COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 1996

No. 95-1974

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

WILLIAM SCHLEICHERT, DOROTHY SCHLEICHERT and JOHN DOE,

Plaintiffs-Appellants,

v.

COLUMBIA COUNTY,

Defendant-Respondent.

APPEAL from an order of the circuit court for Columbia County: DONN H. DAHLKE, Judge. *Reversed and cause remanded*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

DEININGER, J. The plaintiffs appeal from an order dismissing their complaint for failure to prosecute the action under § 805.03, STATS. The sole issue is whether the trial court properly exercised its discretion in determining that the plaintiffs' failure to advance the case constituted egregious

conduct. We conclude that there is no reasonable basis to support the determination of egregiousness and, accordingly, reverse the order.

BACKGROUND

The basic facts are not in dispute. The plaintiffs are presently or have been employed as deputy sheriffs for Columbia County (County). They filed an action on April 30, 1990, in Columbia County Circuit Court seeking additional regular and overtime wages from the County.[1] Early on, there was activity in the case centering on motions for summary judgment filed by both parties. An appeal from the trial court's decision on these motions was denied, and the cause was remitted on September 4, 1992.

During a hearing on motions on October 8, 1992, the trial court ordered depositions of witnesses to take place the week of October 20, 1992 "unless the parties can agree to a different schedule." Counsel for the County, Robert Hesslink, attempted to schedule depositions of the plaintiffs during that week, but plaintiffs' counsel directed his clients not to attend the depositions. He was withdrawing from the case and did not want the plaintiffs to attend the depositions without counsel.

The trial court permitted the substitution of plaintiffs' counsel on February 3, 1993. Plaintiffs' new counsel, Jeff Olson, contacted Hesslink for information on the status of the case. Although Hesslink initially suggested scheduling depositions during the first week in March, he and Olson agreed to postpone the depositions in order to pursue settlement negotiations.

After forwarding a copy of the County's settlement offers, Hesslink wrote to Olson and stated that unless the County had received a settlement counteroffer from the plaintiffs by May 11, 1993, the County would go ahead and notice depositions of the plaintiffs. After contacting his clients and determining that there were questions regarding the method used by the

[1] The plaintiffs' complaint was originally filed in Dane County on November 22, 1989, but venue was transferred to Columbia County upon the County's motion in April 1990.

County to arrive at its settlement figures, Olson wrote to Hesslink and proposed that the parties jointly engage the services of an independent wage auditor and agree to be bound by the auditor's evaluation. Hesslink rejected the proposal in a letter dated June 8, 1993, and stated that unless the County received a settlement proposal from the plaintiffs by July 6, 1993, he would proceed to schedule the depositions.

Immediately after the letter from Hesslink, Olson was seriously injured in an accident, hospitalized for nine days and restricted to bed rest for two more weeks. Olson went back to work part-time by mid-August and wrote to Hesslink, telling him that he (Olson) would try to get some settlement figures to him by early September 1993. Olson did not communicate any settlement offers by that time. Subsequently, in early 1994, Olson decided that consultation with an expert wage auditor was necessary and retained the services of a wage expert with whom he had worked previously. In February 1994, Olson sent Hesslink a letter requesting production of the original time records of the plaintiffs. Olson sent two more letters requesting the documents. Hesslink replied in writing on April 1, 1994, stating that he would produce the documents as soon as the plaintiffs complied with the outstanding deposition order.

Olson and Hesslink spoke on April 12, 1994, and agreed that they would put off formal discovery in anticipation of further settlement efforts. Olson suggested that he would be able to prepare the settlement offer from the plaintiffs without the original time records in possession of the County.

Hesslink wrote Olson on May 4 and July 14, 1994, to inquire about Olson's progress. Although Olson did not reply to Hesslink's letters, he stated later in an affidavit that he was working with his clients during this time to calculate settlement figures based on the records already in the plaintiffs' possession.

