

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2010

A. John Voelker
Acting 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. 2009AP1594

Cir. Ct. No. 2008FO4675

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**DANE COUNTY PLANNING & DEVELOPMENT,
C/O ROGER LANE, ZONING ADMINISTRATOR,**

PLAINTIFF-RESPONDENT,

v.

GREG GRISWOLD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, III, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ Greg Griswold appeals from a circuit court order dismissing Dane County Planning & Development's zoning violation action

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

against Griswold without prejudice. Griswold argues that the circuit court erroneously exercised its discretion in dismissing this action without prejudice because he was prejudiced by the dismissal, he had no notice that the circuit court would consider Dane County's request to dismiss this action without prejudice at a hearing in a companion case, and the circuit court did not provide a record of the reasoning underlying its decision. Griswold also argues that the circuit court erred in failing to resolve his summary judgment motion. We conclude that the circuit court properly exercised its discretion in dismissing this action without prejudice, and on that basis did not reach Griswold's motion for summary judgment. Accordingly, we affirm.

Background

¶2 In November 2008, Dane County commenced this action by issuing a citation to Griswold personally for storing numerous boats on his residential property as part of a commercial business, and having "junk" on his property, contrary to the Dane County Zoning Ordinances. Dane County also issued a citation to Second Wind Boat Works, Ltd., Griswold's business entity, for the same violations, commencing a separate action. *See Dane County v. Second Wind Boat Works, Ltd.*, Case No. 08FO4691. On December 1, 2008, Griswold filed a not guilty plea and requested a jury trial in this action.

¶3 On January 12, 2009, the Dane County Zoning Administrator wrote to the circuit court requesting the court dismiss this action without prejudice. A copy of this letter was sent to Griswold. Griswold wrote to the circuit court the next day objecting to Dane County's request for dismissal without prejudice and requesting dismissal with prejudice. On February 18, 2009, Griswold filed a motion for summary judgment seeking dismissal with prejudice.

¶4 On March 2, 2009, the circuit court ordered Dane County to provide written argument in favor of its motion to dismiss the citation without prejudice by April 1, 2009. The court also ordered Griswold to provide written argument against such a dismissal by May 1, 2009, and Dane County to reply by May 15, 2009. The circuit court's order did not address Griswold's summary judgment motion. On March 13, 2009, the Dane County Corporation Counsel wrote the circuit court explaining that Dane County wished to dismiss the citation because it decided not to pursue this forfeiture action for a single day's zoning violation. Instead, the County had commenced an action against Griswold for approximately 500 days of zoning violations. Corporation Counsel stated he did not object to dismissal with prejudice. A copy of this letter was sent to Griswold.

¶5 On March 26, 2009, a status conference hearing was held for *Dane County v. Second Wind Boat Works, Ltd.*, Case No. 08FO4691. Griswold appeared at the status conference. Dane County moved to dismiss the citations issued to Second Wind Boat Works, Ltd., and to Griswold individually. The circuit court granted Dane County's motion and dismissed both citations without prejudice. Griswold appeals.

Standard of Review

¶6 Motions for voluntary dismissal lie within the circuit court's discretion. See *Clark v. Mudge*, 229 Wis. 2d 44, 49, 599 N.W.2d 67 (Ct. App. 1999). Additionally, our review is limited to the record before us. See *Estate of Engebose v. Moraine Ridge Ltd. P'ship*, 228 Wis. 2d 860, 867, 598 N.W.2d 584 (Ct. App. 1999).

Discussion

¶7 Griswold claims that the circuit court erroneously exercised its discretion by dismissing this case without prejudice. Griswold argues that he was prejudiced by the dismissal, and therefore the court was required to either deny Dane County’s motion or dismiss the action with prejudice under WIS. STAT. § 805.04(2). He also argues the circuit court erred in failing to explain its reasoning on the record. Griswold then argues that he was denied due process because he had no notice that the circuit court would decide Dane County’s motion in this action at the status conference for the related case by Dane County against Griswold’s boat company, and that Dane County’s motion did not meet statutory requirements under WIS. STAT. § 802.01. Finally, Griswold asserts that the circuit court should have addressed his summary judgment motion, and that he was entitled to summary judgment as a matter of law. We disagree, and conclude that the circuit court properly exercised its discretion in granting the county’s motion to voluntarily dismiss the citation in this case under § 805.04(2). We further conclude that we have no basis to reverse based on any deviation from the rules of civil procedure in this case, and that Griswold has not established he suffered a due process violation. Finally, we conclude that the circuit court properly did not reach Griswold’s motion for summary judgment after dismissing this action on Dane County’s motion.

¶8 Under WIS. STAT. § 805.04(2),² a court may only grant a plaintiff’s request to dismiss an action after a defendant has joined issue under such terms as the court deems proper. Thus, § 805.04(2) “protect[s] a defendant from prejudice

² WISCONSIN STAT. § 805.04(2) provides that “an action shall not be dismissed at the plaintiff’s instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.”

when a plaintiff seeks to discontinue his suit without an adjudication on the merits.” See *Estate of Engebose*, 228 Wis. 2d at 863. We have said that a dismissal without prejudice is proper only if no other party will be prejudiced by the dismissal. See *Clark*, 229 Wis. 2d at 48-49. Factors the circuit court must consider include

(1) the plaintiff’s diligence in bringing the motion; (2) any undue vexatiousness on the plaintiff’s part; (3) the extent to which the suit has progressed, including the defendant’s efforts and expense in preparation for trial; (4) the duplicative expense of relitigation; and (5) the adequacy of plaintiff’s explanation for the need to dismiss.

