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**DISTRICT I**

November 11, 2014

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

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2013AP2357

Nancy Dovin v. Bhupinder Singh Saini, MD, Advanced Pain Management, S. C. and Wisconsin Injured Patients and Families Compensation Fund (L.C. # 2011CV15165)

Before Curley, P.J., Fine and Brennan, JJ.

Nancy Dovin appeals an order of the circuit court, dismissing her medical malpractice action without prejudice. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The order is summarily reversed.

Dovin filed this action against Dr. Bhupinder Singh Saini, Advanced Pain Management, and the Wisconsin Injured Patients and Families Compensation Fund on September 26, 2011, alleging negligence and lack of informed consent regarding a “radiofrequency nerve ablation

procedure.”<sup>1</sup> At the time, Dovin was represented by Attorney Paul Gagliardi. The circuit court, the Honorable Dominic S. Amato, entered a scheduling order on December 21, 2011. The first relevant deadline set by the order required Dovin to identify her experts by March 30, 2012.

By letter dated March 28, 2012, and filed April 2, 2012, Gagliardi moved to withdraw. The circuit court set a hearing on the motion for August 1, 2012, but had to reset the hearing because of difficulties with Gagliardi’s telephone appearance. The hearing resumed on August 31, 2012, and the circuit court allowed Gagliardi to withdraw, over Dovin’s objection. The circuit court set a status hearing for December 10, 2012, expecting Dovin to retain successor counsel by then.

At the December 10, 2012 hearing, the circuit court adjourned the deadlines set in the December 21, 2011 scheduling order, set a scheduling conference for January 25, 2013, and directed Dovin—who was still *pro se*—to respond to interrogatories from the Fund by February 25, 2013, whether she had an attorney or not.<sup>2</sup> Attorney John O’Connor, who was tentatively considering taking Dovin’s case, contacted the court around January 11, 2013, and asked to reschedule the January 25 hearing. Saini objected, but the circuit court overruled the objection and reset the scheduling conference for April 19, 2013. On February 20, 2013, O’Connor advised the court that he would not be taking the case after all.

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<sup>1</sup> Throughout this opinion, we will use “Saini” to collectively refer to the doctor and the pain management clinic. The Fund is separately represented.

<sup>2</sup> Though the circuit court evidently signed an order following this hearing, there is no official copy on file. Instead, there is only a stamped copy attached as an exhibit to the Fund’s motion to dismiss.

On March 5, 2013, the Fund moved to dismiss this case for failure to prosecute because Dovin had not yet answered its interrogatories. The Fund invoked both WIS. STAT. §§ 804.12(2)(a)3. and 805.03.<sup>3</sup> Saini joined the Fund's motion by letter.

The April 19, 2013 scheduling conference was reset to May 8, 2013, because of a conflict with the circuit court's calendar. On May 8, Dovin appeared with Attorney Timothy J. Casper, although his appearance at that time may have been informal. Judge Amato, who was retiring effective July 31, 2013, reset the hearing date to August 26, 2013, noting that his successor would hear the motion to dismiss and issue a new scheduling order. Following the August 26, 2013 hearing, the circuit court, now presided over by the Honorable Mary M. Kuhnmuensch, granted the motion to dismiss, dismissing the case without prejudice and commenting that Dovin could refile her case if she thought it had merit. Dovin contends that she cannot refile the case because the statute of repose has run. We do not address this assertion.

WISCONSIN STAT. §§ 804.12(2)(a) and 805.03 permit the circuit court to impose sanctions for failure to prosecute a case and for failure to comply with court orders. See *Industrial Roofing Services, Inc. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 97, 726 N.W.2d 898, 906. The decision to impose sanctions is committed to the circuit court's discretion. See *Sentry Insurance v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 515, 634 N.W.2d 553, 560. "A discretionary decision will be sustained if the circuit court has examined the relevant facts,

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<sup>3</sup> WISCONSIN STAT. § 804.12 deals with sanctions for discovery issues; WIS. STAT. § 805.03 deals with sanctions for failure to prosecute or comply with procedural statutes.

applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Ibid.*

“Dismissal of an action is a particularly harsh sanction[.]” *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 274, 470 N.W.2d 859, 864 (1991), overruled on other grounds by *Industrial Roofing*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898. Because of the harshness, “dismissal requires that the non-complying party has acted egregiously or in bad faith.” *Industrial Roofing*, 2007 WI 19, ¶43, 299 Wis. 2d at 97, 726 N.W.2d at 906. “Egregious conduct is conduct that, although unintentional, is ‘extreme, substantial, and persistent.’” *Teff v. Unity Health Plans Insurance Corp.*, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 717, 666 N.W.2d 38, 46 (citation omitted). To warrant dismissal, egregious conduct must lack a clear and justifiable excuse. See *The Selmer Company v. Rinn*, 2010 WI App 106, ¶35, 328 Wis. 2d 263, 287, 789 N.W.2d 621, 633. A finding of bad faith requires a finding that “the noncomplying party ‘intentionally or deliberately’ delayed, obstructed, or refused to comply with the court order.” *Dane County Department of Human Services v. Mable K.*, 2013 WI 28, ¶70, 346 Wis. 2d 396, 425, 828 N.W.2d 198, 212 (citation omitted). The circuit court need not expressly find egregiousness or bad faith; we may affirm if such finding is implicitly made under the correct standard and if the facts provide a reasonable basis for that implicit decision. See *Teff*, 2003 WI App 115, ¶14, 265 Wis. 2d at 717, 666 N.W.2d at 45.

We reverse because the circuit court made no finding, implicit or explicit, of egregiousness or bad faith, and the facts of record do not support such a finding. The motion to dismiss complained that Dovin had not directed any discovery towards defendants. However, the deadline for Dovin to do so had been suspended by Judge Amato while Dovin attempted to retain successor counsel, and it was never reinstated. While Judge Kuhnmuensch wondered what

to “say to defense counsel when they have filed a March ... motion to dismiss that should [have] been heard long before” the August 26 hearing, that delay was created by her predecessor, not Dovin. Additionally, Dovin offered to testify about her attempts to retain counsel, but was not taken up on her offer. Under such circumstances, we cannot conclude her behavior was egregious or in bad faith, particularly when the circuit court admitted that it had “no clue about what the case is about.”

The motion to dismiss also complained that Dovin failed to comply with the order requiring her to answer the Fund’s interrogatories; that deadline was not suspended. However, we are not persuaded that there was any egregiousness or bad faith. The Fund’s interrogatories totaled five questions. There is no basis on which to conclude Dovin “intentionally or deliberately” refused to answer them, nor do we think her failure to answer the questions is, under the circumstances of this case, extreme or substantial. Further, in seeking dismissal on this ground, the Fund asserted that “this isn’t a case the fund should be in in the first place.” Thus, even if we thought that the record supported a finding of egregiousness or bad faith with respect to the order to answer the interrogatories—and, to be clear, it does not—such a finding would at best justify dismissal as to the Fund only, not Saini.

Upon the foregoing,

IT IS ORDERED that the September 6, 2013 order dismissing Dovin’s case is summarily reversed and the cause is remanded.

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