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**DISTRICT II**

June 21, 2017

To:

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

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2016AP1652

John Jun Zhang v. Donna J. Burkard (L.C. # 2014CV2424)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

John Jun Zhang appeals from an order dismissing his case with prejudice for having failed to comply with a previous order, which required him to pay defense expert fees. 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 (2015-16).<sup>1</sup> We affirm the order of the circuit court.

This case arises from an automobile accident that occurred in 2011. In 2014, Zhang commenced a personal injury action against Donna J. Burkard and her insurer, American Family

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

Mutual Insurance Company. The case was filed in Waukesha County, and the circuit court entered a scheduling order, which required the parties to provide written reports for their expert witnesses.

One month before trial, Zhang's attorney, James Gatzke, filed a motion for relief from the scheduling order. He sought more time to provide written reports for his expert witnesses. Burkard and American Family responded with a motion to preclude Zhang's treating physician from testifying. Following a hearing on the matter, the circuit court granted a postponement of the trial. However, as a condition, it required Zhang to pay defense expert fees incurred in preparation for the scheduled trial. The court gave Zhang thirty days to make the payment.

Zhang failed to pay the defense expert fees within the time allotted by the circuit court. Burkard and American Family subsequently filed a motion to dismiss, and the court held another hearing. There, Gatzke informed the court that Zhang did not have the ability to pay the defense expert fees, which amounted to \$3,750. The court found otherwise. It then ordered Zhang to pay the fees by April 10, 2016, or the case would be dismissed with prejudice. When Zhang did not pay the fees again, the court entered an order dismissing the case with prejudice. This appeal follows.

The decision to impose sanctions, including dismissing an action with prejudice, is reviewed under an erroneous exercise of discretion standard. See *Lister v. Sure-Dry Basement Sys., Inc.*, 2008 WI App 124, ¶10, 313 Wis. 2d 151, 758 N.W.2d 126. We will uphold a circuit court's decision if it "has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* (citation omitted).

Dismissal of an action is warranted for egregious conduct without any clear and justifiable excuse. *See Selmer Co. v. Rinn*, 2010 WI App 106, ¶35, 328 Wis. 2d 263, 789 N.W.2d 621. The circuit court need not make an explicit finding of egregiousness as long as the facts support such a finding. *Id.*, ¶36. Failure to comply with a court order without a clear and justifiable excuse is egregious conduct. *See Lister*, 313 Wis. 2d 151, ¶11.

On appeal, Zhang contends that the circuit court erred in dismissing his case with prejudice. He does not offer an excuse for his failure to comply with the court order requiring him to pay defense expert fees. Rather, he simply argues that the fees were the result of neglect by his attorney and should not have been attributed to him.

We conclude that Zhang's failure to comply with the circuit court order requiring him to pay defense expert fees constituted egregious conduct. The court found that Zhang had the ability to pay the fees, and he has offered no clear and justifiable excuse for failing to do so. The fact that the fees were the result of his attorney's conduct does not permit Zhang to ignore subsequent court orders to pay it. Consequently, we are satisfied that the court properly exercised its discretion in dismissing the case with prejudice.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, 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).

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*Diane M. Fremgen*  
Clerk of Court of Appeals