Even though off-record discussions and communications were taking place, no formal action had occurred since February 1993, when plaintiffs' counsel was substituted. On September 27, 1994, the trial court, on its own motion, issued an order for dismissal pursuant to § 805.03, STATS., for

failure to prosecute.[2] Plaintiffs' counsel filed an objection and an affidavit explaining that he had been in an accident and outlining the off-record activities in the case. The trial court wrote both parties in October 1994 stating that although "it appears that there has been considerable movement in this case, and also Mr. Olson had a serious medical problem," it had still issued a dismissal because "none of this was apparent from the official court file." The trial court also stated that it had unsuccessfully attempted to contact the County's counsel, to see if the County had "any objection to not dismissing the above action." The County responded by requesting that the order to dismiss remain in place because plaintiffs' counsel had failed to diligently prosecute the action. The trial court held a hearing on the dismissal order on January 6, 1995, and subsequently entered an order of dismissal on August 7, 1995.

ANALYSIS

A circuit court's decision to dismiss an action under § 805.03, STATS., is discretionary and will not be disturbed unless the court has erroneously exercised its discretion. ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law and reached a conclusion that a reasonable judge could reach using a demonstrated rational process. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

It is the plaintiff's responsibility to move a case to trial. A plaintiff may not rely on the circuit court to prompt him or her to action or move a case to trial for him or her. ***Prahl v. Brosamle***, 142 Wis.2d 658, 670-71, 420 N.W.2d 372, 377 (Ct. App. 1987). In ***Prahl*** we explained:

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[2] Section 805.03, STATS., states in relevant part:

> For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a) [discovery].

> "Courts are glutted with stale lawsuits, and the responsibility of an attorney to his [or her] client, as well as to the judicial system, requires that counsel be ready for trial in a reasonable time. One of the principal causes for delay in the trial courts is the failure of counsel to be in readiness when [a] case is called for trial or [a] lack of vigor in moving [the] case to the trial stage."

Id. at 670, 420 N.W.2d 377 (quoting ***Lawrence v. MacIntyre***, 48 Wis.2d 550, 556, 180 N.W.2d 538, 541 (1970)).[3] Trial courts have a variety of measures they can, in their discretion, employ to sanction dilatory plaintiffs, including dismissal. *See* § 805.03, STATS.; § 804.12(2)(a), STATS.; § 802.10(3)(d), STATS. However, we have stated that outright dismissal 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, 69 (Ct. App. 1995).

The plaintiffs argue that the trial court should not have dismissed their complaint because there is no reasonable basis on this record to support a determination that their conduct was egregious. The County, citing ***Prahl v. Brosamle***, 142 Wis.2d 658, 420 N.W.2d 372 (Ct. App. 1987) and ***Schwab v. Baribeau Implement Co.***, 163 Wis.2d 208, 471 N.W.2d 244 (Ct. App. 1991), counters that the egregious conduct standard is limited to dismissals for noncompliance with court orders, whereas dismissals for failure to prosecute must be upheld unless the aggrieved party can show a "clear and justifiable excuse" for a delay in prosecution. Neither ***Prahl*** nor ***Schwab*** supports the County's contention, since in both we acknowledged the necessity for a finding of egregious conduct before dismissal is warranted.

In ***Prahl***, the plaintiff "did absolutely nothing" to advance his case for three years after we reversed a summary judgment and remanded his case for trial. ***Prahl***, 142 Wis.2d at 669, 420 N.W.2d at 377. The trial court granted

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[3] The plaintiffs argue that, under Wisconsin's "new" rules of civil procedure, some part of the burden for bringing cases promptly to trial rests on the trial court. While we agree that the rules, revised in 1976, contemplate a more active role for trial judges in the scheduling process, the primary responsibility for ensuring that a case progresses remains on the plaintiff. *See* ***Marshall-Wisconsin Co. v. Juneau Square Corp.***, 139 Wis.2d 112, 136, 406 N.W.2d 764, 774 (1987) ("This court has thus repeatedly stated that it is the plaintiff's burden to proceed with the prosecution of the action within a reasonable period of time.")

