

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0497-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STEPHANIE D. IRBY,

Plaintiff-Appellant,

v.

STANLEY H. HUNT,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM J. HAESE, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Stephanie D. Irby sued Stanley H. Hunt, seeking restitution for nursing and home-care services she provided to Hunt. The trial court entered a scheduling order. When Irby failed to comply with the scheduling order, Hunt moved the trial court to dismiss Irby's complaint. The trial court concluded that Irby's failure to comply with the scheduling order had been egregious and without justifiable excuse, and dismissed Irby's complaint with prejudice. Irby appeals from the order of dismissal and from a trial court

order denying reconsideration. Pursuant to this court's order dated March 16, 1995, this case was submitted to the court on the expedited appeals calendar. We conclude that the trial court properly exercised its discretion in dismissing Irby's complaint. We therefore affirm the trial court's order.

The facts are undisputed. Irby commenced her action on April 14, 1994. On July 19, 1994, the trial court entered a scheduling order requiring Irby to submit her list of witnesses to the court and to opposing counsel no later than September 1, 1994. Hunt was ordered to submit his witness list no later than November 1, 1994. All dispositive motions were to be heard no later than November 21, 1994, and trial was scheduled for January 9, 1995. The court's order provided that failure to comply with the order "shall be considered cause for imposing sanctions."

Irby failed to submit her witness list to the trial court or opposing counsel by the September 1, 1994 deadline. By letters dated September 19, 1994, and October 6, 1994, Hunt's counsel contacted Irby's counsel to request the witness list. Hunt's counsel also attempted to contact Irby's counsel by telephone. According to an affidavit filed in support of the dismissal motion, Hunt's counsel spoke to Irby's counsel on October 11, 1994, to again request the witness list. Irby's counsel promised the list on or before October 14, 1994.

When Irby still failed to provide the witness list, Hunt, on November 1, 1994, moved the trial court to dismiss Irby's complaint. In the alternative, Hunt requested a new trial date.

On Monday, November 14, 1994, the trial court held a hearing on Hunt's motion. In support of dismissal, counsel for Hunt noted that, without Irby's witness list, he had been unable to develop and provide his own list, and that he had been unable to conclude discovery. He further noted that, because of Irby's failure, he had been unable to comply with the November 21, 1994 deadline for resolution of dispositive pretrial motions. Hunt's counsel stated that on the Friday prior to the hearing, Irby's counsel had attempted to give him "some idea of a witness list," but he noted that the list was incomplete and confusing.

Irby's counsel addressed the court and conceded that he had "run late consistently." He stated that he had not intended to disadvantage Hunt, and indicated that he believed rescheduling the trial was an appropriate remedy. He admitted that he had no "good excuse" such as "being ill or something like that." Instead, counsel stated that his tardiness was "just a press of business thing."

In its ruling, the trial court noted that, as of the date of the hearing, Irby had yet to file a witness list. It further noted that, although Hunt's counsel had attempted to "work the matter out informally," Hunt had been unable to fulfill his obligations under the scheduling order due to Irby's tardiness. In dismissing the complaint with prejudice, the trial court found compelling Irby's failure to follow a court order, as well as the inconvenience to defense counsel. The trial court continued, stating that Irby's failure represented "[p]robably ... the most egregious case" it had ever seen because Irby failed to seek an extension from the court or even to contact the court. It further noted that nothing in the record indicated Irby had taken any action whatsoever to prosecute her case. It reasoned that dismissal was appropriate because any other sanction "would negate any necessity for scheduling conferences at all, and would remove any ability of the court to conduct anything like an orderly disposition of cases."

Irby subsequently asked the trial court to reconsider the dismissal of her case with prejudice, and consider dismissal without prejudice. After holding a hearing, the trial court denied the request, concluding that dismissal without prejudice was inappropriate. In support of that conclusion, the trial court stated that dismissal without prejudice would allow Irby to re-commence her action simply by paying a second filing fee, and that such a monetary sanction was insufficient under the circumstances. Irby appeals, contending that the trial court erroneously exercised its discretion when it concluded that her failure to comply with the scheduling order warranted dismissal of her complaint with prejudice. We disagree.

