COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 27, 1996

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(1), 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. 95-1866-FT

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

LAURA ROBERSON and
ROSALINE ROBERSON,

Plaintiffs-Appellants,

v.

DONALD JESSUP and
ABC INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Laura Roberson and her daughter Rosaline Roberson appeal from a circuit court judgment dismissing their personal injury case for their failure to comply with the terms of the circuit court's scheduling

order. Because the circuit court did not err in its exercise of discretion in dismissing this case, we affirm.

BACKGROUND

Laura Roberson allegedly slipped and fell outside the front door of her daughter's apartment in the city of Milwaukee on February 16, 1990. When Rosaline Roberson attempted to assist her mother, she allegedly also fell. The two women subsequently filed a complaint against Donald Jessup, Rosaline's landlord, claiming that they each suffered personal injuries as a result of their respective falls on the ice accumulated in front of Jessup's apartment building.

On June 29, 1993, the trial court issued a scheduling order pursuant to § 802.10(3)(b), STATS. In part, the scheduling order required the Robersons to provide their witness list to Jessup no later than October 1, 1993. The deadline passed without the Robersons' compliance. In August 1994, the Robersons' counsel contacted Jessup's counsel seeking his consent to the Robersons' desire to file a belated witness list. Jessup's counsel declined to grant Robersons' counsel his consent. Shortly thereafter, Robersons' counsel contacted the trial court and scheduled a hearing on a motion to amend the scheduling order. Despite scheduling the matter for hearing, Robersons' counsel did not file or serve the motion. The trial court held its hearing on October 5, 1994. Robersons' counsel did not appear or cancel the date. In light of these circumstances, the trial court, on its own motion, denied the Robersons' putative request for relief.

On January 3, 1995, more than a month after the scheduling order's discovery cut-off date and only two weeks before the trial date, Robersons' counsel contacted Jessup's counsel regarding dates on which Jessup and a physician would be available for deposition. Jessup's counsel refused to consent to the proposed depositions and on January 5 filed a motion *in limine*, requesting the trial court to enter an order prohibiting the Robersons from calling any witnesses at trial. The trial court subsequently contacted both parties, informing them that the motion *in limine* would be heard on January 17. When neither the Robersons nor their counsel appeared at the hearing, the matter was postponed, eventually to March 2, 1995. At the March 2 hearing, the Robersons' counsel requested leave to file a motion to amend the scheduling

order. The trial court granted the Robersons leave and scheduled a hearing to hear the motion *in limine* and the motion to amend on March 27, 1995, the lawsuit's new trial date. The Robersons again did not file or serve a motion to amend the scheduling order.

At the March 27 hearing, the trial court heard arguments on Jessup's motion *in limine* and the Robersons' oral motion to set a new scheduling order. The trial court construed Jessup's motion as one to dismiss the case. The trial court granted the motion, finding that the "plaintiffs' day in Court has been forfeited by the egregious conduct of plaintiff[s] and plaintiff[s'] counsel without any justifiable excuse [for] ignoring the scheduling order in this particular case."

DISCUSSION

Trial courts have the authority to impose sanctions, including the dismissal of claims for a party's failure to obey a scheduling order. Secs. 805.03, 804.12(2)(a)3, and 802.10(3)(d), STATS. However, where dismissal is imposed for a failure to comply with a scheduling order, the trial court must make a finding of egregious conduct. ***Johnson v. Allis-Chalmers Corp.,*** 162 Wis.2d 261, 276, 470 N.W.2d 859, 865 (1991).

At the same time, a party may not obtain relief from an order requiring discovery by a certain date after the date has expired *unless* the party is able to demonstrate that its failure to seek relief from the order prior to that date was the result of "excusable neglect." *See* § 801.15(2)(a), STATS.; ***Schneller v. St. Mary's Hosp. Medical Center,*** 162 Wis.2d 296, 310, 470 N.W.2d 873, 878 (1991). Additionally, a party may not be relieved of the consequences resulting from its failure to comply timely with a discovery order unless that party is able to demonstrate "a clear and justifiable excuse" for that failure. ***Johnson***, 162 Wis.2d at 280, 470 N.W.2d at 866. *See also* ***Carlson Hearing, Inc. v. Onchuck***, 104 Wis.2d 175, 181-82, 311 N.W.2d 673, 676-77 (Ct. App. 1981).

Whether a sanction is appropriate and the choice of sanction to be imposed are issues subject to trial court discretion. ***Johnson,*** 162 Wis.2d at 273-75, 470 N.W.2d at 863-64. We will sustain a discretionary determination that is a

reasonable product of a demonstrated rational mental process based upon facts of record and the applicable law. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). "Because 'the exercise of discretion is not the equivalent of unfettered decision-making,'" the record must reflect the trial court's "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982).

We hold that the trial court's order did not result from an erroneous exercise of discretion. The trial court cataloged the Robersons' failure to comply with its order or file a request for relief. These findings of fact sustained the trial court's conclusion that the Robersons repeatedly failed to heed the trial court's deadlines and ignored the court's orders and hearing dates "with impunity, particularly where they have no reasonable explanation for the conduct." The court termed the case a "mess because plaintiff[s'] counsel has failed to comply with the scheduling order, which clearly denoted what the sanction would be for failing to comply with the scheduling order." Those sanctions indicated on the trial court's scheduling order included dismissal under sec. 805.03, Stats. In light of the record, we conclude that the trial court properly exercised its discretion when it concluded that the Robersons' failure to comply with the scheduling order was egregious in character and without justifiable excuse.

We are aware of the harsh effect of the trial court's order barring Walter's expert witnesses from testifying on his behalf at trial. Yet, "[t]he general control of the judicial business before it is essential to the court if it is to function." ***Latham v. Casey & King Corp.***, 23 Wis.2d 311, 314, 127 N.W.2d 225, 226 (1964). Accordingly, we conclude that the trial court properly exercised its discretion in firmly enforcing its orders to protect the integrity of its scheduling conference and orders to facilitate the case before it.

By the Court.—Judgment affirmed.

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