COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2407 **Cir. Ct. No. 2003CV6612**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JONATHAN SNAPP,

PLAINTIFF-APPELLANT,

V.

MANUEL A. RIVERA, MD, JAMES L. KNAVEL, MD, AURORA LAKELAND MEDICAL CENTER AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Order reversed and cause remanded for further proceedings.*

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

¶1 KESSLER, J. Jonathan Snapp appeals from an order dismissing his medical malpractice claims against Manuel A. Rivera, M.D.; James L. Knavel,

M.D.; Aurora Lakeland Medical Center and Wisconsin Patients Compensation Fund. He argues that the trial court erroneously exercised its discretion when it dismissed his claims for failure to prosecute, based on his failure to take any action in the case for nearly a year after remittitur from our court. We conclude that the trial court erroneously exercised its discretion when it dismissed the claims because Snapp's failure to prosecute was not egregious and, therefore, dismissal was not justified under WIS. STAT. § 805.03 (2005-06).[1] We also conclude that WIS. STAT. § 808.08(3) was not applicable and therefore could not serve as a basis to dismiss the claims. Therefore, we reverse the order and remand for further proceedings.

BACKGROUND

¶2 On April 15, 2000, Snapp was involved in a motorcycle accident and sustained a serious leg injury and fracture. He was treated at two different hospitals, by a number of doctors. On August 11, 2003, he filed a complaint alleging medical malpractice against sixteen doctors, two hospitals, three unknown insurance companies and Wisconsin Patients Compensation Fund. The case was assigned to the Honorable Jeffrey A. Kremers.

¶3 Many defendants were dismissed early in the proceedings. One of the remaining defendants, Dr. Rivera, filed a motion for summary judgment on November 16, 2004. About the same time defendants Dr. Knavel, Dr. Jessie Jean-Claude, Dr. Raj D. Rao and Aurora Lakeland Medical Center (Aurora Lakeland)

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

also moved for summary judgment. The trial court denied the motions brought by Dr. Rivera, Dr. Knavel and Aurora Lakeland.

¶4 With respect to Dr. Rao's motion for summary judgment, which the trial court considered on January 18, 2005, the court indicated that it wanted time to consider the motion, and suggested it would decide the motion at the final pretrial, scheduled for February 25, 2005.

¶5 The trial court granted Dr. Jean-Claude's motion for summary judgment. Snapp appealed the judgment dismissing Dr. Jean-Claude, and the final pretrial scheduled for February 25, 2005, was never held. The court of appeals affirmed the judgment. *See* ***Snapp v. Jean-Claude***, No. 2005AP403, unpublished slip op. (WI App Jan. 18, 2006). Snapp filed a petition for review with the Wisconsin Supreme Court, which was denied on May 9, 2006. *See* ***Snapp v. Jean-Claude***, 2006 WI 108, 292 Wis. 2d 411, 718 N.W.2d 725. On May 10, 2006, the court of appeals' remittitur returned the record to the trial court.

¶6 After remittitur, counsel for Dr. Rao wrote to the trial court and sought a decision on his motion for summary judgment, which had been held in abeyance since January 2005. The trial court granted the motion for summary judgment, without a hearing, on June 21, 2006. The notice of entry of judgment with respect to Dr. Rao was entered on July 3, 2006. As of that date, the remaining defendants were Dr. Rivera, Dr. Knavel, Aurora Lakeland and Wisconsin Patients Compensation Fund.[2]

[2] Several unknown insurance companies also remained in the case. We do not discuss them.

¶7 From July 3, 2006, until June 22, 2007, there was no activity in the case, including no correspondence with the trial court. In the meantime, the case was assigned, pursuant to judicial rotation, to the Honorable Jean W. DiMotto, effective July 31, 2006.

