

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2006

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. 2006AP207

Cir. Ct. No. 2005TP142

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
OMAR J., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

CLARISSA W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Clarissa W. appeals from an order concerning the termination of her parental rights to Omar J. Clarissa claims that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

her failure to comply with the trial court's orders was not so egregious to justify the default judgment sanctions rendered against her. Because the trial court did not erroneously exercise its discretion in entering a default judgment in favor of termination of Clarissa's parental rights to Omar, this court affirms.

BACKGROUND

¶2 This case involves the termination of parental rights to Omar, who was born on June 1, 1992. Clarissa is Omar's mother. Omar was removed from Clarissa's home and found to be a child in need of protection or services on April 21, 1993. Omar was shortly thereafter returned to Clarissa's home. However, on November 5, 1997, Omar was again removed from the home and found to be in need of protection or services.

¶3 On April 8, 2005, a termination of parental rights petition was filed alleging that Omar was a child in continuing need of protection or services. In October 2005, the petition was amended, adding the termination ground of abandonment. The initial hearing on the petition occurred on May 2, 2005. Omar's father, Lamar J., was found in default. Clarissa appeared at this hearing and requested counsel. The case was adjourned to June 3, 2005, to allow time for appointment of counsel. The trial court warned Clarissa at this May hearing that if she failed to appear at future court dates, she would be defaulted.

¶4 On June 3, 2005, Clarissa appeared with counsel to address visitation. At that hearing, future court dates were set for August 12, 2005 (motions), September 20, 2005 (final pretrial), and October 10, 2005 (trial). The trial court ordered Clarissa to appear at all court hearings, and to cooperate and appear at all discovery proceedings or she would be defaulted.

¶5 At the August 12, 2005 motion hearing, Clarissa appeared with counsel. A back-up trial date of October 17, 2005, was selected due to a potential conflict. On September 20, 2005, at the final pretrial, the court was advised that the case could not proceed because Clarissa missed two scheduled depositions. The trial court then cancelled the October 10 trial date, set trial for October 17, and ordered Clarissa to appear at a September 23, 2005 deposition. A new pretrial date of October 7, 2005, was set and the court warned Clarissa of the consequence of not appearing for any of those dates:

This case affects you more than anyone else in this room... the State of Wisconsin wants to take your child away from you permanently. You, as is your right, are fighting so that doesn't happen; but it is a lawsuit and there are rules, one of the rules is that when the district attorney wants to take your deposition you must appear. No excuses other than the fact that you are under a doctor's care and have a doctor's excuse.

Now, what is going to happen is this, I am going to cancel the jury trial for October 10, I am going to leave it on for October 17; between now and then we are going to come back on a final pretrial the week of October 10. Between now and that final pretrial you are going to have your deposition taken and you are going to be there. If you are not there, then I am going to strike your contest posture and declare a new default and give the State of Wisconsin what they want; do you understand?

Clarissa responded "Yes." Clarissa attended the scheduled deposition. She failed to appear, however, for the final pretrial hearing on October 7th. Clarissa phoned the court and said she did not have a bus pass to get to court. This claim was contrary to the assertion of case manager, Lynn Bade, that a bus pass had been mailed to Clarissa. The State moved to strike Clarissa's contest posture and requested a default judgment. The trial court adjourned the final pretrial to October 10, 2005, and took the motion for default under advisement. Clarissa's attorney was advised to have his client present for the October 10 hearing.

¶6 On October 10th, Clarissa did not appear or call the court. The trial court checked court system records and discovered that Clarissa had a criminal charge pending against her and was in a preliminary court hearing on the criminal matter, which was scheduled for the same time as the final pretrial in the termination case. The criminal court was contacted and verified that Clarissa was present in that courtroom. The trial court conducted the final pretrial without Clarissa present, although her counsel did attend. The trial date for October 17, 2005, was kept on the calendar.

¶7 On October 17, 2005, Clarissa did not appear for the scheduled jury trial. Clarissa's attorney reported that he had spoken to her twice the previous week by telephone and reminded her of the jury trial date. The State renewed its motion for default. After hearing arguments, the trial court granted the motion. The trial court then heard evidence regarding the grounds to terminate Clarissa's and Lamar's parental rights to Omar. The trial court made findings regarding grounds as to both parents, found both parents unfit, and determined that termination was in Omar's best interests. The trial court entered an order terminating Clarissa's and Lamar's parental rights to Omar.

¶8 On January 19, 2006, Clarissa appealed the order terminating her parental rights. On February 24, 2006, Clarissa's appellate counsel filed a post-termination motion alleging that Clarissa had good cause for her failure to appear for the October 17, 2005 jury trial.² The reason proffered was that she was an inpatient at a residential drug treatment program.

² This court remanded the matter to allow the filing of the post-termination motion by order dated February 22, 2006.

¶9 On March 27, 2006, the trial court conducted a hearing on the motion. The drug treatment records indicated that Clarissa entered the program on October 20, 2005, and she was discharged on November 12, 2005. Clarissa acknowledged that she was not a patient at the treatment facility on October 17, 2005—the date of the parental termination trial. Clarissa told the court that she did not recall where she was on that date. Clarissa also testified that she remembered what had occurred at the court hearings she attended, she remembered the trial court advising her that she could be defaulted if she did not attend the court dates and that she understood that a default meant she would have no say regarding the termination of her parental rights.

