COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2020AP1421
2020AP1422

Cir. Ct. Nos. 2018TR1179
2018TR1910

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

FOND DU LAC COUNTY,

PLAINTIFF-APPELLANT,

V.

JOHN ANTHONY HETTWER,

DEFENDANT-RESPONDENT.

APPEALS from an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] The issue before us is whether the circuit court erroneously exercised its discretion when it dismissed, with prejudice, Fond du

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version.

Lac County's cases against John Anthony Hettwer as a sanction for its failure to prosecute. Fond du Lac cited Hettwer on February 17, 2018, for operating while under the influence (OWI), case No. 2018TR1179, and operating with a prohibited alcohol concentration (PAC), case No. 2018TR1910.[2] The court dismissed the case over two years later after aborting a commenced jury trial for the second time due to Fond du Lac's failure to have necessary witnesses appear at trial. The court did not erroneously exercise its discretion in so dismissing, and we affirm.

First Trial: July 11, 2019

¶2 Hettwer's first jury trial commenced over a year after he was cited. The jury was brought in, voir dired, selected, and sworn. During voir dire, the jury was informed that a phlebotomist would be called by Fond du Lac as a witness. Hettwer's counsel spoke with the jury panel about blood draws. Preemptory strikes were made, and the jury was selected. After the jury was sworn, the court took a short break prior to opening statements.

¶3 After the break, Fond du Lac told the court that the phlebotomist was unavailable due to a sick child and asked that the phlebotomist be allowed to appear by phone. Hettwer objected. The Court declared a mistrial after discussing the situation with counsel.[3]

[2] Each citation is a separate case, which were consolidated for purposes of trial in the circuit court and consolidated for this appeal. For purposes of readability, we refer to both cases as "the case."

[3] The court explained that it could either deny Fond du Lac's motion for telephone testimony or declare a mistrial. The defense requested a mistrial, and Fond du Lac reiterated its preference for phone testimony but said it would rather have a mistrial declared than have the case dismissed with prejudice.

Second Trial: January 23, 2020

¶4 The second jury trial commenced six months later. The court inquired of Fond du Lac as to whether they were ready to proceed. Fond du Lac said it was and that the phlebotomist would testify. The court called for the jury to be brought up and took a five minute break to allow for that to happen.

¶5 Upon reconvening (with the jury assembled outside the courtroom), Fond du Lac informed the court that the phlebotomist was not available as she was out of the country "getting married." The court inquired when Fond du Lac learned of the phlebotomist's unavailability. Fond du Lac's attorney said he just found out and it "annoys me certainly." The court asked the attorney to investigate further when his office learned that the phlebotomist would be out of the country. Fond du Lac's attorney was allowed to go to his office to find out, and upon his return, he told the court that "[t]here's no way to determine when that note was put in [the file] … and that wasn't … seen, apparently, until this morning."

¶6 Fond du Lac asked that it be allowed to try the PAC citation without the phlebotomist's testimony and that it would prove up her expert qualifications via the arresting officer's testimony. The court found that the officer could not prove up the phlebotomist's qualifications and that the phlebotomist's "non-appearance is without justification legally."

¶7 Fond du Lac offered no proof that they subpoenaed the phlebotomist, and the court observed that any mailed subpoena Fond du Lac may have sent would have constituted improper service. The court further observed that Fond du Lac's lack of attention to its subpoena power is of "great

consternation to the administration of cases within this county…. I understand there's a system and it is of great frustration to the [c]ourt." The court continued, "[T]here's an attitude of less than seriousness about whether witnesses should be subpoenaed and brought here …. It is very frustrating. I don't know why better procedures and notice could not have been followed …."

¶8 Initially, the court dismissed Fond du Lac's case without prejudice but assessed jury costs of approximately $1000 against Fond du Lac, finding that "squarely, the—the blame for inability to proceed today is—is not with the defendant, its with" Fond du Lac. Hettwer thereafter moved for reconsideration of the dismissal without prejudice. Fond du Lac moved for reconsideration of the court's sanction of jury fees.

¶9 At the reconsideration hearing, the court found that the phlebotomist had been improperly subpoenaed and that the phlebotomist needed to testify in order for the blood test results to be admissible. The court amended its sanction by dismissing Fond du Lac's case against Hettwer with prejudice and in turn removed its sanction of jury costs, finding that the dismissal with prejudice was "a sufficient deterrence to being unprepared to proceed."

