COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1626 **Cir. Ct. No. 2008CV16310**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ROMAN ZROTOWSKI,

PLAINTIFF-APPELLANT,

V.

NATIONWIDE INSURANCE COMPANY OF AMERICA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Roman Zrotowski, *pro se*, appeals a judgment and an order of the circuit court. The order denied Zrotowski's request to postpone a summary judgment hearing, granted Nationwide Insurance Company of America's motion to strike Zrotowski's summary judgment response, and granted

Nationwide's motion for summary judgment on all of Zrotowski's claims. The judgment held Zrotowski liable for $3,166.90 in costs. Zrotowski contends the circuit court erred in holding his pattern of conduct to be egregious enough to warrant the drastic sanction of striking his summary judgment response, which resulted in dismissal of Zrotowski's claims. We affirm.

BACKGROUND

¶2 Zrotowski owned a house in Milwaukee, which was burglarized and vandalized on November 13, 2007. Zrotowski submitted a claim to his insurer, Nationwide, which issued two checks: one for $2,635.36, for personal property, and one for $11,777.69, for structural damage, based on the "actual cash value" of the property.[1]

¶3 Zrotowski, believing his claims were worth more, did not cash the checks. Zrotowski claims Nationwide agreed to make a second adjustment but it never did. On November 20, 2008, just before the one-year anniversary of the loss, Zrotowski filed a complaint against Nationwide, alleging breach of contract and seeking $37,000 for property loss in addition to the two checks already issued. He also sought compensatory and punitive damages for alleged bad faith, including $5,000 for emotional distress.

¶4 The circuit court entered a scheduling order on August 7, 2009. The order required Zrotowski to name any expert witnesses and file their written reports by September 8. Also, discovery would close on November 23; final

[1] It appears that "actual cash value" is the repair or replacement cost of an item, minus depreciation.

pretrial reports would be due January 22, 2010; and a pretrial conference would be held January 29. The order further contained two provisions set forth in bold typeface. One, "[D]eadlines set forth in this order may not be extended without the consent of the court," and two, "The court will sanction parties who fail to comply with the provisions of this order. Sanctions may include entering judgment or dismissing claims or defenses."

¶5 On September 11, 2009, Zrotowski moved for an extension of time to name experts because the expert he had retained had not yet provided an adequate report. On September 17, Nationwide moved to foreclose Zrotowski from naming experts because the deadline set forth in the scheduling order had passed. On September 23, Zrotowski retained Erik Colque, Esq., who moved on October 8 to amend the scheduling order to allow additional time for naming witnesses and providing expert reports. The motion noted that Zrotowski's expert "ha[d] refused to continue" on his behalf.[2] An off-the-record status conference was held on October 14.

¶6 At a December 9, 2009 motion hearing, the circuit court noted that during the October 14 status conference, it had "indicated that obviously it would behoove the plaintiffs to have their … experts and file their reports" by the December hearing date. The circuit court observed that not only had Zrotowski not named experts or produced their reports, but he also wanted an additional thirty to forty-five days in which to do so. The circuit court declined to grant the extension and foreclosed Zrotowski from naming experts in the future. It noted

[2] According to the expert's letter to Zrotowski, he had not actually been retained to be an expert witness, only to provide a repair estimate. Further, because Zrotowski had failed to comply with the agreed-upon payment terms, the "expert" withdrew his estimate.

that it had already offered Zrotowski extra time and still nothing had been accomplished, and the circuit court had no assurance that an expert would be named in the next thirty days even if that extension were granted. On December 28, 2009, Colque moved to withdraw.

¶7 On January 8, 2010, Nationwide moved for summary judgment on all claims. It asserted that Zrotowski's losses, including the damage to the heating and plumbing systems that constituted a large portion of the claim, predated the burglary and vandalism; Zrotowski had not adequately documented his losses consistent with policy requirements; expert testimony was necessary on causation, damages, and especially on depreciation; and the lack of experts was fatal to Zrotowski's claims. The court set a briefing schedule with Zrotowski's summary judgment response due on February 25. The order advised that the written deadlines would not be modified without permission of the circuit court. A motion hearing date set for April 5 was rescheduled to May 10 at Nationwide's request.

