COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0422-FT

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

DAVID T. LASS AND, REBECCA J. REEVES,

PLAINTIFFS-APPELLANTS,

V.

HERITAGE MUTUAL INSURANCE COMPANY AND ROBERT K. NELSON, III,

DEFENDANTS,

GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

PER CURIAM. David T. Lass and Rebecca J. Reeves (plaintiffs) sued Robert K. Nelson, III, (Nelson) and his insurer, General Casualty Company

of Wisconsin (General Casualty), alleging that Nelson negligently caused the plaintiffs personal injury as a result of an automobile accident. Upon the motion of Nelson and General Casualty, the trial court dismissed the plaintiffs' complaint because the plaintiffs violated the trial court's scheduling order. The plaintiffs appealed. Because the trial court did not err in its exercise of discretion in dismissing the case, we affirm.[1]

BACKGROUND

This lawsuit was commenced on January 6, 1997. On May 22, 1997, the trial court issued a scheduling order directing the plaintiffs to name their fact witnesses, itemize their special damages and provide expert reports by June 30, 1997. The scheduling order provided in pertinent part that "[w]itnesses not timely named shall not be called as witnesses at trial, except for good cause shown," and that "[f]ailure to comply with the terms of this order shall be considered cause for imposing sanctions … [under] … secs. 804.12 and 805.03, Wisconsin Statutes." The plaintiffs did not respond to the trial court's scheduling order.

On October 1, 1997, Nelson and General Casualty filed a motion to dismiss the case, citing the plaintiffs' failure to serve their witness list, list of special damages, expert reports, answers to interrogatories or executed releases to allow discovery regarding the plaintiffs' health status. On the eve of the hearing on the motion to dismiss, the plaintiffs filed their witness list and a pre-trial report that included physician reports respectively dated January 6, 1994, November 1,

[1] Pursuant to this court's order dated March 11, 1998, this case was submitted to the court on the expedited appeals calendar. *See* RULE 809.17, STATS.

1994, December 6, 1995, June 10, 1996 and January 14, 1997. The plaintiffs also filed a motion requesting the trial court to extend the scheduling order's deadline. After hearing, the trial court denied the plaintiffs' extension motion and granted the defendants' motion to dismiss.

DISCUSSION

Trial courts have the authority to impose sanctions, including the dismissal of claims for a party's failure to obey a scheduling order. Sections 805.03, 804.12(2)(a)3, and 802.10(3)(d), STATS. Further, 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. Med. Ctr.***, 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. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 280, 470 N.W.2d 859, 866 (1991); *see also* ***Carlson Heating, Inc. v. Onchuck***, 104 Wis.2d 175, 181-82, 311 N.W.2d 673, 676-77 (Ct. App. 1981). However, where dismissal is imposed for a failure to comply with a scheduling order, the trial court must make a finding of egregious conduct. *See* ***Johnson***, 162 Wis.2d at 276, 470 N.W.2d at 865.

Determining if a sanction is appropriate as well as the choice of sanction to be imposed, are issues subject to trial court discretion. *See* ***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. *See* ***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 on appeal must reflect the circuit 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) (citation omitted).

In this case, the trial court issued its two decisions from the bench. The trial court first established that plaintiffs' counsel was unaware of the standard by which motions to extend a scheduling order are evaluated.[2] The trial court then informed plaintiffs' counsel that the court's authority to grant such an extension motion was limited to cases where it found that the party's failure to act was the result of excusable neglect. The trial court went on to catalog its reasons for concluding that the plaintiffs had not demonstrated excusable neglect—the plaintiffs' "total failure to comply" with the orders of the court, the vagueness of the excuse offered to explain their delay, and the possession by the plaintiffs of the identities of their witnesses and their expert witnesses' reports prior to the scheduling conference itself.

The trial court then considered whether cause existed to dismiss the case by examining the conduct of the plaintiffs to determine whether it was egregious or demonstrated bad faith. The trial court found that the plaintiffs' tardy compliance occurred on the eve of the hearing, some five months after the scheduling order's deadline and two months after the motion to dismiss was filed by Nelson and General Casualty to secure the imposition of sanctions. The trial

[2] When asked by the trial court what standard governed the extension counsel was requesting, counsel replied: "I didn't review the case law in that regard."

court again noted that the plaintiffs had in their possession the physician reports subject to the scheduling order. The trial court found that the plaintiffs failed to offer a valid excuse for their conduct. The trial court also pointed to the scheduling order which advised the plaintiffs that "failure to comply will be considered cause for imposing sanctions," including dismissal under § 805.03, STATS. In light of these circumstances, the trial court concluded that the plaintiffs' conduct was egregious and that dismissal was warranted.

We conclude that the trial court properly exercised its discretion when it concluded that the plaintiffs failed to demonstrate the excusable neglect necessary to justify an extension of the scheduling order's deadline. We further conclude that the trial court properly exercised its discretion when it concluded that the plaintiffs' failure to comply with the scheduling order was egregious and without justifiable excuse. We hold, therefore, that the sanction of dismissal was warranted in this case. *Cf.* ***Latham v. Casey & King Corp***., 23 Wis.2d 311, 314, 127 N.W.2d 225, 226 (1964) ("The general control of the judicial business before it is essential to the court if it is to function.").[3]

By the Court.—Order affirmed.

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

[3] Nelson and Heritage Mutual moved this court on August 13, 1998, to impose sanctions on the plaintiffs for violating RULE 809.15(1)(a), STATS., by including a document not of the record in their reply brief. The plaintiffs did not file a response to the motion. The court concludes that the motion states cause for relief. Accordingly, counsel for the plaintiffs is hereby directed to remit $50 in costs to the clerk of the Court of Appeals no later than ten days after the date of this opinion.