

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 96-0244

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICIA LUCHSINGER,

Plaintiff-Appellant,

WISCONSIN PHYSICIANS SERVICE CORPORATION,

Plaintiff,

v.

HERITAGE MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane County:
GEORGE A. W. NORTHRUP, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Patricia Luchsinger appeals from a judgment dismissing her complaint against Heritage Mutual Insurance Company under § 804.12(2)(a)3, STATS., after the trial court found that Luchsinger's failure to

answer interrogatories in a timely fashion was egregious and that dismissal was the appropriate sanction. Because the trial court did not erroneously exercise its discretion, we affirm.

BACKGROUND

Luchsinger commenced this personal injury action in August 1988. Luchsinger's claim arises from an August 1985 automobile accident. Heritage is the liability insurer of the other driver, Cindi Koltes. Koltes was dismissed from the litigation by stipulation in 1988.

In March 1992, the trial court dismissed the complaint for failure to prosecute. Luchsinger appealed, and this court reversed. *Luchsinger v. Koltes*, No. 92-1402, unpublished slip op. (Wis. Ct. App. Nov. 4, 1993). We held that Luchsinger's actions, "while not necessarily the most effective response to the situation, were reasonable given her *pro se* status, so that the [trial] court erroneously exercised its discretion in finding them egregious or without excuse." *Id.* at 9.

After remittitur, the trial court conducted a scheduling conference on February 17, 1994. Luchsinger was now represented by counsel. Trial was scheduled for November 7, 1994. No specific discovery deadlines were established.

On July 8, 1994, Heritage served interrogatories on Luchsinger. Under § 804.08(1)(b), STATS., Luchsinger was required to answer the interrogatories within thirty days. She did not do so. During a September 8 hearing on an unrelated topic, Luchsinger's attorney told opposing counsel that the answers were substantially completed, and were awaiting his client's final review and signature. On September 14, Heritage's attorney sent Luchsinger's counsel a letter requesting that the interrogatories be answered. Heritage filed a motion to dismiss on September 23. That motion apparently crossed in the mail with Luchsinger's answers, and Heritage received the interrogatory answers on September 26, 1994. Luchsinger's answers were not complete. For example, while the answers included a summary of medical expenses, they also stated that "[w]age loss information will be provided upon receipt."

A motion hearing was held on October 10, 1994. After hearing argument from Heritage and Luchsinger, the trial court dismissed Luchsinger's complaint. The trial court found that Luchsinger's conduct was "absolutely outrageous." The court reviewed the long history of the litigation, including the earlier dismissal, and concluded that Luchsinger's failure to timely answer the interrogatories was egregious. The court rejected Luchsinger's assertion that her incomplete answers were offered in good faith, noting that she had stated in a 1988 deposition that she would "have to go back and look at her records" to substantiate her wage loss claim. The court felt that Luchsinger's reply, offered six years later, that she would supply the wage loss information as soon as practicable was "inconsistent" with her 1988 deposition answer.

ANALYSIS

A trial court may dismiss a complaint if the plaintiff violates the rules of discovery. See §§ 805.03 and 804.12(2)(a)3, STATS.; *Hudson Diesel Inc. v. Kenall*, 194 Wis.2d 531, 541, 535 N.W.2d 65, 69 (Ct. App. 1995). This court reviews the decision to dismiss a complaint under the erroneous exercise of discretion standard. *Id.* at 541-42, 535 N.W.2d at 69. We will reverse the trial court's discretionary determination only if it fails to properly apply the law or its determination is unreasonable under the existing facts and circumstances. *Id.* at 542, 535 N.W.2d at 69.

Dismissal is a "drastic penalty that should be imposed only where such harsh measures are necessary." *Id.* A trial court may dismiss a complaint where the noncomplying party's conduct is either egregious or in bad faith. *Id.* A dismissal for bad faith requires intentional conduct and a finding that the noncomplying party "intentionally or deliberately delayed, obstructed or refused" the discovery demand. *Id.* at 543, 535 N.W.2d at 69. Unintentional conduct will not support a dismissal unless it is "so extreme, substantial and persistent that it can properly be characterized as egregious." *Id.* Egregious conduct includes a persistent violation of discovery procedure or conduct that is "part of a continuous attempt to obstruct or delay the litigation." *Id.* at 543, 535 N.W.2d at 70.

On appeal, Luchsinger argues that her conduct cannot be considered egregious because her answers were only "a few weeks tardy."

Luchsinger also asserts that she acted in good faith, and that she answered the interrogatories as soon as she could. We are not persuaded.

The timeliness of the answers must be viewed in the context of the entire litigation. Luchsinger's complaint had been dismissed previously because of inaction on her part. While this court reversed, the facts remained unchanged. The reversal and reinstatement did not alter the fact that nearly nine years had elapsed since the accident and that the litigation had been pending for six years. The parties had a duty to bring this matter to a prompt completion, and the trial court had a "duty to discourage the protraction of litigation." *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 282, 470 N.W.2d 859, 867 (1991). To fulfill that duty, the trial court properly could consider the history of the entire litigation, including conduct that led to the prior dismissal.

In an attempt to shift responsibility from her conduct, Luchsinger notes that Heritage did not serve its interrogatories until seven months after remittitur. Luchsinger asserts that Heritage's "last-minute discovery requests" exacerbated the situation. As we noted above, no discovery deadlines were established by court order. Heritage acted properly when it served interrogatories on Luchsinger four months before trial. Once served, Luchsinger had a statutory obligation to answer within thirty days. Section 804.08(1)(b), STATS. Luchsinger's failure to do so is unaffected by Heritage's actions.

Luchsinger's assertion of good faith was expressly rejected by the trial court. Heritage first sought information about the claimed wage loss in a 1988 deposition. At that time, Luchsinger deflected the inquiry by stating that she had to check her records. Six years later, and only six weeks before trial, she had yet to review her records so that a complete response could be made. The trial court reasonably rejected Luchsinger's claim of good faith.

Luchsinger also argues that the trial court misused its discretion by not exploring less severe sanctions. When faced with egregious conduct, "the trial court must determine whether less severe sanctions are available to remedy the noncomplying party's discovery violation before dismissal may be ordered." *Hudson Diesel*, 194 Wis.2d at 545, 535 N.W.2d at 70. While a trial court must "explore alternative remedies," the court is not obligated to choose

the less severe sanction if the court determines that dismissal is "necessary to assure justice between the parties." *Id.* at 545-46, 535 N.W.2d at 70-71.

The record defeats Luchsinger's argument. Before dismissing the complaint, the court did consider less severe sanctions. The court noted that it could deny recovery for wage loss and limit damages to the medical expenses identified in the answers. However, the court noted that "in order to do that, I'd have to say that ... it was reasonable for her to file the interrogatories [sic] at the time that she did." The court stated that the interrogatories were "[n]ot overly cumbersome" and were designed to elicit information necessary to the defense of the action. The court noted that the responses were not forthcoming after Luchsinger's counsel represented that they were ready during the September 8 hearing and after Heritage's attorney sent a follow-up letter on September 14. Finally, the court noted that Luchsinger had known since her 1988 deposition that Heritage wanted the basis for the wage loss claim.

The record shows that the trial court explored alternative remedies prior to concluding that dismissal was warranted. Therefore, the court properly exercised its discretion, and the dismissal must be upheld.

By the Court.—Judgment affirmed.

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