¶8 In the interim, another hearing was held on January 29, 2010, the original final pretrial date. The first issue was Colque's motion to withdraw. Colque indicated that Zrotowski was insisting on a course of conduct with which counsel disagreed and that Zrotowski was making his representation "unreasonably difficult." Counsel also noted that Zrotowski had not complied with the original fee agreement, and informed the circuit court that he was attempting to dictate terms that "differ[ed] greatly" from the written fee agreement. For instance, counsel indicated that Zrotowski would not allow him to

appear at a second deposition or order transcripts thereof.[3] Zrotowski responded that as the client, he was simply attempting to limit counsel to reasonable expenditures, and that he did not want to give up "veto power" over charges. Zrotowski further complained the withdrawal would prejudice him because he would be out of state between February 13 and March 6 to take the Nevada bar exam.

¶9 The circuit court allowed Colque to withdraw, explaining to Zrotowski that

> [y]ou can't just file a lawsuit and expect things to happen without complying with the laws and following orders of the court. And I think that's happening here, and you have to become familiar with what's required here, either through the assistance of your lawyer or on your own if you're going to be pro se.
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> …
>
> Now, either you have a claim and you can prove it and proceed and you've got to go about doing that, whether it's pro se or it's with your attorney, and so far I haven't seen that happening, sir. And I don't know if you really understand that.

The circuit court then set April 26, 2010, as a status conference date.[4] On April 16, Zrotowski filed his summary judgment response and moved for an eight-week delay of the hearing.

[3] It is worth noting that Zrotowski had refused to show up on his first deposition date because Nationwide would not reschedule so Zrotowski could appear *with counsel*.

[4] The circuit court did not sign the order allowing Colque to withdraw until March 18, 2010.

¶10 At the April 26, 2010 status conference date, Zrotowski advised the circuit court that he would not be hiring a new attorney: "My search for attorney was long before last hearing. I mean, sometime before last hearing on January 29th and pretty much knew that it will be almost impossible for me to find a counsel." Zrotowski cited the cost of hiring counsel, and the fact that deadlines in the case were having a "cooling effect." The circuit court concluded that Zrotowski "didn't have any real intention of having an attorney in January." The circuit court went on to direct Nationwide to reply to Zrotowski's summary judgment response by May 3, in advance of the previously-scheduled May 10 hearing date. Zrotowski asked if he could bring his expert witness or affidavit; the circuit court denied the request.

¶11 On April 30, 2010, Nationwide moved to strike Zrotowski's response because it was untimely and "continue[d] a patterned of Plaintiff's ignoring the court's orders, failing to comply with the court's deadlines, and attempting to delay or obstruct the proceedings."[5] The motion further objected to Zrotowski's requested eight-week delay of the summary judgment hearing.

¶12 At the May 10, 2010 hearing, following the parties' arguments, the circuit court began its ruling by summarizing the case's procedural history. It then determined it would strike Zrotowski's summary judgment response both because it was untimely and because of Zrotowski's ongoing failure to comply with the scheduling and briefing calendars. The circuit court noted that the delays occasioned by Zrotowski "really cannot be excused in the overall scheme of this

[5] The document also contained, as an alternative, Nationwide's reply to the summary judgment response.

entire record." It deemed Zrotowski's conduct "egregious as evidenced by what is in the record." The circuit court additionally observed that there was no evidence submitted to give rise to a general issue of material fact that would warrant denying summary judgment. Thus, after striking Zrotowski's response, the circuit court granted Nationwide's motion for summary judgment and dismissed Zrotowski's claims. Zrotowski appeals.

DISCUSSION

¶13 Despite the lengthy factual recitation, the issue presented is straightforward: whether the circuit court erred in striking Zrotowski's summary judgment response based on a finding of egregiousness.[6]

¶14 The decision to impose sanctions is discretionary. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 515, 634 Wis. 2d 553, 560. We sustain a discretionary decision 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." ***Ibid.*** The circuit court is vested with broad discretion to sanction parties for violating scheduling orders. ***Id.***, ¶19, 247 Wis. 2d at 515, 634 N.W.2d at 561.

