COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP229 **Cir. Ct. No. 2004CV352**

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

EDWARD P. BARNES,

PLAINTIFF-APPELLANT,

V.

HARTFORD UNDERWRITERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Edward P. Barnes appeals from trial court orders dismissing his case with prejudice, imposing costs and attorneys fees and denying his motion for reconsideration. He argues that the trial court erred when it dismissed his case with prejudice as a sanction for his failure to appear for a

deposition and his failure to respond to Hartford Underwriters Insurance Company's discovery demands. Our holding in this case is driven largely by our standard of review: a trial court's decision to impose a discovery sanction is discretionary. Because the record reveals a reasonable basis for the trial court's determination that Barnes's conduct was egregious, bad faith and without a clear and justifiable excuse, the trial court did not erroneously exercise its discretion in dismissing the action. We affirm.

Facts

¶2 On June 9, 2004, Barnes filed a summons and complaint against Hartford, claiming uninsured motorist benefits under his insurance contract with Hartford. Barnes had been injured in an automobile accident and the at-fault driver was uninsured.

¶3 Hartford sent Barnes its first set of interrogatories and its request for production of documents and medical authorizations on July 14. In the attached letter, Hartford asked Barnes for possible dates to take his deposition; Barnes did not provide the requested dates. Hartford filed its answer, affirmative defenses and cross-claim five days later on July 19. On July 26, Hartford sent Barnes an authorization for release of employment records to sign and return and renewed its request for potential deposition dates.

¶4 In a letter dated August 6, Barnes's attorney notified Hartford's attorney that he had been in communication with Melonie Hamilton, a claims adjuster at Hartford, about the potential settlement of the case. Barnes's attorney requested a thirty-day extension to respond to the written interrogatories and the demands for the production of documents and to provide the medical release. On August 13, Hartford sent Barnes a letter setting Barnes's deposition for

September 13. Hartford informed Barnes that the September 13 date could be moved if either he or his counsel were not available on that date. Hartford did not acknowledge Barnes's August 6 letter.

¶5 On August 19, Barnes resent the August 6 letter. On August 20, Hartford sent Barnes a letter in which it granted the extension requested and made the discovery responses due on or before September 6. Hartford's attorney expressed hope that Barnes would be able to settle the case directly with Hamilton. Hartford confirmed the September 13 deposition date. Also on August 20, Hamilton allegedly spoke with Barnes's attorney and informed him that he had until September 30 to respond to the discovery demands.

¶6 On August 27, Barnes sent Hartford two signed medical authorizations. On August 30, Hartford sent Barnes a letter moving his deposition to September 14.

¶7 On September 10, Hartford agreed to adjourn Barnes's deposition until October 14. On September 15, after the agreed upon extension date for the written discovery had passed, Hartford again offered Barnes an extension. Hartford informed Barnes that "signed answers to [its] first set of written interrogatories and responses to my request for production of documents" would be due in advance of the scheduled October 14 deposition.

¶8 Barnes did not provide the requested materials. He also failed to show up for his October 14 deposition. Barnes had not informed Hartford that he would not attend the deposition. Hartford fully expected and prepared for his attendance. Hartford then rescheduled Barnes's deposition for October 21. Hartford advised Barnes that the written discovery responses had to be received no later than October 22 or it would file a motion to compel. Around October 18,

Barnes's attorney called Hartford's attorney and requested a duplicate set of the initial discovery requests, indicating that the initial discovery requests could not be located. Hartford's attorney promptly sent the requested documents and reiterated that the answers had to be provided in advance of the scheduled deposition. Also on October 18, Hartford offered to settle the case for $5000 inclusive. The offer expired on the day before the deposition.

¶9 Barnes attended the October 21 deposition, but did not provide the requested discovery materials. After the deposition, Barnes's attorney asked Hartford's attorney if he still wanted "the signed & notarized response to the interrogatories." Hartford's attorney responded, "I'm not sure, I'll have to think about it." In a letter dated November 1, Hartford acknowledged Barnes's rejection of the settlement offer and stated, "I will let you know in the next few days what answers I will need to interrogatories." By letter dated November 10, Hartford demanded that it receive the overdue responses by November 15. Hartford again noted its intention to file a motion to compel if its demand went unmet and indicated that it would even accept unsigned responses. Barnes did not comply. On December 7, Hartford filed a motion for sanctions, costs and attorneys fees and an order to compel because Barnes: (1) failed to attend a properly noticed deposition, (2) failed to respond to properly served written discovery, and (3) failed to return the signed employment authorization form.

