COURT OF APPEALS DECISION DATED AND FILED

May 9, 2017

Diane M. Fremgen
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. 2015AP1903

Cir. Ct. No. 2013FA4500

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE MARRIAGE OF:

JOHN F. KASTNER,

PETITIONER-APPELLANT,

V.

MELANIE S. KASTNER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. John F. Kastner appeals from a judgment of divorce, in which the circuit court struck John's contest posture with regard to his request

for property division and maintenance because John failed to comply with discovery demands. We affirm.

BACKGROUND

¶2 On July 19, 2013, John filed a petition for divorce following twenty-three years of marriage to Melanie Kastner. At some point, John moved to New Jersey. Melanie filed a motion to compel John's answers to interrogatories and the production of his documents, arguing that John was "dealing in bad faith to delay the process."[1]

¶3 On May 22, 2014, John's attorney filed a motion to withdraw as counsel, which the circuit court granted on July 28, 2014.[2] John appeared *pro se* at a status conference on September 5, 2014. The court ordered the parties to update their financial information by December 1, 2014, and warned the parties that a failure to comply would result in the failing party forfeiting his or her right to object to the compliant party's information. The court set a trial date and also advised John to retain counsel promptly if he planned to proceed with counsel because the court would not adjourn the trial or any other hearings to accommodate a new lawyer's schedule.

---

[1] A transcript of the pretrial conference in which the circuit court addressed the motion to compel is included in John's appendix and cited by both parties; however, the transcript is not included in the record. Accordingly, we do not consider the circuit court's comments on the motion, but we note that the court's comments are not relevant to this appeal. It is only relevant that Melanie filed a motion to compel.

[2] Again, a transcript of this proceeding is included in John's appendix and cited by both parties; however, the transcript does not appear in the record. Accordingly, we cannot consider the transcript of the July 28, 2014 hearing. We assume the missing record supports the circuit court's decision. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

¶4 At the final pretrial hearing on January 12, 2015, John again appeared *pro se*. Melanie's counsel informed the circuit court that he "prepared and served [John] with a proposed marital settlement agreement in July 2014 [but] … still [had] not received a substantive response." Counsel also informed the court that John "is not willing to provide his new employer's information, which also denies us the ability to understand his earning situation and without his position on maintenance we can't address that issue." The court ordered the parties to exchange updated wage information, specifically wage statements from December 31, 2014 and January 31, 2015, and W-2 forms. The court also told John to update his financial disclosure statement. The court warned the parties that noncompliance with the court's order would result in "sanctions" because neither "side gets to hold the case hostage. We need to go along. And people are entitled to get that information so they can determine what they want to do and have the opportunity to prepare for trial." The court gave the parties a February 15, 2015 deadline. The court also confirmed with John on the record, multiple times, that John would appear for a deposition scheduled for April 2, 2015.

¶5 John did not appear at the April 2, 2015 scheduled deposition. On that day, Melanie filed a motion for sanctions and to compel discovery. The motion requested that the circuit court sanction John for failing to appear at the scheduled deposition and compel John to produce: (1) un-redacted 2014 end of year wage statements from all sources of his employment, including the name and address of his employers; (2) information regarding the status of his option to purchase certain property in Brookfield, Wisconsin; (3) proof of the amount of rent he actually paid for all and current residences, including, but not limited to, his residence in New Jersey, and current lease agreements; (4) written offers of employment from January 1, 2013, through the date of the motion, including the

names of the employers, "position, title, salary and benefits structure"; and (5) "the remaining outstanding items outlined in the Subpoena *Duces Tecum* items."

¶6 The circuit court heard the motion at a final pretrial conference on April 20, 2015, where John again appeared *pro se*. Melanie's counsel asked the court to "limit [John's] motion with regard to property division, as well as possible receipt of maintenance in this matter" because John "repeatedly held this court and [Melanie] hostage in proceeding with this case." Counsel noted that trial was fourteen days away at that point, yet "I do not know who [John] works for. I do not have a complete understanding of his earning structure. He has provided me only with redacted copies of his W2 statements and earning statements." Counsel also noted:

> there was an option to purchase a residence in Brookfield…. We had no further information on the status and it would obviously be a potential asset of the marriage. [John] lists rent which seems to be in excess of market value, but provided no data with regard to the rent. We have no statements with regard to his 401K, I.R.A. or pension. No information with regards to stocks he may own. We have not received the bank statements requested…. We don't have credit card statements to cross check what he claims. He has not provided a written offer of employment…. That gives us no ability to understand what his compensation structure is and at this point I have no opportunity to try to obtain that from an employer with a separate discovery demand because he failed to provide us with who that employer might be.