[6] Nationwide appears to contend that the summary judgment response was struck simply for its tardiness, then the case was dismissed for Zrotowski's egregious behavior. We do not read the summary judgment order and transcript quite this way, in part because Nationwide's motion to strike was based on both the lateness of Zrotowski's response and a pattern of missed deadlines. It thus appears that the summary judgment response was stricken for ongoing egregious behavior, of which tardiness was simply one element. With the response stricken, the circuit court then granted summary judgment to Nationwide because no genuine issue of material fact existed on the record before it. We note, however, that it also appears that the circuit court did not perceive any genuine issue of material fact even if Zrotowski's response was not stricken.

¶15 Because the circuit court's sanction here—striking the summary judgment response—had the ultimate effect of dismissal, Zrotowski's conduct must have been egregious, and it must lack a clear and justifiable excuse. *See* ***Schneller v. St. Mary's Hosp.***, 162 Wis. 2d 296, 308, 470 N.W.2d 873, 877 (1991); *see also* ***East Winds Properties, LLC v. Jahnke***, 2009 WI App 125, ¶13, 320 Wis. 2d 797, 806, 772 N.W.2d 738, 742. "Egregious conduct is conduct that, although unintentional, is 'extreme, substantial and persistent.'" ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 717, 666 N.W.2d 38, 46. (quoted source omitted). In addition, conduct may be egregious without being in bad faith. ***Sentry Ins.***, 2001 WI App 203, ¶21, 247 Wis. 2d at 516–517, 634 N.W.2d at 561.

¶16 We have reviewed the circuit court's ruling and agree with its egregiousness finding. First, Zrotowski never did comply with the original scheduling order: he failed to sufficiently identify expert witnesses or procure their reports, despite the circuit court's provision of at least one extension through December 9, 2010; he failed to submit his discovery materials by the closing date; he failed to file motions in limine; and he failed to file a final pretrial report.[7]

¶17 Second, Zrotowski failed to comply with the summary judgment briefing schedule. He appears to argue that the relevant orders were confusing.

[7] Zrotowski attempts to lay blame for these omissions at Colque's feet. Assuming without deciding that Colque's behavior was also egregious, Zrotowski cites no authority for the proposition that counsel's actions cannot be attributed to the client. *Cf., e.g.*, ***Schneller v. St. Mary's Hosp.***, 162 Wis. 2d 296, 301–302, 470 N.W.2d 873, 874 (court denied motion and dismissed case because plaintiffs' counsel's conduct was egregious). We do note, however, that Zrotowski was well aware of the scheduling obligations before, during, and after counsel's appearance in this matter, and the departure of the first expert is squarely on Zrotowski, not counsel.

However, Zrotowski does not specifically identify what about the orders caused confusion, nor does he show that he ever took steps to remedy his confusion. We generally do not abandon our neutrality to develop a party's argument.[8] *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142–143 (Ct. App. 1987).

¶18 To the extent that Zrotowski is complaining because the order allowing Colque to withdraw was not signed until March 18, 2010, after the summary judgment response deadline passed, we observe the following. Colque advised Zrotowski in a January 11, 2010 letter: "Considering your instructions and my motion to withdraw, I have not reviewed the summary judgment

[8] Although Zrotowski does not so specify, it appears his alleged confusion may stem from the circuit court's oral ruling at the January 29, 2010 conference. The circuit court stated:

> Now, what I'm willing to do … you say you're going to be out of the state from February 13th to March 6th. I will give you until sometime after that to perhaps retain new counsel. If you don't, at the next court appearance, I will set some dates within which you're going to be required to respond to their pending motions …. If you don't get counsel, you then would have to respond to their summary judgment yourself[.]
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> … [G]iven the fact that I've allowed counsel to withdraw, I'm going to give you the opportunity, if you wish and since you're going to be gone, to decide whether or not to retain counsel and to do so. If not, at the next appearance this case is going to move forward[.]

