COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

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. 2005AP189 **Cir. Ct. No. 2003CV1475**

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

INDUSTRIAL ROOFING SERVICES, INC. AND KEITH DIPPEL,

PLAINTIFFS-APPELLANTS,

V.

RANDY J. MARQUARDT, DALE M. MARQUARDT, BRADLEY L. ENGNATH, JEFFREY P. SAMPSON AND ROOFING DESIGN & SOLUTIONS, INC.,

DEFENDANTS-RESPONDENTS,

STEVEN W. SCHOEN AND JOHN G. DORRER,

DEFENDANTS.

APPEAL from orders of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed*.

Before Snyder, P.J., Brown, J., and Daniel L. LaRocque, Reserve Judge.

¶1 SNYDER, P.J. Industrial Roofing Services, Inc. and its president, Keith Dippel, (Industrial) appeal from orders dismissing their complaint against Randy J. Marquardt, Dale M. Marquardt, Bradley L. Engnath, Jeffrey P. Sampson, and Roofing Design & Solutions, Inc. (Marquardt) with prejudice and denying their motion for reconsideration.[1] Marquardt moved for dismissal as a sanction for Industrial's failure to respond to discovery requests and comply with the circuit court's scheduling order. Industrial maintains that all such failures were the result of its attorney's emotional and psychological problems, and that the court improperly imputed these failures to Industrial. The court's order, it contends, was based on a mistake of fact and misapplication of the law. Industrial also claims that the court erred when it refused to reconsider its ruling after the mistake of fact became apparent. We disagree and affirm the orders of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 Industrial hired a lawyer and commenced this action after several employees and an officer resigned and established a competing business now known as Roofing Design & Solutions, Inc.[2] The complaint alleged that the defendants conspired together and acted in concert to damage Industrial's business

[1] The original complaint lists several additional defendants. Apparently, certain claims against individual defendants were addressed prior to this appeal. Our recitation of the facts and procedural background is limited to those that are relevant to the defendants named as respondents in this appeal unless other facts are deemed necessary.

[2] No independent claims against the lawyer for his conduct are before this court; therefore, we choose not to identify him in this opinion.

by resigning en masse and taking Industrial's confidential and trade secret information with them. It further alleged that Marquardt then used Industrial's information to set up a competing business in violation of Wisconsin law and their duties and obligations to Industrial.

¶3 Several defendants filed motions to dismiss, alleging lack of personal jurisdiction. A motion hearing was scheduled for October 27, 2003; however, upon determining that Industrial's lawyer failed to serve its response to the motions on defense counsel, the motion hearing was rescheduled to November 17. Industrial's attorney offered to pay the defendants' fees and costs for the second hearing. He explained to the court that the mistake was attributable to his office, not his client.

¶4 At the November 17 hearing, the circuit court denied the motions to dismiss and conducted a scheduling conference. Dippel, Industrial's president, was present at the November 17 hearing. According to the scheduling order, Industrial was to produce a witness list by March 30, 2004, and Marquardt was to produce a witness list by July 2, 2004. The court ordered discovery closed as of September 1, 2004, and set a date of September 15 for filing any dispositive motions. The court deferred scheduling the trial until after hearing any dispositive motions.

¶5 In the meantime, Marquardt and other defendants issued written discovery, including production requests, interrogatories, and requests for admission. These were served on Industrial between August 28, 2003 and September 19, 2003. Industrial responded with answers to some discovery requests and objections to others, objecting in large part to the interrogatories propounded by Marquardt. In January 2004, Marquardt issued "replacement

interrogatories" in lieu of those it had already served. More requests for admission followed as well. On January 23, another defendant, James Clark, filed a motion to compel, seeking more complete answers from Industrial.

¶6 On February 9, 2004, Industrial filed a motion for a protective order, objecting to the number of interrogatories issued by Marquardt. At the same time or shortly thereafter, Industrial responded to Marquardt's requests for admission and several other discovery requests submitted by other defendants, including Clark.