Counsel also informed the court that John contacted him on March 30, 2015, three days before the scheduled deposition, to inform counsel that he (John) would not be attending the deposition. Counsel said that he "strongly encouraged" John to attend. Counsel told the court that John then "engaged in what I believed to be egregious conduct when I again encouraged him to appear at my office April 2 for the court ordered deposition" by sending counsel an email telling counsel that if

counsel "respond[s] to [John] again, [John] will contact the Milwaukee Police Department, file a complaint against [counsel] and have [counsel] arrested and press charges and prosecute it to the fullest extent of the law."

¶7 The circuit court referenced the transcript of the previous pretrial conference at which John confirmed he would attend the April 2, 2015 deposition. When the court questioned John about his failed attendance, John did not offer the court a clear answer. Instead, John vaguely alluded to the fact that he and Melanie's counsel had a conversation about the flexibility of the deposition date and John assumed he did not have to attend.

¶8 The circuit court ultimately denied John's "opportunity to request maintenance or property division issues that have not been identified." The court reasoned:

> I would note here, I have no plausible explanation given to me by [John] that would indicate why he did not appear at the scheduled date, particularly in light of the problems we have had in trying to get the matters resolved…. Discovery has been an on-going problem. As the statute allows, the court has an option, as far as sanctions, to strike contest posture and it is my intention to strike contest posture as requested by [Melanie's counsel], because of [John's] failure to cooperate in the proceedings.
>
> ….
>
> So, as a result of [John's] actions and quite frankly, his attitude today, I have been nothing but appropriate with [John], trying to support him representing himself. I know he's frustrated, but … this case has to be resolved. It has been held hostage. We need to get it resolved.

The court also told John that he could file any objections to the court's ruling in writing and that if John had concerns about the exchange of financial information, he could "file a motion."

¶9 Following the circuit court's ruling, John hired counsel and filed a motion seeking to adjourn the trial. He also filed a motion for reconsideration, or in the alternative, for relief from the court's order striking John's contest posture for maintenance and property division. The motions were filed three days before the scheduled trial date.

¶10 The circuit court addressed the motions on the first day of trial, May 4, 2015. The court implicitly denied the motion by recapping John's conduct and continuing with the trial. At trial, Melanie's counsel told the court that he had only learned that day that John was now living and working in California. Counsel told the court that he had thought John was still working and living in New Jersey. John also provided his 2014 W-2 form for the first time that day. John testified at trial, telling the court that he missed the April 2, 2015 deposition because he and Melanie's counsel agreed that the April 2, 2015 date was flexible.

¶11 The circuit court found that the case had been pending for two years and that it had exhibited tremendous patience with John while he proceeded *pro se*. The court noted that it warned John about the consequences of noncompliance with its orders and found John's testimony regarding missing the deposition incredible and disingenuous. The court accepted Melanie's proposed marital settlement agreement, in which she asked the court to waive maintenance for both John and herself. The court also accepted Melanie's property division worksheet, which provided for an equal property distribution allowing each party to receive approximately $460,000 in assets.[3]

[3] Melanie excluded two items from the division worksheet, which the circuit court found acceptable.

¶12 Following trial, the circuit court issued a written "Findings of Fact, Conclusions of Law, and Judgment of Divorce," which: (1) recapped its findings regarding John's failure to comply with discovery; (2) found John's conduct "dilatory"; (3) found Melanie's proposed marital settlement agreement and proposed property division "fair and infinitely reasonable"; and (4) granted the parties a judgment of divorce. (Capitalization omitted.) This appeal follows.

DISCUSSION

¶13 On appeal, John contends that the circuit court "abused its discretion and erred by striking [John's] position on property division and maintenance as a sanction for missing his deposition." (Capitalization omitted.) We disagree.

¶14 "The circuit court has both statutory authority ... and inherent authority to sanction parties for ... 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), *overruled on other grounds by* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. Because dismissal is a particularly harsh sanction for a party's failure to obey discovery orders, "'a dismissal ... should be considered appropriate only in cases of egregious conduct by a claimant.'" ***Johnson***, 162 Wis. 2d at 275 (citation omitted). "[W]e will sustain the sanction of dismissal if there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no 'clear and justifiable excuse' for the party's noncompliance." ***Id.*** at 276–77. "A circuit court's decision to dismiss an action is discretionary, and will not be disturbed unless the party claiming to be aggrieved by the decision establishes that the [circuit] court has [misused] its discretion." ***Id.*** at 273.

