circuit court's issuance of the protective order.

¶7 Johannes maintains that under WIS. STAT. § 804.01 she is permitted to pursue information that is reasonably calculated to lead to the discovery of admissible information, and the protective order in this case runs afoul of liberal discovery. She argues that it was inappropriate for the court to rule near the beginning of this lawsuit that other acts evidence would be inadmissible and suggests the ruling should have been delayed until the nature of the other acts evidence had been learned through discovery. Johannes points out that the circuit court failed to undertake the analysis mandated by ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W. 2d 30 (1998), when holding that other acts evidence would be inadmissible.

¶8 She asserts that the circuit court protective order ignores ***J.W.***, 284 Wis. 2d 493, ¶¶20-26, which she characterizes as making "crystal clear that

evidence that a doctor has touched other patients in an allegedly sexual manner is discoverable." Johannes contends that evidence of other similar bad acts is relevant to punitive damages. Finally, she insists that under HIPAA, specifically 45 C.F.R. § 164.512(e), health care records can be discovered during the course of judicial proceedings. Johannes faults the court for not considering a limited protective order under which the court would have communicated with the complainants identified by Baehr and given them the opportunity to permit or forbid disclosure of their identity to Johannes.

¶9 Circuit courts have broad discretion in determining whether to limit discovery through a protective order. ***State v. Beloit Concrete Stone Co.***, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981). Our standard of review is whether the circuit court mistakenly exercised its discretion in granting the order. ***Shibilski v. St. Joseph's Hospital***, 83 Wis. 2d 459, 470-71, 266 N.W.2d 264 (1978).

> A proper exercise of discretion requires a statement on the record of the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case. If there is no statement of the trial court's reasoning, the reviewing court may examine the record to determine whether the facts support the trial court's decision. The trial court misuses its discretion when it bases its decision on an error of law.

Earl v. Gulf & W. Mfg. Co., 123 Wis. 2d 200, 204-205, 366 N.W.2d 160 (Ct. App. 1985) (citations omitted).

¶10 We conclude that the circuit court erroneously exercised its discretion in a number of respects. First, there is no statement in the record supporting the court's conclusion that "Dr. Baehr has a privilege under applicable state and federal law to not identify the names of other patients." The court failed

to apply the legal standards of HIPAA and WIS. STAT. § 146.82 to the sparse facts of the record. Second, the court held any other acts evidence inadmissible without conducting the analysis required by ***Sullivan***, 216 Wis. 2d 768; it failed to consider the applicability of ***J.W.***; and it did not consider whether other acts evidence is relevant to punitive damages.

¶11 Turning first to privacy concerns raised by HIPAA and WIS. STAT. § 146.82. HIPAA, and the rules issued by the federal government under it, "are intended to protect the privacy of a broad range of health care information." Timothy A. Hartin, *New Federal Privacy Rules for Health Care Providers*, 75 WISCONSIN LAWYER 14, 14 (2002). While HIPAA provides privacy protection, the 7th Circuit has noted HIPAA does not create a privilege for patients' medical information, it merely provides the procedures one must follow in order to secure the disclosure of such information from a "covered entity." ***Northwestern Mem'l Hosp. v. Ashcroft***, 362 F.3d 923, 925-26 (7th Cir.2004).

¶12 We need not discuss in depth the workings of HIPAA and WIS. STAT. § 146.82 because Baehr concedes state and federal medical privacy laws do not bar discovery of the identity of other complainants. Baehr does not respond in any manner to Johannes' assertion that patient health care records are discoverable under state and federal law pursuant to an order of the court or her suggestion that a limited protective order could be drafted to protect the identity of other complainants. We take the absence of a reply as a concession, *see* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments ignored may be deemed conceded), and, therefore, we reverse that portion of the circuit court's protective order based on state and federal privacy laws. Still, we make some observations before leaving this topic.

¶13 HIPAA preempts all state medical privacy laws except those that are more stringent. Jay E. Grenig and Jeffery S. Kinsler, 8 WISCONSIN PRACTICE SERIES, CIVIL DISCOVERY § 16:4 (Thomson/West 2008). WISCONSIN STAT. § 146.82 is more stringent than HIPAA because the statute limits discovery of medical records to lawful court orders; however, in some instances, HIPAA permits discovery through the use of a subpoena or discovery request issued by an attorney. Grenig at § 16:4.

