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DISTRICT I

July 21, 2026

To:

Hon. Michael J. Hanrahan
Circuit Court Judge
Electronic Notice

Luke Hudock
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Appeals Processing
Division
Electronic Notice

Walter Weiberg
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2025AP107

Kathryn Gardner v. Walter Weiberg (L.C. # 2024CV5529)

Before Donald, C.J., Colón, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kathryn Gardner appeals an order that dismissed her money damages suit with prejudice. The circuit court concluded that she failed to prosecute her case because she did not appear at the hearing held to address a mediation request filed by Walter Weiberg. Based upon the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).¹ Because the record does not show either that Gardner's

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

failure to appear was egregious or that she was personally to blame for the failure, we reverse with directions to reinstate her claims.

Gardner filed a complaint alleging that Weiberg improperly retained her security deposit after she moved out of his rental property. Weiberg filed an answer and denied her claims. In September 2024, the circuit court conducted the first hearing in this matter, a scheduling conference held off the record. The docket reflects that Gardner appeared by counsel, and Weiberg appeared pro se. That same day, the court entered a written scheduling order establishing dates and deadlines for a variety of pretrial matters. The form included preprinted language about mediation but reflected that this language was “N/A.” The form concluded with advisements that “[t]he court will sanction parties who fail to comply with the provisions of this order. Sanctions may include entering judgment or dismissing claims or defenses.”

Soon after the scheduling conference, Weiberg filed a letter requesting mediation. In response, the circuit court found that “an in-person appearance will facilitate a discussion about the most efficient way to bring this case to a determination” and ordered a 10:30 a.m. hearing on December 5, 2024. The circuit court also filed a notice of the hearing and distributed the notice electronically to Gardner’s counsel and to Weiberg. Neither the court’s order for the hearing nor the notice of that hearing cautioned the parties about any potential penalties for non-appearance or suggested that the circuit court had concerns about the parties’ conduct in handling the litigation.

On November 15, 2024, Gardner filed a timely notice of motion and motion for summary judgment, along with a memorandum, affidavit, and exhibits in support. The notice reflected a January 2025 hearing date.

On December 5, 2024, Weiberg appeared for the hearing on his mediation request, but neither Gardner nor her counsel appeared, and the circuit court dismissed her case from the bench. The next day, the court entered a written order that stated: “[t]he plaintiff’s claims are dismissed, with prejudice, due to plaintiff’s failure to prosecute the case by failing to attend the hearing” on December 5, 2024.

Gardner promptly filed a motion requesting either relief from the dismissal order or reconsideration. With the motion, Gardner submitted an affidavit of counsel which reflected that in the early morning of December 5, 2024, counsel was at a meeting outside of his office when he received notice of a “family medical situation” that consumed the remainder of his day. Counsel further alleged that he was unable to contact the circuit court before he received the dismissal order. Finally, counsel alleged that the “medical situation ... resulted in the death of a family member,” and counsel provided a link to an online obituary.

The circuit court did not address Gardner’s post-disposition motion. Gardner filed a notice of appeal.

Dismissal for failure to prosecute is largely left to the circuit court’s discretion. ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 392, 497 N.W.2d 756 (Ct. App. 1993). Our standard of review is therefore deferential. ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. “‘Exercise of discretion,’ however, is not license for mere ‘unfettered decision making,’ [but] requires the application of correct legal principles to the facts of record.” ***Hlavinka***, 174 Wis. 2d at 392 (citations omitted).

A circuit court considering dismissal for failure to prosecute is guided by WIS. STAT. § 805.03, which provides, as relevant here:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under [WIS. STAT. §] 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.

