COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 1998

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. 97-0293

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

TIMARA YOUNG, A MINOR, AND TIMMY YOUNG, A MINOR, BY THEIR GUARDIAN AD LITEM, TRANACE HAMILTON, INDIVIDUALLY AND AS NATURAL MOTHER OF TIMARA YOUNG AND TIMMY YOUNG,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES, KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES, AND RACINE COUNTY DEPARTMENT OF HUMAN SERVICES,

PLAINTIFFS,

V.

DUSAN MATIC, BANC ONE, RACINE NATIONAL ASSOCIATION, A DOMESTIC CORPORATION, WESTSHORE MANAGEMENT, INC., A NON-DOMESTIC CORPORATION, AND ARTHUR DAVIS,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY, A FICTITIOUS ENTITY,
COLLEEN DEININGER,
JOHN DOE I MANAGERS, A FICTITIOUS ENTITY,
DEF INSURANCE COMPANY, A FICTITIOUS ENTITY,

GHI INSURANCE COMPANY, A FICTITIOUS ENTITY,
COLLEEN REALTY CORPORATION, A FICTITIOUS ENTITY,
JOHN DOE II MANAGERS, A FICTITIOUS ENTITY,
JKL INSURANCE COMPANY, A FICTITIOUS ENTITY,
MNO INSURANCE COMPANY, A FICTITIOUS ENTITY,
JOHN DOE III MANAGERS, A FICTITIOUS ENTITY,
PQR INSURANCE COMPANY, A FICTITIOUS ENTITY,
STU INSURANCE COMPANY, A FICTITIOUS ENTITY,
JOHN DOE IV MANAGERS, A FICTITIOUS ENTITY,
VWX INSURANCE COMPANY, A FICTITIOUS ENTITY,
YZA INSURANCE COMPANY, A FICTITIOUS ENTITY,
JOHN DOE V MANAGERS, A FICTITIOUS ENTITY,
BCD INSURANCE COMPANY, A FICTITIOUS ENTITY,
EFG INSURANCE COMPANY, A FICTITIOUS ENTITY,
JOHN DOE VI MANAGERS, A FICTITIOUS ENTITY,
HIJ INSURANCE COMPANY, A FICTITIOUS ENTITY,
KLM INSURANCE COMPANY, A FICTITIOUS ENTITY,
JOHN DOE VII MANAGERS, A FICTITIOUS ENTITY, AND
NOP INSURANCE COMPANY, A FICTITIOUS ENTITY,

DEFENDANTS,

V.

RICHARD VALLEE,

DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT,

CITY OF RACINE,

THIRD-PARTY DEFENDANT-
RESPONDENT,

CITY OF KENOSHA,

THIRD-PARTY DEFENDANT-
ADDITIONAL-THIRD-PARTY PLAINTIFF-
RESPONDENT,

CITIES AND VILLAGES MUTUAL INSURANCE COMPANY,

ADDITIONAL-THIRD-

PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Timara and Timmy Young and their mother, Tranace Hamilton (hereafter, the Youngs) appeal from a judgment dismissing their action against Dusan Matic, Banc One, Westshore Management, Inc., Arthur Davis, Richard Vallee, and the cities of Racine and Kenosha (hereafter, the defendants). The issue on appeal is whether the circuit court erroneously exercised its discretion when it barred the Youngs from calling expert witnesses as a sanction for violating an amended scheduling order. We conclude that the sanction which resulted in dismissal was a proper exercise of discretion. We affirm the judgment.

Discovery sanctions involve the exercise of the circuit court's discretion and will not be disturbed absent an erroneous exercise of discretion. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). However, dismissal of an action for failure to comply with discovery and scheduling orders is permissible only when bad faith or egregious conduct can be shown on the part of a noncomplying party. *See* ***id.*** at 275, 470 N.W.2d at 864. We will sustain the sanction of dismissal if there is a reasonable basis for the trial court's determination that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance. *See* ***id.*** at 276-77, 470 N.W.2d at 865. We apply these standards of review even though the

sanction imposed only precluded expert witnesses from testifying because the sanction ultimately caused dismissal of the case. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis.2d 296, 308, 470 N.W.2d 873, 877 (1991).