¶8 On June 22, 2007, Dr. Rivera moved to dismiss for failure to prosecute. He argued that pursuant to WIS. STAT. § 805.03, Snapp's claim should be dismissed. Dr. Knavel, Aurora Lakeland and Wisconsin Patients Compensation Fund joined in the motion. Aurora Lakeland argued that in addition to § 805.03, WIS. STAT. § 808.08(3) provided a basis for dismissal.

¶9 Snapp opposed the motion, arguing in his brief that he had not failed to prosecute the case or disobeyed any court orders. Snapp's counsel argued that Judge Kremers, who had previously been assigned to this case, had taken an active role in scheduling the case and had frequently initiated contact with the parties. Snapp's counsel asserted that after the judgment dismissing Dr. Rao was entered on July 3, 2006, he received no communications from the trial court or the other parties. He noted that neither he, nor any other party, had taken any action to move the case along. None of these representations were disputed.

¶10 Snapp's counsel also asserted that he was not aware the case had been reassigned to Judge DiMotto. In addition, he noted that he did not intend to depose any defense experts because the detailed expert reports made depositions unnecessary. Finally, he noted that he had advanced in excess of $23,000 in out-of-pocket expenses pursuing Snapp's claim.

¶11 A motion hearing was held on August 15, 2007. For reasons discussed below, the trial court granted the defendants' motion to dismiss based on two different statutes: WIS. STAT. §§ 805.03 and 808.08(3). In doing so, the trial

court expressed significant frustration with Snapp's counsel for: not taking any action for over a year, especially when counsel asserted at the motion hearing that he was "ready to go to trial"; suggesting that the defendants or the trial court should have notified Snapp about the judicial rotation and taken other action in the case; and suggesting that the fact $23,000 in expenses had been advanced should affect the court's decision. Snapp now appeals.

DISCUSSION

¶12 The trial court stated two independent bases for dismissal, relying on WIS. STAT. §§ 805.03 and 808.08(3). We reverse the dismissal that was based on § 805.03 because we conclude that Snapp's conduct after remittitur was not egregious and thus did not justify dismissal. We reverse the dismissal that was based on § 808.08(3) because we conclude that statute was inapplicable here and therefore could not serve as a basis to dismiss the claims.

I. WISCONSIN STAT. § 805.03

¶13 The first basis for the trial court's dismissal was failure to prosecute pursuant to WIS. STAT. § 805.03, which provides in relevant part:

> **Failure to prosecute or comply with procedure statutes.** For *failure of any claimant to prosecute* or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, *the court in which the action is pending may make such orders in regard to the failure as are just*, including but not limited to orders authorized under s. 804.12 (2) (a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.

(Emphasis added.) Our supreme court has recognized that § 805.03 and WIS. STAT. § 804.12(2)(a)[3] (concerning failures to comply with a discovery order) "limit the sanctions that [trial] courts may impose for failure to prosecute and for failure to comply with court orders to those that are 'just.'" ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898 (quoting §§ 804.12(2)(a) and 805.03). ***Industrial Roofing*** explained that "Wisconsin courts have interpreted this limitation to mean that dismissal requires that the non-complying party has acted egregiously or in bad faith."[4] ***Id.*** Thus, although a trial court has discretion to dismiss an action with prejudice, "it is a particularly harsh sanction" that "is therefore appropriate only in limited circumstances." ***Id.***, ¶42.

¶14 Here, the trial court dismissed Snapp's claim after concluding that Snapp's failure to prosecute the case for nearly a year was egregious.[5] On appeal, we must determine whether the trial court erroneously exercised its discretion when it dismissed Snapp's complaint with prejudice as a sanction for failing to prosecute the case. "The decision to impose sanctions and the decision of which

[3] WISCONSIN STAT. § 804.12(2)(a) provides that if a party fails to comply with a discovery order, "the court in which the action is pending may make such orders in regard to the failure as are just."

