COURT OF APPEALS
DECISION
DATED AND RELEASED

April 8, 1997

NOTICE

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.

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

No. 96-0464

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

Shirley Daniels,

Plaintiff-Appellant,

v.

Kohl's Food Stores, Inc.,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Shirley Daniels appeals from a final order that dismissed her slip and fall action against Kohl's Food Stores, Inc. The trial court dismissed the action based on Daniels's failure to comply with the scheduling order the court had issued. Daniels asks this court to review whether the trial court erroneously exercised its discretion when it dismissed her complaint. Because we conclude that the trial court was

within its discretion when it implicitly determined that Daniels's failure to comply with the scheduling order was egregious conduct, we affirm.

Daniels filed her complaint and summons commencing the action on May 22, 1995. In June 1995, Kohl's served Daniels with interrogatories and medical authorizations requiring Daniels's signature. Daniels's counsel did not obtain signed answers to the discovery requests in a timely manner. After discussions, both parties agreed that if the written discovery requests were not completed by September 29, 1995, Kohl's would file a motion to compel with the trial court. This agreement was memorialized in a letter from Kohl's dated September 18, 1995.

The trial court held a scheduling conference on September 28, 1995, and at that time the court discovered that Daniels had not responded to the discovery request. The trial court ordered Daniels to serve responses on Kohl's by September 29, 1995, or the court would dismiss Daniels's claim. On September 29, Daniels's counsel provided signed answers to the written interrogatories, but did not provide the signed medical authorizations.

On October 24, 1995, Daniels's counsel did not attend the next scheduling conference, but another attorney from the law firm contacted the court by telephone. The attorney was informed that the scheduling conference was completed and that a copy of the scheduling order would be sent to Daniels's counsel. When Daniels's counsel received the scheduling order, he never noted the trial court's handwritten entry on the order that required the "plaintiff to provide signed medical authorizations by November 10, 1995 or instant case will be dismissed."

Daniels's counsel never noticed the deadline for the medical authorizations until November 14, 1995, when he received a copy of Kohl's motion to dismiss. Daniels's counsel mailed the signed medical authorizations on November 28,

1995. On November 29, 1995, the trial court issued an order dismissing Daniels's case without holding a hearing. The order dismissing the action stated:

> In light of the plaintiff's failure to appear at the scheduling conference of this matter on October 24, 1995 and upon the plaintiff's further failure to comply with the scheduling order by providing signed medical authorization to the defendant by November 10, 1995, the above matter is dismissed upon the merits and with prejudice pursuant to Wis. Stat. sections 805.03 and 804.12(2)(a)3.

Daniels appeals from this order.[1]

Daniels argues that the trial court erroneously exercised its discretion when it granted Kohl's motion to dismiss her action based on her failure to comply with the scheduling order. We disagree.

A trial court's order dismissing an action involves the exercise of discretion that we will not disturb absent an erroneous exercise of discretion. *See* ***Johnson v. Allis Chalmers Corp.,*** 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). Dismissal of an action for failure to comply with discovery and scheduling orders, however, is permissible only when bad faith or egregious conduct can be shown on the

[1] Daniels later filed a motion to vacate the November 29, 1995, final order pursuant to § 806.07, STATS. The trial court held a hearing and orally denied the motion on January 3, 1996. Daniels's notice of appeal states that she is also appealing from this decision. No written order memorializing this oral decision is part of the record. Moreover the circuit court docket sheet does not provide any evidence that such a written order was ever rendered and filed by the trial court. Accordingly, this court does not have the jurisdiction to review the trial court's oral ruling on Daniels's post-final order § 806.07 motion to vacate. *See* ***Helmbrick v. Helmbrick,*** 95 Wis.2d 554, 556, 291 N.W.2d 582, 583 (Ct. App. 1980) (holding that an "oral ruling must be reduced to writing before an appeal can be taken from it").

Further, both parties use the trial court's oral decision on Daniels's § 806.07 motion to support their position on the propriety of the final order dismissing Daniels's action. Any action taken by the trial court after the final order was entered is not properly before this court and therefore is not reviewable on this appeal. *See* ***Chicago & N.W. R.R. v. LIRC,*** 91 Wis.2d 462, 473, 283 N.W.2d 603, 609 (Ct. App. 1979) (stating "[a]n appeal from a judgment does not embrace an order entered after the judgment" and therefore is not reviewable on appeal). Hence, this opinion only addresses the trial court's actions prior and contemporaneous to the entry of the November 29, 1995, final order.

part of a noncomplying party. *See* ***id.*** at 275, 470 N.W.2d at 864. We will sustain the sanction of dismissal if there is a reasonable basis for the trial court's determination that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance. *See* ***id.*** at 276-77, 470 N.W.2d at 865. The Wisconsin Supreme Court has held that even an implicit finding of egregiousness or bad faith is sufficient to warrant dismissal of an action if the facts provide a reasonable basis for the trial court's conclusion. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.,*** 162 Wis.2d 296, 311, 470 N.W.2d 873, 878-79 (1991); *see also* ***Englewood Community Apartments Ltd. v. Alexander Grant & Co.,*** 119 Wis.2d 34, 39 n. 3, 349 N.W.2d 716, 719 n.3 (Ct. App. 1984).

Because the trial court granted the dismissal without holding a hearing, we only possess the trial court's written statement in the final order to decide whether the trial court properly exercised its discretion. *See* note 1, *supra* (discussing what actions of the trial court are properly reviewable on this appeal). The trial court stated that it was granting the motion to dismiss because of "the plaintiff's failure to appear at the scheduling conference of this matter on October 24, 1995 and upon the plaintiff's further failure to comply with the scheduling order by providing signed medical authorization to the defendant by November 10, 1995."

Explicit in the trial court's order is the fact that Daniels's counsel never appeared at the scheduling conference or complied with the deadline set in the resulting scheduling order. Implicit is the fact that the trial court considered Daniels's conduct egregious because this was the second scheduling order that the trial court issued to compel Daniels to comply with Kohl's discovery requests. In both, the trial court clearly stated that if Daniels did not abide with the deadlines, her case would be dismissed. In her brief, Daniels states that "[d]espite receiving the Court's scheduling Order appellant's counsel failed to see the newly imposed discovery deadline." This court has reviewed the

scheduling order and notes that the "newly imposed discovery deadline" is written in heavy black handwriting on the face of the scheduling order. This scheduling order clearly states that if Daniels failed to comply with the November 10, 1995 deadline for the medical authorizations, her case would be dismissed.

"When we review a discretionary decision, we consider only whether the trial court properly exercised its discretion, putting to one side whether we would have made the same ruling." ***State v. Kruzycki,*** 192 Wis.2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). Here we conclude that the trial court acted within its discretion given that Daniels was twice put on notice that failure to comply with the court's scheduling order would result in the dismissal of her case, that Daniels's counsel never attended the second scheduling conference, and that Daniels never mailed the required medical authorization until eighteen days after the deadline had passed. The trial court could properly determine Daniels's conduct egregious and therefore impose the penalty of dismissing her case.

By the Court.—Order affirmed.

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