COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0204-FT **Cir. Ct. No. 01CV000019**

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

SECURA INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

JERRY BRUBAKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed.*

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

¶1 PER CURIAM. Jerry Brubaker appeals the circuit court's judgment in favor of Secura Insurance Company. The issue is whether the circuit court properly exercised its discretion in granting judgment in favor of Secura because Brubaker failed to appear at the final pretrial conference. This case was placed on

the expedited appeals calendar pursuant to WIS. STAT. RULE 809.17 (2001-02).[1] We reverse.

¶2 Secura brought this action against Brubaker, alleging that he negligently constructed a silo belonging to its insured. The circuit court entered judgment against Brubaker because he failed to appear at the final pretrial conference on October 24, 2002. Brubaker moved to reopen the judgment. The circuit court denied the motion to reopen, concluding that Brubaker had not shown excusable neglect, mistake, or inadvertence as required by WIS. STAT. § 806.07.[2]

¶3 Brubaker argues that the circuit court should not have entered judgment against him as a sanction for not appearing at the final pretrial conference. He frames this argument as a motion to reopen the judgment pursuant to WIS. STAT. § 806.07. However, he also raised the distinct issue of whether the circuit court had "just cause" to dismiss his claim, as that term is used in WIS. STAT. § 805.03. This latter issue is dispositive of this appeal, and is therefore the issue we address.

¶4 "The circuit court has both statutory authority, through secs. 802.10(3)(d), 805.03, and 804.12(2)(a)3, Stats., and inherent authority to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). Among the sanctions permitted are

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] WISCONSIN STAT. § 806.07 provides that the circuit court may "upon such terms as are just" relieve a party from a judgment for various reasons, including "[m]istake, inadvertence, surprise, or excusable neglect."

judgment against the disobedient party and dismissal. WIS. STAT. § 804.12(2)(a)3. Although the circuit court has wide latitude in imposing sanctions, it may impose only such orders "as are just." *See* ***Johnson***, 162 Wis. 2d at 274-75. Harsh sanctions are improper—not "just"—"unless bad faith or egregious conduct can be shown on the part of the noncomplying party." ***Id.*** at 275. ***Johnson*** discusses dismissal as a sanction, but its reasoning applies equally to any harsh sanction imposed under § 804.12(2)(a)3, including judgment against the noncomplying party, as was imposed here. *Cf.* ***id.*** at 273-75.

¶5 The circuit court analyzed Brubaker's claim that judgment should not have been entered against him solely under the standard set forth in WIS. STAT. § 806.07(1)(a), which explains when a circuit court may *reopen a properly entered judgment*. Before addressing the motion to reopen, however, the circuit court should have addressed the initial question of whether it properly entered judgment against Brubaker as a sanction in the first instance, which turns on whether Brubaker's failure to appear constituted "egregious conduct."[3] Because the circuit court did not decide whether Brubaker's failure to appear at the pretrial conference constituted "egregious conduct," despite the fact that Brubaker raised it in his brief in support of setting aside the judgment, the circuit court misused its discretion.[4] *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175

[3] Given the circuit court's finding that Brubaker may have been confused about the date, the circuit court could not have found that he acted in bad faith in failing to appear.

[4] Based on the docketing statement and other documents, Brubaker clearly intended to appeal both the December 9, 2002 judgment and the March 12, 2003 order denying the motion to reopen. Secura has not objected and has raised arguments concerning both the judgment and the order. Therefore, we do not address whether the notice of appeal encompasses the order denying the motion to reopen.

(1982) (a circuit court misuses its discretion if it fails to apply the correct legal standard).

¶6 Although we would ordinarily remand for the circuit court to consider whether the conduct was egregious, we conclude that Brubaker's conduct was not egregious as a matter of law because no reasonable judge could decide that it was based on the record and the facts as found by the circuit court. The circuit court found that there may have been some confusion about the date of the pretrial because it was switched to October 24 from October 25 at Secura's request, and Brubaker appeared on the day the conference was originally scheduled. Therefore, Brubaker did not *willfully* disobey an order of the court by failing to appear at the pretrial conference. As for Brubaker's conduct earlier in the case, Brubaker failed to name expert witnesses, but he was not required to do so. Instead, he lost the opportunity to call the witnesses. Brubaker was also not required by court order to respond to the request for admissions, which addressed damages for the most part, and he explains that he did not do so because he was not disputing damages, only liability. Although Brubaker did initially fail to respond to the interrogatories sent to him by Secura, he apparently did respond once the court ordered him to do so. Finally, the circuit court pointed to the fact that Brubaker's attorney had withdrawn as indicative of a pattern of uncooperative conduct, but the fact that Brubaker's attorney withdrew was not relevant to the issue at hand: whether Brubaker acted egregiously by failing to comply with court orders. In sum, we conclude that no reasonable judge could conclude on this record that Brubaker's conduct was egregious. Therefore, the circuit court misused its discretion in entering judgment against Brubaker as a sanction for failing to appear at the pretrial conference.

¶7 Finally, in closing, we wish to clarify that our decision does not preclude the circuit court on remand from considering, based on an appropriate motion from the plaintiff, whether there is any issue of fact to be tried on liability, given that Brubaker will not present expert testimony.[5]

By the Court.—Judgment reversed.

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

[5] The circuit court stated that Brubaker needed to have a meritorious defense to reopen the judgment, a point also argued by the parties on appeal. A meritorious defense is required only when a motion to reopen a default judgment is brought pursuant to WIS. STAT. § 806.07. *See* ***J.L. Phillips & Assoc. v. E&H Plastic Corp.***, 217 Wis. 2d 348, 351, 577 N.W.2d 13 (1998). Because we have not decided this case based upon § 806.07, the reasoning of ***J.L. Phillips*** does not apply.