¶7 The circuit court heard Industrial's motion for a protective order and Clark's motion to compel on February 23. Industrial was represented by counsel, but Dippel did not attend the motion hearing. According to Dippel, Industrial was never advised of the hearing, nor was it advised of the discovery issues being raised by the defendants. The court chastised Industrial's attorney and awarded attorney fees for the hearing to certain defendants as a sanction. The court also warned that if discovery problems continued, the court would "react … on a stronger basis" and the sanction would be larger. The court set the matter for a status hearing on June 14, 2004. Industrial's attorney did not advise Industrial of the results of the motion hearing, the imposition of sanctions, or the warning issued by the court. He also failed to inform Industrial of the status conference date.

¶8 The circuit court issued two orders stemming from the February 23 motion hearing. The first order granted Clark and Marquardt relief from the local rule limiting the number of allowable interrogatories. It required Industrial to respond to the outstanding discovery requests by March 1. The court imposed sanctions and awarded the defendants a total of $665. Industrial never received

copies of the orders from its attorney, nor was it advised of the contents of the orders.

¶9 On March 22, after the response deadline had passed, Industrial answered Marquardt's requests for admission. Industrial did not provide any response to Marquardt's request for production. Marquardt filed motions to dismiss and for sanctions based on Industrial's failure to fully comply with the circuit court's March 1, 2004 discovery response deadline. The court set June 14, originally reserved for a status hearing, to hear motions. Industrial's attorney did not advise Industrial of the motions or of the hearing date.

¶10 At the June 14 hearing, Industrial's attorney advised the court that he was undergoing personal and emotional problems that had prevented him from managing the case and for that reason he had failed to comply with the discovery deadline. He stated, "The fault in this case in terms of responding [has] been mine…. And if the Court's ruling today, to the extent there are sanctions to be levied, Judge, I would ask the Court to levy them against me in terms of any fees and not to my client."

¶11 The circuit court accepted the explanation, but inquired as to Industrial's knowledge of the ongoing compliance issues regarding the discovery order. Industrial's attorney correctly indicated that Industrial, by Dippel, had been present at the November 17, 2003 hearing where the scheduling order and discovery time line were issued. He also indicated that Industrial knew of the substance of the June 14 hearing and that Industrial had been advised to seek new counsel. Industrial disputes these representations. Attorneys for Clark and Marquardt indicated to the court that Dippel was present at the February 23

hearing where the court warned of severe sanctions for future discovery violations. The transcript from the February 23 hearing indicates that Dippel was not present.

¶12 The day after the June 14 hearing, Industrial's attorney informed the company the he could no longer represent it. Industrial then hired new counsel. Upon filing a notice of appearance and an affidavit from Dippel, Industrial's new attorney requested a status conference and an opportunity to present a plan for expeditious handling of the claims. In a decision filed on June 29, 2004, the circuit court denied Industrial's request for a status conference, stating that it would first decide the pending motions to dismiss. The court indicated that it would consider Dippel's affidavit in its decision on the motions.

¶13 On September 16, the circuit court signed an order granting Marquardt's motion to dismiss. The dismissal was without prejudice, subject to certain conditions:

> For plaintiffs to re-file this case against the Marquardt Defendants, which would have to be done within 60 days from the date of this Order, plaintiffs will first have to pay to the Marquardt Defendants attorneys fees of $3,740.81, as well as the previously ordered fees of $186.00, for a total of $3,926.81. If the 60 days passes and the attorneys fees are not paid and the case is not re-filed, the case is then dismissed with prejudice as to the Marquardt Defendants.
>
> If the attorneys fees are paid and the case re-filed within the 60 days, plaintiffs must demonstrate, at a hearing to be held immediately upon such re-filing, the viability of the allegations against the Marquardt Defendants in the complaint from both a factual and legal basis. Failure to so demonstrate may result in the case being dismissed with prejudice as to the Marquardt Defendants.

¶14 On December 9, the circuit court entered an order dismissing the claim against Marquardt with prejudice because Industrial had neither paid the

sanctions nor refiled the case.[3] Industrial filed a motion for reconsideration. The court denied the motion and Industrial appeals.

DISCUSSION

¶15 The primary issue presented here is whether the circuit court's ultimate decision to dismiss Industrial's case with prejudice was error. A circuit court's decision to dismiss an action is discretionary and will not be disturbed absent an erroneous exercise of the court's discretion. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). Moreover, "we review a circuit court's decision to impose sanctions, as well as the particular sanction it chooses, for an erroneous exercise of discretion." ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion. ***Johnson***, 162 Wis. 2d at 273.