A detailed history of the litigation is appropriate. The Youngs' complaint alleged that they suffered personal injuries as a result of ingesting lead paint at various rental units owned or managed by the defendants. The first scheduling order entered on September 6, 1995 required the Youngs to name their expert witnesses, itemize special damages, and provide medical and hospital records by January 6, 1996. A jury trial was set for February 11, 1997.

The record shows that by a letter dated December 12, 1995, the Youngs' attorney requested all defense counsel to afford him a thirty-day extension to provide a witness list and specify special damages. There appears to have been no objection to the request. On February 9, 1996, the Youngs filed an expert witness list which specified nine named individuals and five categories of persons identified generically only by their occupation, i.e., city health department sanitarians, building inspectors, nurses, environmental health officials, and school teachers. At that point, the only expert witness report that the Youngs had produced was that of Mary Ellen Fischer, Ph.D.

The parties sought to depose Fischer on April 8, 1996. The Youngs' attorney indicated that Fischer was not available on that date. When the defense attorneys were unable to schedule Fischer's deposition in April, a motion to compel discovery depositions of the Youngs' experts and to amend the scheduling order was filed. A hearing was held May 22, 1996.

At the hearing, it became apparent that a number of expert witnesses' reports were tied to reevaluation of the Youngs to be completed by

Fischer. The defendants proposed that Fischer be required to complete a reevaluation within thirty days and that Fischer and all other remaining experts be deposed sixty days after the completed reevaluation. The Youngs' attorney agreed to those deadlines. The circuit court expressed concern for preserving the February 1997 trial date.

An amended scheduling order was entered requiring Fischer's reevaluation to be completed by June 28, 1996; submission of Fischer's report by July 8, 1996; Fischer to be produced for deposition by July 26, 1996; submission of written reports from all other experts by July 26, 1996; and production of all other expert witnesses for deposition by September 2, 1996. This order reflected changes agreed to by counsel because Fischer could not interview the Youngs until June 28, 1996.

On October 16, 1996, the defendants filed a motion for discovery sanctions for the Youngs' failure to produce witness reports and expert witnesses for depositions as required by the amended scheduling order. The motion was supported by the correspondence between the attorneys attempting to schedule the deposition of Fischer and a few other experts named by the Youngs. The motion was set to be heard on October 31, 1996.

On October 30, 1996, the Youngs' attorney filed an affidavit indicating that his affliction with sickle cell anemia had debilitated his health over the past eighteen months. The affidavit was presented in support of a motion to adjourn the sanctions hearing so that new co-counsel would have time to prepare a response to the sanctions motion. The circuit court denied as untimely the Youngs' motion to adjourn the sanctions hearing.

In defense of the sanctions motion, the Youngs argued that counsel had sent several letters proposing dates for the depositions of various experts. They suggested that the inability to comply with the amended scheduling order was due to the inability of the defense attorneys to coordinate their calendars and the medical condition of their attorney.

In ruling on the motion for sanctions, the circuit court recalled that at the May 22, 1996 scheduling conference it was aware of the health problems suffered by the Youngs' attorney but had obtained the assurances of the attorney that he could meet the new deadlines imposed. The record demonstrates that the circuit court exercised its discretion based on the consideration of the proper standards—that the noncomplying party's conduct was egregious or in bad faith and without a clear and justifiable excuse. The court found that the failure of the Youngs' attorney to earlier notify the court of problems with scheduling discovery depositions or his inability to meet the agreed upon deadlines was egregious. It further concluded that because counsel was aware at the May 22 hearing of his health limitations and the difficulty he would have in producing out-of-state experts, no clear and justifiable excuse for noncompliance existed. The court also noted that the deadlines had already been modified at a hearing in which it was made clear that any noncompliance would result in a motion for sanctions.

