

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 2010

A. John Voelker
Acting 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. 2009AP899

Cir. Ct. No. 2007CV134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**MILWAUKEE SAFEGUARD INSURANCE COMPANY, AS SUBROGEE OF TOM
AND RUBY THOMA,**

PLAINTIFF-APPELLANT,

v.

DIANE C. HANSON AND PETER J. MEADOWS IRREVOCABLE TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Milwaukee Safeguard Insurance Company, as subrogee of Tom and Ruby Thoma, appeals an order dismissing its claims against Diane Hanson and the Peter J. Meadows Irrevocable Trust. Milwaukee Safeguard argues the circuit court erred by: (1) dismissing its claims after striking its

amended complaint as untimely filed pursuant to a scheduling order; (2) concluding it lacked jurisdiction over the Trust due to a lack of service; and (3) failing to hold an evidentiary hearing to determine whether it had personal jurisdiction over the Trust. We reject these arguments and affirm the order.

BACKGROUND

¶2 This case arises from a subrogation action based on payments Milwaukee Safeguard made to or on behalf of its insureds, the Thomas, after a motor vehicle accident with Hanson. In April 2007, an entity identified as Kemper Insurance Companies filed suit against Hanson. The action was filed a few days before the three-year statute of limitations governing personal injury claims was set to expire. *See* WIS. STAT. § 893.54(1) (2007-08).¹

¶3 In June 2007, Hanson transferred property she owned in Menomonie to a trust that had been created for her child. Conceding Kemper was identified erroneously as the plaintiff, counsel for Milwaukee Safeguard subsequently sought to file an amended complaint, substituting Milwaukee Safeguard for Kemper Insurance Companies.² Counsel also sought to add the Trust as a defendant based on its belief that Hanson had fraudulently transferred her property.

¶4 The court ultimately issued a scheduling order specifying: “Amended pleadings, including joinder of additional parties, [are] to be filed with the Court no later than December 18, 2007.” The order further advised the parties

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² From the record, it appears that a “forms manager” of Kemper Independence Insurance Company certified a duplicate copy of the policy. That certification, however, specifies that the policy was issued by Milwaukee Safeguard Insurance Company to Tom and Ruby Thoma.

that “failure to comply with this order may result in sanctions ... including dismissal of action.” Hanson, then pro se, filed an amended answer on December 18. Although dated December 13, Milwaukee Safeguard’s amended complaint was not filed in the circuit court until December 26.

¶5 It is undisputed that the amended complaint was properly served on Hanson. Based on a determination that the trustee, Peter Gunderson, lived at 1189 State Road 40 in Colfax, a process server made two failed attempts to serve Gunderson at that address. When nobody answered the door at the house on the third attempt, the process server went to the barn and ultimately left the amended summons and complaint with Peter’s brother, Andrew Gunderson. Although Peter had been receiving mail at the 1189 State Road 40 address since 1989, he resided two miles away on a farm located at Rural Route 2 (State Highway 40) in Dunn County.

¶6 In her second amended answer, Hanson alleged that based on Milwaukee Safeguard’s failure to timely comply with the scheduling order, its claims should be dismissed and it should be barred from adding the Trust to the action. In a separate answer, the Trust alleged the court lacked jurisdiction over it because the summons and complaint had not been properly served pursuant to WIS. STAT. §§ 801.11 and 801.13. After considering both written and oral argument, as well as additional documentation, the court effectively struck the amended complaint as untimely under the scheduling order, thereby resulting in dismissal of Milwaukee Safeguard’s claims. The court additionally held that failure to properly serve the trustee at his “usual place of abode” constituted a fundamental defect that deprived the court of jurisdiction over the Trust. Milwaukee Safeguard’s motion for reconsideration was denied and this appeal follows.

DISCUSSION

¶7 Milwaukee Safeguard challenges the circuit court’s decision to strike the amended complaint as untimely filed pursuant to the scheduling order. Where, as here, a party seeks to amend the pleadings more than six months after the summons and complaint are filed, the amendment may be made within the time set in a scheduling order under WIS. STAT. § 802.10, or by either leave of court or written consent of the adverse party. WIS. STAT. § 802.09(1). Pursuant to the statute, “leave shall be freely given at any stage of the action when justice so requires.” *Id.* A circuit court’s decision whether to grant leave to amend a complaint is discretionary. See *Finley v. Culligan*, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996). Further, Milwaukee Safeguard concedes that pursuant to WIS. STAT. §§ 804.12 and 805.03, the circuit court has discretion to dismiss an action for a party’s noncompliance with a scheduling order. A court has properly exercised its discretion “when it relies upon facts of record and applicable law and articulates a reasonable rationale justifying its decision.” *Rendler v. Markos*, 154 Wis. 2d 420, 433, 453 N.W.2d 202 (Ct. App. 1990).

¶8 In order to justify a dismissal under WIS. STAT. § 805.03, the party against whom the sanction is imposed must have engaged in “egregious conduct.” *East Winds Properties, LLC v. Jahnke*, 2009 WI App 125, ¶13, 320 Wis. 2d 797, 772 N.W.2d 738. We will reverse a circuit court’s imposition of a sanction for noncompliance with a court order, however, only when a party shows a clear and justifiable excuse for the noncompliance. *Id.*

¶9 Here, Milwaukee Safeguard contends its conduct was not egregious and dismissal of its claims is a harsh result for an amended complaint filed merely eight days late. It is not clear to this court, however, that the failure to identify the

correct plaintiff in the original complaint was justified. As noted above, the policy's certification clearly specifies that the policy was "issued by Milwaukee Safeguard Insurance Company to Tom and Ruby Thoma." When the circuit court nevertheless offered Milwaukee Safeguard an opportunity to remedy the error, it failed to timely file its amended complaint despite a warning that non-compliance with the scheduling order could result in dismissal of the action. The insurer's attempts to blame holiday mail delays and court staff holiday vacation are not persuasive, especially considering then-pro se Hanson was capable of timely filing an amended answer pursuant to the same scheduling order. As the court noted on reconsideration:

[A] reasonably prudent person under the same circumstances, here an attorney involved in insurance claims, would do everything necessary to make sure that ... the proper parties are correctly and timely identified and served[,] ... the complaint and any amendments are filed within time restraints as set [forth] in the court's scheduling order ... and ... all files are timely received and docketed, without exception.

Ultimately, counsel's decision to mail the amended complaint constitutes assumption of the risk of potential vagaries in mail delivery. See *Gunderson v. DOT*, 106 Wis. 2d 611, 615, 318 N.W.2d 779 (1982). Because Milwaukee Safeguard has established no justifiable excuse for its failure to timely comply with the scheduling order, we conclude the court properly exercised its discretion when striking the amended complaint and dismissing the action.

¶10 Because the amended complaint served to both substitute the plaintiff and add the Trust as a defendant, Milwaukee Safeguard's failure to timely file the amended complaint justifies dismissal of its claims against both Hanson and the Trust. Therefore, we need not address Milwaukee Safeguard's alternative claims regarding the court's additional determination that it lacked jurisdiction

over the Trust. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

By the Court.—Order affirmed.

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

