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DISTRICT II

January 9, 2019

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

2018AP1157-FT Nick Cortese v. Russell D. Bohach (L.C. #2017CV1320)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nick Cortese appeals from an order dismissing his lawsuit, contending that the circuit court should have modified the scheduling order to permit his belated naming of an expert witness. 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).[1] Because Cortese's failure to name his expert in compliance with the scheduling order was egregious and

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

without a clear and justifiable excuse, we conclude the circuit court did not err when it refused to modify the scheduling order even though that refusal ultimately resulted in the dismissal of the action. We affirm.

Representing himself, Cortese filed a complaint on July 28, 2017, against the two attorneys who had represented him years earlier in a criminal matter.[2] Paul Rifelj represented Cortese through the criminal trial, and Russell Bohach represented him for postconviction matters. The complaint styled the claims as breach of fiduciary duty, legal malpractice, and ineffective assistance of counsel. Rifelj was soon dismissed via an uncontested summary judgment motion.

Following a December 1, 2017 conference, the circuit court issued a two-page scheduling order. Per the order, dispositive motions were to be heard by June 29, 2018, discovery would close on September 4, and the trial would begin on September 11. Of particular relevance here, the order required Cortese to name all expert witnesses by March 1, providing for each expert a summary of expected testimony and a current curriculum vitae. It required Bohach to do the same by May 1. The order stated that "[c]ounsel and parties are bound to the time limits and dates set by this Scheduling Order unless altered by the court upon its own motion or written motion of any party." Near the bottom of the second page, the order cautioned in bold upper case lettering: "Failure to comply with the provisions of this order may result in sanctions to the noncompliant party including entering of judgment or dismissing claims or defenses. See [WIS. STAT. §§] 804.12, 805.03."

[2] In this appeal, Cortese is represented by counsel.

On February 23, 2018, Cortese moved for relief from the expert witness requirement, alleging that the attorneys he had contacted refused to serve as experts, that he planned to call as witnesses the criminal prosecutor, Rifelj, and Bohach, whose collective testimony he claimed would provide sufficient evidence, and that testimony from a designated expert would be cumulative and confusing. Bohach opposed the motion, arguing that an expert was critical to prove the types of professional malpractice claims asserted by Cortese and that a failure to name an expert should lead to a dismissal as a matter of law. The court denied the motion, reasoning that Cortese's claims required "expert opinion testimony of the applicable standard of care and of any breach of the same."

On March 5, 2018, four days past the deadline, Cortese moved the court to appoint an expert for him under WIS. STAT. § 907.06, asserting he had been unable to secure one on account of his pro se status. The court denied the motion, indicating Cortese should have known about the need for, and secured the services of, an expert before commencing this action, and he did not provide a sufficient reason for a court-appointed expert under § 907.06.

On March 23, 2018, Cortese moved for reconsideration of his two prior motions, primarily asserting that the legal issues were not technical or complex and that therefore a lay jury should be able to decide them without the aid of expert testimony. He also submitted an affidavit listing five lawyers or law firms that declined his requests for an expert. On March 26, the court denied the motion, indicating no reason had been provided to change the court's view on the original motions.

On March 28, 2018, Bohach moved for summary judgment dismissal of all claims, arguing, among other things, Cortese's lack of an expert witness was fatal to proving his claims.

On April 4, Cortese filed a motion "for acceptance of notice of expert witness," advising that he had retained Attorney Jeffery Katz as an expert witness and providing Katz's curriculum vitae. Before the court heard these motions on April 25, its clerk notified Cortese that he must file in advance a written report of Katz's expert opinions. The court also granted Cortese's request that Katz be permitted to appear by phone.

At the April 25 hearing, the court noted, to its frustration, that it had not received a written report of Katz's opinions. After Katz stated he was not aware the court wanted his opinions in advance, Cortese apologized, admitting he had "no answer for that" and he "just totally forgot about it." Katz then stated it was his opinion that Bohach did not provide Cortese with effective legal assistance with regard to postconviction motions. When asked whether Katz believed that the alleged ineffective assistance was equivalent to proving Cortese's innocence, Katz stated he did not.