[4] The supreme court also held "that it is an erroneous exercise of discretion for a [trial] court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. Snapp argues one basis for reversal is that the trial court erroneously exercised its discretion because it made no findings about what Snapp personally knew or should have known about his counsel's conduct. The defendants argue Snapp waived this issue by not raising the issue of blame in the trial court. Because we reverse the dismissal on grounds that counsel's conduct was not egregious, we do not consider Snapp's argument concerning blame. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

[5] No one argued, and the trial court did not find, that Snapp acted in bad faith.

sanctions to impose, including dismissing an action with prejudice, are within a [trial] court's discretion." ***Id.***, ¶41. The court's "'discretionary decision will be sustained if the [trial] court 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).

¶15 The facts upon which the trial court based its decision are essentially undisputed: the case began in August 2003, numerous defendants were dismissed, Snapp unsuccessfully appealed the dismissal of one defendant, and the case was returned to the trial court in June 2006. Throughout the first three years of the case, Judge Kremers was actively involved in managing the case, frequently contacting the parties for progress updates or in response to being copied on correspondence among the parties.[6]

¶16 After the case was remitted, the trial court issued a written decision dismissing Dr. Rao on July 3, 2006. After that dismissal, there was no activity with the court or among the parties for nearly a year. There were no scheduling orders or orders directing the parties to take action. The next activity on the case, and the first involving Judge DiMotto, occurred in June 2007, when the defendants moved to dismiss the case for lack of prosecution.

[6] Counsel for Snapp, Dr. Rivera and Aurora Lakeland all told the trial court at oral argument that Judge Kremers had actively managed the case. Dr. Rivera's counsel characterized Judge Kremers' management as "very hands on" and the trial court stated: "So it looks like the Court did ask [Snapp's counsel] at various times to update the Court about the progress of the case."

¶17 Based on these facts, the trial court concluded that the failure to prosecute was egregious and dismissed the case.[7] The trial court's oral decision makes clear that the trial court was troubled by Snapp's counsel's suggestions that the court or other parties should have moved the case along, that the funds expended on the case are relevant to egregiousness, that counsel was ready to proceed to trial but had not taken any steps to request a trial date, and that counsel had not been informed that a new judge had been assigned to the case.

¶18 We agree with the trial court that Snapp's counsel should have taken steps to move the case along. However, not every failure by a party (and specifically by his or her counsel) to advance a case justifies dismissal, because dismissal is "a particularly harsh sanction." *See* ***id.***, 299 Wis. 2d 81, ¶¶42-43. In this case, the sanction would completely bar any recovery for a severely injured plaintiff after years of active litigation, including an appeal.

¶19 The undisputed facts do not support the conclusion that Snapp's failure to prosecute was egregious before remittitur or after. There is no indication that before the appeal Snapp failed to follow any court orders. For three years before the appeal, the assigned judge took an active role in managing the case, frequently initiating conferences with the parties. During the period of inactivity,

[7] While our supreme court has held that it is an erroneous exercise of discretion to dismiss a case for failure to prosecute "when the noncomplying party has 'a clear and justifiable excuse' for its delay," the court has also recognized that even if the party lacks such an excuse, "the nominal nature of some violations of court orders may make dismissal inappropriate." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276, 470 N.W.2d 859 (1991) (citation omitted), *overruled in part on other grounds by* ***Industrial Roofing***, 299 Wis. 2d 81, ¶61. Here, Snapp did not assert, and the trial court did not consider, whether Snapp had "'a clear and justifiable excuse'" for not taking action in the case. Instead, Snapp relies on his assertion that his conduct was not egregious. We therefore do not consider whether Snapp had a clear and justifiable excuse for his inaction.

there were no standing court orders directing the parties to take any particular action. Finally, the time after remittitur during which none of the parties took any action was just under one year. Based on these facts, an appropriate sanction for this failure to prosecute was not dismissal. Thus, we conclude the trial court erroneously exercised its discretion when it dismissed the case.

