

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-1783-FT
STATE OF WISCONSIN**

Cir. Ct. No. 00CV000784

**IN COURT OF APPEALS
DISTRICT IV**

HOLLYWOOD LIVESTOCK, INC.,

PLAINTIFF,

V.

ANDREW PITZER,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT,**

V.

**ROBERT PETERSON D/B/A HOLLYWOOD LIVESTOCK,
INC., AND HOLLYWOOD DRESSED BEEF CORP. D/B/A
AND/OR A/K/A HOLLYWOOD LIVESTOCK, INC.,**

**THIRD-PARTY DEFENDANTS-
APPELLANTS.**

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with
directions.*

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

¶1 PER CURIAM.¹ Robert Peterson and Hollywood Dressed Beef Corp. (HDB) appeal an order denying their motion to reconsider dismissal of their claims against Andrew Pitzer. The trial court dismissed these claims as a sanction for discovery violations. The court subsequently treated the motion to reconsider as an application for WIS. STAT. § 806.07 relief, and denied it. We exercise our discretionary power under WIS. STAT. § 752.35, and reverse in the interest of justice.

¶2 Hollywood Livestock, Inc., commenced an action against Pitzer. Pitzer then filed a third-party complaint against Peterson and HDB. Peterson and HDB, in turn, alleged claims against Pitzer. In February 2003, Peterson and HDB, by Attorney Joan Schwarz, moved to compel Pitzer to answer certain interrogatories and to produce certain documents sought through discovery. By letter of February 24, 2003, Pitzer's attorney, Vernon Jesse, responded to the motion, and also gave Attorney Schwarz an extended March 3 deadline to comply with Jesse's discovery requests. Meanwhile, the trial court scheduled a hearing on Schwarz's motion for 1:15 p.m. on March 4. The trial date was March 10, 2003.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 In February, Attorney Schwarz sought a different date for the hearing because she was scheduled to teach classes at the University of Wisconsin-Whitewater on March 4. When the trial court refused her request, Attorney Schwarz withdrew her motion to compel by letter served on the court and Attorney Jesse on the morning of March 3.

¶4 In a letter faxed later that day to the court, Attorney Jesse asked the court to keep the March 4 hearing on its calendar and use the time to address Jesse's claim that Attorney Schwarz and her clients were failing to comply with his discovery requests. Jesse stated in the letter that he intended to ask the court to dismiss the matter as a discovery sanction if he did not receive his requested discovery by the close of business on March 3.

¶5 On the morning of March 4, upon learning that Judge Callaway still declined to adjourn the March 4 hearing, Attorney Schwarz sought intervention by the Deputy Chief Judge of the District. She also wrote the trial court, denying Attorney Jesse's allegations about the alleged discovery violations and reiterating that her teaching obligations would prevent her from appearing on March 4. She stated that because "there are no motions before the court this afternoon and since the court has had ample notice of my unavailability, I intend to fulfill my obligations at the university. If the court would like to schedule a hearing [on a later date], I am available."

¶6 Attorney Jesse also wrote the court on March 4. In a letter received two and a half hours before the scheduled hearing, Jesse alleged that Attorney Schwarz had not met the March 3 deadline for discovery, and consequently asked "that the Court dismiss this matter as an appropriate sanction against the Plaintiff for failing to respon[d] to the discovery in good faith."

¶7 The court went ahead with the March 4 hearing without Attorney Schwarz's presence. After Attorney Jesse briefly recited the alleged discovery violations, the trial court granted his request for dismissal, as a discovery sanction under WIS. STAT. § 804.12(2)(a) and (4). As noted, Attorney Schwarz's subsequent attempt to vacate that order was unsuccessful.

¶8 WISCONSIN STAT. § 752.35 gives this court discretionary authority to reverse the trial court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried ... regardless of whether the proper motion or objection appears in the record" We have broad authority under this statute to achieve justice in a particular case. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

¶9 We conclude that the trial court's refusal to grant relief from its dismissal order was a substantial miscarriage of justice. Dismissal as a discovery sanction requires a finding of bad faith or egregious conduct, supported by a reasonable factual basis. See *Sentry Ins. v. Davis*, 2001 WI App 203, ¶¶19-21, 247 Wis. 2d 501, 634 N.W.2d 553. Here, the trial court made no finding of either bad faith or egregious conduct. Nor was there a reasonable factual basis for such a finding. In fact, Attorney Jesse presented no evidence supporting his request for discovery sanctions, relying instead on his brief summary of the alleged violations.

¶10 We do not mean to convey approval of Attorney Schwarz's decision. Faced with the choice of serving her client and meeting her teaching responsibilities, we think Schwarz should have given priority to her client. However, her absence from the hearing does not change our conclusion that the trial court lacked a basis to dismiss Schwarz's client's claims.

¶11 A miscarriage of justice occurred when the court refused to vacate its order of dismissal. We therefore remand to the trial court for entry of an order vacating the March 5, 2003, order of dismissal.

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

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