dismissal for failure to prosecute. In upholding the dismissal, we noted that "because dismissal is a harsh sanction, the remedy is appropriate `only in cases of egregious conduct by a claimant.'" ***Id.*** at 667, 420 N.W.2d 376 (quoting ***Trispel v. Haefer***, 89 Wis.2d 725, 732, 279 N.W.2d 242, 245 (1979)). We cited this same language in reaching a similar result in ***Schwab***. ***Schwab***, 163 Wis.2d at 215, 471 N.W.2d at 247.

Moreover, subsequent to ***Prahl***, the supreme court has held that a dismissal, whether for failure to prosecute or failure to comply with a court order, is an erroneous exercise of discretion in two situations: (1) if there is no reasonable basis to support the circuit court's determination that the aggrieved party's conduct was egregious ***or*** (2) if the aggrieved party can establish a clear and justifiable excuse for the delay in prosecuting the action. ***Monson v. Madison Family Inst.***, 162 Wis.2d 212, 224, 470 N.W.2d 853, 858 (1991)(failure to prosecute); ***Johnson***, 162 Wis.2d at 276, 470 N.W.2d at 864-865 (failure to obey court order).

The County next argues that plaintiffs' "fail[ure] to comply with a court order to appear for their depositions for over two years" was egregious conduct. The order to attend depositions was not part of a scheduling or discovery order, nor was it a written order of any kind.[4] The following is the colloquy at the October 8, 1992, hearing regarding the scheduling of depositions:

> THE COURT: Depositions have been scheduled and they should be held at the time and place they were scheduled unless the parties can agree to a different schedule.
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> MR. KAMMER [then plaintiffs' counsel]: I can tell you now that as to some of those days--and I don't have my calendar in front of me--I'm not going to be there. I have other things I have to do. I can tell you

[4] It does not appear that a scheduling order was ever entered by the court or that a scheduling conference was ever conducted. At the January 6, 1995 hearing on the dismissal order, plaintiffs' counsel requested the court to set aside its dismissal order and conduct a scheduling conference.

> that at least one of my deponents is not going to be there either....
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> If you're ordering that he must be there at the times that have been noticed, then we're going to have some real problems. If you're ordering that they be held at some reasonable and mutually convenient time, we certainly will work with Mr. Hesslink to get them scheduled.
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> THE COURT: He indicated before that he would work around it.
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> MR. KAMMER: That's fine, Judge.
>
> THE COURT: I'm starting out with the basic premise that it would be held at the time and place that it was scheduled. And like I say, both parties have common sense, and if there are circumstances that arise and change, why you have to work around it.
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> ....
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> Like I say, it's not ironclad that they be held at that time, but that's the basic premise.

Shortly after the hearing, Kammer notified Hesslink that he was withdrawing and that neither he nor his clients would be appearing for depositions on October 20, 1992. He noted the court's order that "these depositions be rescheduled to a time which is convenient for the parties." After Attorney Olson's entry into the case, Hesslink agreed to postpone the depositions in order to explore settlement. On two occasions during 1993, Hesslink stated in letters to Olson that he would notice the depositions of the plaintiffs pursuant to the court's order ***if*** a settlement offer was not forthcoming. In March of 1994, Hesslink again referred to the depositions in responding to Olson's request for wage and time records: "[W]e are willing to consider setting up a mutually agreeable time to exchange the information as soon as your clients comply with the outstanding court order to attend their depositions." No depositions were ever noticed, however.