Against the background of the litigation as previously detailed, we conclude that the circuit court had a reasonable basis for imposing the sanction of barring expert testimony. When the amended scheduling order was entered, the burden was placed on the Youngs' attorney to produce for discovery depositions the experts he intended to use. This is demonstrated by the circuit court's solicitation of counsel's ability to meet the new deadlines. There was no error in concluding that there was noncompliance with the scheduling order. There was

noncompliance with deadlines which had already been extended and there were numerous named experts who had not been produced for discovery depositions which establish that the noncomplying conduct was persistent and extreme so that it could be categorized as egregious.

Although the Youngs suggest that the defense attorneys engaged in chicanery to compromise their ability to meet the discovery deadlines, they should have returned to the circuit court for assistance. The court was appropriately bothered that the Youngs had not earlier notified the court of problems with discovery deadlines. Moreover, even though the Youngs' attorney knew he had health problems which might affect his ability to move this complex case along, the addition of co-counsel was not even explored by the Youngs' attorney until October 22, 1996 after the sanctions motion was filed.

The Youngs argue that because the circuit court did not find that their noncompliance was intentional, the court was obligated to consider less severe sanctions. They cite ***Hudson Diesel, Inc. v. Kenall***, 194 Wis.2d 531, 545, 535 N.W.2d 65, 70 (Ct. App. 1995), which states: "We further conclude that when the conduct that is the basis for dismissal is not intentional or in bad faith, the trial court must determine whether less severe sanctions are available to remedy the noncomplying party's discovery violation before dismissal may be ordered."

The circuit court did not specifically discuss whether a less severe sanction was an appropriate remedy. It alluded to the necessity of requiring compliance with scheduling orders to keep cases moving along to completion. Dismissal is necessary to maintain the circuit court's duty to discourage the protraction of litigation, preserve judicial integrity and promote the orderly

processing of cases. *See* ***Johnson***, 162 Wis.2d at 282, 470 N.W.2d at 867. A less severe sanction would not serve the circuit court's interest.

At the October 31, 1996 sanction hearing, the Youngs suggested that all of the discovery deadlines, including the defendants' disclosure of their witnesses, could be pushed back and the trial could go on as scheduled. An additional extension of discovery deadlines would have prejudiced the defendants. By the time of the sanctions hearing, the February 11, 1997 trial date was fast approaching. The Youngs had at least seven named experts who had not yet been deposed and an unspecified number of other witnesses who had only been identified by their employment. The reports of the Youngs' vocational rehabilitation expert and economist had not yet been completed. The defendants had yet to identify their witnesses and complete any independent medical evaluations that may have been necessary depending on the testimony of the Youngs' experts during discovery depositions. The circuit court acknowledged that the case was complex and the defendants would be prejudiced if they were forced to prepare for trial in three months. Implicit was the circuit court's rejection of an additional extension of discovery deadlines. We conclude that the circuit court properly determined that a less severe sanction would not remedy the problems associated with the failure to meet discovery deadlines.

The Youngs claim that the circuit court should not have excluded the expert witnesses reports that were timely provided to the defendants even though the experts themselves were not produced for depositions. The court found that allowing the Youngs to use those expert witnesses reports without providing the defendants with an opportunity to cross-examine the experts was prejudicial. We summarily affirm the circuit court's ruling because the unfair prejudice is obvious.

Finally, the Youngs contend that it was improper to also bar the testimony of their school teachers, treating physicians, municipal sanitarians and building inspectors because those persons were not experts retained solely for litigation. The Youngs characterize these persons as "expert fact witnesses." We reject this contention. It makes no difference that none of these persons were under a retainer agreement. The Youngs' attorney had represented that all experts would be produced for depositions by September 2, 1996. Although the Youngs claim that these persons could have been subpoenaed by the defendants, they failed to specifically identify the persons they would call from the fields of employment identified on their witness list.

Moreover, it is without a basis to claim that teachers who would testify about cognitive deficits and learning disabilities suffered by the Youngs are not expert witnesses. The same is true of the treating physicians who would report that the children suffered from lead toxicity and what treatments were necessary. These persons were experts within the scope of the production requirement in the scheduling order. It was not error to exclude their testimony as well.

By the Court.—Judgment affirmed.

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