¶20 In support of their argument that Snapp's conduct was egregious, the defendants note that Wisconsin courts have dismissed cases where the plaintiffs failed to prosecute for thirteen years, *see* ***Marshall-Wisconsin Co. v. Juneau Square Corp.***, 139 Wis. 2d 112, 406 N.W.2d 764 (1987); for thirty years, *see* ***Neuhaus v. Clark County***, 14 Wis. 2d 222, 111 N.W.2d 180 (1961); and for three years, *see* ***Prahl v. Brosamle***, 142 Wis. 2d 658, 420 N.W.2d 372 (Ct. App. 1987). Those cases are distinguishable based on the length of the failure to prosecute — here the failure to prosecute was less than one year. In addition, we recognize that each case is unique, and that numerous facts affect the ultimate decision to dismiss. Based on the facts of this case, we conclude that Snapp's conduct after remittitur was not egregious and thus did not justify dismissal.

II. WISCONSIN STAT. § 808.08

¶21 The trial court relied on WIS. STAT. § 808.08(3) as a second basis for dismissal. Section 808.08 governs proceedings in the trial court after appeals. It provides:

> **Further proceedings in trial court.** When the record and remittitur are received in the trial court:
>
> **(1)** If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.
>
> **(2)** If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.

> **(3)** If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

In this case, one of the defendants moved for dismissal based on § 808.08(3), arguing that because "further proceedings [were] not so initiated" within one year after the remittitur, the case should be dismissed. *See* ***id.***

¶22 At issue is whether, when the trial court's judgment dismissing Dr. Jean-Claude was affirmed, the court of appeals or supreme court ordered "action or proceedings other than those mentioned in [WIS. STAT. § 808.08](1) or (2)," such that failure of Snapp to initiate further proceedings within one year would result in dismissal pursuant to § 808.08(3). The parties all discuss how this issue might be affected by the supreme court's decision in ***Tietsworth v. Harley-Davidson, Inc.*** ("***Tietsworth IV***"), 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418. ***Tietsworth IV*** examined whether the trial court "had authority to reopen the case and grant leave to amend the complaint after the [trial] court had dismissed the original complaint in its entirety on the merits and the dismissal was affirmed [by the supreme court] on appeal." ***Id.***, ¶23. We conclude that ***Tietsworth IV*** is relevant to the instant case only because of its discussion of § 808.08(3).

¶23 ***Tietsworth IV*** stated that WIS. STAT. § 808.08(3) "is triggered if and when the appellate court directs, commands, or instructs (i.e., 'orders') the [trial] court to take 'action' or proceedings other than the 'specific action' or new trial described in subsections (1) and (2)." ***Tietsworth IV***, 303 Wis. 2d 94, ¶36. In Snapp's case, the court of appeals mandate stated: "Judgment affirmed." *See*

Snapp, No. 2005AP403, unpublished slip. op. at 15. The supreme court mandate stated: "Petition for Review Denied." *See* ***Snapp***, 292 Wis. 2d 411. The remittitur stated that the judgment had been affirmed by the court of appeals and returned the appeal record to the Clerk of Circuit Court for Milwaukee County. Nowhere did the court of appeals or the supreme court order specific further proceedings. Interpreting the plain language of § 808.08(3), we conclude that the statute was not "triggered" because the appellate courts did not instruct or order the trial court to take action. *See* ***Tietsworth IV***, 303 Wis. 2d 94, ¶36; ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (Statutory construction "'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'") (citation omitted). Because § 808.08(3) was not triggered, it does not provide a basis to dismiss the claims.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

¶24 FINE, J. (*dissenting*). In a well-reasoned, factually supported analysis, the circuit court determined that letting this case languish for nearly one year was "egregious" and warranted dismissal. As the Majority recognizes, this is a discretionary determination, and I do not see how by any stretch of the imagination it can be said that the circuit court erroneously exercised its discretion. The Majority concludes that it did, but does not tell us why. As I read the Majority opinion, the judges in the Majority would not have ordered the dismissal. But that is not the test. We owe the circuit court significant deference in assessing its discretionary determinations. The Majority does not do that here, and I respectfully dissent. I would affirm the circuit court's dismissal under WIS. STAT. § 805.03.