¶16 Industrial first challenges the dismissal on grounds that the circuit court unfairly imputed the conduct of Industrial's attorney to Industrial. Here, Industrial's attorney admitted his mistakes, explained that they were a result of personal problems affecting his law practice, and requested that the circuit court visit any sanctions upon him rather than his client. Citing ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis. 2d 498, 514, 285 N.W.2d 720 (1979), for support, Industrial argues that the failures of a lawyer constitute excusable neglect on the part of the client where the client has acted reasonably in hiring a lawyer of

[3] The circuit court issued a similar order with regard to other defendants. The combined sanction against Industrial, to be paid within sixty days of the court's orders, was $20,004.31.

good reputation. Further, Industrial directs us to ***L.P. Steuart, Inc. v. Matthews***, 329 F.2d 234, 235 (D.C. Cir. 1964), for the proposition that a client should be granted relief from consequences of an attorney's negligent conduct when "personal problems of counsel cause him [or her] grossly to neglect a diligent client's case and mislead the client." Likewise, a lawyer's conduct should not be imputed to the client where the client is not regularly involved with lawsuits or where the attorney and client are not acting as one. *See* ***Baird Contracting, Inc. v. Mid Wisconsin Bank of Medford***, 189 Wis. 2d 321, 326, 525 N.W.2d 276 (Ct. App. 1994); ***Primbs v. United States***, 4 Cl. Ct. 366, 370 (1984), *aff'd*, 765 f.2d 159 (Fed. Cir. 1985).

¶17 Marquardt responds that where an attorney in a civil action fails to obey court orders and such failure implicates the circuit court's ability to administer judicial business, it is fair to impose the adverse consequences on the shoulders of that party who chose the attorney rather than on the other litigants. *See* ***Johnson***, 162 Wis. 2d at 285. Marquardt also argues that the circuit court crafted a two-tiered sanction that provided Industrial with the opportunity to pursue its lawsuit if it paid the sanctions and demonstrated a viable claim; therefore, Industrial had the opportunity to avoid the harsh sanction of dismissal with prejudice. Furthermore, Marquardt takes issue with Industrial's reliance on ***Steuart***. There, the federal court observed that the case involved a "diligent" plaintiff whom the trial court had described as "unfamiliar with court procedures."

Steuart, 329 F.2d at 235. Marquardt contends that Industrial was neither a diligent client nor an inexperienced litigant.[4]

¶18 In ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 404, 308 N.W.2d 887 (Ct. App. 1981), we held that a party in a civil case who alleges poor performance by trial counsel has a remedy by way of legal malpractice, not by reversal of the adverse judgment or order. A reversal would act as a remedy against the opposing party in the lawsuit, not against trial counsel, and would be inappropriate. Presumable, the rationale behind ***Village of Big Bend*** is that an innocent opposing party should not bear the burden of a new trial where the other party's lawyer was somehow ineffective. *Cf.* ***Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust***, 2004 WI 57, ¶36, 271 Wis. 2d 610, 679 N.W.2d 794 (under agency law, ordinarily a litigant is bound by the acts of counsel during the representation). The facts presented here provide no compelling reason to override this policy.

¶19 We also reject Industrial's contention that as an otherwise diligent client who is inexperienced in the law, it is automatically excused from any responsibility for the conduct of its attorney. We made clear in ***Baird*** that the decision of whether to impute an attorney's conduct to the client should be made on a case-by-case basis. ***Baird***, 189 Wis. 2d at 326. Here, the circuit court implied that Industrial was not diligent in following up on problems with its

[4] Marquardt alleges that Industrial's president, Dippel, has a long history of litigation experience, including: bankruptcy, a noncompete contract dispute with a former employer, traffic accident litigation, John Doe investigations, and administrative proceedings. Industrial asserts that no documentation of such cases appears anywhere in the record and the allegations should be stricken. We draw no conclusions from Marquardt's characterization of Industrial and Dippel as "courthouse veterans."

attorney's performance. The court considered that Industrial knew as early as November 17, 2003, that there were problems. Industrial contacted its attorney many times, which "should have raised suspicion as to [the attorney's] abilities to prosecute the case." The court concluded that "[m]erely because [Dippel] relied on [the attorney's] assurance that things were being taken care of does not exonerate Mr. Dippel from the consequences and sanctions." We agree, particularly in light of the fact that Industrial was aware of the sanctions imposed on its attorney at the November 17 hearing.