A trial court has discretion to dismiss an action for failure to comply with a court order if the offending party's conduct is egregious and without a "clear and justifiable excuse." *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 276, 470 N.W.2d 859, 865 (1991). We will sustain a discretionary determination if we find that the trial court 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. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). "The question is not whether this court as an original matter would have dismissed the action; it is whether the circuit court [erroneously exercised] its discretion in doing so." *Johnson*, 162 Wis.2d at 273, 470 N.W.2d at 863.

Irby contends that dismissal with prejudice was unwarranted because her failure to comply with the scheduling order was not egregious. She notes that her failure to file the witness list was a violation of but a single court order. She argues that the cases that established the standards for dismissal involved failures far more egregious than her own. *See, e.g., Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 277, 470 N.W.2d 859, 865 (1991) (dismissal with prejudice appropriate where plaintiff failed to follow court orders after repeated warnings and a two-year delay); *Schneller v. St. Mary's Hosp.*, 162 Wis.2d 296, 314, 470 N.W.2d 873, 879 (1991) ("drastic sanction" of dismissal appropriate where party repeatedly failed to comply with deadline for naming experts necessary to substantiate its case); *Buchanan v. General Cas. Co.*, 191 Wis.2d 1, 7, 528 N.W.2d 457, 460 (Ct. App. 1995) (dismissal appropriate where party fails to appear for trial without court approval). She suggests that because those cases involved a party's repeated failures to comply with court orders, her behavior was not sufficiently egregious to warrant dismissal. We disagree.

Although Irby's behavior is distinguishable from the behavior described in *Johnson* and its progeny, the legal principles on which the results in those cases relied are not.

Where, as here, the conduct of the plaintiffs threatens the orderly administration of justice and the authority of the circuit court, it is within the circuit court's discretion to dismiss the action. [Citation omitted]. Plaintiffs are bound to follow the dictates of the scheduling order. They are not at liberty to flaunt that order and expect to not be penalized because they believe no delay or prejudice will result from the violation.

Schneller, 162 Wis.2d at 314-15, 470 N.W.2d at 880.

As we have already noted, the question is not whether this court would have imposed the same sanction as the trial court, but whether the trial court properly exercised its discretion in imposing the sanction it chose. *See Johnson*, 162 Wis.2d at 273, 470 N.W.2d at 863. Here, the trial court indicated that dismissal with prejudice was appropriate because it considered Irby's failure to be egregious, and that its failure to dismiss with prejudice would undercut the effectiveness of scheduling orders and impede the orderly disposition of cases in the trial court. As the supreme court has noted, trial courts must be able to control their calendars, and have a duty "to discourage protraction of litigation and to 'refuse [the courts'] aid to those who negligently or abusively fail to prosecute the actions which they commence'" *Schneller*, 162 Wis.2d at 314, 470 N.W.2d at 880 (citations omitted).

Irby's counsel told the trial court that his failure to comply with the scheduling order was due to nothing other than the "press of business." Irby cites to no case law—and we are aware of none—that would support the proposition that "press of business" is a clear and justifiable excuse for failing to comply with a court's order. In the absence of a clear and justifiable excuse, the trial court had the authority to dismiss the appeal if Irby's failure to comply with its order was egregious. The record shows that Irby's counsel was notified by opposing counsel no fewer than three times that the witness list was late. Irby failed to seek an extension of the deadline from the trial court, and Hunt moved for dismissal as a sanction only when Irby's counsel failed to comply with the informal extensions Hunt granted him. Nonetheless, Irby still failed to provide Hunt with a witness list until shortly before the dismissal hearing. That list, according to Hunt's counsel, was "incomplete and confusing." The trial court noted at the dismissal hearing that Irby had failed to file anything with the court by the time of the hearing. In concluding that Irby's failure was egregious and in dismissing her case with prejudice, the trial court considered the relevant facts and law, and reached a conclusion that a reasonable judge could reach. The trial court therefore properly exercised its discretion.

By the Court.--Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.