¶14 We note that "the HIPAA regulations [45 C.F.R. § 164.512(e)] permit discovery of protected health information so long as a court order or agreement of the parties prohibits disclosure of the information outside the litigation and requires the return of the information once the proceedings are concluded." ***A Helping Hand, LLC v. Baltimore County, Md.***, 295 F.Supp.2d 585, 592 (D. Md., 2003). It has been suggested that the parties and court prepare an order for disclosure and protective order with precision because only health care information expressly authorized by the order can be released.[5] Grenig at § 16:3. A precise court order that complies with HIPAA will also constitute a lawful court order required by WIS. STAT. § 146.82(2)(a)4.

¶15 Of course, another means of obtaining protected health care information is the informed written consent of the patient. Grenig at § 16:4. A properly prepared written consent of the patient is probably synonymous with 45

[5] In ***J.W. v. B.B.***, 2005 WI App 125, ¶26, 284 Wis. 2d 493, 700 N.W.2d 277, we put our stamp of approval on a circuit court's requirement that before disclosure of protected health information the parties agree to a protective order designed to ensure that any disclosures in response to the discovery order are not made public.

C.F.R. § 164.508(c)(1) and (2) and WIS. STAT. § 146.82(1). Grenig at §§ 16:3 and 16:4.[6]

¶16 We now turn to the portion of the protective order holding that other acts evidence is inadmissible. We begin by noting there are no facts in the record that establish who the complainants are and what inappropriate touching may have occurred. All the record contains is Baehr's assertion that Johannes' counsel "plans to discuss at depositions other acts where Dr. Baehr may have touched female patients inappropriately." Because there are no facts of record, the circuit court's conclusion that other acts evidence is inadmissible is an erroneous exercise of discretion. ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 271, 306 N.W.2d 85 (Ct. App. 1981).

¶17 The court committed three errors in holding the other acts evidence would be inadmissible.[7] First it failed to properly exercise its discretion in analyzing the admissibility of other acts evidence. In exercising discretion regarding other acts evidence, the circuit court must apply the three-step analytical framework set forth by the supreme court in ***Sullivan***: (1) The court must determine whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2), such as motive, opportunity, intent, preparation,

[6] Professor Grenig provides sample patient authorizations and motions to authorize disclosure of confidential medical information in WISCONSIN PRACTICE SERIES: CIVIL DISCOVERY § 16:3. Appendix A (Thomson/West 2008).

[7] Baehr's assertion in his motion, "Judge Weinke indicated that he normally does not admit 'other acts' evidence in civil cases," gives us pause because it suggests that the court approached the issue of other acts evidence with a made-up mind. This is improper and could serve as one of the reasons for our reversal. *Compare* ***State v. J.E.B.***, 161 Wis. 2d 655, 674, 469 N.W.2d 192 (Ct. App. 1991) ("It is improper for a court to approach sentencing decisions with an inflexibility that bespeaks a made-up mind."), *cert. denied*, 503 U.S. 940, 112 S. Ct. 1484, 117 L.Ed.2d 626 (1992).

plan, knowledge, identity, or absence of mistake or accident; (2) The court must determine whether the other acts evidence is relevant under WIS. STAT. § 904.01; and (3) The court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, or other similar concerns under WIS. STAT. § 904.03. ***Sullivan***, 216 Wis. 2d at 772-73.

¶18 We "will sustain an evidentiary ruling if [we] find[] that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id***. at 780-81. The protective order is devoid of any "demonstrative rational process" and we cannot sustain the court's conclusion that the other acts evidence is inadmissible. However, that does not end our inquiry for, if the trial court fails to articulate its reasoning, we must independently examine the record to determine if there was a reasonable basis for not admitting the evidence. ***State v. Derango***, 2000 WI 89, ¶37, 236 Wis. 2d 721, 613 N.W.2d 833. We cannot conduct this examination because, as we have lamented, there are no evidentiary facts in the record.

¶19 Second, the circuit court ignored Johannes' assertion that ***J.W.*** stands for the proposition that "evidence of other complaints against a doctor for inappropriate touching [is] discoverable, but subject to a protective order to protect patient confidentiality." ***J.W.***, 284 Wis. 2d 493, ¶¶20-26. We agree with Johannes that ***J.W.*** is of value in this case.

¶20 In ***J.W.***, two men filed a joint complaint against a physician alleging that he performed unnecessary digital-rectal examinations during pre-employment physicals and asserting claims of negligence and failure to obtain informed

consent. ***Id.***, ¶2. The plaintiffs filed a motion to compel discovery regarding prior complaints against the physician.[8] ***Id.***, ¶4. The circuit court granted plaintiff's motion to compel and the physician appealed. We affirmed the order to compel discovery of other acts evidence. ***Id.***, ¶¶20-25. We discussed for what permissible purposes other acts evidence would be potentially admissible and concluded that J.W.'s discovery demand for the identity of other complainants is "reasonably calculated to lead to the discovery of admissible evidence" under WIS. STAT. § 804.01(2)(a). ***J.W.***, 284 Wis. 2d 493, ¶25.

