COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2923

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

REV. THOMAS PONCHIK,

PLAINTIFF-APPELLANT,

V.

JOHN J. EVERSMAN, A. THOMAS INDRESANO, MARY KAY SCHUKNECHT, GENE MORRIS AND ILIR SINO,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Reversed and cause remanded with directions.*

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

WEDEMEYER, P.J. Thomas Ponchik appeals from an order dismissing his cause of action with prejudice pursuant to § 805.03, STATS., for failing to obey the trial court's notice to appear at a scheduling conference. In essence, he claims trial court error in determining that his conduct in failing to

appear for a scheduling conference was egregious and without a clear and justifiable excuse. Because the trial court record before us is inadequate for due process purposes, we reverse and remand with directions.

I. BACKGROUND

On May 20, 1996, Ponchik filed a cause of action against John J. Eversman, M.D., A. Thomas Indresano, D.M.D., Eugene Morris, D.D.S., Mary Kay Schuknecht, and Sheriff's Deputy Ilir Sino. Ponchik alleged that while an inmate of the Milwaukee County Jail, he was denied dental "restoration treatment" for tooth decay. Schuknecht and Sino were employees of the sheriff's department. Indresano, Eversman, and Morris were employees of the Medical College of Wisconsin, and were signatories to an agreement between the Medical College and Milwaukee County. Under the agreement, the Medical College was to supply certain dental services to the inmates of the Milwaukee County Criminal Justice Facility. Ponchik was an inmate of the Milwaukee County Jail and alleged non-compliance with the agreement.

On June 27, 1996, the trial court served all the parties and their respective counsels with a notice of hearing for a scheduling conference to be held on August 27, 1996, at 8:45 a.m. The notice contained the following language: "If you have a disability and need help in court, please call (414) 289-6767." Unbeknown to the trial court, on August 9, Ponchik was transferred to the Dodge County Correctional Facility. On August 27, the trial court, by phone, notified the jail to bring Ponchik to court and then first learned that he had been transferred to the Dodge County Correctional Facility in Waupun. Ponchik was the only party not to make an appearance at the scheduling conference. His absence precipitated motions to dismiss by opposing counsels. After a lengthy discussion on the

record, the trial court ruled that Ponchik's conduct was "extreme" and "substantial" and "based on the way he has proceeded up to now … this court must grant dismissal with prejudice under 805.03." Judgment was entered dismissing his claim. Ponchik now appeals.

II. DISCUSSION

A trial court's decision to dismiss an action is of a discretionary nature. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis.2d 296, 310, 470 N.W.2d 873, 878 (1991). It will not be reversed unless the party claiming to be aggrieved by the decision can demonstrate an erroneous exercise of discretion. *See* ***Gaertner v. 880 Corp.***, 131 Wis.2d 492, 497-98, 389 N.W.2d 59, 61 (Ct. App. 1986). Subsection § 802.10(7), STATS., provides that violations of a scheduling order are subject to the provisions of § 805.03, STATS., which in turn allows the trial court to make such orders as are just "including but not limited to orders authorized under s. 804.12(2)(a)." Subdivision (a)3 of this subsection allows an order for dismissal.

The sanction of dismissal will be sustained if there is a reasonable basis for the trial court's determination that the non-complying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 276, 470 N.W.2d 859, 865 (1991). These determinations in the context of general principles of due process presume equal ability on the part of the competing parties to present their respective positions.

When our justice system is called upon to adjudicate "pro se prisoner" claims, regardless of their nature, the underlying approach has consistently been measured liberality. This policy was well expressed in ***State ex***

rel. Terry v. Traeger, 60 Wis.2d 490, 211 N.W.2d 4 (1973) when our supreme court explained:

> We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court. Accordingly, we must follow a liberal policy in judging the sufficiency of pro se complaints filed by unlettered and indigent prisoners.

Id. at 496, 211 N.W.2d at 7-8 (footnote omitted).

Admittedly, the issue before us is not the adequacy or meaning of a particular pleading. We conclude, however, the same measured approach should, for the same reasons, be utilized in reviewing the process that has been called into question.

We have carefully reviewed the record and exhaustive analysis rendered by the trial court in reaching its decision to dismiss. We are also most cognizant of the consequences that the recent increased "pro se prisoner" litigation has had on our trial courts. We bow under the same yoke. Nevertheless, when faced with a record that we deem inadequate for our purposes, we are compelled to require another alternative for a fair resolve. Our difficulty in examining the issue before us in light of the two-prong rubric of ***Johnson***, 162 Wis.2d at 276, 470 N.W.2d at 865, is whether Ponchik, in the context of his more restrictive existence in a high-security system, was provided a reasonable opportunity to present reasons why he did not make an appearance on the assigned date.

This question is all the more critical when we learn from the record that Ponchik informed an officer of the court by letter dated August 22, 1996, that

his residence was Waupun.[1] Why this notification was not called to the attention of the court earlier, what the contents of the letter were, how restricted was Ponchik's freedom of activity and his choices for contact with the community outside his prison environs, all relate to whether he had a "justified excuse."

[1] SCR 20:3.3 provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal;
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (4) offer evidence that the lawyer knows to be false.
>
> ….
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Although the final result may not change on remand, we deem it warranted that Ponchik is afforded that opportunity be it in person or by telephonic means. We therefore remand for the trial court to provide Ponchik an opportunity to be heard as to why he could not make the required appearance.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.