COURT OF APPEALS DECISION DATED AND FILED

January 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1359-FT

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

IRMA T. WIEDMEYER,

PLAINTIFF-APPELLANT,

V.

DORIS E. CARRIVEAU,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Irma Wiedmeyer appeals from the trial court's judgment dismissing her case against Doris Carriveau as a sanction for noncompliance with a scheduling order. The issue is whether the trial court misused its discretion in dismissing the case. We conclude that it did not. Accordingly, we affirm.

Wiedmeyer filed this action against Carriveau for alleged environmental damage to property Wiedmeyer had purchased from Carriveau. On November 18, 1997, the trial court entered a scheduling order which required Wiedmeyer to name her lay witnesses and give a summary of their testimony by January 31, 1998, to name her expert witnesses and provide an itemized statement of special damages by January 31, 1998, and to provide a written summary of the reports of her experts by February 27, 1998.

On February 9, 1998, Carriveau filed a motion for sanctions because Wiedmeyer had not provided a list of her lay and expert witnesses and had failed to submit an itemized statement of special damages. Carriveau also alleged that Wiedmeyer had not complied with her discovery demand.

On February 20, 1998, Wiedmeyer moved to extend the deadline for filing her list of witnesses and her statement of special damages. In support, Wiedmeyer's attorney explained that he had failed to place the scheduling order deadlines in his calendar. On March 12, 1998, Wiedmeyer filed her witness list, naming herself, her two children, an environmental services company and an unknown roofing contractor. She also filed two resumes of people who worked at the environmental services company and stated that it would cost $9,995 for them to investigate the environmental problems, but that her damages were unknown.

The trial court found that Wiedmeyer had no justifiable excuse for not complying with the scheduling order and that her conduct was egregious. The trial court dismissed the case as a sanction. Wiedmeyer moved the trial court for reconsideration, but the motion was denied.

A trial court may dismiss a plaintiff's action for noncompliance with discovery or scheduling orders where the conduct is either egregious or in bad

faith and where there is no "clear and justifiable excuse." ***Johnson v. Allis Chalmers Corp.***¸ 162 Wis.2d 261, 275, 470 N.W.2d 859, 864 (1991). Decisions of this type are committed to the sound discretion of the trial court and will not be reversed by this court unless the trial court misuses its discretion. ***Id.*** at 273, 470 N.W.2d at 863. Unintentional conduct can be characterized as "egregious," warranting dismissal, when it is "extreme, substantial and persistent." ***Hudson Diesel, Inc. v. Kenall***, 194 Wis.2d 531, 543, 535 N.W.2d 65, 69-70 (Ct. App. 1995).

The trial court did not misuse its discretion in dismissing this lawsuit as a sanction for Wiedmeyer's failure to comply with the scheduling order. Wiedmeyer did not comply with a number of scheduling deadlines. More importantly, however, the substance of Wiedmeyer's *belated submissions* also did not comply with the scheduling order. She did not present an itemized statement of her special damages, did not file any reports from experts that substantiated her damage claims, and had barely begun the investigation necessary to determine what her damages were. Her only attempt to specify her damages was her statement that an environmental services company "ha[d] prepared a report indicating what activities are necessary *to further investigate* the premises concerning the environmental problems," (emphasis added) that $9,995 was needed to undertake the investigation, and that damages could be as much as $500,000. The problem with this statement, of course, is that, pursuant to the scheduling order, Wiedmeyer was to have already undertaken the investigation. The trial court properly concluded that Wiedmeyer's conduct was "egregious" because the defendant had no more knowledge about the basis of the lawsuit against her than she did on the first day the lawsuit was filed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.