COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP502 **Cir. Ct. No. 2012CV8980**

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

MARY JANE STEPHANEK,

PLAINTIFF-APPELLANT,

V.

KOHN LAW FIRM,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mary Jane Stephanek, *pro se*, appeals an order of the circuit court, dismissing her case with prejudice as a sanction for egregious

behavior and litigating in bad faith. Stephanek has failed to show that the circuit court erred, so we affirm the order.

¶2 Defendant-respondent Kohn Law Firm, on behalf of client Capital One, obtained a small-claims default judgment against Stephanek for $1177.22. It suffices to say that Stephanek felt that Kohn was overly aggressive with its subsequent collection tactics, so she filed the underlying suit against Capital One and Kohn on August 14, 2012. Capital One was later dismissed from the action.

¶3 On August 29, 2013, Kohn filed a motion to dismiss. The circuit court heard that motion on January 9, 2014, granting dismissal with prejudice. The circuit court found that Stephanek's conduct was egregious and that she was litigating in bad faith, so dismissal was appropriate as a sanction. Stephanek appeals. Additional details will be discussed herein as necessary.

STANDARD OF REVIEW

¶4 The decision whether to impose sanctions is committed to the circuit court's discretion. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. This includes the sanction of dismissal with prejudice. *See* ***Lister v. Sure-Dry Basement Sys., Inc.***, 2008 WI App 124, ¶10, 313 Wis. 2d 151, 758 N.W.2d 126. "A discretionary decision will be sustained if the 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." ***Sentry Ins.***, 247 Wis. 2d 501, ¶19.

¶5 Dismissal of an action with prejudice is a particularly harsh sanction. *See* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶42, 299 Wis. 2d 81, 726 N.W.2d 898. Under WIS. STAT. § 805.03 (2011-12),[1] sanctions may be imposed on parties for failure to prosecute a case or failure to comply with court orders but, because of the harshness, "dismissal requires that the non-complying party has acted egregiously or in bad faith." *See* ***Industrial Roofing***, 299 Wis. 2d 81, ¶43. Failure to comply with a court's orders without a clear and justifiable excuse is egregious conduct. *See* ***Lister***, 313 Wis. 2d 151, ¶11. Bad faith requires a finding "that the noncomplying party 'intentionally or deliberately' delayed, obstructed, or refused to comply with the court order." ***Dane Cnty. DHS v. Mable K.***, 2013 WI 28, ¶70, 346 Wis. 2d 396, 828 N.W.2d 198.

¶6 "Our inquiry is not whether we would have done the same thing if we were sitting as a circuit court judge." *See* ***Industrial Roofing***, 299 Wis. 2d 81, ¶40. Rather, the party challenging the dismissal must show a clear and justifiable excuse for the behavior that led to the dismissal. *See* ***id.***, ¶43; *see also* ***Buchanan v. General Cas. Co.***, 191 Wis. 2d 1, 9, 528 N.W.2d 457 (Ct. App. 1995).

DISCUSSION

I. "Lenience" to Counsel

¶7 Stephanek's first argument on appeal is presented as a question of "whether it is proper that a court grants more lenience to an attorney than to a *pro se* litigant." This argument ultimately amounts to an assertion that the circuit court

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

should not have dismissed her action as a failure to follow rules or court orders because Kohn violated more rules than she did.

¶8 The circuit court, in dismissing Stephanek's case, explained that "the file's replete with your non-cooperation since you started this lawsuit.… And it's my belief that the problems lie at your feet and that you're responsible for the constant over-litigating of this case." It also properly noted the correct legal standards for dismissing a case with prejudice as a sanction.

¶9 The circuit court then went on to list the specific instances of Stephanek's egregious conduct and otherwise offending behavior, finding she had given evasive discovery responses, made excessive discovery requests,[2] filed excessive and frivolous motions for sanctions, refused to cooperate in being deposed, provided evasive deposition testimony, refused to answer deposition questions, refused to cooperate in setting up mediation, and unjustifiably refused to speak to Kohn's counsel on the telephone. Based on this behavior, the circuit court concluded Stephanek had behaved egregiously and that the litigation was "not being done in good faith."

¶10 Stephanek's briefs are largely comprised of her disagreement with the circuit court's characterization of the facts. An appeal, however, is not the forum for litigating factual disputes. *See* ***Lange v. LIRC***, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997) (court of appeals is not a fact-finding court). If the circuit court's factual findings are clearly erroneous, *see* ***Employers Ins. of Wausau v. Jackson***, 190 Wis. 2d 597, 613, 527 N.W.2d 681 (1995), then the

[2] In fact, the circuit court noted that it had to enter an order in October 2013 prohibiting Stephanek from conducting additional discovery.

challenger must so demonstrate, generally by citation to appropriate portions of the record.