The next court date was April 26, well after the February 25 deadline for a summary judgment response. We suspect Zrotowski's argument would be that this oral pronouncement contradicted the written briefing schedule, although that would mean that Zrotowski was, in fact, fully aware of the briefing schedule order. However, we do not consider any confusion to be a clear and justifiable excuse.

As we have seen, the circuit court concluded that Zrotowski never had actually intended to hire new counsel. As we will see, Zrotowski knew that Colque was not going to handle the summary judgment motion for him. We therefore conclude that any "confusion" is directly attributable to Zrotowski's own actions.

materials[.]" Colque further explained that, "consistent with my understanding to only do what you direct me to do, I will not be reviewing, analyzing or providing you any opinion" on the summary judgment motion unless directed otherwise.

¶19 Thus, on January 11, 2010—three days after the summary judgment motion was filed—Zrotowski *knew* that the response would be due on February 25, *knew* that Colque was not going to prepare the response, *knew* that this lack of action was at Zrotowski's own directive, and *knew* that he would be out of town for an extended period of time. By January 29, Zrotowski also *knew* that Colque was permitted to withdraw and he *knew* that he would not be hiring replacement counsel. In addition, although the withdrawal order was not signed until March—which Zrotowski notes because he claims he would not have been able to file a response while still represented—Zrotowski did not immediately submit his response when counsel was finally ordered off the case but, instead, he waited another month before filing anything related to the summary judgment motion.

¶20 Zrotowski's motion to delay the summary judgment hearing by eight weeks so that he could gather evidence also supports the egregiousness determination. By April 26, 2010, nearly a year and a half had passed since the suit was commenced, and nearly two and a half years had passed since the original loss. Although Zrotowski was not required to present his entire case to defend against a summary judgment motion, surely, by that point, he had some evidence available to timely submit a response to a summary judgment motion to try to show the existence of a genuine issue of material fact, yet the circuit court noted that Zrotowski had not submitted anything of substance.

¶21 While Zrotowski insists his behavior was not in bad faith, we have seen that egregious behavior need not be in bad faith or even intentional. ***Teff***, 2003 WI App 115, ¶14, 265 Wis. 2d at 717, 666 N.W.2d at 46. However, Zrotowski's repeated missing of deadlines was extreme, substantial, and persistent, and the requested delay of the summary judgment hearing simply crystallized Zrotowski's extreme, substantial, and persistent lack of preparedness and his complete failure to meaningfully advance his case.

¶22 It was, therefore, not an erroneous exercise of discretion to strike the summary judgment response. Once that response was stricken, it was not erroneous to grant Nationwide's summary judgment motion.[9]

[9] Zrotowski's brief, which is mainly a school of red herring, raises three additional inadequately-briefed points. We ordinarily do not address underdeveloped arguments, *see* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244–245, 430 N.W.2d 366, 369 (Ct. App. 1988), though we choose to briefly address these three.

First, Nationwide had moved to bifurcate the breach of contract claims from bad faith and punitive damages claims, which was allowed pursuant to stipulation. Zrotowski thus contends the bad faith and punitive damages claims survived the summary judgment. However, the bad faith and punitive damages claims were bifurcated only "to the extent that they would survive any Summary Judgment or Dismissal Claims." Therefore, none of Zrotowski's claims remain.

Second, Zrotowski asserts that the circuit court ruled at the summary judgment hearing that experts were not necessary. It appears that the court's discussion of the need for experts is confined to evidence of property values: the court noted that Zrotowski could have offered his own testimony to refute Nationwide's assertion that Zrotowski had no documentation of value. However, it appears experts were still expected for causation and, possibly, depreciation.

Third, Zrotowski complains that the circuit court expected more of him than a normal *pro se* litigant because the circuit court knew that he had graduated from law school. The circuit court's comments in this regard are irrelevant: *pro se* litigants, while they may be afforded some leniency, are bound by the same rules as attorneys. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451–452, 480 N.W.2d 16, 19–20 (1992).

By the Court.—Judgment and order affirmed.

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