

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

February 29, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-2448**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**MICHAEL KIDD, and  
CHERYL KIDD,**

**Plaintiffs-Appellants,**

**v.**

**SUE DIBLASIO, DANE  
COUNTY HUMANE SOCIETY,  
DAVID SONNTAG, RONALD  
MAINGUTH and LYNNE HETTRICK,**

**Defendants-Respondents.**

APPEAL from an order of the circuit court for Dane County:  
PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Michael and Cheryl Kidd appeal from an order dismissing their action against Susan DiBlasio, Dane County Humane Society (DCHS), Ronald Mainguth, David Sonntag and Lynne Hettrick. The trial court,

in response to the Kidds' motion to voluntarily dismiss the complaint without prejudice, dismissed it with prejudice. We reject the Kidds' arguments and affirm.

DiBlasio is a DCHS employee and the other individual defendants are law enforcement officers. The complaint alleged that in August 1990, after speaking with Hettrick, DiBlasio caused Sonntag and Mainguth to forcibly enter the Kidds' residence to search for evidence of animal abuse. They allegedly committed further acts in violation of the Kidds' civil rights that eventually resulted in criminal charges of animal abuse against the Kidds.

In September 1991, the Kidds commenced this action seeking recovery for property damage and, apparently under 42 U.S.C. § 1983, for violation of their constitutional rights. They subsequently obtained a stay of proceedings pending resolution of the criminal charges. In September 1992, the court allowed the Kidds' attorney to withdraw and the Kidds have represented themselves since that date. In November 1993, the trial court scheduled trial for May 1994, although the criminal action remained pending.

In January 1994, the defendants moved to compel responses to interrogatories served in November 1991, and disclosure of documents requested at the same time. In response, the Kidds moved for a protective order, citing the criminal proceeding. The trial court denied the Kidds' motion because they failed to show how the requested information would prejudice them in the criminal action. The court then ordered them to respond to the interrogatories within thirty days. The Kidds were later denied reconsideration of that order. Meanwhile, the trial was postponed until January 1995.

In May 1994, after the Kidds partially complied with the discovery order, the defendants again moved to compel discovery. Again, the Kidds sought a protective order, and again the trial court denied one. On May 16, 1994, the Kidds were ordered to provide the withheld information within fifteen days.

In a motion dated May 25, 1994, the Kidds asked the court "to put lock on evidentiary materials prejudicing parallel criminal case ongoing, or in

the alternative, to allow plaintiffs to dismiss, without prejudice, this civil case at present time." On June 14, the individual defendants moved to dismiss the complaint for failure to state a claim. On June 27, DCHS moved to compel disclosure of the Kidds' expert witnesses and a summary of each one's testimony. A hearing on all motions was scheduled for July 18 at 2:45 p.m.

At approximately 2:33 p.m. on July 18, Michael Kidd called the court and spoke to court employee Sharon Brooks. He advised her that he and Cheryl could not appear at the hearing due to car trouble. At the hearing, Brooks testified that she instructed Michael to call back at 2:45 p.m. so that he could explain the problem to the court and the defendants' attorneys on the record by using a speaker phone.

The Kidds did not call back, and at 2:55 p.m., the trial court proceeded with the hearing. The court denied relief on the "lock" motion because the matter had been previously litigated and resolved in the defendants' favor. The court then deemed it appropriate to grant the Kidds' alternative request to dismiss the action. However, the trial court determined that it should be dismissed with prejudice. The court relied on the Kidds' failure to comply with discovery requests and orders, and their demonstrated bad faith in prosecuting the action. As evidence of their bad faith, the court cited their recently expressed willingness to dismiss the case in exchange for dismissal of the criminal charges.

The Kidds did not attempt to reopen the matter or obtain reconsideration until after they commenced this appeal. The issues on appeal are whether the trial court properly proceeded with the July 18 hearing in the Kidds' absence and, if so, whether the court properly denied the "lock" motion and granted a dismissal with prejudice. We also address whether the court was demonstrably biased toward the Kidds. We do not review whether the trial court erred by subsequently denying the reconsideration motion brought after this appeal commenced because the Kidds did not appeal that decision.

The trial court properly allowed the July 18 hearing to proceed. The Kidds received notice of the hearing several weeks in advance. The court heard testimony that Michael Kidd phoned a court employee at 2:33 p.m. to report car trouble and was told to call back at 2:45 to speak on the record. When

he did not do so, the court reasonably concluded that the Kidds voluntarily chose to abandon their request for a postponement. Although the Kidds now allege that Michael was not told to call back, they did not make that allegation until after commencing this appeal, and their evidence to support it is, therefore, not of record.

The trial court properly denied the motion to "lock" the discovery materials. The issue whether disclosing those materials was unfairly prejudicial in the criminal case had been litigated twice previously. Despite those opportunities, the Kidds never demonstrated that disclosing the requested information violated their Fifth Amendment right to remain silent, or unfairly prejudiced them in the criminal proceeding in any other manner. The trial court's May 16 order prompting the latest motion required the Kidds to identify their treating veterinarians and to disclose statements and reports given them by those veterinarians. Nothing in the order implicated the Kidds' constitutional rights in the criminal proceeding.

The trial court reasonably chose to dismiss with prejudice. Section 805.04(2), STATS., provides that the trial court may approve a voluntary dismissal request, "upon such terms and conditions as the court deems proper." Those terms may include dismissal with prejudice. *Bishop v. Blue Cross & Blue Shield*, 145 Wis.2d 315, 319, 426 N.W.2d 114, 116 (Ct. App. 1988) (citing *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986), for its interpretation of the federal counterpart to § 805.04(2)). Here, over the course of three years, the Kidds had done nothing to prosecute the matter. They had refused discovery, and opposed motions compelling discovery, on flimsy and unsubstantiated grounds. When required to submit a list of witnesses for trial, the Kidds presented a preposterously long list including the judge and prosecutor in the criminal proceeding, the clerk of the circuit court, the Dane County executive, and numerous other people with no conceivable connection with this case. A few weeks before the hearing, the Kidds stated, in writing, their willingness to drop the action in exchange for dismissal of the criminal charges. Given these circumstances, the trial court reasonably concluded that the Kidds were using the action in a bad faith effort to gain bargaining leverage in the criminal prosecution. That conclusion, in turn, reasonably allowed the trial court to dismiss with prejudice.

Additionally, the Kidds knew or should have known that dismissal with prejudice was a potential result of the hearing. First, they had notice that among the pending matters was the defendants' motion to dismiss. Second, if the Kidds did not know that § 805.04(2), STATS., allowed the trial court to so modify their voluntary dismissal request, they should have. It is plainly acknowledged to be the law in *Bishop*.

The record does not disclose that the trial court was biased against the Kidds. They contend that the court's actions at the July 18 hearing speak for themselves in establishing bias. We disagree. The court knew only that the Kidds had been offered the opportunity to explain their non-appearance on the record, and had evidently declined to do so. The court's subsequent decisions were not a demonstration of bias, but a reasonable response to the motions pending before it and the record of the case as established over three years.

*By the Court.* – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.