> We emphasize that we do not determine here whether any information the physician provides in response to the appealed orders will necessarily be admissible at trial. The future evidentiary rulings are committed to the sound discretion of the circuit court, to be based on the testimony and other evidence adduced at trial and the specific nature of the proffered evidence and objections to it. Admissibility of any "other acts" evidence at trial may also turn on the circuit court's discretionary weighing of its probative value versus the danger of unfair prejudice or other considerations. *See* WIS. STAT. § 904.03.

J.W., 284 Wis. 2d 493, ¶25.

¶21 We reject Baehr's assertion that this case is distinguishable from ***J.W.*** because he is claiming privilege but the physician in ***J.W.*** did not. Baehr does not claim physician-patient privilege under WIS. STAT. § 905.04; he is claiming privilege under state and federal medical privacy laws. Earlier we held that the medical privacy laws do not create a privilege but a means to obtain otherwise protected health information for use during litigation. Baehr's distinction fails.

[8] The plaintiffs also sought to compel discovery regarding the defendant's sexual orientation and employment history. ***J.W.***, 284 Wis. 2d 493, ¶4.

¶22 Third, the circuit court did not consider whether other acts evidence is admissible in conjunction with Johannes' claim for punitive damages. We have considered this question on prior occasions and have held that because punitive damages are designed to punish and deter, the admission of other acts evidence is akin to the listed permissible purposes under WIS. STAT. § 904.04(2). ***Smith v. Golde***, 224 Wis. 2d 518, 532, 592 N.W.2d 287 (Ct. App. 1999). We reasoned that the greater number of other acts, the greater the need for deterrence and punishment. ***Id.*** Here, testimony concerning prior instances of inappropriate touching may be admissible to show a pattern of incidents of offensive bodily contact. *See* ***Mucek v. Nationwide Commc'n, Inc.***, 2002 WI App 60, ¶41, 252 Wis. 2d 426, 643 N.W.2d 98 ("[T]he witness's testimony concerning the prior batteries was admissible to show a pattern of abusive incidents, evidencing the maliciousness of the defendant's conduct.").[9]

[9] We do not address Baehr's argument that his alleged criminal record does not include any conduct involving inappropriate touching and, therefore, other acts evidence is not relevant to punitive damages, because he relies upon facts that were not in the record before the trial court. Baehr argues, "Knowing the scope of any alleged complaints based on presiding over Fond du Lac County case No. 2006CM732 and from submissions in the pending civil case, Judge Weinke was in a position to do an 'other acts' evidence analysis." He also refers to the criminal case in arguing why the other acts are not relevant to punitive damages. And he includes a partial transcript from the criminal case that was not in the record before the trial judge. We point out that Baehr chastises Johannes for including in her appendix facts that were not part of the record in the circuit court. He also notes that the trial judge also presided in a criminal case involving Baehr, and contends we should not consider what the judge learned, because it is not a part of the record in this appeal.

Baehr's argument gives us pause for two reasons. First, Baehr castigates Johannes for introducing evidence that was not part of the trial record but he casually relies upon evidence that is not part of the record when it suits his argument. We will not consider the extraneous documents in Baehr's appendix because they were not part of the record before the circuit court and we strike any references to these documents and facts not before the circuit court from Baehr's brief. Second, if in fact he did so, the trial judge should not have used his knowledge of the evidence in the criminal case without properly taking judicial notice of the records of the court. *See* WIS. STAT. § 902.01.

¶23 In summary, we reverse the protective order since the circuit court erroneously exercised its discretion. First, the court failed to give a reasoned explanation of why "Dr. Baehr has a privilege under applicable state and federal law to not identify the names of other patients." State and federal medical privacy laws do not create a privilege that Baehr can assert; rather, they create a process to obtain medical records for use in litigation while maintaining confidentiality. Second, the court failed to properly exercise its discretion in analyzing the admissibility of other acts evidence; it failed to consider the applicability of ***J.W.***, 284 Wis. 2d 493, ¶¶20-26. Finally, it failed to discuss the relevancy of other acts evidence to the demand for punitive damages.

By the Court.—Order reversed.

Not recommended for publication in the official reports.