Pursuant to WIS. STAT. § 804.12(2)(a)3., dismissal of an action or proceeding is among the orders authorized by WIS. STAT. § 805.03. Our supreme court holds, however, that because § 804.12(2)(a) and § 805.03 limit sanctions to those that are “just,” dismissal under § 805.03 “requires that the non-complying party has acted egregiously or in bad faith.” *Marquardt*, 299 Wis. 2d 81, ¶43 (citations omitted). *Marquardt* further explains that failure to follow “circuit court scheduling ... orders without clear and justifiable excuse is egregious conduct.” *Id.* (citation omitted). Therefore, “[w]here the circuit court finds that failures to ... follow court orders are ‘extreme, substantial, and persistent’ it may dismiss the action with prejudice on the grounds that the conduct is egregious.” *Id.* (citation omitted). By contrast, dismissal under § 805.03 is an erroneous exercise of discretion if no reasonable basis exists to support the circuit court’s determination that the noncomplying party’s conduct was egregious. See *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991).

The circuit court’s dismissal order here does not include a finding that Gardner’s conduct was egregious. We have therefore reviewed the record to determine whether it supports such a finding. See *id.* at 312. Although we have conducted our review in light of the deference owed to the circuit court, we conclude that the record does not allow a determination that Gardner’s conduct here was egregious, that is, “‘extreme, substantial, and persistent.’” See *Marquardt*, 299 Wis. 2d 81, ¶43 (citation omitted).

Nothing in the record suggests that Gardner engaged in dilatory tactics during the five months that followed the commencement of her lawsuit. To the contrary, she was an active participant in the litigation, which her counsel moved steadily forward. Her dispositive motion was pending and awaiting the scheduled hearing when the circuit court dismissed her claims for failure to prosecute them. We cannot conclude on these facts that Gardner engaged in ““extreme, substantial, and persistent”” disobedience or disregard of her obligations as a litigant. *See id.* (citation omitted). Accordingly, her single error in failing to attend a hearing on December 5, 2024, did not constitute egregious conduct within the meaning of *Marquardt* and thus cannot support the order to dismiss her claims with prejudice.

Moreover, were we to conclude that Gardner’s failure to appear on December 5, 2024, was egregious—and to be clear, we do not reach such a conclusion—we would nonetheless conclude that the circuit court erred by dismissing Gardner’s claims with prejudice. “[I]t is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney’s conduct to the client, where the client is blameless.” *Id.*, ¶61. The record does not reveal a basis to blame Gardner for the failure to appear at the December 5, 2024 hearing. The record shows that the circuit court gave notice of that hearing only to Gardner’s counsel and to Weiberg, not to Gardner herself. Further, nothing in the circuit court’s notice or in any other document filed prior to December 5, 2024, gave Gardner reason to believe that she must personally take some action to safeguard her claims. Indeed, the record lacks anything from which Gardner should have concluded either that her attorney was failing to manage her case properly or that the circuit court was contemplating sanctions against her. *See id.*, ¶68. Additionally, neither she nor her attorney had moved the circuit court to permit counsel to withdraw or suggested that Gardner intended to represent herself.

Finally, the record does not suggest that Gardner was personally responsible for the dismissal of her claims with prejudice rather than without. To the contrary, the circuit court did not give Gardner an opportunity to preserve her claims after the December 5, 2024 hearing. *See id.*, ¶69. For example, the circuit court did not first enter an order dismissing the case without prejudice and establish conditions that would have allowed Gardner to reinstate her claims. *See id.* The circuit court instead immediately dismissed the action with prejudice and without specifying anything that Gardner could do on her own to salvage her litigation.

In sum, we conclude that the dismissal of Gardner’s claims with prejudice constituted an erroneous exercise of discretion.² Accordingly, we reverse the dismissal order and remand with directions to reinstate Gardner’s claims and thereafter to conduct proceedings as warranted, consistent with this court’s decision.

IT IS ORDERED that the dismissal order is summarily reversed, *see* WIS. STAT. RULE 809.21, and this matter is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

² Gardner asserts that the dismissal of her claims also violated her right to due process because none of the orders entered in her case contained a warning of any adverse consequences for failing to attend the December 5, 2024 hearing. Because we resolve this case on the grounds that the record reveals neither egregious conduct on Gardner’s part nor a basis to blame Gardner personally for the failure to appear at the December 5, 2024 hearing, we need not further consider her due process claim. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we resolve cases on the narrowest possible ground).