¶10 The hearing on the motion was held on December 9. Prior to the hearing on that date, Barnes delivered to the court some sort of response to Hartford's discovery demands. Neither Hartford's attorney nor Barnes's attorney had the opportunity to review the four-page packet of documents prior to the hearing. At the hearing, Barnes's attorney asked the court to return the packet of documents to him, stating, "[T]he packet that you just looked at, that I haven't

seen, was not meant for your eyes at this point. It was meant to be delivered to this courtroom to be given to me."

¶11 At the hearing, Barnes's attorney offered several explanations for the failure to answer written discovery and attend the deposition. He noted that he had problems getting Barnes to complete the interrogatories. Barnes's attorney explained that Barnes had lost two copies of the interrogatories and he was "confuse[d]" and "mixed up." He stated that he had relied on Hamilton's representations that he could ignore the formal discovery requests.

¶12 Following the parties' arguments, the trial court stated, "[E]ither I'm going to decide the motion that I've been presented with, or in the alternative there's going to be a settlement of this case as we sit here, one of the two." Barnes indicated he was ready and willing to consider settlement. Because Hartford was not prepared to settle at that point, the trial court proceeded to rule on the motion.

¶13 The court began by stating:

> I certainly recognize that—the sanctions that the Court has available to it, and discovery issues are multiple. I also recognize that there are certain sanctions that are quite drastic. When we look at some dilatory tactics, or we look at certain patterns of behavior, the Court can certainly draw inferences, I can draw certain conclusions, that the Court must then balance to determine whether or not it would conclude that there may be bad faith, it may be egregious, it may be without any clear justifiable excuse.

The court determined that Barnes's failure to respond to the written discovery requests and show up for the deposition constituted "egregious behavior, bad faith behavior, dilatory behavior, lack of cooperation behavior, behavior that this Court finds should not in any way, manner or form be tolerated, accepted or condoned, and that there is in fact no clear or justifiable excuse for any of this." The court

went on to say: "I'm hard line on discovery. I'm not impossible, but I respect the fact that the statue provides a road map for attorneys to follow in an attempt to provide for the orderly administration of justice. It's for the attorneys to comply with that strictly." The trial court then dismissed Barnes's action on the merits and with prejudice and ordered him to pay costs and attorneys fees. Subsequently, Barnes filed a motion for reconsideration, which the trial court denied.

Discussion

¶14 Barnes maintains that the trial court erroneously exercised its discretion when it dismissed the case with prejudice as a sanction for his failure to appear at the October 14 deposition and his failures to respond to the properly served written discovery and request for the employment authorization form. Barnes submits that the evidence does not support the trial court's findings that his conduct was egregious, bad faith and without a clear and justifiable excuse. He claims that because the evidence does not support the trial court's findings, the court did not have the authority to dismiss the case with prejudice or, at the very least, the authority to dismiss the case with prejudice without first considering less severe sanctions.

¶15 WISCONSIN STAT. § 804.12(4) (2003-04)[1] authorizes the circuit court to impose sanctions against a party who fails to appear at a deposition or to respond to interrogatories or requests for information. Section 804.12(4) does not require a violation of a discovery order to justify sanctions; failure to comply with

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the statutory directive is sufficient. ***Odegard v. Birkeland***, 85 Wis. 2d 126, 146, 270 N.W.2d 386 (1978).

