

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2003

Cornelia G. Clark
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. 02-2367

Cir. Ct. No. 00-CV-57

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NORMAN KUEHLING,

PLAINTIFF-(IN T. CT.),

NORMA KUEHLING,

PLAINTIFF-APPELLANT,

v.

VILLAGE OF UNITY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Norma Kuehling appeals the circuit court's judgment dismissing her action against the Village of Unity as a sanction for her

failure to comply with a circuit court discovery order and local court rules. Kuehling argues that the circuit court erroneously exercised its discretion in dismissing this action. We agree. Therefore, we reverse.

¶2 “Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary.” *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995). The supreme court has explained “that dismissal is appropriate only where the noncomplying party’s conduct is egregious or in bad faith and without a clear and justifiable excuse.” *Id.* A circuit court’s decision to dismiss an action for a party’s failure to comply with court orders or rules is discretionary, and will be upheld on appeal unless the circuit court misuses its discretion. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). “A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.*

¶3 Kuehling contends that the circuit court erroneously exercised its discretion because it did not adequately explain why it chose the extremely harsh sanction of dismissal for her failure to timely name experts, rather than simply prohibiting her from calling any experts as a sanction.¹ Kuehling also contends

¹ Kuehling brought claims for unlawful condemnation, private nuisance, trespass,—based on both the sewage effluent discharged onto her land and agents of the city entering onto and working on her land—and breach of warranty. We agree with Kuehling that expert testimony is not required to substantiate all—or perhaps any—of these claims. See *Kujawski v. Arbor View Health Care Center*, 139 Wis. 2d 455, 463, 407 N.W.2d 249 (1987) (“When the determination involves matters within the common knowledge, no expert testimony is necessary”).

that the circuit court misused its discretion by dismissing her case by written order before the hearing on the dismissal motion was scheduled, depriving her of an opportunity to show that she had an excuse for not having complied with the order to name her experts—the Village was not forthcoming with public records she needed to determine what experts she would call.

¶4 We conclude that the circuit court erroneously exercised its discretion. The circuit court did not provide an adequate rationale in its decision for the course of action it chose. The circuit court’s decision discusses the prejudice to the Village because Kuehling had failed to name experts in compliance with the circuit court’s order, but does not explain why the more severe sanction of dismissal was warranted, rather than simply not allowing Kuehling to put on any experts. We also believe that the circuit court’s decision to dismiss by written order before the scheduled hearing prevented Kuehling from providing the court with an explanation for her failure to comply with the discovery order, depriving the court of all the relevant facts it needed to make its decision. *See Johnson*, 162 Wis. 2d at 273 (the circuit court misuses its discretion if it does not examine all of the relevant facts and use a demonstrated rational process to reach a reasonable conclusion).

¶5 The Village moves for attorney’s fees and costs, arguing that this appeal is frivolous. *See* WIS. STAT. RULE 809.25(3) (2001-02).² We have concluded this appeal does have merit. We deny the motion.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

By the Court.—Judgment reversed and cause remanded.

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

