COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 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. 96-1562

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

SPENCER G. BREITREITER,

PLAINTIFF-APPELLANT,

v.

CLIFTON GUNDERSON & COMPANY,
ABC INSURANCE COMPANY,
JOEL GARLOCK AND
DEF INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Spencer G. Breitreiter appeals from an order dismissing his action against Clifton Gunderson & Company and Joel Garlock for accountant malpractice. The issues on appeal are whether the trial court

erroneously exercised its discretion in refusing to permit Breitreiter to call any expert witnesses as a sanction for Breitreiter's failure to comply with the scheduling order with regard to naming expert witnesses and whether expert testimony was necessary for proof of Breitreiter's claim. We sustain the sanction imposed by the trial court and affirm the dismissal of the action.

We first address whether Breitreiter's action could proceed without expert testimony. The complaint alleged that the accountants "did not exercise the degree of care, skill and judgment usually exercised under like or similar circumstances practicing in this area." While not required in every malpractice case, expert testimony will generally be required to prove the standard of care as to those matters which fall outside the area of common knowledge and lay comprehension. *See* ***Olfe v. Gordon***, 93 Wis.2d 173, 180, 286 N.W.2d 573, 576 (1980).

The case involves the standard of care needed to render advice about the tax implications of a distribution from a pension and profit sharing plan. By necessity there must be an explanation of the tax laws and the interplay between those laws and the premature distribution from a pension and profit sharing plan. These are not matters within the common knowledge of a layperson or there would have been no need for Breitreiter to seek an accountant's advice. This is not a case where want of care and skill is so obvious that the neglect is clear as a matter of law. The trial court did not err in concluding that expert testimony was necessary.

We turn to the sanction imposed for Breitreiter's violation of the scheduling order. Although dismissal of the action was not the sanction for the violation of the scheduling order, the barring of expert testimony had that effect.

The issue is whether the trial court erroneously exercised its discretion by essentially dismissing the case as a sanction for violation of the scheduling order. *See* ***Schneller v. St. Mary's Hosp***., 162 Wis.2d 296, 311, 470 N.W.2d 873, 878-79 (1991). Dismissal is a drastic penalty and is appropriate only where the noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse. *See* ***Hudson Diesel, Inc. v. Kenall***, 194 Wis.2d 531, 542, 535 N.W.2d 65, 69 (Ct. App. 1995).

A trial court has both the inherent power and statutory authority to sanction parties for failure to comply with a scheduling order. *See* ***Gerrits v. Gerrits***, 167 Wis.2d 429, 446, 482 N.W.2d 134, 141 (Ct. App. 1992). "The general control of the judicial business before [the court] is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.'" ***Latham v. Casey & King Corp.***, 23 Wis.2d 311, 314, 127 N.W.2d 225, 226 (1964) (quoted source omitted). The trial court's exercise of discretion will be sustained if there is a reasonable basis for the determination that the noncomplying party's conduct was egregious and there was no justifiable excuse for noncompliance. *See* ***Schneller***, 162 Wis.2d at 311, 470 N.W.2d at 878-79.

An August 31, 1995 scheduling order set the trial for April 16, 1996.[1] Breitreiter was to name expert witnesses by November 1, 1995. On March 20, 1996, Breitreiter withdrew his previously named expert and substituted another. Then again on April 2, 1996, a third expert, a witness from Chicago,

[1] The scheduling order is not of record. The trial court's findings include the deadlines established in the scheduling order.

Illinois, was named. Along with the naming of the new expert, Breitreiter sought a continuance of the trial on the grounds that it was scheduled for the day after the tax return filing day and for that reason Breitreiter had not been able to retain a local expert. At the April 4 motion hearing, Breitreiter explained that he sought to obtain a local expert in order to reduce his litigation costs.

The trial court denied Breitreiter's motion for a continuance. It concluded that because the action had been pending for almost a year, Breitreiter had ample time to secure experts and to do so in anticipation of the trial being near the tax filing day.[2]

On April 10, 1996, the trial court revisited the issue of expert witnesses as Breitreiter continued to attempt to depose experts before trial.[3] The court was informed that following the April 4 hearing, Breitreiter named a new local expert witness. The court found that a mess had been made of discovery proceedings because Breitreiter had jumbled around naming and withdrawing experts. The trial court's comments reflect its concern that the failure to follow the scheduling order had caused the discovery issues to become muddled and that such issues were brought to the court's attention only a few days before trial. The court noted that only five or six days before trial Breitreiter was naming expert witnesses when the case had been pending for almost a year. It said, "[T]he

[2] At the April 4, 1996 hearing the trial court also ruled on pending motions regarding depositions and discovery. The trial court quashed subpoenas duces tecum of out-of-state Clifton Gunderson employees with the understanding that Clifton Gunderson's expert would be available for a deposition at his Illinois office on April 8, 1996. Breitreiter's Chicago expert had been subpoenaed for an April 9, 1996 deposition.

