COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1722 **Cir. Ct. No. 2010CV1393**

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

CARL H. DORN,

PLAINTIFF-RESPONDENT,

V.

MARJORIE JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed*.

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

¶1 LUNDSTEN, P.J. Carl Dorn filed suit against the daughter of his deceased wife. Dorn alleged that the daughter, Marjorie Johnson, converted to her own use assistance payments that should have gone to her mother and, presumably, Dorn. After Johnson failed to comply with a court order to produce

bank records of an account she held jointly with her mother, the circuit court, as a sanction, entered default judgment in favor of Dorn. Johnson appeals, arguing that the record does not support the circuit court's discretionary decision to impose default judgment as a sanction. We affirm the circuit court.

Background

¶2 Olive Dorn, wife of plaintiff Carl Dorn and mother of defendant Marjorie Johnson, died in 2010. In a complaint filed June 28, 2010, Carl Dorn alleged that Marjorie Johnson, who had financial power of attorney for Olive, converted medical assistance payments meant for Olive to Johnson's own use.[1] Dorn alleged that, since at least 2004, Johnson had received medical assistance payments owed to Olive and failed to forward these payments, "despite requests that she do so." Dorn alleged that Johnson "converted" the payments "to her own use" and "failed to otherwise account for those funds." Dorn alleged that Johnson owed Dorn $18,603.02. Johnson filed an answer denying the allegations.

¶3 In a motion dated April 12, 2011, Dorn moved for sanctions for Johnson's failure to comply with a court order that she turn over bank records and pay $200 in motion costs. The motion was based on the following facts. On December 16, 2010, Dorn moved for an order to compel discovery. During a status conference on January 24, 2011, the circuit court orally ordered Johnson's attorney to provide to Dorn, by February 28, 2011, monthly bank statements of a joint account held by Johnson and Olive Dorn. It is undisputed that Johnson failed

[1] We refer to the payments as "medical assistance payments." We note that in circuit court these payments were sometimes referred to as "spousal support payments." The specific type of payment does not affect the outcome of this appeal.

to comply with this order and, as of the April 12 motion, still had not complied. As a sanction, Dorn requested judgment in his favor.

¶4 A hearing on Dorn's motion for sanctions was held on May 20, 2011. Dorn appeared with his attorney. Johnson appeared, but her attorney, James Hammis, did not appear.[2] The transcript of this hearing is not in the record. The circuit court issued an order on May 25, 2011, stating that, "since [Johnson] has refused to comply with previous court orders to provide discovery to [Dorn], that [Johnson's] answer is stricken and Judgment is ordered against [Johnson] for $18,603.02, plus costs and statutory attorney fees." In a subsequent final judgment, the court awarded Dorn a total judgment of $19,630.52. Johnson appeals that judgment.[3]

Discussion

¶5 On appeal, Johnson does not argue that the court lacked authority to enter default judgment against her as a sanction for failing to comply with the discovery order to WISCONSIN STAT. § 804.12(2)(a)3.[4] provides that, "[i]f a party ... fails to obey an

[2] The record reveals no explanation for Attorney Hammis's absence. However, Johnson's appellate brief, prepared by Attorney Hammis and apparently explaining the attorney's absence, states: "On March 1, 2011 the Defendant's attorney was suspended for 4 months from the practice of law by the Wisconsin State Supreme Court and duly advised the circuit court, the Defendant and Plaintiff's attorney as was required by the Supreme Court order."

[3] After filing a notice of appeal, Johnson's counsel, Attorney Hammis, filed a "Motion to Reopen." There is no indication that the circuit court acted on that motion, and Johnson does not mention it in her appellate brief. Dorn tells us that the motion was withdrawn, and cites to the minutes of a hearing held September 15, 2011, which states: "[Attorney] Hammis withdrawing motion."

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

order to provide ... discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others ... [a]n order ... rendering a judgment by default against the disobedient party." The sanction of default judgment is available for the failure to comply with a discovery order if the noncomplying party's conduct is without a clear and justifiable excuse and the conduct is either egregious or in bad faith. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶13, 265 Wis. 2d 703, 666 N.W.2d 38. The decision whether to impose this sanction is discretionary. ***Id.***, ¶12.