¶20 The circuit court applied the rationale in ***Johnson*** in its decision to hold Industrial accountable for the repeated failures of its attorney. A "dismissal may be imposed as a sanction regardless of whether the opposing party has been prejudiced by the delays in discovery and regardless of whether the party bears personal responsibility for the noncompliance of [his or her] attorney." ***Johnson***, 162 Wis. 2d at 266. We conclude that the court's decision to impute the conduct of its attorney to Industrial was within the bounds of the court's discretion.

¶21 Industrial presses on, turning to ***Johnson*** for the proposition that dismissal is improper unless bad faith or egregious conduct on the part of the noncompliant party is demonstrated. *See* ***id.*** at 274-75. Here, the circuit court reviewed the multiple episodes of noncompliance and stated: "Sanctions, I think at this point, standing alone, the litany of failures here, the matter of egregious failures that … the case covers.... [I]t's highlighted because the Court has already indicated that there was … a warning." The court, responding to Industrial's motion for reconsideration, referred to its prior findings that the failure of discovery "was not ordinary, it was extraordinary, and it was sufficiently egregious to the point that the Court considered options." The court also expressly linked Industrial's conduct to its attorney's conduct, stating, "I feel that the

responsibility of the plaintiff for his counsel in light of the findings that the Court made and the basically egregious failure to do discovery was carefully considered under these circumstances."

¶22 To dismiss a complaint for egregious conduct, the court must find that the noncomplying party's conduct, although unintentional, is so extreme, substantial and persistent that it can properly be characterized as egregious. *See* ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995). The record here demonstrates that the circuit court examined the conduct of Industrial's attorney at length. On November 17, 2003, the court sanctioned Industrial's attorney for failure to reply to another party's motion, failure to copy opposing counsel on a brief filed with the court, and causing opposing counsel to appear at a hearing where no business could be transacted. On February 23, 2004, the court heard from several defendants regarding the lack of information provided by Industrial. The court identified a "pattern" of conduct by Industrial, including failure to return phone calls or to provide adequate responses to discovery requests. Because the record reveals a reasonable basis for the circuit court's determination that the discovery violations were egregious, we conclude that the court did not erroneously exercise its discretion when it dismissed the action.

¶23 Industrial also asserts that the circuit court's ruling is founded on a mistake of fact and must therefore be reversed. We agree that the court's original ruling on June 14 included a finding that Dippel was present at the February 23 hearing, where the court warned of severe sanctions for future discovery violations. The transcript from the February 23 hearing indicates that Dippel was not present. The court adequately addressed the error during the hearing on Industrial's motion for reconsideration. There, the court acknowledged the mistake and explained that "the comment in the June 14th transcript was mistaken,

that [Dippel] wasn't there when I gave a lecture, okay. Does that make a difference in the Court's mind? No." The court went on to explain that Dippel's own affidavit confirmed that Industrial had "sufficient contacts" with its attorney such that Industrial's concerns should have been elevated and "flags had to be up" that "things were not being accomplished." We are satisfied that the circuit court corrected the mistake and reasonably concluded that it was not of such importance as to upset its final determination.

CONCLUSION

¶24 We are mindful that the law prefers to afford litigants a day in court. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). Nonetheless, we follow our supreme court in placing our faith in the circuit court's judgment when it imposes sanctions against a party. *See* ***Johnson***, 162 Wis. 2d at 286-87. Where a circuit court's decision to impose sanctions, as well as the particular sanction it chooses, is not an erroneous exercise of its discretion, we will affirm. ***Schultz***, 248 Wis. 2d 746, ¶8. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion. ***Johnson***, 162 Wis. 2d at 273. Here, the record reflects the circuit court's consideration of Industrial's discovery failures, the court's application of the principles espoused in ***Johnson***, and the court's determination that dismissal is the proper sanction under the circumstances. The court acted within the bounds of its discretion and, therefore, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.