The court denied Cortese's motion to accept Katz as an expert witness. Referencing the procedural history of the case and Cortese's continued noncompliance with the expert deadline ("[y]ou do not get to flaunt against the Court's order"), the court reasoned that Cortese knew about the importance of having an expert, but nonetheless failed to show proper diligence in securing one. When Cortese sought another opportunity to designate an expert via his current motion identifying Katz as his expert, Cortese not only failed to submit a report of Katz's opinions requested by the court, but failed to even ask Katz to prepare such a report. Without an expert to support the claims, the court concluded Bohach was entitled to judgment as a matter of law and granted his motion for summary judgment. Cortese appeals.

A circuit court has both statutory and inherent authority to manage its docket and to sanction parties for failing to comply with court orders, including scheduling orders. ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶¶9-10, 317 Wis. 2d 460, 767 N.W.2d 272; *see also* WIS. STAT. §§ 802.10(3) & (7), 805.03. A circuit court may enter a scheduling order that addresses, among other things, deadlines for amending pleadings, filing motions, disclosing expert witnesses, and completing discovery. Sec. 802.10(3). Because of the importance of a court's ability to enforce its orders and "ensure prompt disposition of lawsuits," deciding whether and how to modify a scheduling order and to sanction a noncompliant party is within the circuit court's broad discretion. ***260 N. 12th St., LLC v. DOT***, 2010 WI App 138, ¶27, 329 Wis. 2d 748, 792 N.W.2d 572; *see also* ***Parker***, 317 Wis. 2d 460, ¶10. We therefore review such decisions through the deferential erroneous exercise of discretion standard. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553.

The dispositive issue is whether the circuit court erroneously exercised its discretion when it denied Cortese's motion to modify the scheduling order to permit the naming of Katz as his expert.[3] We conclude the circuit court did not err.

A circuit court's reasonable determination that a party had not shown cause to modify a scheduling order is usually sufficient to sustain the court's discretionary decision to deny the modification. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 308, 470 N.W.2d 873 (1991). But when such a denial effectively results in the dismissal of the action, as here, we

[3] Cortese's motion was labeled as a motion "for acceptance of notice of expert witness," which we consider to be equivalent to a motion to modify a scheduling order deadline after the deadline has passed.

must further examine the decision using the standard for dismissing an action as a sanction for a party's noncompliance with a court order. ***Id.***; ***Sentry Ins.***, 247 Wis. 2d 501, ¶20. The denial will be upheld if (1) the conduct of the noncompliant party was "egregious" and (2) the noncompliant party provided no "clear and justifiable excuse" for violating the order. ***Schneller***, 162 Wis. 2d at 308-10; ***Sentry Ins.***, 247 Wis. 2d 501, ¶20; *see also* WIS. STAT. § 805.03 (authorizing orders "as are just," including dismissal of an action, for a claimant's failure to prosecute or a party's failure to comply with a court order).

Although the circuit court here did not expressly find that Cortese's conduct was "egregious," its reasoning implied as much, and "[a]n implicit finding of egregious conduct … is sufficient if the facts provide a reasonable basis on review for the court's conclusion." *See* ***Schneller***, 162 Wis. 2d at 306, 311 (whether the reviewing court would have made the same decision is not the test, but rather whether the circuit court erred in making the discretionary decision it made).

The facts reasonably support the court's implicit determination of egregious noncompliance. The following from the record is especially noted: for a long time, Cortese knew of the facts that he would later allege supported his malpractice-type claims, as Bohach had represented Cortese primarily from 2010 to 2012, about six years before Cortese commenced this lawsuit; in his own complaint, Cortese asserted several times that his claims would be supported by expert witness testimony; the scheduling order advised Cortese of the need for an expert, allowing him three months to identify one and to provide a summary of opinions; in two separate paragraphs of the simple twelve-paragraph order, the parties were informed that they were "bound to the time limits and dates" unless modified by motion and, in conspicuous typeface, warned that noncompliance may result in sanctions, including dismissal; one week before the

March 1 deadline, Cortese moved the court to waive the expert requirement, which the court promptly denied; in the weeks following the missed March 1 deadline, Cortese moved to have the court appoint an expert (which was denied) and then for reconsideration of his denied motions (which also was denied) despite the lack of any new and substantive argument or information; after Bohach moved for summary judgment (a motion Bohach had forewarned when he opposed Cortese's motion seeking waiver of the expert requirement) and more than a month after the deadline, Cortese identified Katz as his expert via a motion that essentially asked for modification of the scheduling order after the fact; while the scheduling order itself had already required parties to provide written summaries of their expert's opinions, the court specifically requested that Cortese provide Katz's opinions in a written report and in advance of the April 25 hearing, but Cortese failed to comply; at the April 25 hearing, Katz revealed he had not been asked to prepare a report in advance, and Cortese had utterly no explanation for this lapse, acknowledging he "forgot." Ultimately and most importantly, and despite Cortese's filing of a motion identifying Katz as his expert and asking that Katz be accepted as one, Cortese never provided a written report of Katz's opinions at any point.

