

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2007

David R. Schanker
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. 2006AP1137

Cir. Ct. No. 2003CV668

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KISER/ARROW CONSTRUCTION AND JOHN KISER,

PLAINTIFFS-RESPONDENTS,

V.

CHRIS BLOTZER,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

RHONDA BLOTZER,

THIRD-PARTY PLAINTIFF-APPELLANT,

V.

**STOBB PLUMBING AND HEATING, INC.,
JOHNSON BROTHERS CONCRETE CONSTRUCTION
CO., INC., WICK BUILDING SYSTEMS, INC. AND
SHANE SCOTT D/B/A SMOOTH-WALKING CONCRETE,**

THIRD-PARTY DEFENDANTS-RESPONDENTS,

**WEST BEND MUTUAL INSURANCE COMPANY,
INTERVENOR.**

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Chris and Rhonda Blotzer appeal from an order dismissing their claims alleging faulty construction work on their home. The trial court dismissed the claims for numerous and extensive violations of discovery and scheduling orders. The issues are whether (1) the trial court based its ruling on factual errors, (2) an order compelling discovery under WIS. STAT. § 804.12(1) (2005-06)¹ must issue before the court can sanction a party for a discovery violation, and (3) the trial court imposed a sanction that was too harsh. We affirm.

¶2 Kiser Construction commenced this action against the Blotzers for unpaid amounts due under a home construction contract. The Blotzers responded with a counterclaim and later a third-party complaint, alleging negligence in the construction project. The third-party defendants included four other companies or individuals involved in the work on their home.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Discovery commenced in March 2004. In January and February 2006, the parties defending against the Blotzers' claims moved for sanctions, based on the Blotzers' repeated discovery violations. They contended that after repeated attempts they were unable to obtain sufficient information on the Blotzers' claims to adequately defend against them. The trial court found that throughout the discovery period the Blotzers had provided inconsistent, confusing, and incomplete lists of alleged defects and repair costs, and failed to timely provide documents and videos. As of January 2006, they remained in violation of the trial court's scheduling orders in several respects. They had not, for example, provided any meaningful reports from experts, or made any experts available for deposition.

¶4 Additionally, when contacted by counsel for one of the opposing parties, the person identified as the Blotzers' principal expert witness stated that the Blotzers had not retained him as a witness, he did not want to nor feel qualified to testify as an expert in this case, and had never spoken to the Blotzers' attorney. The trial court referred to this development as the "frosting on the cake" in its decision to dismiss. In explaining the dismissal, the court stated:

The Court finds that in fact the plaintiffs have failed to diligently prosecute their case. That they have violated the Court's orders in failing to provide expert opinions on causation of damages and liability of the defendants. That they have continued to provide widely disparate lists of repairs that they want to make to their house without ever providing any underlying reports of why any of the repairs are needed. That they have failed to provide or timely respond to discovery requests such as the set of interrogatories Mr. Shafer sent in March of 2004. That they delayed for about a year in providing photographs and videos which had been promised within 30 days. That their main so-called expert indicates that he has never even been retained as an expert, and that the plaintiffs' lawyer has never even talked to him.

The court described as extreme “the plaintiffs’ lack of cooperation, lack of follow-through, lack of specificity, lack of a liability expert, and lack of compliance with court orders and statutory discovery.” The court concluded that “the plaintiffs’ claims ha[d] been so poorly prosecuted that the Court finds it appropriate to put these claims out of their misery at this point in time and before wasting vast amounts of additional resources of the parties and of the Court.”

¶5 The decision to impose sanctions for discovery violations is discretionary. See *Schultz v. Sykes*, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. We affirm discretionary decisions if the court examines the relevant facts, applies the proper legal standard, and reaches a reasonable result. *Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). Dismissal is an appropriate sanction if the violations are without a clear and justifiable excuse, and egregious or committed in bad faith. *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995). The court need not use the words “egregious” or “bad faith” if there is an implicit finding under the correct standard and if the facts provide a reasonable basis for the court’s implicit determination. *Schneller v. Saint Mary’s Hosp. Med. Ctr.*, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991).

¶6 The Blotzers challenge the trial court’s determination that they provided untimely and incomplete discovery and did not comply with scheduling orders. However, the record fully supports the trial court’s findings. The trial court’s scheduling order of January 10, 2005, required a detailed statement of the Blotzers’ claims by February 4, 2005, but the information the Blotzers subsequently provided, mostly after the deadline, did not comply with that order. It can be fairly characterized as a terse and conclusory list of alleged damages, without information as to why a specific item of damage was included, and no

information on causation or liability. In May 2005, the court ordered the Blotzers to provide a list of expert witnesses and a copy of each expert's written report. Instead of reports, the Blotzers submitted a series of conclusory repair and/or replacement estimates that provided no information beyond a bare statement of costs for various jobs. As noted, the defending parties and the court subsequently learned that the person that counsel for the Blotzers identified in court as their principal expert witness was never in fact retained as an expert, had never spoken to counsel, did not consider himself qualified as an expert, and had no intention of acting as one in this case. Also, the purportedly complete list of claims provided in response to the January 2005 scheduling order turned out to be incomplete, as the Blotzers advanced new claims in a November 2005 deposition. Additionally, what discovery was provided was typically produced late and only after repeated requests. As the trial court noted, as of March 2006, nearly two-and-one-half years after the Blotzers first filed their claims, the opposing parties still lacked basic information about the Blotzers' claims that they were entitled to under the discovery statutes and the trial court's orders. Consequently, the Blotzers' assertion that they complied with their discovery obligations is without merit.

¶7 The Blotzers next contend that a court may not impose sanctions for a discovery violation unless the dispute is first litigated on a WIS. STAT. § 804.12(1) motion to compel discovery, and no defendant filed one in this case before moving for sanctions. We conclude that there is no such precondition for the sanction the court imposed. WISCONSIN STAT. § 805.03 provides the trial court with authority to dismiss "for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court." The language of this provision is plain: it requires no intermediate proceeding under § 804.12(1) motion before the court can sanction a party for discovery violations. While due

process certainly requires notice and an opportunity to be heard as to the alleged violations, both were clearly provided to the Blotzers, and they do not contend otherwise.

¶8 Finally, the Blotzers contend that the dismissal sanction was too harsh. They principally argue that in comparison to the conduct sanctioned by dismissal in *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), *overruled on other grounds by Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898, their violations were relatively mild. However, the Blotzers present no authority holding that *Johnson* establishes the minimum conditions necessary for proper use of the dismissal sanction, and we are aware of none. The question in any given case remains whether the trial court reasonably exercised its discretion in determining that the noncomplying party's conduct was egregious and without a clear and justifiable excuse. *See id.* at 276-77. Here, the record clearly supports the trial court's decision under this standard.

By the Court.—Order affirmed.

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