In ***Hudson Diesel, Inc. v. Kenall***, 194 Wis.2d 531, 535 N.W.2d 65 (Ct. App. 1995), the plaintiff failed to respond to a discovery request until the defendant brought a motion for sanctions, and plaintiff's compliance thereafter was inadequate. The trial court granted a dismissal against the plaintiff for an "egregious violation of discovery procedures." ***Id.*** at 541, 535 N.W.2d at 69. We reversed, holding that where the trial court has not found that the delaying party "intentionally or deliberately delayed, obstructed or refused the requesting party's ... demand," a trial court can "only order dismissal if [the plaintiff's] conduct was egregious." ***Id.*** at 543, 535 N.W.2d 69. We further held that an action "can properly be characterized as egregious" where "the noncomplying party's conduct, though unintentional, is ... extreme, substantial and persistent." ***Id.***

Similarly, we here conclude that there is no reasonable basis to support the trial court's determination that plaintiffs' failure to appear for depositions and their delay in advancing the case constitutes egregious conduct of the type required for a dismissal under § 805.03, STATS. Here, the trial court did not find that the plaintiffs deliberately obstructed or refused to meet the County's demand. The plaintiffs assert, and the County does not dispute, that the two parties twice agreed to put off formal discovery while the plaintiffs attempted to arrive at settlement figures. Although the County could have noticed the depositions any time after October 1992, it did not do so. The record falls short of a showing that plaintiffs "intentionally or deliberately delayed, obstructed or refused the requesting party's demands." ***Hudson Diesel***, 194 Wis.2d at 543, 535 N.W.2d at 69.

Nor can the plaintiffs' behavior be characterized as "extreme, substantial and persistent." ***Id.*** In ***Monson v. Madison Family Institute***, 162 Wis.2d 212, 470 N.W.2d 853 (1991), for example, the supreme court concluded that the plaintiffs' behavior was clearly "egregious" where the plaintiffs repeatedly failed to meet deadlines set by the court, failed to give any response to the defendant's request for production of documents, conducted no discovery for nearly two years, filed its brief opposing a first motion to dismiss late and failed to respond in any way to a second motion to dismiss except to appear at the hearing. ***Monson***, 162 Wis.2d at 221, 223, 470 N.W.2d at 857. We conclude that the plaintiffs' pace of prosecution, while procrastinatory, does not rise to the level of extreme, substantial, and persistent misconduct.

We do not endorse plaintiffs' conduct in this case. Although Olson's accident may have justifiably delayed progress on the case to some extent, the trial court correctly noted that the period of time for which Olson was incapacitated was relatively short compared to the period of time for which no meaningful progress occurred in the case. *See* ***Lawrence v. MacIntyre***, 48 Wis.2d 550, 554, 180 N.W.2d 538, 540 (1970) (attorney's illness not an excuse where illness over for more than a year before the dismissal order was entered). Since the substitution of counsel in February 1993, plaintiffs neither managed to complete any formal discovery nor produce any settlement offers. They failed to respond to the County's two requests for information for nearly six months.

We stress that we do not wish to discourage trial courts from using their discretionary power to sanction plaintiffs who have been remiss or derelict in fulfilling their obligation to bring their cases to trial. We do not accept plaintiffs' suggestion that a trial court's failure to enter a scheduling order immunizes plaintiffs from sanctions under § 805.03, STATS., and § 804.12(2), STATS. We simply conclude that on the facts of this case, where the plaintiffs were engaged in some, even if minimal, efforts to advance the case, the "harsh sanction" of dismissal was too drastic. *See* ***Johnson***, 162 Wis.2d at 274, 470 N.W.2d at 864. Further, we conclude that in light of the indications that some progress was being made in the case (which the trial court itself noted in its October 20, 1994 letter to counsel), the court should have first determined whether less severe sanctions could be used to remedy the plaintiffs' conduct. *See* ***Hudson Diesel***, 194 Wis.2d at 545, 535 N.W.2d at 70 (where plaintiff's behavior was unintentional, trial court should determine whether less severe sanctions will remedy any discovery problems).

Because we conclude that there is no reasonable basis to support a determination that the plaintiffs' conduct was egregious, we reverse the order.[5]

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[5] The plaintiffs did not argue that there was a "clear and justifiable excuse" for the delay in prosecuting this matter. We thus need not and do not consider this issue.