COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 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. 98-3130

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

ALBERT TOELLER AND SYLVIA TOELLER,

PLAINTIFFS-RESPONDENTS,

V.

EDWARD A. GRAFF AND CINDY J. GRAFF,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

BAKERY WERKS, INC., A WISCONSIN CORPORATION, BY ITS REGISTERED AGENT ALBERT TOELLER,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Appeal dismissed; order affirmed.*

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

¶1 PER CURIAM. Edward and Cindy Graff appeal from an order dismissing their counterclaims against Albert and Sylvia Toeller[1] and their third-party complaint against Bakery Werks, Inc. as a sanction for their discovery abuses. We dismiss this appeal as to Edward Graff and affirm the dismissal order as to Cindy Graff.

¶2 As a preliminary matter, we note that this appeal encompasses only the claims of Cindy Graff, not Edward Graff. Neither Cindy nor Edward is a lawyer. The Graffs proceeded pro se in the circuit court. Cindy signed the notice of appeal for herself and Edward. Because Cindy is not a lawyer, the notice of appeal is not effective to commence an appeal on Edward's behalf. *See* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis.2d 187, 202-04, 562 N.W.2d 401, 407-08 (1997) (filings by a nonlawyer on behalf of another are of no effect). Under § 802.05(1), STATS., a party who is not represented by an attorney must himself or herself sign papers filed with the court. Because Edward did not sign the notice of appeal, his appeal is dismissed.

¶3 We turn to the merits of Cindy's appeal. Dismissal of an action is discretionary with the circuit court. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). We will sustain the circuit court's discretionary decision if the court examined the relevant facts, applied a proper legal standard and "using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** The court has inherent and statutory

[1] The Toellers' claims against the Graffs were also dismissed in this order. The Toellers have not appealed the dismissal.

authority to sanction parties for discovery abuses and violation of court orders. *See* ***id.*** at 273-74, 470 N.W.2d at 863. This authority includes dismissal. *See* ***id.*** at 274, 470 N.W.2d at 863.

¶4 A circuit court's dismissal sanction will be sustained "if there is a reasonable basis for the circuit court's determination that the non-complying party's conduct was egregious and there was no 'clear and justifiable excuse' for the party's noncompliance." ***Id.*** at 276-77, 470 N.W.2d at 865.

¶5 The relevant facts are as follows. The Toellers commenced this action in 1994, and the action lay dormant for approximately three years. In March 1998, the parties were before the court on the Toellers' motion to dismiss because the Graffs had violated the scheduling order by not submitting their witness list and failing to exchange documents requested in discovery. During this hearing, the Toellers complained about the Graffs' discovery tactics and stated that Sylvia Toeller had produced a box of documents at her deposition, which had lasted over three hours. The Graffs did not dispute this statement.

¶6 In response to the Toellers' motion to dismiss, the Graffs pled their pro se status and requested a new scheduling order. The court recognized that dismissal would be the most severe sanction for the Graffs' violation and declined to impose it. Instead, the court reopened all discovery, set deadlines for discovery and made sure the parties understood the deadlines. The court clearly and carefully explained the meaning of the scheduling order and its significance for discovery. The court made clear that future discovery disputes would result in the appointment of a special master. The court specifically informed the Graffs that regardless of their pro se status, they had to comply with court orders and failure to do so could be grounds for

dismissal of their claims. Edward specifically acknowledged this obligation. The new scheduling order required discovery to be completed by September 4, 1998.

¶7 In June 1998, the Toellers moved the circuit court to terminate the Graffs' discovery because it had been burdensome to the Toellers. Counsel's affidavit in support of the motion stated that depositions of his clients had been cancelled fifteen minutes prior to the starting time and the Toellers had been deposed for seventeen hours over five sessions. Counsel stated that the Toellers produced 900 pages of documents during discovery and made these documents available to the Graffs for review and copying. Counsel complained that the Graffs continued to file new sets of interrogatories and requests for production of documents. In response, the court appointed a special master to handle discovery disputes.

¶8 During the summer of 1998, the Graffs filed a motion complaining that the Toellers had not complied with their discovery requests. In an August 14 letter to counsel for the Toellers, Edward Graff stated that he did not intend to appear for his deposition until he received the documents he had requested from the Toellers. Otherwise, Edward claimed, he could not properly prepare for the deposition. On August 20, counsel for the Toellers gave notice of the Graffs' depositions for September 3. On September 1, the Graffs filed a motion to quash the deposition notices and did not appear for their September 3 depositions. The court referred the Graffs' motion to quash to the special master because it constituted a discovery dispute. The Toellers then filed a second motion to dismiss the Graffs' claims, citing the numerous problems with discovery and the Graffs' discovery abuses.

