

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP251

Cir. Ct. No. 2004CV2519

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JAMES SZYMCZAK,

PLAINTIFF-APPELLANT,

v.

THE TERRACE AT ST. FRANCIS,

DEFENDANT-RESPONDENT.

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

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

¶1 WEDEMEYER, J. James Szymczak appeals from an order dismissing his complaint against The Terrace at St. Francis as a sanction for Szymczak's failure to comply with the trial court's orders. Szymczak claims: (1) the trial court's sanction of dismissal constituted an erroneous exercise of discretion; (2) the trial court should have granted summary judgment in

Szymczak's favor; (3) the trial court failed to follow the remand instructions from this court; and (4) the attorneys for the Terrace gave false information to the trial court. Because the trial court did not erroneously exercise its discretion in dismissing this action, because the trial court did not need to address summary judgment, because the trial court did not violate the remand instructions from this court and because the claim regarding false information need not be decided by this court, we affirm.

BACKGROUND

¶2 This appeal follows the remand from this court following an earlier appeal, wherein we reversed the trial court's grant of summary judgment in favor of the Terrace, and remanded to the trial court "to determine whether the Terrace's refusal to release Mrs. Szymczak's medical records was 'knowing and willful' pursuant to WIS. STAT. § 146.84(1)(b)." *Szymczak v. Terrace at St. Francis*, 2006 WI App 3, ¶1, 289 Wis. 2d 110, 709 N.W.2d 103. The dispute centered on the Terrace's refusal to release Szymczak's mother's medical records to him based on the Terrace's belief that Mrs. Szymczak was possibly incompetent and therefore, incapable of signing the medical release.

¶3 Upon remand, the trial court entered a scheduling order on March 21, 2006. The Terrace issued a subpoena to take the deposition of Mrs. Szymczak on April 12, 2006. Neither Mrs. Szymczak nor Szymczak appeared for the deposition. Szymczak then filed a motion seeking summary judgment, but because the motion failed to comply with local rules, it was returned to him. Szymczak then filed another motion for summary judgment.

¶4 The Terrace issued another subpoena for Mrs. Szymczak, setting a deposition date of April 24, 2006. Szymczak indicated that his mother would not

appear for the deposition. Subsequently, the Terrace filed a motion to compel Mrs. Szymczak's deposition and a request to postpone the summary judgment hearing until after the deposition had occurred. The trial court granted the Terrace's motion on May 1, 2006, adjourning the summary judgment motion to allow discovery, including the deposition of Mrs. Szymczak. The trial court ruled that the Terrace had the right to depose Mrs. Szymczak as she was a critical witness in this proceeding. A deposition was scheduled for May 22, 2006, but Mrs. Szymczak did not appear. The Terrace filed a motion to show cause why Szymczak and his mother should not be held in contempt. The trial court heard the motion on June 12 and ruled that Mrs. Szymczak is:

a critical Defense witness with respect to the validity, authenticity, of the signature on the authorization to disclose medical records. I certainly hope for Mr. Szymczak's sake that his vehement assertions ... are correct-because otherwise there is going to be a lot of other fallout from all of this.

... [the Terrace] didn't have to accept Mr. Szymczak's assertion that it's her signature and they wish to depose her about that. They are entitled to depose her about that. They are going to depose her about that.

And she's also a critical witness, and I think ... the Court of Appeals decision has intimated that his mom's competency to make the determination as to whether or not to sign that authorization to have access to her medical records is an open and material issue in this litigation, and certainly that's a critical issue with respect to that area of the inquiry.

So I would also say that the way this has been framed up by the Court of Appeals I do not believe that those issues can be fairly, rationally, or appropriately assessed without Mr. Szymczak's mother being deposed and/or testifying in this litigation.

¶5 The trial court then ordered Szymczak to identify five different three-hour time periods in the following two weeks when his mother would be

available to be deposed. The trial court stayed all other proceedings until the deposition occurred. The trial court also advised Szymczak that if the deposition does not take place within the next six months, the case would be dismissed. Szymczak failed to comply with the trial court order. He did not provide any time period that his mother would appear for a deposition. Six months passed. The Terrace moved for dismissal. The trial court granted the motion and dismissed the case as a sanction against Szymczak for failing to comply with the court orders. Szymczak now appeals from that order.

DISCUSSION

¶6 The dispositive issue in this case is whether the trial court erroneously exercised its discretion when it dismissed the complaint for Szymczak's failure to comply with the trial court's orders. Our review is limited to whether the trial court erroneously exercised its discretion by failing to consider the pertinent facts, apply the correct law and reach a reasonable determination. See *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991), *overruled in part on other grounds by Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. We conclude that the trial court did not erroneously exercise its discretion.

¶7 On remand from this court, the Terrace sought to take the deposition of Mrs. Szymczak, so that it could show it did not knowingly, and willfully withhold the medical records in violation of WIS. STAT. § 146.84 (2005-06).¹ The

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

trial court found that Mrs. Szymczak's deposition was critical to resolving the issue on remand. We agree with the trial court's assessment.

¶8 In looking at the facts and sequence of events after remand by this court, we note that Szymczak blatantly disregarded the repeated orders of the trial court to produce his mother for a deposition. The trial court's last order specifically advised Szymczak that if he did not provide deposition dates by December 12, 2006, the court "shall dismiss this case on the merits." Despite this stern warning, Szymczak failed to comply with the order. Under these facts and circumstances, the trial court had no alternative but to dismiss Szymczak's case.

¶9 Szymczak argues in this appeal that his conduct was not so egregious as to warrant dismissal as a sanction. We cannot agree. Szymczak was afforded repeated opportunities to provide deposition dates and appear for the court-ordered deposition. He failed to do so. Szymczak believed that his mother did not need to appear for a deposition and that the Terrace should have simply honored the request for the release of medical records. Szymczak, however, does not have the authority to make those determinations. Rather, the court is the authority in this matter and the court ordered Szymczak to comply. The trial court gave Szymczak several opportunities to comply. The final warning was clear: comply with the trial court order by December 12, 2006 or the case will be dismissed. Szymczak rebuffed the court's authority. Failure to comply with a trial court order, when given repeated chances and a specific ultimatum, is seriously egregious conduct. The trial court's decision did not constitute an erroneous exercise of discretion.

¶10 Szymczak also contends that the trial court erred when it failed to grant his motion for summary judgment filed when this court remanded the matter

to the trial court. We are not convinced. The trial court specifically advised that it was postponing any decision on summary judgment until discovery was completed. Szymczak failed to permit discovery to take place. He obstructed discovery. Thus, the trial court's failure to decide Szymczak's motion seeking summary judgment was the result of Szymczak's own contemptuous conduct. Accordingly, we cannot hold that the trial court erred in not deciding Szymczak's motion for summary judgment.

¶11 Szymczak also contends that the trial court failed to follow the remand instructions from this court. We disagree. To the contrary, in reviewing our opinion and the actions of the trial court on remand, the trial court did not engage in any action contrary to the dictates of our opinion.

¶12 Finally, Szymczak raises numerous instances where he asserts the attorneys for the Terrace engaged in misconduct. We need not address this issue as it is not dispositive to this appeal. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (non-dispositive issues need not be addressed).

¶13 In sum, we conclude that the trial court did not erroneously exercise its discretion when it dismissed Szymczak's case as a sanction for failing to comply with the trial court's orders. We are further not persuaded by any of the additional issues he raises in this appeal. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

