

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2013

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. 2012AP1653

Cir. Ct. No. 2010CV981

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

THE LAZY SUSAN, INC. AND SHERRY MENACHER,

PLAINTIFFS-APPELLANTS,

v.

**EMMY'S LLC, WAVE MANAGEMENT, INC. AND BADGER MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Ozaukee County:
SANDY A. WILLIAMS, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. The Lazy Susan, Inc., and Sherry Menacher (collectively “Lazy Susan”) appeal from an order dismissing their case with prejudice as a sanction for failure to comply with court orders and the denial of their motion for reconsideration. For the reasons discussed below, we affirm.

¶2 In November 2010, Lazy Susan filed an action against Emmy’s LLC and Wave Management, Inc. (collectively “Wave Management”) relating to a commercial lease dispute. Approximately one year later, Wave Management served Lazy Susan with its first set of interrogatories and request for production of documents. Lazy Susan’s responses to those discovery requests were due December 21, 2011. It failed to meet this deadline.

¶3 Wave Management subsequently filed a motion to compel discovery. Following a hearing on the motion, the circuit court ordered Lazy Susan to serve responses to the outstanding discovery requests by April 5, 2012.¹ The court also issued a scheduling order requiring, among other things, that Lazy Susan file its witness list by April 23, 2012. Again, Lazy Susan failed to meet these deadlines.

¶4 Wave Management next filed a motion to dismiss the case for failure to prosecute. At the hearing on that motion, the circuit court observed that Lazy Susan had not provided a legitimate reason for why it had not complied with the April 5 deadline regarding the outstanding discovery requests. Likewise, it noted that Lazy Susan had not offered an explanation for why it had not complied with the April 23 deadline regarding its witness list.

¶5 Accordingly, the circuit court entered a written order granting Wave Management’s motion and dismissing the matter with prejudice. Thereafter, Lazy

¹ There was no misunderstanding or pressure with respect to the April 5, 2012 deadline. Counsel for Lazy Susan confirmed to the circuit court that he could serve responses to the outstanding discovery requests by then.

Susan filed a motion for reconsideration, which the court denied on the ground that no new arguments had been presented. This appeal follows.

¶6 The decision to impose sanctions, including dismissing an action with prejudice, is reviewed under an erroneous exercise of discretion standard. *See Lister v. Sure-Dry Basement Sys., Inc.*, 2008 WI App 124, ¶10, 313 Wis. 2d 151, 758 N.W.2d 126. We will uphold a circuit court’s decision if it “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.” *Id.* (citation omitted).

¶7 Dismissal of an action is warranted for egregious conduct without any clear and justifiable excuse. *See Selmer Co. v. Rinn*, 2010 WI App 106, ¶35, 328 Wis. 2d 263, 789 N.W.2d 621. The circuit court need not make an explicit finding of egregiousness as long as the facts support such a finding. *Id.*, ¶36. Failure to comply with the court’s scheduling or discovery orders without a clear and justifiable excuse can constitute egregious behavior. *See Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898.

¶8 On appeal, Lazy Susan contends that the circuit court erred in dismissing its case with prejudice and denying its motion for reconsideration. It submits that its failure to comply with court orders was both justified and caused by excusable neglect. Primarily, it cites the following reasons for its noncompliance: (1) Menacher’s personal bankruptcy, (2) the general disarray of

the records, and (3) an insurance company's motion for stay and bifurcation followed by a motion to declare there was no insurance coverage.²

¶9 Like the circuit court, we are not persuaded that Lazy Susan's excuses amount to clear and justifiable excuses or excusable neglect. As noted, Lazy Susan filed its action in November 2010. By then, it needed to know what its case was comprised of in order to proceed. Thus, regardless of Menacher's personal bankruptcy and the condition of the records, Lazy Susan's failure to serve responses to discovery requests nearly a year and one-half later, as required by the court, was egregious.

¶10 As for the insurance company's motions, there was no reason to believe that they prevented the case from moving forward through discovery. After all, the circuit court issued an order in October 2011 requiring the insurance company to defend its insured, Wave Management, and holding in abeyance its remaining requests. Even if that were not the case, it cannot be credibly argued that Lazy Susan's subjective (and erroneous) belief that there were pending insurance coverage issues meant that it was free to ignore subsequently issued court orders.

² Additionally, Lazy Susan asserts that (1) it eventually (albeit untimely) provided discovery to the circuit court on CD, (2) Wave Management suffered no prejudice from the delays, (3) Wave Management failed to provide it with a witness list (which was not due until July 23, 2012), (4) Wave Management refused to allow third parties to remove equipment from the leased premises, (5) counsel for Wave Management refused Lazy Susan's invitation to inspect records, (6) counsel for the insurance company failed to comply with a local rule regarding discovery motions, and (7) Lazy Susan failed to seek extensions because it was in the process of trying to produce the required documents. The problem with these arguments is that none of them—except the unsupported contention that Lazy Susan failed to seek extensions because it was in the process of trying to produce the required documents—relates to Lazy Susan's repeated failure to comply with court orders.

¶11 In the end, the excuses offered by Lazy Susan do not justify its failure to comply with court orders. Consequently, we are satisfied that the circuit court properly exercised its discretion in dismissing the case with prejudice and denying the motion for reconsideration.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

