

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2011

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. 2011AP444

Cir. Ct. No. 2009CV105

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CRAIG MUENCHOW AND AMY MUENCHOW,

PLAINTIFFS-APPELLANTS,

V.

DAVID SCHMIDT AND RAE SCHMIDT,

DEFENDANTS-RESPONDENTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT,

STATE FARM FIRE AND CASUALTY COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. The denial of an extension of time to name experts effectively dismissed the plaintiffs' case. The circuit court found that their lawyer's conduct was egregious, and it was. What the court failed to do, however, despite an express request, was to determine if the plaintiffs shared any of the fault so as to merit the harshness of dismissal. We therefore reverse and remand for findings as to the blameworthiness, if any, of the plaintiffs.

¶2 Craig and Amy Muenchow and David and Rae Schmidt own adjacent vacation cottages. The Muenchows' property lies lower than the Schmidts'. The Schmidts built a garage on their property in 2003. In 2004, the Muenchows began experiencing serious flooding problems. The Muenchows believed that the Schmidts' garage redirected the natural flow of water.

¶3 The Muenchows, through their former counsel, filed suit against the Schmidts in April 2009. In April 2010, they discharged him and retained current counsel, the Law Office of Daniel W. Stevens ("Stevens"). Stevens filed an amended complaint on April 22, 2010. About three weeks later, Stevens filed a Second Amended Complaint alleging private nuisance, negligence, unintentional trespass and physical injury to and interference with real property pursuant to WIS. STAT. § 844.01 (2009-10).¹

¶4 The scheduling order directed the Muenchows to name their witnesses and provide reports from their experts by August 2, 2010. They retained a surveyor, a storm water engineer and an appraiser as their experts and timely

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

provided all reports to Stevens. The witness list and reports were not provided to opposing counsel by the deadline, however.

¶5 The Schmidts timely provided their witness list and expert reports on October 15. A lay witness, a former neighbor to the Muenchow property, would testify that she was aware of flooding on the property before the Muenchows owned it. A construction and engineering expert opined that the problem was caused by defects in the Muenchow cottage itself, such as no rain gutters in the area where water intrusion occurred. A hydrogeologist opined that the Schmidt garage, which is to the south of the Muenchow cottage, did not impact the quantity of runoff directed toward the northeast corner of the Muenchow cottage, where they suffered the flood damage.

¶6 Also on October 15, the Schmidts filed a motion for summary judgment. They argued, first, that WIS. STAT. § 844.01 does not create a cause of action. *See Menick v. City of Menasha*, 200 Wis. 2d 737, 747, 547 N.W.2d 778 (Ct. App. 1996). Second, they asserted that the failure to name experts doomed the Muenchows' remaining claims because all required proof of negligence, and negligence requires proof of causation which, in turn, requires expert testimony. As the record stood, the undisputed evidence was that the garage did not cause the Muenchows' claimed damages.

¶7 The Muenchows did not respond to the summary judgment motion. Instead, nearly four weeks later, Stevens provided Muenchows' witness list and expert reports and simultaneously moved to amend the scheduling order. The accompanying affidavit explained Stevens' intra-office protocol for handling cases and how the deadline for providing the witness list and expert reports was believed to have been missed. The Muenchows requested an extension of time to name

witnesses, on the grounds that they had been diligent in obtaining the required expert opinions and the Schmidts could not claim surprise because they knew that the Muenchows had experts who had completed property inspections.

¶8 The court found that Stevens's internal lapses did not demonstrate good cause. It also expressed some incredulity that Stevens neither attempted to remedy its failing as soon as it came to light nor responded to the summary judgment motion. The court therefore denied the Muenchows' motion to amend the scheduling order, granted the Schmidts' motion for summary judgment and dismissed the Muenchows' case.

¶9 The Muenchows moved for reconsideration. They asserted that it was error to impute Stevens's conduct to them and dismiss their case without specifically finding that they shared in the blame for the offending conduct. The circuit court declined to probe the attorney-client relationship so as to assign the greater weight of responsibility to one or the other, however. It found that the failure to comply with the scheduling order deadlines without good reason was egregious. It also noted that the grant of summary judgment in favor of the Schmidts was not a sanction but a recognition that the motion for summary judgment went utterly unanswered. The court denied the Muenchows' motion and dismissed the case. The Muenchows appeal.

¶10 The decisions of whether to modify a scheduling order or to dismiss an action are within the circuit court's discretion. *See Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 305, 470 N.W.2d 873 (1991). Discretionary decisions will be sustained if the 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.* at 306.

¶11 Here, the circuit court reasonably found that Stevens’ handling of the Muenchows’ case was egregious and without any clear and justifiable excuse. What gives us pause, however, is that the denial of a motion to modify a scheduling order for the purpose of naming a liability expert is the functional equivalent of a dismissal. “[D]ismissal 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).

¶12 Our supreme court has said that “it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney’s conduct to the client, where the client is blameless.” *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. In deciding whether to impute an attorney’s conduct to the client for purposes of a sanction, the circuit court must consider the client’s failure to act in a reasonable and prudent manner and his or her knowledge of or complicity in the attorney’s conduct. *Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis. 2d 707, 728, 599 N.W.2d 411 (Ct. App. 1999).

¶13 The Muenchows specifically asked the circuit court to determine, as the supreme court says it must, if some of the blame for Stevens’ egregious conduct could be laid at their feet. The court declined the invitation. We therefore reverse and remand for the court to make that finding.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