¶10 The case worker also testified, advising the court that she had personally mailed Clarissa a bus ticket for the trial date, and that Clarissa told the case worker she had basically forgotten about the court hearing. After arguments from counsel, the trial court denied Clarissa's motion for relief. The trial court noted that Clarissa was personally ordered by the court to appear at all court dates on May 2, 2005, again on June 3, 2005, and on September 20, 2005. She was also warned that failure to appear could result in her being found in default. The trial court then reasoned:

I acknowledge that a default is a harsh sanction, and it is to be applied reluctantly. In order for the Court to default somebody, the Court has to make a finding that the conduct in disobedience of the order to appear -- disobedience of the order to appear at depositions was without clear and justifiable excuse.

The mother offers no excuse for her failure to appear at the depositions. No excuse for her failure to appear at the jury trial date of October 17. The Court will note that that was the second jury trial. The first jury trial was set for October 7th. The Court could not proceed with that jury trial because of the mother's failure to appear at

depositions. So it had to cancel that jury trial and order the jury trial for October 17th.

The only excuse Mom offers is that she was homeless and staying with people. That excuse I believe is incredible....

The Court also has to look at whether or not her conduct in disobeying the orders was egregious or in bad faith. I don't know from this record whether or not it was egregious or in bad faith. I don't know if it's intentional. I know it's one or the other. But when someone misses two depositions -- not one -- when someone misses a court date of October 7th with no excuse, when someone misses a court date of October 10th with an excuse but an excuse that the Court had to find out.

Mom did not call here on October 10th, did not call her lawyer and tell him that she had an appearance downtown on October 10th. The Court, through its own initiative in reviewing computer records and making a phone call to the preliminary court on October 10th, is the one that found Mom and then excused her appearance on October 10th because she was in a criminal matter.

And then she missed a backup jury trial date after the Court had to cancel the primary jury trial date because of Mom's failure to obey the Court's orders to appear at depositions. I believe that that is either bad faith -- in that, she's acting intentionally -- it is certainly egregious. It is flaunting of the Court's order. It protracted this litigation.

Based upon her egregious conduct in this case of flaunting court orders, based upon her nonappearance on the jury trial date, I would have denied her motion to vacate the default even if it had been made in October.

And I also look at [the fact] that she did know enough to appear in her criminal court [matter] on October 19th ... two days after this jury trial was supposed to be set. There's no question in my mind she knew about the date of October 17th and did not appear.

....

As I said, the Court has the right to expect its orders to be obeyed, and I believe the rational[e] for my findings that her conduct is either egregious or bad faith have been set forth on the record.

¶11 The trial court also pointed out that Clarissa’s counsel had reminded her of the date at least twice after October 10th and before October 17th, and that Clarissa had been provided with a bus ticket from the case worker. The trial court entered an order denying her post-termination motion. She now appeals from that order.

DISCUSSION

¶12 Clarissa concedes that the trial court had both inherent authority and statutory authority under WIS. STAT. §§ 802.10(7), 804.12(2)(a) and 805.03, to sanction parties for failing to obey court orders. She contends, nonetheless, that the offending party’s conduct must be egregious in order to justify the granting of default and that her conduct was not egregious.

¶13 Thus, the dispositive issue in this case is whether the trial court erred in finding that Clarissa’s conduct was egregious. In reviewing a trial court’s decision to grant default judgment, this court applies the erroneous exercise of discretion standard. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. In order for a default judgment to be imposed as a sanction, the conduct of the offending party must be egregious or in bad faith, and without any “clear and justifiable excuse.” *Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.*, 2001 WI App 205, ¶11, 247 Wis. 2d 521, 634 N.W.2d 544.

¶14 Here, the trial court found that Clarissa’s conduct was egregious. Egregious conduct has been defined as unintentional conduct that is “extreme, substantial, and persistent.” *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995). Based on these standards, this court cannot conclude that the trial court’s granting of default constituted an erroneous exercise of discretion. As set forth in the trial court’s analysis at the hearing and in its

written order denying Clarissa's motion, there was a pattern of substantial and persistent non-compliance with the trial court's order without any clear and justifiable excuse. Clarissa failed to appear for two scheduled depositions, the October 7, 2005 final pretrial, and the October 17 trial. She offered no clear and justifiable excuse for disregarding the orders of the court. The record reflects that she had adequate and repeated notice of the court dates, she was advised that her failure to appear could result in a default judgment, and that she was provided with a means of transportation to ensure her ability to attend. Under these circumstances, the trial court's determination that Clarissa's conduct warranted the default sanction has a reasonable basis in this record.

¶15 Clarissa argues in her brief that her mental health issues and depression somehow excuse her defiance of the court's orders. This court cannot agree with this contention. As noted by the trial court, Clarissa appeared at a criminal court hearing two days after she failed to appear for the trial in this termination case. Her attorney had two phone contacts with her in the days immediately preceding the trial date. Based on these factors, this court is not convinced that any mental health issues excuse Clarissa's substantial and persistent defiance of the court's orders.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

