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**DISTRICT II**

March 19, 2014

To:

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2013AP825

Christopher J. Blotzer v. Heins Law Office LLC  
(L.C. #2012CV252)

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

Christopher and Rhonda Blotzer appeal a judgment dismissing their complaint for failure to prosecute. The circuit court implicitly found that the Blotzers' counsel missed deadlines without a clear and justifiable excuse and that such conduct was egregious. *See Schneller v. Saint Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991). Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition, *see* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

This case is like matryoshka dolls: a case within a case within a case. The “case” was a construction defect case involving a manufactured home the Blotzers purchased. Attorney Franz Maurer represented the Blotzers in a claim a contractor filed against them, in their counterclaim against the contractor, and in their third-party complaint against other contractors. The suit against the contractors was dismissed for discovery and court order violations; we affirmed.

The Blotzers then retained a second lawyer to file a legal malpractice action against Maurer—the case within the case. That lawyer withdrew when the Blotzers refused his advice to accept the mediated settlement offer. The Blotzers then engaged Attorney Janet Heins to pursue the claim against Maurer. A rift in their relationship led Heins to withdraw. The circuit court dismissed the case against Maurer. The Blotzers retained a fourth lawyer, Attorney Daniel Jardine, to commence this lawsuit—the case within the case within the case—alleging that Heins’ professional negligence led to the dismissal of the case against Maurer.

On August 14, 2012, Heins served the Blotzers with the first request for admissions, written interrogatories, and request for production of documents. The request for admissions addressed Heins’ alleged errors, the underlying claims against the contractors, and the Blotzers’ ability to prove and collect on the claim against Maurer. Despite multiple extensions of time, Jardine did not provide any timely responses or respond to Heins’ efforts to contact him.

On November 8, 2012, Heins moved for summary judgment. She argued that to prevail in the layered case, the Blotzers first would have to prove the construction-defect case and, as the failure to respond to the request for admissions amounted to admissions and meant they could not prove that case, neither Maurer’s nor Heins’ alleged negligence could be causal of any damages. A motion hearing was set for December 7. The Blotzers did not respond to the

motion. Jardine later said he had been ill. The response deadline was extended to December 14; the hearing was adjourned to January 4, 2013. The Blotzers' response, filed December 26,<sup>2</sup> addressed only the "collectability" portion of Heins' motion.

On December 19, 2012, the Blotzers moved to disqualify Heins' counsel on grounds that they had contacted her when seeking an attorney to handle the Maurer case. The motion was taken up at the January 4 hearing. Jardine conceded he had not filed a brief or an affidavit supporting the disqualification motion, citing "the holidays[] and ... Your Honor's vacation," and claimed he gave discovery responses to a retired judge, pending resolution of the motion. The court granted Jardine's request for extra time to file additional information, setting a January 11 deadline. Jardine also explained that the failure to designate witnesses was because his legal assistant miscalendared the December 17 deadline as March 18. He said he could name lay witnesses but still had no expert. The court ordered the Blotzers to file the information and discovery materials under seal by the next hearing, January 30.

By January 30 the Blotzers had submitted nothing. The court denied the disqualification motion and noted that the Blotzers still had not designated witnesses. Indeed, Jardine requested an enlargement of time to do so. The court declined his request and, based on the overall failure to prosecute, granted Heins' motion for summary judgment, dismissing the action on its merits. The Blotzers appeal.

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<sup>2</sup> Jardine faxed the response after hours on Friday, December 21. As the courthouse was closed on Monday and Tuesday, December 24 and 25, it was filed on December 26.

A circuit court may make such orders “as are just,” including dismissal of the action, where a party fails to prosecute or obey a court order. WIS. STAT. §§ 805.03, 804.12(2)(a)3. The decisions to impose sanctions and which to impose, including dismissing an action with prejudice, are within the circuit court’s discretion. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. We will uphold the decision if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. *Id.* A sanction is appropriate if the failure is without a clear and justifiable excuse, and is egregious or done in bad faith. *See Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995).

The Blotzers suggest they were blindsided when the action was dismissed due to their “first-time error” of missing the deadline for designating witnesses. Actually, the record is replete with multiple missed deadlines despite repeated extensions of time. When given, excuses included the out-of-state illness and death of Mr. Blotzer’s father, Jardine’s illness, allegedly giving discovery to another judge, inclement weather, a clerical error, “the holidays,” and the judge’s vacation. The court was skeptical that, with an August 17 scheduling conference, a March 18 deadline to name witnesses would make any sense to Jardine, observed that Jardine seemed willing to “throw [his] assistant under the bus” instead of double-checking the dates himself, and wondered why, even accepting the calendaring excuse given on January 4, the witness list still was outstanding on January 30 as, without witnesses, the original case was unprovable. The facts provide a reasonable basis for the court’s implicit findings that Jardine’s conduct was egregious and the failure to prosecute was without a clear and justifiable excuse. *See Schneller*, 162 Wis. 2d at 311; *see also Monson v. Madison Family Inst.*, 162 Wis. 2d 212,

215 n.3, 470 N.W.2d 853 (1991) (circuit court's failure to label conduct "egregious" immaterial when finding implicitly made).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*