Id. at 49 (citation omitted).

¶9 In *Clark*, we concluded that the circuit court had properly exercised its discretion in granting the plaintiff’s motion for voluntary dismissal. *Id.* at 51. We agreed with the circuit court’s reasoning that the defendant was not prejudiced by a voluntary dismissal because the motion for dismissal was filed less than one year after the action was commenced, was brought for the legitimate purpose of pursuing a higher damages cap, discovery had not substantially progressed, and the court had not invested substantial time in the case. *Id.*

¶10 We conclude that the dismissal in this case did not prejudice Griswold under the factors set forth in *Clark*. Dane County moved to dismiss its action against Griswold only two months after it issued the citation in this case, and only one month after Griswold pled not guilty to the citation. Therefore, Dane County was diligent in moving to dismiss. We have no indication Dane County moved to dismiss out of vexatiousness; rather, Dane County has made clear it sought dismissal to bring a consolidated action against Griswold rather than

separate ordinance violation actions.³ The suit had not significantly progressed when Dane County moved to dismiss. The record consisted only of the citation and Griswold's plea. Griswold had not expended significant effort or incurred significant expenses.⁴ Therefore, there will not be duplicative expense in relitigation. Finally, Dane County provided an adequate explanation for its need to dismiss: it decided to pursue voluntary dismissal to bring one consolidated action against Griswold.

¶11 Moreover, we disagree with Griswold's assertion that we must reverse because we do not have a record of the court's reasoning. First, Griswold has not provided a transcript of the status conference in the companion case to this one, so we do not know whether the court stated its reasons on the record. As the appellant, it was Griswold's burden to provide that transcript. *See Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546.⁵ Additionally, even if the circuit court does not state its reasoning on the record, we will uphold the circuit court's decision if we conclude on our own review that the

³ We recognize Griswold's argument that Dane County has brought this and other zoning actions against him for the purpose of harassment. We simply do not have evidence of that claim in the record before us.

We also acknowledge Griswold's argument that Dane County wrote a letter to the court stating it did not object to a dismissal with prejudice. While we note that letter in the record, we will assume, absent a transcript, that Dane County then argued at the status conference to dismiss without prejudice, and provided adequate reasons for its motion.

⁴ We note that Griswold asserts he expended significant effort in his motion for summary judgment. But he did so after receiving Dane County's motion to dismiss this action. He chose to spend time on a matter that could easily become moot.

⁵ Griswold asserts he had no reason to provide a transcript in this appeal of a hearing in a different case. Griswold asserts, however, that the court erroneously exercised its discretion in dismissing this action at that hearing, at which he was present. Griswold therefore was required to provide us with the transcript of that hearing to support his argument.

record supports the circuit court's decision. *See McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). As we have explained, we reach that conclusion here.

¶12 Next, Griswold asserts that we must reverse the court's order dismissing this action because Dane County did not follow the proper procedure for a motion to dismiss. *See* WIS. STAT. § 802.01(2)(a) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought."). Griswold argues that Dane County failed to satisfy the formal requirements of written motions because the County's motion did not provide him with the date, place and time of the hearing, or reasons why the County wanted the citation dismissed. However, even if a defect occurs in a pleading or proceeding, the circuit court's decision need not be reversed unless the defect "affected the substantial rights" of a party. *See* WIS. STAT. § 805.18(2). A party's substantial rights are affected if a reasonable possibility exists that the error contributed to the outcome of the case. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. If the error is not sufficient to undermine our confidence in the outcome, the error is harmless. *Id.* We conclude such is the case here.

¶13 Griswold received notice that Dane County was seeking to dismiss this action in January 2009. Griswold promptly stated his objection. Griswold appeared personally at the status conference for Dane County's action against his boat company.⁶ Griswold does not explain how the outcome of the case would be

⁶ We note that the court held the status conference in Dane County's action against Griswold's boat company before the date it had set for Griswold to file a written response to
(continued)

different if Dane County had complied with formal requirements, nor can we perceive any reason to conclude the errors contributed to the outcome in this case.

¶14 Next, Griswold asserts that he was denied due process because he did not have sufficient notice of the motion. We disagree.

¶15 Due process requires that litigants be afforded notice and an opportunity to be heard. *See Neylan v. Vorwald*, 124 Wis. 2d 85, 90, 368 N.W.2d 648 (1985). “The adequacy of notice and hearing respecting proceedings that may affect a party’s rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.” *Id.* (citation omitted). Here, Griswold had actual notice of Dane County’s motion to dismiss this citation when Dane County copied Griswold on its January letter to the circuit court. Moreover, Griswold was present at the status conference for the case against his boat company, where the court heard and decided the motions to dismiss both cases. Again, in the absence of a transcript, we assume this issue was fully developed at the hearing. We perceive no due process violation in these events.

¶16 Finally, Griswold argues that the circuit court erred when it failed to consider his summary judgment motion. However, the record makes clear that Dane County filed its motion to dismiss before Griswold filed his motion for summary judgment, and the circuit court dismissed this action before reaching the

Dane County’s argument, and that Griswold then filed his response after the court dismissed this action without prejudice. However, Griswold also appeared at the status conference on behalf of his boat company, and we assume, absent a transcript, that he had an opportunity to express his arguments there.

summary judgment motion. Because the action had been dismissed, the court had no reason to address the motion for summary judgment. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