[3] The April 8 deposition of Clifton Gunderson's expert had not occurred and Breitreiter sought to do the deposition by telephone. Breitreiter's Chicago expert was not deposed because on the afternoon of April 4, 1996, Breitreiter named a new local expert.

plaintiff hasn't gotten done what they should have done long ago." It noted that there was no court approval of an amendment to the scheduling order. The court ruled that any expert named after the deadline established in the scheduling order would not be allowed to testify.

The trial court's decision is a proper exercise of discretion. The trial court focused on its need to control the case and the problems that the late naming of Breitreiter's expert had created. Implicit is the trial court's finding that Breitreiter's conduct was egregious.

Breitreiter argues that he advanced a clear and justifiable excuse for not having an expert in place earlier. Breitreiter points out that his first experts declined to testify and others were too busy during tax season to do so. It did not go unnoticed that the trial date was scheduled around the busiest business time for expert accountants. However, as the trial court acknowledged, the trial date was known long in advance and Breitreiter should have planned around it. The difficulty in obtaining an expert was known to Breitreiter more than one week before trial. Breitreiter never sought court approval to amend the scheduling order until two weeks before trial.[4]

Breitreiter argues that Clifton Gunderson consented to the late naming of expert witnesses. While Clifton Gunderson accommodated Breitreiter's need to name new experts, it did not consent to a delay in the trial which Breitreiter's late naming of experts suggested to be necessary. Even in the face of

[4] In his reply brief, Breitreiter suggests that the scheduling order's failure to warn of the possibility of dismissal as a sanction for a violation makes the sanction imposed unreasonable. Sections 802.10(3)(d), 804.12(2)(a) and 805.03, STATS., provide authority for and sufficient notice of potential sanctions.

the other party's consent, the enforcement of the scheduling order is for the trial court alone to determine. The court alone determines how to accommodate "the conflicting interests in permitting parties to fully present their case, in preventing prejudice to the opposing party, and in deterring litigants from flaunting court orders and interfering with the orderly administration of justice." ***Schneller***, 162 Wis.2d at 310, 470 N.W.2d at 878. We appreciate a litigant's desire to avoid incurring expert witness fees and discovery costs until all avenues of settlement have been exhausted. However, in employing such tactics by ignoring deadlines established by the court, the litigant takes a risk that the court will require strict compliance with its order.

Even if the noncomplying party's conduct is unintentional, it may be so substantial and persistent that it can be characterized as egregious. ***Hudson Diesel***, 194 Wis.2d at 543, 535 N.W.2d at 69. Here, the trial court had firsthand knowledge of how Breitreiter's violation of the scheduling order was impacting the case. The facts here provide a reasonable basis for the trial court's implicit finding that Breitreiter's conduct was egregious and without a justifiable excuse.[5]

The sanction imposed was within the trial court's discretion. *See* ***Schneller,*** 162 Wis.2d at 311, 470 N.W.2d at 878-79 (even an implicit finding of egregiousness is sufficient to warrant dismissal). Although Breitreiter claims that in the face of an unintentional violation the trial court was obligated to consider less severe sanctions, *see* ***Hudson Diesel***, 194 Wis.2d at 545, 535 N.W.2d at 70, he does not suggest any less severe sanction that would have preserved the trial

[5] Breitreiter claims that the trial court's written order imposing the sanction does not reflect the findings made by the court at the hearing. The trial court expressly adopted the written order in the face of Breitreiter's objection. Moreover, we need not consider findings made in relation to other pending motions regarding discovery.

date set by the scheduling order. Even if the trial court could have imposed a lesser sanction, there is no basis for disturbing the sanction chosen. *See* ***Englewood Community Apartments Ltd. Partnership v. Grant & Co.***, 119 Wis.2d 34, 40, 349 N.W.2d 716, 719 (Ct. App. 1984).

By the Court.—Order affirmed.

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