¶16 The decision to impose a discovery sanction is discretionary. ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. A discretionary decision will be sustained if the trial court has 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. ***Id.*** The question is not whether this court as an original matter would have imposed the sanction; it is whether the trial court erroneously exercised its discretion in doing so. ***Id.***

¶17 Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary. ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995). Dismissal is appropriate only where the noncomplying party's conduct is egregious or bad faith and without a clear and justifiable excuse. ***Id.*** To dismiss a complaint for bad faith, the trial court must find that the noncomplying party intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand. ***Id.*** at 543. To dismiss a complaint for egregious conduct, the court must find that the noncomplying party's conduct, though unintentional, is so extreme, substantial and persistent that it can properly be characterized as egregious. ***Id.***

¶18 The trial court is not required to make an explicit finding of bad faith or egregious conduct before imposing a sanction. *See* ***Sentry***, 247 Wis. 2d 501, ¶22. It is sufficient if the record demonstrates a reasonable basis for a

determination that the sanctioned conduct was egregious or bad faith and that there was no clear and justifiable excuse. ***Id.***

¶19 When the conduct that is the basis for dismissal is not intentional or bad faith, the trial court must determine whether less severe sanctions are available to remedy the noncomplying party's discovery violation before dismissal may be ordered. ***Hudson Diesel***, 194 Wis. 2d at 545. However, a trial court need only explore alternative remedies where the noncomplying party's conduct, while egregious, is unintentional. ***Id.*** at 545-46 ("We emphasize that a trial court need only explore alternative remedies where the noncomplying party's conduct is unintentional."); *see also* ***Brandon Apparel Group, Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶19, 247 Wis. 2d 521, 634 N.W.2d 544.

¶20 As these cases teach us, we must sustain the sanction of dismissal if there is a reasonable basis in the record for the trial court's determination that Barnes's conduct was egregious or bad faith and there was no clear and justifiable excuse for his noncompliance. We address the trial court's findings as to each in turn.

¶21 First, the record supports the trial court's finding that Barnes's conduct was so substantial and persistent that it could be characterized as egregious. While Barnes did return the signed medical authorizations, he repeatedly ignored discovery requests and deadline extensions, he refused to provide potential deposition dates and then failed to appear for the rescheduled deposition without noticing Hartford and he apparently lost two sets of written interrogatories. It does not matter that he did not violate a discovery order; his violation of a statutory directive is sufficient. *See* ***Odegard***, 85 Wis. 2d at 146. Hartford's conduct, on the other hand, was in keeping with the standards of

professional courtesy. Hartford accommodated Barnes's repeated requests for enlargements of the time for responding to the initial discovery demands, even after deadlines had passed. Hartford attempted to arrange mutually acceptable dates for Barnes's deposition and, when Barnes failed to appear for the scheduled deposition, graciously offered to reschedule for the following week. Simply put, Barnes's dilatory and obstructive conduct frustrated what should have been a routine discovery process.

¶22 Second, the record also reveals a rational basis for the trial court's conclusion that Barnes acted intentionally and with bad faith.[2] As noted, a court may conclude a party operated in bad faith when the party has "intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand." ***Brandon Apparel Group***, 247 Wis. 2d 521, ¶11 (citation omitted). "A circuit court is not required to analyze a specific set of factors ... instead, it should focus on 'the degree to which the party's conduct offends the standards of trial practice.'" ***Id.*** For example, we have sustained a trial court's finding of bad faith based on a "spirit of noncooperation" and on a "pattern of last-minute offerings of inadequate material." ***Id.*** (citations omitted). Barnes failed to respond to Hartford's repeated requests for possible deposition dates. Hartford ultimately scheduled the deposition, but later agreed to adjourn it for one month. After Hartford granted the request, Barnes failed to appear at the scheduled deposition without notifying Hartford. Hartford fully expected and prepared for Barnes's presence at the deposition. Further, Barnes knew of the discovery deadlines;

[2] The trial court did not expressly state that Barnes's conduct was "intentional." However, the court did find Barnes acted in "bad faith" and "bad faith by its nature cannot be unintentional," ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995).

indeed, he asked for and was granted extensions. Hartford gave Barnes multiple advance warnings about the likely consequences if his conduct continued. Barnes still failed to comply with the extended deadlines.

¶23 Barnes's conduct sharply contrasts with that described in ***Hudson Diesel***, where the trial court had held that a noncomplying party's conduct was unintentional. *See* ***Hudson Diesel***, 194 Wis. 2d at 543. There, unlike here, the noncomplying party had actually provided in-depth responses to the discovery requests, but the responses were inadequate because the party had inadvertently omitted certain documents that were "peripheral" to the issue at hand. *See* ***id.*** at 541, 543.