¶9 At the September 30, 1998 hearing on the Toellers' motion to dismiss,[2] the court stated that the Graffs were not free to refuse to appear at their depositions. The Graffs again attempted to take refuge in their status as pro se litigants and argued that they believed that their motion to quash the deposition notices was sufficient to relieve them of the obligation to appear for their depositions. Edward Graff stated that he did not want to attend his deposition because he was being asked to produce documents he did not have and which had been the subject of his document production request to the Toellers. Counsel for the Toellers argued that Edward had not stated an adequate reason for failing to appear for his deposition.

¶10 The court found that the Graffs had not stated an adequate reason for failing to appear at their scheduled depositions. The court rejected the Graffs' theory that filing a motion to quash relieved them of the obligation to appear in the absence of a ruling of the special master or court to that effect. The Graffs conceded that they did not speak to the special master before they filed their motion to quash. When the special master informed the Graffs that the motion to quash did not relieve them of the requirement to appear for deposition, the Graffs then offered to appear for deposition. Cindy Graff advised the court that the Toellers' counsel had agreed to another deposition date for the Graffs. The Toellers' counsel objected, stating that Cindy had mischaracterized his position on scheduling depositions, and Cindy conceded that her statement was erroneous. The court then stated:

[2] Cindy argues that the court should have referred the Toellers' motion to dismiss to the special master. The court addressed this question at the September 30 hearing and noted that the Toellers had alleged that the Graffs had refused to participate in discovery depositions. The court distinguished this from a discovery dispute which would be decided by the special master. We accept the court's distinction.

> I've heard enough, quite frankly. Let me tell you something. I think courts have particular responsibility to look out for pro se litigants. I think public respect for the system and the manner in which we try cases and resolve disputes requires that. I think the Supreme Court has spoken to that on several times.
>
> But I can't be your lawyer for you, and I can't be your advocate for you. And more particularly, I'm not going to permit people to hide behind their professed ignorance and beat the other side over the head with it. You cannot sit there pro se and crank out some semi-accurate legal documents by the reams, by the carload, if you will, and beat the other side over the head with these documents.

¶11 The court found that the Graffs engaged in bad faith by refusing to comply with the Toellers' discovery requests until the Toellers complied with their discovery requests. The court went on to say that "discovery is not a process for beating up people. And the use of legal briefs and the use of motions and so forth is not for that purpose.… I can't allow this to continue. This is outrageous. And to require the other side to hire a lawyer to come in here and defend against all this is unconscionable, and I'm not going to permit it any longer. I'm granting [the Toellers'] motion [to dismiss]." Edward Graff objected, claiming that the court had one set of rules for pro se litigants and one set of rules for attorneys.

¶12 The record of the discovery disputes and abuses sustains the circuit court's findings and does not establish that the Graffs had a clear and justifiable excuse for failing to comply with discovery and court orders relating to discovery. *See* ***id.*** The court properly exercised its discretion in dismissing Cindy's claims. Although Cindy argues that the motion to quash her deposition notice should have been heard by the court or special master, the court found that the motion did not state grounds to excuse the Graffs' attendance at their depositions. The Graffs' mistaken assumption that they did not need to attend their depositions after filing the motion to quash does not constitute good cause for failing to attend.

¶13 Cindy complains in her appellant's brief that the circuit court was not sensitive to the fact that she was proceeding pro se. We reject this argument. The record indicates that the court took adequate account of the Graffs' pro se status, initially declined to impose discovery sanctions, reopened discovery under a new scheduling order, and required the parties to work together and with a special master to resolve discovery disputes.

¶14 Cindy's status as a pro se litigant did not relieve her of her responsibility to comply with the statutes and court orders. Neither a circuit court nor an appellate court has a duty to walk a pro se litigant through the procedural requirements or point the litigant to the proper substantive law, and a pro se litigant is not excused from complying with relevant rules of procedural and substantive law. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20, *cert. denied,* 506 U.S. 894 (1992). Acting as one's own lawyer does not excuse a litigant from acting in a reasonable and responsible manner. *See* ***Zirngibl v. Zirngibl***, 165 Wis.2d 130, 142, 477 N.W.2d 637, 642 (Ct. App. 1991). The record in this case supports the circuit court's findings that Cindy Graff did not act reasonably and responsibly in pursuing her case pro se.

By the Court.—Appeal dismissed; order affirmed.

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