¶6 Johnson appears to argue that the record does not support the circuit court's discretionary decision to impose the harsh sanction of default judgment. The entirety of Johnson's argument, including its grammatical errors, is as follows:

> [T]he case law that follows such discretion and authority emphasis that such action of failure to obey a court order, without evidence of bad faith or no merit, such an order under 804.12(2)(a) deny due process. ***Dubman v. North Shore Bank***, 75 Wis. 2d 597, 249 N.W. 2d 797 (1977)
>
> There is no evidence of bad faith on behalf of [Johnson].
>
> Trial courts have been determined to have erred in not considering other less severe sanctions before dismissing an action for failure to comply with a demand for discovery when no bad faith was found. ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 535 N.W. 2d 65 (Ct. App. 1995).
>
> Once again that is no evidence or even contention of bad faith on behalf of [Johnson].
>
> The conduct that was further not found by the court is that the conduct of [Johnson] was egregious and without clear and justifiable excuse. In this instance [Johnson] was without counsel at the time that the Motion for Sanction was filed and did not attend such hearing to provide any proof that her actions were egregious. When a sanction causes the ultimate dismissal of an action, the sanctioned

> party's action must be egregious and with clear and justifiable excuse. ***Sentry Insurance v. Davis***, 2001 WI App 203, 247 Wis. 2d 501, 634 N.W. 2d, 00-2427.
>
> The sanction discovery failure was the failure to produce bank records form a joint account held by [Johnson] and [Dorn's] deceased wife, Olive Dorn. There was no limitation of [Dorn] himself from subpoenaing the actual bank records, which if such would have born a costs to [Dorn] such costs as sanction would have been the appropriate act of discretion of the circuit court.

There are multiple flaws in this discussion.

¶7 First, Johnson's emphasis on "bad faith" misapprehends the applicable law. As Dorn points out, the relevant test allows the imposition of harsh sanctions, including default judgment, when there is *either* bad faith *or* egregious conduct. ***Teff***, 265 Wis. 2d 703, ¶13. The two terms are not synonymous. ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶21, 247 Wis. 2d 501, 634 N.W.2d 553 ("[T]he terms 'egregious' and 'bad faith' are not necessarily synonymous, and ... a party can be guilty of egregious conduct even if it did not act in 'bad faith.'"). Thus, the record need not support a finding of bad faith.[5]

¶8 Second, to the extent Johnson may be complaining that the circuit court did not *expressly* find Johnson's conduct to be egregious and without clear and justifiable excuse, the argument misses the mark because no express finding

[5] Johnson's appellate brief cites ***Dubman v. North Shore Bank***, 75 Wis. 2d 597, 249 N.W.2d 797 (1977), for the proposition that granting judgment as a sanction for failing to comply with a discovery order is not an available sanction "without evidence of bad faith or no merit." In this regard, we note Johnson's counsel has been careless. The ***Dubman*** discussion including the terms "bad faith" and "no merit" appears in the context of sanctions for contempt of court and whether there was an appealable contempt order. *See* ***id.*** at 600-01. The ***Dubman*** court is not discussing the standard for imposing the sanction of dismissal or default judgment, which is the issue in this case.

using these terms is required. *See* ***Teff***, 265 Wis. 2d 703, ¶14 ("we do not reverse simply because the court did not use" the words "egregious" or "bad faith").

¶9 Third, Johnson asserts that the bank records were otherwise available to Dorn by means of a subpoena and, therefore, Johnson's failure to provide the bank records was not "egregious." This argument is completely undeveloped. One deficiency is that Johnson does not explain why the bank that was holding the records would have been required to respond to a subpoena for this type of record. Another deficiency is that there is no explanation as to why Dorn should have attempted to use a subpoena when the court had ordered Johnson to produce the records.

¶10 Fourth, and most troubling, Johnson has not taken the steps necessary to provide us with a sufficient record to assess whether the circuit court properly exercised its discretion. The record on appeal contains no oral or written decision reflecting the circuit court's reasoning. The minutes of the hearing held on May 20, 2011, indicate that this was the sole hearing addressing the sanctions issue and almost certainly the hearing at which the court heard argument and gave reasons for sanctioning Johnson. In the absence of a transcript of this hearing, we do not know what arguments were made, whether the circuit court heard evidence, whether the parties stipulated to facts, or what the circuit court said, if anything, to support its decision. The omission of this transcript is fatal to this appeal, and the fault lies with Johnson. The "appellant ... is responsible for ensuring that the record is complete on appeal; when the record is incomplete, this court must assume that the missing material supports the trial court's ruling." ***State ex rel. Darby v. Litscher***, 2002 WI App 258, ¶5 n.4, 258 Wis. 2d 270, 653 N.W.2d 160. Accordingly, whatever occurred at the May 20 hearing, we must assume it supports the circuit court's decision to impose the default judgment.

Conclusion

¶11 For the reasons stated, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.