Discussion

¶10 We review a circuit court's decision to dismiss an action under an erroneous exercise of discretion standard. ***Industrial Roofing Serv., Inc. v. Marquardt***, 2007 WI 19, ¶40, 299 Wis. 2d 81, 726 N.W.2d 898. A circuit court has discretion to impose sanctions and choose which sanctions to impose, including dismissing an action with prejudice. ***Id.***, ¶41. If a circuit 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," then a discretionary decision will be sustained. ***Id.*** (citation omitted).

¶11 Dismissal for failure to prosecute is an erroneous exercise of discretion "(1) if there is no reasonable basis to support the circuit court's determination that the aggrieved party's conduct was egregious or (2) if the aggrieved party can establish a clear and justifiable excuse for the delay in prosecuting the action." ***Monson v. Madison Family Inst.***, 162 Wis. 2d 212, 224, 470 N.W.2d 853 (1991). Egregious conduct is defined as conduct that "although unintentional, is 'extreme, substantial and persistent.'" ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 666 N.W.2d 38 (citation omitted). Even if the court does not explicitly state that conduct was egregious or in bad faith, "if there is an implicit finding under the correct standard and if the facts provide a reasonable basis for the court's implicit determination," we do not reverse the decision. ***Id.***

¶12 When presented with excuses by a party seeking a delay in a scheduled trial, a court weighs the parties' interests in having the case move forward with the prejudice caused by the delay and "the court's interest in the timely administration of justice." *See* ***Monson***, 162 Wis. 2d at 221-22. The burden to show that an excuse is clear and justifiable is on the party challenging dismissal. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 666, 420 N.W.2d 372 (Ct. App. 1987). "[G]iven the volume of litigation burdening the trial courts, the bar and litigants must understand that Wisconsin trial judges will monitor their calendars to avoid the damaging effects of unwarranted delay." ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 114, 479 N.W.2d 557 (Ct. App. 1991).

¶13 Fond du Lac contends that its conduct was not egregious as it was willing and able to move forward with the jury trial without the phlebotomist's testimony and that its lack of proper service of a subpoena on the phlebotomist shows that it did not believe the phlebotomist's testimony was necessary to the case.[4] Fond du Lac has the burden to show that its excuses are "clear and justifiable." *See* ***Prahl***, 142 Wis. 2d at 666 (citation omitted). It has not done so, and it only offers additional excuses. Fond du Lac ignores the circuit court's findings that its improper subpoena "system" is of "great frustration to the Court" and to the "administration of cases within this county." Fond du Lac also ignores that it did, within its own records, have notice that the phlebotomist would be unavailable on January 23, 2020, but its system was deficient both in keeping a record of when that information was obtained and in getting that information to all affected files. Fond du Lac has not met its burden to overcome the court's finding that Fond du Lac's case against Hettwer had "not been prosecuted adequately and properly" and that Fond du Lac "quite frankly, was negligent in not procuring that witness. [Fond du Lac] had time to get that witness. [It] didn't subpoena that witness properly."

¶14 The circuit court put Fond du Lac on notice at the first trial that the phlebotomist's appearance at trial was necessary, regardless of whether her testimony was required by law or whether Fond du Lac believed her testimony was important for its case. At the second trial, the court found that the phlebotomist's failure to appear was "without justification legally" due to both the

[4] Fond du Lac also argued that it was not given any advanced warning that not moving forward with the January 23, 2020 trial could result in a dismissal with prejudice. However, Fond du Lac has not provided any case law or statute indicating that advanced warning is necessary.

length of time the case had been pending and Fond du Lac's inability to show that the phlebotomist's presence had been assured in some way. Fond du Lac has not met its burden to show that its excuses for its failings are "clear and justifiable." *See* ***Prahl***, 142 Wis. 2d at 666 (citation omitted). Fond du Lac's failures, while unintentional, were shown by the court to be "extreme, substantial and persistent" in the administration of cases within Fond du Lac County and as such its conduct is egregious. *See* ***Teff***, 265 Wis. 2d 703, ¶14 (citation omitted).

¶15 Based upon the record before us, we affirm, as the court did not erroneously exercise its discretion when it imposed the sanction of dismissal with prejudice and removed the sanction of jury fees.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.