¶15 The heart of John's argument is that the circuit court relied on inapplicable case law when issuing its decision to strike his contest posture. Specifically, John contends that the circuit court's reliance on ***Englewood Community Apartments Limited Partnership v. Alexander Grant & Co.***, 119 Wis. 2d 34, 349 N.W.2d 716 (Ct. App. 1984), and ***Zarnstorff v. Neenah Creek Custom Trucking***, 2010 WI App 147, 330 Wis. 2d 174, 792 N.W.2d 594, was misplaced because "[n]either case involved a single missed deposition that the deponent was trying to reschedule so that he wouldn't lose employment." John reads both cases too narrowly.

¶16 In ***Englewood***, the defendant corporation served the plaintiff, Englewood, with interrogatories that went unanswered, prompting the defendant to file a motion to compel. ***Id.***, 119 Wis. 2d at 36. When Englewood ultimately responded, the answers were unresponsive. ***Id.*** The defendant's counsel informally requested supplemental answers to the damage questions on numerous occasions, but to no avail, prompting the defendant to file a second motion to compel discovery or dismiss. ***Id.*** The circuit court held a hearing on this motion, at which Englewood's counsel agreed to provide supplemental answers, but again, the defendant contended that the answers received were unresponsive and inadequate. ***Id.*** The defendant also contended that it had considerable difficulty deposing an Englewood executive. ***Id.*** Englewood's failure to respond to interrogatories spanned eighteen months and Englewood cancelled eight depositions. ***Id.*** at 36-38. The circuit court dismissed Englewood's complaint with prejudice. ***Id.*** at 37. We upheld the circuit court's dismissal noting that while "dismissal is an extreme sanction, it is still a sanction within the exercise of a [circuit] court's discretion." *See* ***id.*** at 40.

¶17 In ***Zarnstorff***, the plaintiffs sought to prevent the defendant insurance company from denying coverage for a commercial vehicle accident under a policy that the insurance company did not disclose either in discovery or at trial. ***Id.***, 330 Wis. 2d 174, ¶2. The circuit court declined to impose sanctions and the plaintiffs appealed the circuit court's decision. ***Id.*** We upheld the circuit court's decision, noting that the court did not find the insurance company's conduct egregious and that the decision to impose sanctions was within the court's discretion. *See* ***id.***, ¶¶49-51.

¶18 John contends that the circuit court's reliance on these cases was mistaken because the facts of his case are vastly different. John ignores the fact that both cases stand for the well-established proposition that sanctions are within the discretion of the circuit court. "[W]e will uphold the circuit court's exercise of discretion, so long as it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a conclusion that a reasonable judge could reach." ***Weber v. White***, 2004 WI 63, ¶18, 272 Wis. 2d 121, 681 N.W.2d 137. Further, the circuit court's findings regarding John's persistent failure to cooperate in discovery, and his incredible explanation for his decision not to attend the deposition to which he had committed on the record, demonstrate egregious conduct by John. *See* ***Marquardt***, 299 Wis. 2d 81, ¶43 ("[F]ailure to comply with circuit court scheduling and discovery orders without clear and justifiable excuse is egregious conduct.… Where the circuit court finds that failures to respond to discovery and follow court orders are extreme, substantial, and persistent it may dismiss the action with prejudice on the grounds that the conduct is egregious.") (quoted sources, multiple sets of quotation marks and internal citations omitted; brackets in ***Marquardt***).

¶19 Here, the circuit court properly exercised its discretion in striking John's contest posture for failing to comply with discovery, depositions, and court orders. The record establishes that John failed to comply with discovery throughout the proceedings in various ways—by failing to provide W-2s, failing to provide employer information, and failing to address purchase options for the parties' Brookfield property, among other things. The court noted that Melanie's counsel filed two separate motions to compel and that John's deposition had been properly noticed two different times, but John still failed to attend. The court pointed out that the second deposition was scheduled with John's agreement and based on his convenience. The court repeatedly warned John about the consequences of noncompliance with discovery demands and ultimately found John's conduct egregious, noting that John failed to provide adequate reasons for any of his noncompliance and was aware of the consequences of such conduct. The court also found that John's behavior served primarily to delay the divorce proceedings. The circuit court examined the relevant facts, used a demonstrated rational process, and based on its inherent authority, reasonably determined to strike John's contest posture. We therefore conclude that the circuit court properly exercised its discretion in striking John's contest posture as a sanction for John's egregious failure to comply with discovery demands and equally egregious failure to attend the scheduled deposition.

By the Court—Judgment affirmed.

Not recommended for publication in the official reports.