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DISTRICT I/II

May 31, 2017

To:

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

2016AP479

David P. Ryan v. American Family Mutual Insurance Company
(L.C. #2012CV6710)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

David P. Ryan appeals an order dismissing his personal injury lawsuit with prejudice.

Upon review of the briefs and the record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We reverse and remand for the circuit court to make a finding as to whether Ryan is blameless in the failure to prosecute his action.

In June 2009, Ryan was injured in a motor vehicle accident necessitating surgery. The record indicates that he had prior surgical treatment for pre-existing injuries. He filed suit in 2012. Court-ordered deadlines repeatedly were ignored and medical records were not provided

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

to the defense. In September 2014, the defendants moved to dismiss for failure to prosecute. The court declined to dismiss the case but barred Ryan's permanency claim, dismissed the two individual defendants, and admonished Ryan's counsel that any further failures to follow its orders would result in dismissal for egregious conduct.

Trial was set for Tuesday, January 19, 2016. Ryan's counsel advised the court that Ryan's surgeon would not be testifying. Counsel said he had subpoenaed the doctor on January 15 for a deposition on January 18—the day before trial—but the surgeon could not accommodate him on such short notice.

The court refused either to adjourn the trial or to allow Ryan to provide the sole testimony about his injuries and treatment. The court noted the continued unpreparedness, giving as one example the necessity for a final pretrial in October 2013, a “double final pretrial” in May 2014, a “triple final pretrial” in February 2015, and an “ultimate final pretrial” in May 2015. As other examples, counsel did not file his pretrial report and proposed jury verdict until the morning of trial and assured the court just the Thursday before that “the jury was firm.” The court stated that it considered sanctions short of dismissal and recognized the severity of dismissal here, as the statute of limitations had run. Finding the plaintiffs' failure to prosecute the nearly four-year-old action egregious, it dismissed the case with prejudice. Ryan appeals.

“The decision to impose sanctions and the decision of which sanctions to impose, including dismissing an action with prejudice, are within a circuit court's discretion.” *Industrial Roofing Servs. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. “[D]ismissal requires that the non-complying party has acted egregiously or in bad faith.” *Id.*, ¶43. “[F]ailure

to comply with circuit court scheduling and discovery orders without clear and justifiable excuse is egregious conduct.” *Id.* (citation omitted).

It is an erroneous exercise of discretion, however, for a circuit court to enter a sanction of dismissal with prejudice, imputing an attorney’s egregious conduct to a client who is blameless. *Id.*, ¶61. Thus, before it can dismiss a case with prejudice, the circuit court first must find that the client is *not* blameless. *Id.*, ¶61 n.10 (emphasis added).

The court here did not make that finding. We reverse on that narrow ground and direct the court to determine whether Ryan shared any blame in the failure to prosecute his case.

IT IS ORDERED that the order of the circuit court is summarily reversed and remanded with directions, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals