COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1302 **Cir. Ct. No. 2002CV82**

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

JOHN BEYERL AND DEBRA BEYERL,

PLAINTIFFS-APPELLANTS,

LAWRENCE MADER, PAULA MADER, DAVID PESCINSKI, JANE PESCINSKI, MERCIER DAIRY, INC., DAVID MERCIER, DAWN MERCIER, JEFF PINTER, AND JILL PINTER,

PLAINTIFFS,

V.

CLARK ELECTRIC COOPERATIVE AND FEDERATED RURAL ELECTRIC INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. John Beyerl and Debra Beyerl appeal an order dismissing their complaint as a sanction for discovery violations. We affirm.

¶2 The Beyerls and other plaintiffs began this stray voltage action against the Clark Electric Cooperative and its insurer in 2001. Clark moved to dismiss the Beyerls' claims in 2004 as a sanction under WIS. STAT. § 804.12(2)(a) (2003-04)[1] for failure to obey one or more discovery orders. In particular, Clark had recently learned that three out of seven bins of farm business records, containing approximately 55,000 documents, had not been provided. The court granted Clark's motion and denied the Beyerls' motion for reconsideration.

¶3 The parties agree that imposition of the sanction of dismissal requires either bad faith or egregious conduct by the sanctioned party. In this case, the circuit court relied on both grounds.

¶4 The parties further agree that a determination of bad faith requires a finding that the party's action was intentional. Here, there is some ambiguity in the court's decision regarding intent. While the court stated that it "concludes that plaintiff intentionally refused the defendant's discovery demand," the court also stated in a footnote that it would not infer that the Beyerls had intentionally failed to provide the additional material that Clark had recently learned about. It may be that the court was attempting to clarify the scope of its intent finding, and that the conduct the court found intentional concerned earlier failures by the Beyerls. The parties dispute the court's meaning. However, rather than resolve this dispute, we instead turn to the issue of egregious conduct.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 For a party's conduct to be considered egregious, the conduct must be extreme, substantial, and persistent. ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995). The record easily supports the circuit court's conclusion that the Beyerls' conduct was egregious.

¶6 The Beyerls first argue that the court erred by deeming their failure to provide the three bins to be a discovery violation. Their argument is, essentially, that even though they agreed, at Clark's request, to arrange for these records to be copied and sent to Clark, it was not a statutory violation when the Beyerls failed to copy and send all the documents because the pertinent discovery statutes, WIS. STAT. §§ 804.08(3) and 804.09, require only that a party offer the requester an opportunity to inspect and copy the records. According to the Beyerls, they made such an offer before later agreeing to arrange for copying and transmitting the copies to Clark. We reject the argument.

¶7 Once the Beyerls led Clark to believe that copies of all pertinent records would be copied and delivered, and then copied and delivered only a portion of those records, thereby misleading Clark into believing that all the documents had been delivered, it was unreasonable to expect Clark to pursue the Beyerls' prior offer to inspect and copy. To accept the Beyerls' argument would be to approve a mechanism that permits a party to mislead another party by sending incomplete discovery, while representing that the sending party had provided complete discovery. Having agreed to copy and transmit all documents subject to Clark's request, the Beyerls were responsible for following through with the agreement.

¶8 The Beyerls next argue that no order of the court covered the uncopied material in the bins. They assert that the court's oral order in January

2004 related only to material to be used at trial, but they fail to note that the subsequent written scheduling order directed them to fulfill any overdue discovery requests, a directive that covers the documents at issue here. The Beyerls also assert that the court's oral statement on April 16, 2004, giving twenty days to properly answer discovery requests did not cover the uncopied material because the Beyerls had already properly responded by making the material available for inspection. This argument is duplicative of the one we rejected above. And, the Beyerls assert that the court's oral order on May 10, 2004, to complete discovery gave them the option of simply making the records available for inspection, which had already occurred. However, we see nothing in this argument that shows the court intended to supersede the agreement the Beyerls had already made to provide copies at the defendants' expense.

¶9 The Beyerls contend that the court erred by concluding that their conduct was egregious because there was a clear and justifiable excuse for their conduct. They point to the complexity of discovery in this multi-plaintiff case, confusion caused by counsel's transfer from a Wausau office to a Milwaukee office, and the loss of a paralegal on the case. We are satisfied, however, that a reasonable judge could conclude that the conduct was egregious, based on the large amount of material not copied, the several orders the court issued to compel discovery, and the Beyerls' attorney's erroneous representation to the court and Clark that this material had already been copied and delivered.

¶10 Finally, the Beyerls argue that the court erred by not applying a lesser sanction. They cite no authority, however, requiring the court to impose the minimum necessary sanction. And, as we have explained, a reasonable judge could conclude that dismissal was an appropriate sanction for the conduct.

By the Court.—Order affirmed.

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