¶24 Finally, the trial court's determination that there was no justifiable excuse for Hartford's egregious and bad faith conduct also finds support in the record. First, Barnes offers no clear excuse for his failure to appear at the October 14 deposition. He was aware that the deposition was scheduled for that day. Second, Barnes had reasonable opportunities to respond to the discovery requests. On several occasions, Hartford offered Barnes the professional courtesy of deadline extensions so that he could gather the necessary information. As the trial court noted, the accident occurred nearly three years before the routine insurance coverage case was filed so the discovery materials requested should have been well defined and readily available.

¶25 Third, we agree with the trial court that Barnes's reliance on Hamilton's representations that he did not have to respond to discovery requests until September 30 was unreasonable. Hartford acknowledges that it must bear some responsibility for the confusion since its attorney knew that Barnes was attempting to negotiate a settlement with Hamilton. However, we question

whether a lawyer can or should rely on a "side agreement" with a claims adjuster when the matter is already in litigation and the lawyer is also dealing with the insurer's attorney. Further, from the record, it appears that Barnes never attempted to clear up the confusion generated by the claims adjuster's representations and the lawyer's discovery demands.

¶26 Fourth, even if Barnes's "side agreement" with Hamilton excused his noncompliance through September 30, it did not excuse his failure to comply with the discovery demands in the weeks before the motion for sanctions was filed and the hearing on that motion was held. Following multiple deadline extensions, Hartford's attorney told Barnes he had until October 14, the date of the deposition, to respond to the discovery demands. Barnes did not do so. Even though Hartford's attorney told Barnes's attorney following the October 21 deposition that he was not sure that he would need the responses to all of the interrogatories, Hartford's attorney did ultimately inform Barnes that he needed to respond to the interrogatories by November 15. Barnes did not even attempt to respond to the discovery demands until the December 9 motion hearing, at which point Barnes submitted responses to the interrogatories to the court. However, neither Barnes's attorney nor Hartford's attorney had a chance to review the responses before the hearing. As a result, Barnes asked the court not to review the responses at that time.

¶27 Barnes points out that while the trial court noted that it had considered the propriety of less severe sanctions, it did not explain why alternatives short of the drastic sanction of dismissal with prejudice would not have remedied Barnes's discovery violations. However, because we hold that the record establishes a reasonable basis for the trial court's finding that Barnes's conduct was egregious, in bad faith and without a clear and justifiable excuse, we

must also hold that the trial court did not need to consider whether less severe sanctions were available that would remedy Barnes's discovery violations before it ordered dismissal. *See* ***Hudson Diesel***, 194 Wis. 2d at 545-46 ("We emphasize that a trial court need only explore alternative remedies where the noncomplying party's conduct is unintentional.").

¶28 We appreciate that our holding will deprive Barnes of his day in court and that his discovery rule violations, which occurred over a six-month period, *may* not be as flagrant and offensive as the violations we have encountered in the other cases he cites. *See* ***Brandon Apparel Group***, 247 Wis. 2d 521, ¶¶1, 5 (discovery violations included failing to appear for a court-ordered deposition four weeks before a scheduled trial and providing nonresponsive answers to written interrogatories); ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 277-78, 470 N.W.2d 859 (1991) (discovery violations included failing to comply with discovery orders for well over two years); ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶¶6, 14, 265 Wis. 2d 703, 666 N.W.2d 38 (discovery violations included failing to provide adequate responses to written interrogatories and then disobeying court's order compelling discovery even after court warned that further disobedience would result in default judgment); ***Furrenes v. Ford Motor Co.***, 79 Wis. 2d 260, 263, 255 N.W.2d 511 (1977) (discovery violations included failing to comply with court order to produce a tie rod for inspection after court warned that the consequence of noncompliance would be dismissal on the merits). However, we emphasize that we do not decide de novo whether the sanction of dismissal was the appropriate remedy in this case. "A trial court's discretionary determination … may encompass a result 'which another judge or another court,' including this one, might not have reached on the present facts." ***Sentry***, 247 Wis. 2d 501, ¶24 (citation omitted). The trial court was within its discretion in

finding that Barnes's conduct in failing to appear at his deposition and to respond to the written discovery demands was egregious, bad faith and without a clear and justifiable excuse. It therefore had the authority to order the sanction of dismissal with prejudice.

By the Court.—Orders affirmed.

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