

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2005

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. 04-0517
STATE OF WISCONSIN**

Cir. Ct. No. 01CV000987

**IN COURT OF APPEALS
DISTRICT II**

**A.I.M. RETURNABLE PACKAGING SOLUTIONS, INC. AND
THOMAS STAFFORD,**

PLAINTIFFS-APPELLANTS,

v.

ROSE STAFFORD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. A.I.M. Returnable Packaging Solutions, Inc. and Thomas Stafford (collectively, A.I.M.) appeal from a judgment dismissing claims against Rose Stafford for corporate fraud, misappropriation of corporate funds, and improper and unauthorized corporate acts. The claims were dismissed as a

discovery sanction. We conclude that the circuit court properly exercised its discretion in imposing the sanction of dismissal and affirm the judgment.

¶2 Thomas and Rose Stafford, husband and wife, were equal owners of A.I.M. In 2001, a divorce action was started. In October 2001, A.I.M. commenced this action, alleging that Rose had diverted corporate funds to personal use and misinformed business contacts that Thomas had been removed as president and that Rose was in complete control of the company (hereinafter referred to as the “corporate claims”). A defamation cause of action was also alleged.

¶3 In May 2003, Rose moved to adjourn the jury trial scheduled to start June 2, 2003. The motion alleged that Rose had not been able to adequately prepare for trial because after a scheduled deposition was canceled, Thomas had failed to make himself available for a discovery deposition. The June jury trial was adjourned. At a motion hearing held on October 10, 2003, it was determined that the corporate claims would be tried with the pending divorce action and the defamation claim would be tried to a jury.¹ This caused the trial set for October 13, 2003, to be adjourned. Although discovery deadlines had passed, the court allowed Rose to complete Thomas’s deposition with respect to the corporate claims.

¶4 On December 15, 2003, Rose moved for an order compelling Thomas to appear for a deposition that was set for Monday, December 22, 2003. The motion alleged that despite having confirmed the agreed-upon December 22

¹ The defamation claim was set for trial on January 12, 2004. That claim was later dismissed by a decision and order entered December 23, 2003.

deposition by a letter dated December 4, not until December 12 was Rose's attorney informed that Thomas would not personally appear because he would be on a three-week, two-day business trip to Florida and would not return until a few days before the scheduled trial. The motion explained that because documentary evidence would be reviewed during the deposition, a telephonic deposition was inadequate.

¶5 The motion was heard on Friday, December 19, 2003. Thomas's attorney stated that there had been miscommunication between himself and Thomas about when Thomas would be gone. He promised that Thomas would be available for a deposition in January and in plenty of time before trial.² He suggested that by insisting that the deposition be conducted in advance of the trial on the defamation claim, Rose was attempting to use the deposition for prohibited discovery on the defamation claim. He argued that it was burdensome for Thomas to return from Florida or bear the expense of a video conference deposition. The circuit court found that Thomas knew about the deposition before leaving for Florida and that he should not have left without resolving when or how the deposition would take place. The court required Thomas to appear on December 22 for the deposition and indicated that if he did not appear, appropriate sanctions would be applied. (As an alternative, Thomas could appear by video conference and pay that expense.) Late in the day on December 19, Thomas's attorney indicated that Thomas's personal appearance could not be arranged. The December 22 deposition was not held.

² The record does not establish the trial date for the divorce case and the corporate claims.

¶6 On December 22, 2003, Rose moved for dismissal of the corporate claims as a sanction for Thomas's failure to appear and produce records at the deposition as ordered by the circuit court. Thomas moved for relief from the order compelling his appearance at the December 22 deposition. The circuit court found that the original scheduling order required discovery to be completed by May 22, 2003. The court found it received an April 30, 2003 letter indicating difficulty in getting Thomas's deposition done because Thomas would be in Texas on possible deposition dates.³ It deemed Thomas's failure to appear at the December 22 deposition to be the second time an order in regard to discovery had not been complied with. It concluded that regardless of whether the fault lay with calendaring by Thomas's attorney or Thomas's decision not to make himself available, its order to appear was violated. It found the conduct egregious and dismissed the corporate claims for the failure to prosecute under WIS. STAT. § 805.03 (2003-04).⁴

¶7 A circuit court's decision to dismiss an action is discretionary and will not be disturbed unless the circuit court erroneously exercised its discretion. *See 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.* Dismissal as a sanction for the failure to comply with a court order is

³ The April 30, 2003 letter requested that a May 22, 2003 pretrial conference be converted to a status conference because Thomas was unavailable for a deposition in advance of the pretrial date.

⁴ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

appropriate only in cases of egregious conduct by the noncomplying party. *Id.* at 275. “[W]e will sustain the sanction of dismissal if there is a reasonable basis for the circuit court’s determination that the noncomplying party’s conduct was egregious and there was no ‘clear and justifiable excuse’ for the party’s noncompliance.” *Id.* at 276-77. Dismissal need not be supported by actual prejudice to the opponent because the authority to impose the sanction of dismissal emanates from a need to prevent injustice to the operation of the judicial system as a whole and the circuit court’s need to efficiently and effectively administer judicial business. *Id.* at 281-82.

¶8 Thomas first argues that the circuit court erroneously exercised its discretion by considering delays in discovery that pertained only to the divorce action and by relying on Rose’s factual misrepresentations. We disagree. The record demonstrates that the inability to take Thomas’s deposition affected the progress of this case towards trial. Moreover, the circuit court did not sanction Thomas for his past evasiveness in making himself available for a deposition. The past events were merely background for why the December deposition was so late in happening and the import to timely completing it.

¶9 Thomas does not directly challenge the circuit court’s ruling on Friday, December 19, 2003, that Thomas had to personally appear at the deposition on the following Monday. That ruling was justified in light of the approaching trial date and the finding that Thomas left Wisconsin knowing that the controversy surrounding the properly noticed deposition had not been resolved. With that order in place, the only issue is whether Thomas’s failure to comply with the court order requiring his personal appearance at the deposition was egregious conduct and without a clear and justifiable excuse.

¶10 Thomas argues that his conduct was not egregious because it was not reasonable or possible for him to comply in the short period of time between the circuit court's Friday ruling and the deposition the following Monday. At the hearing on the motion to dismiss, Thomas did not offer to the circuit court any proof that he was unable to comply or that the cost of compliance was prohibitive. Indeed, the circuit court found that Thomas had made a decision not to make himself available for the Monday deposition. He exhibited an intentional and flagrant disregard of the court's order. Further, no excuse was offered other than a miscommunication between Thomas and counsel. We conclude that the circuit court properly exercised its discretion in dismissing Thomas's corporate claims as a sanction for not appearing for the deposition as ordered.

¶11 Rose moves for an award of costs and attorney fees against Thomas for filing a frivolous appeal under WIS. STAT. RULE 809.25(3). The appeal challenged a discretionary decision involving a harsh sanction and, therefore, is not completely void of arguable merit. We deny the motion for an award under RULE 809.25(3).

By the Court.—Judgment affirmed.

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

