COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1483-FT

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

SCOTT CECIL,

PLAINTIFF-APPELLANT,

V.

KJH ENTERPRISES, INC.,

DEFENDANT-RESPONDENT,

ABC INSURANCE COMPANY, AND
LIBERTY MUTUAL INSURANCE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Scott Cecil appeals a judgment which dismissed his personal injury claim against KJH Enterprises, Inc., "upon the merits" as a sanction under § 805.03, STATS.[1] Cecil claims the trial court should instead have granted his motion to voluntarily dismiss the action without prejudice. We conclude that the trial court's action was within its discretion, and we affirm the judgment.

BACKGROUND

Cecil allegedly suffered smoke inhalation, a back injury, and damage to personal property from a truck fire which occurred in a vehicle leased by Cecil's employer from KJH Enterprises. He filed suit on August 7, 1996. On September 27, 1997, the trial court issued a pretrial scheduling order which set a number of discovery deadlines, including February 1, 1998, as the date by which Cecil was to name any expert witnesses. The order warned that the failure to timely name experts could result in their testimony being barred. In October 1997, Cecil ceased communication with counsel, making it impossible for counsel to respond to KJH's second set of interrogatories, or to name or certify the readiness of its experts. On February 23, 1998, KJH moved to compel compliance with its discovery demands or, in the alternative, to dismiss the action for Cecil's noncompliance with the scheduling order. The trial court scheduled a hearing on the motion for March 30, 1998. Cecil then moved to voluntarily dismiss the action pursuant to § 805.04(2), STATS., but the trial court ruled that it was too late for voluntary dismissal. Instead, the court dismissed the action on the merits for plaintiff's failure to prosecute and his failure to comply with the pretrial order.

[1] This is an expedited appeal under RULE 809.17, STATS.

STANDARD OF REVIEW

The decision to dismiss a case with or without prejudice lies within the discretion of the trial court. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). We will sustain discretionary acts by the trial court so long as the 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." ***Modica v. Verhulst***, 195 Wis.2d 633, 650, 536 N.W.2d 466, 474 (Ct. App. 1995).

DISCUSSION

Voluntary Dismissal.

Cecil first argues that the trial court erroneously exercised its discretion by applying the wrong standard of law to his motion for voluntary dismissal. Under § 805.04(2), STATS., once issue has been joined, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Cecil contends that the trial court erred as a matter of law when it denied his motion to voluntarily dismiss as "too late," because the statute sets forth no time limit for bringing voluntary dismissal motions. The statute also sets forth no specific standard for the trial court to employ when deciding whether to allow voluntary dismissal under subsection (2), but case law establishes that a trial court has no obligation to dismiss an action without prejudice upon the plaintiff's request after a responsive pleading has been filed. *See* ***Gowan v. McClure***, 185 Wis.2d 903, 913, 519 N.W.2d 692, 696 (Ct. App. 1994). Nothing in the statute precludes the trial court from ordering dismissal with prejudice because of the advanced stage of the proceedings. The record shows that the trial court rationally considered all of the

relevant facts in determining that a voluntary dismissal without prejudice was inappropriate more than a year after the action had been filed, after the discovery period had passed and the defendant had filed its own dismissal motion for failure to prosecute.

Dismissal with Prejudice.

Cecil next claims that the trial court erroneously exercised its discretion by dismissing his action on the merits without making a finding that his violations of the pretrial order had been egregious. *See* ***Johnson,*** 162 Wis.2d at 275, 470 N.W.2d at 864 (concluding that, due to the harshness of dismissal as a sanction for failing to obey scheduling orders, there must be a showing of egregious conduct). We disagree that this was an improper exercise of discretion.

First, Cecil overlooks the fact that the trial court based its dismissal on his failure to prosecute as well as his failure to comply with its pretrial order. "The principle is firmly established that in order to demonstrate that a dismissal order based upon the failure to prosecute was a [misuse] of discretion, the aggrieved party must show 'a clear and justifiable excuse' for the delay." ***Trispel v. Haefer***, 89 Wis.2d 725, 733, 279 N.W.2d 242, 245 (1979) (citation omitted). Counsel admitted at the dismissal hearing that he had had no contact with Cecil for over six months and, due to his client's disappearance, could not predict when the case might be able to proceed.[2] Such an admission does not establish any excuse on Cecil's part, much less a justifiable one, for the failure to prosecute.

[2] Concurrent with the Motion for Voluntary Dismissal, Cecil's counsel also submitted a motion to withdraw as Cecil's attorney of record in the matter.

Furthermore, in ***Trispel***, the Wisconsin Supreme Court held that a plaintiff's failure to comply with a discovery order, or to offer a timely explanation for the failure, was inexcusable and warranted dismissal of the case. ***Trispel***, 89 Wis.2d at 735, 279 N.W.2d at 246. We therefore have no difficulty inferring a finding that Cecil's conduct was egregious from the trial court's determinations that a substantial amount of time had passed and that Cecil's unexplained delay had deprived the defendants of the right to have the matter proceed in a timely manner. *See* ***Englewood Community Apartments Ltd. Partnership v. Alexander Grant & Co.***, 119 Wis.2d 34, 39 n.3, 349 N.W.2d 716, 719 (Ct. App. 1984). The trial court reasonably applied an appropriate standard of law to the facts of record to reach a reasonable result.

By the Court.—Judgment affirmed.

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