

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-3038-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN C. KOSHICK D/B/A JACK KOSHICK PRESENTS,

PLAINTIFF-APPELLANT,

V.

**STATE OF WISCONSIN AND WISCONSIN STATE FAIR
PARK,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
DIANE M. NICKS, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. John Koshick appeals from an order dismissing his complaint against the State of Wisconsin and Wisconsin State Fair Park.¹ The

¹ This is an expedited appeal under WIS. STAT. RULE 809.17.

issue is whether dismissal with prejudice was properly imposed as a sanction for Koshick's failure to file a brief. We conclude it was not, and we reverse.

¶2 Koshick's complaint sought nearly \$6 million in damages for the defendants' breach of a contract which allowed him to stage an event at the State Fair Park grounds. The defendants moved to dismiss the action on sovereign immunity grounds. The circuit court issued a written briefing schedule, setting September 5, 2000, as the date for Koshick to file his brief. The next event shown in the record is that on September 15, 2000, the court entered an order dismissing the complaint with prejudice. The order noted that Koshick failed to file a brief. The order then stated that the defendants' motion to dismiss is granted, and that the case is dismissed with prejudice. Judging from the word processing file name that appears on the order, it appears the order was drafted by counsel for the defendants.

¶3 On appeal, Koshick argues the trial court erred by dismissing the complaint with prejudice. Koshick asserts he received no notice that dismissal with prejudice was being sought, because the defendants' motion to dismiss on the merits did not request that relief. Koshick notes the case law holding that dismissal should be imposed as a sanction only when there has been a finding of egregious conduct. *See, e.g., Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991). Koshick argues that the defendants, instead of filing a motion requesting a sanction of dismissal with prejudice, simply included that phrase in the order they submitted to the trial court. He asks that we amend the order to dismissal without prejudice.

¶4 In response, the defendants assert that their dismissal motion did not request dismissal with prejudice because they did not know in advance Koshick

would not comply with the briefing schedule. They argue the court granted dismissal with prejudice based on its finding that Koshick's conduct was egregious.

¶5 We are unable, from this record, to determine whether the circuit court made the necessary finding of egregiousness, or whether it then exercised its discretion to determine whether dismissal with prejudice should be imposed as a sanction. The written order does not address these issues. Nor does it appear the court was expressly asked to impose such a sanction, or that Koshick was provided with notice and an opportunity to be heard on that issue. Indeed, we are unable to determine from this record whether the circuit court itself was even aware that, by signing the defendants' order, the court was granting relief that the defendants sought as a sanction for Koshick's failure to file a brief.

¶6 Accordingly, we grant the relief requested by Koshick. On remand, the circuit court shall amend the dismissal order to a dismissal without prejudice.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