Based on the foregoing, we conclude that the circuit court reasonably determined that Cortese "flaunted" his noncompliance of a clear court order in multiple ways, amounting to

egregious conduct.[4] *See* ***Schneller***, 162 Wis. 2d at 310 (when addressing an untimely motion to amend the scheduling order, a primary concern is "deterring litigants from flaunting court orders"); *see also* ***Sentry Ins.***, 247 Wis. 2d 501, ¶21 n.8 (defining "egregious" as "extraordinary in some bad way; glaring, flagrant" and "flagrant" as "shockingly noticeable or evident").

The foregoing circumstances also show that Cortese had no "clear and justifiable excuse" for violating the order. His primary excuse was that he had great difficulty finding an attorney who would agree to serve as an expert. But, as noted by the circuit court, claims of ineffective assistance of counsel and legal malpractice that are supported by expert opinions are not uncommon; Cortese's inability to find an expert therefore was likely more a reflection of the level of his diligence or the validity of his claims or both. Moreover, putting aside the missed March 1 deadline, when Cortese later failed to comply with the court's specific request that Katz's opinions be provided in writing and in advance of the April 25 hearing, Cortese candidly confessed he "forgot," which is self-evidently not a clear and justifiable excuse.[5]

[4] In support of its denial of the motion to modify the scheduling order, the circuit court determined that Katz's opinion did not meet the necessary legal standard, a standard the court considered to be Cortese's actual innocence. Although Cortese would indeed be required to show by a preponderance of the evidence that he was innocent of the criminal charge in order to prevail on his malpractice claim, *see* ***Hicks v. Nunnery***, 2002 WI App 87, ¶46, 253 Wis. 2d 721, 643 N.W.2d 809, Katz's expert opinion would not have to meet that standard. As the court correctly determined when it denied the earlier motion seeking waiver of the expert requirement, Cortese needed an expert that could testify about "what was required" of Bohach when he reviewed the criminal proceedings and "what standard of care [Bohach] was accountable for and an opinion that [Bohach] failed to live up to that standard owed to [Cortese]."

[5] Cortese argues the circuit court applied the wrong legal standard. Whereas the court based its denial on violations of court orders, Cortese contends the court should have engaged in a balancing test, weighing the probative value of Katz's testimony, which he deems high, against the danger of unfair surprise to Bohach, which he deems low. Cortese relies on ***Magyar v. Wisconsin Health Care Liability Insurance Plan***, 211 Wis. 2d 296, 564 N.W.2d 766 (1997). We reject the argument.

(continued)

Because the record shows Cortese's noncompliance was egregious and without any, much less clear, justification, the circuit court's denial of his motion to modify the scheduling order was a proper exercise of discretion.[6]

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.

Sheila T. Reiff
Clerk of Court of Appeals

Cortese did not make this balancing-test argument to the circuit court and arguably waived it. In any event, even if the circuit court wanted to undertake such a balancing test, it could not have done so, as Cortese deprived the court of anything to balance; the probative value of a nonexistent expert report weighs nothing. Moreover, the ***Magyar*** court itself expressly stated that it was not addressing a case, such as this one, where the witness was excluded as a "sanction for egregious noncompliance [of a scheduling order] that lacks a clear and justifiable excuse." ***Magyar***, 211 Wis. 2d at 308 n.1.

[6] Because we conclude that the circuit court properly exercised its discretion when it denied Cortese's motion to modify the scheduling order, we need not address Cortese's argument that, had the scheduling order been so modified, summary judgment should not have been granted. *See* ***State v. Cameron***, 2012 WI App 93, ¶18 n.4, 344 Wis. 2d 101, 820 N.W.2d 433 (reviewing court need only address the dispositive issue).