

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 15, 1995

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. 94-2461

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JAMES WIECHMANN, D.B.A.,

Plaintiff,

v.

**COLIN ILSLEY
and ROGER ILSLEY,**

Defendants-Third Party Plaintiffs-Appellants,

JED GROSSER,

Defendant,

KARL SCHREIBER,

Third Party Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
FRANK T. CRIVELLO, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Colin Ilsley and Roger Ilsley (Ilsleys) appeal from an order dismissing with prejudice their third-party complaint against Karl Schreiber. The Ilsleys present one issue for our review – whether the trial court erroneously exercised its discretion by granting Schreiber's motion to dismiss. They argue that the trial court's reason for dismissing the complaint, that their third-party complaint was untimely filed in violation of the court's scheduling order, did not rise to the level of “egregious conduct” necessary to support such a dismissal. We agree with the Ilsleys and conclude that there is no reasonable basis for the trial court's conclusion that the Ilsleys' conduct was egregious. Accordingly, the trial court erroneously exercised its discretion and we reverse the trial court's order and remand the matter for further proceedings consistent with this opinion.

In November 1993, James Wiechmann (d/b/a Wiechmann Enterprises Unlimited), a landlord, filed a small claims action for approximately \$1,100 against his former tenants Colin Ilsley, Jed Grosser, and Karl Schreiber. In December 1993, the Ilsleys answered the small-claims complaint and filed a counterclaim against Wiechmann for damages greater than the jurisdictional limit for a small claims action. Consequently, the action was moved to the circuit court.

At the time the action moved to the circuit court, Schreiber had a pending motion to dismiss him as a party because of Wiechmann's failure to serve upon him a copy of the original complaint. At a status conference, the parties stipulated to dismiss Schreiber as a party without prejudice, and the trial court placed a scheduling order deadline of March 28, 1994, for the filing of any third-party or cross-complaints. On March 9, 1994, the Ilsleys sent a proposed order allegedly memorializing the events of the scheduling conference. The proposed order stated that any third-party complaint had to be filed and that any other parties had to be joined by April 13, 1994, and that service of any third-party complaint had to be made within sixty days from April 13, 1994. The Ilsleys never delivered a copy of the proposed order to Schreiber; accordingly, upon hearing no objection from Schreiber, the trial court signed the proposed order. The Ilsleys filed the third-party complaint that is the subject of this appeal on April 13, and served it on Schreiber on May 1, 1994.

Schreiber then filed a motion to dismiss the third-party complaint and both claims were removed from the small claims calendar.¹ After a hearing on the motion, the trial court granted Schreiber's motion and dismissed the third-party complaint with prejudice. The trial court concluded that although the incorrect dates on the Ilsleys' proposed order "were not submitted intentionally to fool the court," dismissal was "an appropriate sanction in this case."

The trial court's decision to dismiss an action is within its discretion, and we will not reverse such a determination unless the trial court erroneously exercised its discretion. *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). Dismissal is not an erroneous exercise of discretion if the aggrieved party's conduct was egregious and without a clear and justifiable excuse. *Id.* Dismissal as a sanction should be rarely granted and is only appropriate where egregious conduct is shown. *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis.2d 523, 533, 502 N.W.2d 881, 884 (Ct. App. 1993). The great majority of cases which are properly sanctioned by dismissal involve a flagrant disregard of the court's orders. *Id.* at 536 n.4, 502 N.W.2d at 886 n.4. We will sustain the sanction of dismissal if there is a reasonable basis for the trial court's determination that the party's conduct was egregious and there was no "clear and justifiable excuse." *Johnson*, 162 Wis.2d at 276-77, 470 N.W.2d at 865.

We can locate no basis for the trial court's determination that the Ilsleys' conduct was egregious. The Ilsleys' counsel, in his affidavit, stated that the erroneous dates that appeared in his proposed order were made by "mistake and inadvertence." Further, the trial court also stated, before dismissing the complaint, that it did not believe the dates were submitted intentionally. The court simply made a finding of these errors and concluded that dismissal was an appropriate sanction. The trial court erroneously exercised its discretion. Without a further demonstration in the record explaining how the errors rise to the level of egregious conduct necessary for granting a dismissal order, we conclude that dismissal of the Ilsleys' third-party complaint was an inappropriate sanction. Accordingly, the order of the trial court is reversed and we remand the matter for further proceedings consistent with this opinion.

¹ See FIRST JUDICIAL DISTRICT LOCAL RULE 304.

By the Court.—Order reversed and cause remanded with directions.

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