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**DISTRICT I**

July 19, 2013

To:

Hon. Dominic S. Amato  
Circuit Court Judge  
Milwaukee County Courthouse  
901 N. 9th St.  
Milwaukee, WI 53233

John Barrett  
Clerk of Circuit Court  
Room G-8  
901 N. 9th Street  
Milwaukee, WI 53233

Lafayette Agnew  
3904 N. 77th St.  
Milwaukee, WI 53222

Shanita Catherine  
6650 W. State St. #163  
Wauwatosa, WI 53213

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

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2012AP697

Lafayette Agnew v. Shanita Catherine (L.C. #2011CV8487)

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

Shanita Catherine, *pro se*, appeals an order dismissing her counterclaim against Lafayette Agnew. The issue is whether the circuit court misused its discretion in dismissing the action as a sanction for Catherine appearing ten minutes late for trial. Based on our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).<sup>1</sup> We summarily reverse.

According to the transcript, neither party was present at 9:30 a.m. when the trial on Catherine's counterclaim against Agnew was scheduled. The circuit court summarily dismissed

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

the case because neither party appeared. Five minutes later, Agnew and his attorney arrived. The circuit court explained that it had already dismissed the case, but that if Catherine appeared and could show excusable neglect for her failure to arrive on time for trial, it would reopen the case. Catherine arrived in the courtroom five minutes later, at 9:40 a.m., a total of ten minutes after the trial was set to commence. The circuit court and Catherine then had the following exchange.

SHANITA CATHERINE: Shanita Catherine, making a special appearance.

....

THE COURT: At 9:30, no one was here. Not the plaintiff, not the defendant, and not plaintiff's counsel.

I called the case. I dismissed the case for want of prosecution on the de novo review of the defendant, reinstated the decision of the small claims judge, Judge Carroll, for failure of the defendant to prosecute.

At 9:35 the plaintiff walked in with his lawyer. I restated what I had just stated. I also indicated that no one has called my clerk to indicate they would be late, or there would be a problem.

And at 9:40 on AT&T, you've walked in, and you're late, and everyone knew this jury trial was supposed to start at 9:30, and no one was here on time.

And unless you give me some excusable neglect, the case will stay dismissed on the de novo review for jury trial.

And you made a special appearance, which I don't understand. Because it's your appeal for de novo review.

SHANITA CATHERINE: (No response.)

THE COURT: So hearing no reason as to why you're late, the de novo review case is dismissed for want of prosecution. The jury is discharged, you can call jury management.

The judgment of Judge Carroll in small claims court in favor on the plaintiff and against the defendant will stand.

And the counter claim ... of the defendant is dismissed.

SHANITA CATHERINE: However, I would like to put on the record—

THE COURT: I already made my ruling, you had a chance to respond.

SHANITA CATHERINE: I should be able to put things on the record, because there was no—

THE COURT: I gave you a chance to respond earlier. I'm not going to argue, you can take me up on appeal.

SHANITA CATHERINE: You were talking.

THE COURT: You can take me up on appeal.

The circuit court has authority to dismiss an action as a sanction for a party's failure to comply with a court order or rule. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991) (overruled in part by *Industrial Roofing Service, Inc. v. Marquardt*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898). Before dismissing, the circuit court must establish that the non-complying party acted in bad faith or that the non-complying party's conduct was egregious, and that there was no clear and justifiable excuse for the party's actions. *Id.* at 275. We will sustain a decision committed to the circuit court's discretion if it "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.* at 273.

Catherine contends that the circuit court should not have dismissed her case because her conduct was excusable; she was ten minutes late to the courtroom despite arriving at the building early because she had to wait in line at the security checkpoint. She also contends that her conduct was not egregious and she was not acting bad faith because she had never been late to any prior court proceedings and she had attempted to arrive on time.

We conclude that the circuit court misused its discretion in dismissing this case as a sanction. The circuit court did not apply the appropriate legal criteria, establishing that Catherine acted egregiously or in bad faith, and did not give Catherine an adequate opportunity to explain why she was late. The circuit court paused briefly as it was admonishing Catherine, apparently expecting her to explain why she was late, although the circuit court did not prompt Catherine to speak at that particular point. When Catherine was silent, the circuit court immediately concluded that Catherine had nothing to say, even though Catherine subsequently tried to explain that she had not said anything because the judge had been talking and she did not want to interrupt him. The circuit court's refusal to let Catherine explain herself precluded her from providing a clear and justifiable excuse for her actions. If Catherine had been given the opportunity, she would have explained that she was late because there was a long line at the security checkpoint. In the absence of a history of tardiness or other factors not present here, Catherine's belated arrival is not the type of egregious conduct that warrants dismissal as a sanction, and her early arrival at the court house deflates any suggestion that she was acting in bad faith in showing up late. We therefore reverse the order dismissing the case.

Therefore,

IT IS ORDERED that the order of the circuit court dismissing this case is summarily reversed.

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