¶11 Here, Stephanek's factual representations are unaccompanied by any record citations.[3] This omission is contrary to WIS. STAT. RULE 809.19(1)(d)-(e), and this court need not search the record for evidence in support of a party's arguments, *see* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.[4] Further, Stephanek does not advance a clear and justifiable excuse for her own behavior as cataloged by the circuit court; her indignation at Kohn's behavior does not suffice. Stephanek thus fails to show that the circuit court erred in finding her conduct egregious or in bad faith, so she cannot show it erroneously exercised its discretion in dismissing her case.

II. The Newly Assigned Magistrate

¶12 Stephanek's second argument on appeal is phrased as "whether it is proper that a magistrate newly assigned to a case and having minimal personal knowledge of it makes a decision to impose the ultimate sanction of dismissal

[3] We note that Kohn's brief suffers from the same infirmity.

[4] Stephanek did include a handful of what we presume are citations to the appendix, but those citations are not particularly helpful. For one thing, there are no corresponding record citations to indicate where in the record the appendix documents would be found. The appendix itself lacks any pagination. Also, an appendix requires "the findings or opinion of the circuit court … including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues[.]" WIS. STAT. RULE 809.19(2)(a). While Stephanek's appendix includes the circuit court's written order, that order merely indicates that the case was dismissed "for the reasons stated on the record." Stephanek did not include a copy of the relevant part of the transcript in her appendix.

prior to hearing." In particular, she asserts that the circuit court "had little to no personal knowledge of the case when he ruled dismissal" and that she had only been before the court for "less than 30 minutes" before dismissal. This appears to be a claim that the circuit court failed to fully understand the background of the case before making its ruling, and improperly prejudged it before the hearing on the motion to dismiss.

¶13 While Stephanek uses this section to challenge the circuit court's criticisms of her, she again includes no record citations to her contrary factual assertions.[5] Further, her disagreement with the circuit court's conclusions does not mean that it lacked sufficient knowledge to render a decision. The motion to dismiss was filed on August 28, 2013, and not heard until January 9, 2014. In between those dates, the parties filed multiple written submissions on the motion to dismiss, as well as other motions and additional written submissions. There was also a motion hearing in October 2013 on a different motion. Undoubtedly, the circuit court gleaned much information from those intervening events; it did not decide Stephanek's case in a factual vacuum.

¶14 To the extent that Stephanek is claiming the circuit court prejudged her case, we note that it is expected that the circuit court will review written submissions regarding a motion prior to any hearing on that motion—that is the primary purpose of such submissions. Further, it is not unexpected for a circuit court to have a tentative decision ready in advance of a hearing, based on the

[5] The only citations provided are to a transcript, with no record number for the transcript.

written submissions but subject to any additional information that might be elicited at a hearing. Stephanek cites no legal authority that might support a claim of circuit court error. We neither consider arguments unsupported by legal authority, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), nor develop a party's arguments, *see* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

III. A Higher Standard

¶15 Stephanek's final issue on appeal is "whether it is improper that a *pro se* litigant be held to a higher standard than an attorney." She quotes a portion of the transcript from the motion hearing, where the circuit court said, "I think there should be a slightly higher standard for pro se litigants since they don't understand the system." Taken at face value, this quote is indeed troubling.

¶16 But Stephanek has disingenuously taken the circuit court's statement out of context. The circuit court actually said:

> [Dismissal] is therefore appropriate only in limited circumstances. I've been on the bench for 22 years. I've never granted a motion dismissing a case for egregious conduct by attorneys or pro se litigants. In fact, I think there should be a slightly higher standard for pro se litigants since they don't understand the system. And I've been trying to be as patient as possible, and I think [the prior judge] also has been patient with trying to move this case along. But it's not moving.

With the statement in its proper context, it is clear that the circuit court, in referencing a "higher standard for pro se litigants," meant that it should be even more difficult to dismiss a *pro se* litigant's case than the high standards of

egregiousness and bad faith already make it. The circuit court did not hold Stephanek to a higher standard.[6]

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] To the extent Stephanek believes she should be given greater latitude because she is *pro se*, she is mistaken. "The right to self-representation is '[not] a license not to comply with relevant rules of procedural and substantive law.'" ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (citation omitted; brackets in ***Graf***). *Pro se* litigants are bound by the same rules as attorneys. *See* ***id.***