

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-2107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**GERALD DRAVES, JEANNIE DRAVES, MARK WUERL,
DAWN WUERL, PETER WELLINGHOFF AND
DIANE WELLINGHOFF,**

PLAINTIFFS-RESPONDENTS,

V.

GAVIN PRIEGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Gavin Priegel appeals from a judgment granting Gerald and Jeannie Draves, Mark and Dawn Wuerl, and Peter and Diane Wellinghoff (collectively, Draves) an easement over his property and

permanently enjoining any conduct restricting exercise of the access easement. Priegel argues that the circuit court denied him a trial when it decided Draves' entitlement to the easement based on evidence presented during litigation of injunction issues, that the court erroneously exercised its discretion in striking his answer as a sanction for failure to comply with scheduling orders, and that the evidence was insufficient to support the court's finding of an easement. We conclude that striking Priegel's answer was a proper exercise of discretion. Once the answer was stricken, judgment on the allegations in the complaint was appropriate. We affirm the judgment.

¶2 Priegel and Draves each own a lot in close proximity to one another on Wallace Lake in Washington County. The property lines of each lot would be adjacent but for a twenty to twenty-four foot wide strip of land between the lots owned by the Wallace Lake Sanitary District. Both Priegel and Draves are permitted access to the lake from the land owned by the sanitary district and both use that land for parking. The land owned by the sanitary district is accessed by a driveway over Priegel's property. Due to increasing animosity between the parties and Priegel's placement of a chain along a portion of his driveway to prevent its use by Draves, Draves filed this action on September 16, 1998, for declaration of an access easement and for compensatory and punitive damages. Priegel's answer included a counterclaim for compensatory and punitive damages for trespass, harassment, and intentional infliction of emotional distress.

¶3 A March 18, 1999 scheduling conference was held. The deadline for naming witnesses and filing an itemization of special damages was May 1, 1999, for Draves and July 1, 1999, for Priegel. On April 16, 1999, Draves petitioned for a temporary injunction to restrain Priegel from maintaining a barrier he set up preventing use of the access easement. The temporary injunction was granted.

Priegel moved to vacate the temporary order and for an order requiring Draves to abate a nuisance created by lighting which interfered with Priegel's enjoyment of his property. These motions were heard by hearings held on May 19, June 7, June 29, July 20, and September 30, 1999. The circuit court went and viewed the property at the conclusion of the September 30 hearing.¹ At the September 30 hearing, a briefing schedule was set on the injunction issues. The October 1999 trial date was released and trial was set for February 28, 2000.

¶4 On February 4, 2000, Draves filed a motion in limine for an order sanctioning Priegel under WIS. STAT. §§ 804.12(2)(a) and 805.03 (1999-2000)² for failure to comply with the circuit court's scheduling orders. The motion alleged that Priegel had not filed his brief by the required December 1, 1999 deadline. Draves' attorney detailed how he had contacted counsel for Priegel in early December inquiring about the brief and had been told that the brief had been faxed several days earlier. When the motion was filed, Draves still had not received the requested copy of Priegel's brief. Draves' motion also sought judgment declaring the access easement and dismissing Priegel's counterclaim based on the proposed sanction of striking Priegel's answer and accepting as true the facts stated in Draves' brief. Priegel responded with his own motion in limine to exclude various

¹ A few months later, the circuit court also viewed the property at night to understand Priegel's complaints about lighting.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

types of evidence. The affidavit filed with the motion explained counsel's reasons for not timely filing the brief and witness list.³

¶5 On February 8, 2000, the circuit court entered its written decision continuing the temporary injunction and requiring Draves to maintain shields on lighting affecting Priegel's property. The decision noted that the briefing schedule required Priegel's brief to be filed by December 1, 1999, and that "Defendant's undated response brief containing 25 pages was submitted to the court at the pretrial conference held on February 4, 2000." The decision explained that it would not wait for a reply brief because of the timing in the receipt of Priegel's brief and the need to finalize a decision on the injunction issues prior to the February 28, 2000 trial. A hearing was set for February 10, 2000 to consider matters raised by Draves' motion in limine.

¶6 At the motion hearing, Draves argued that Priegel's lateness in providing him with a witness list was prejudicial.⁴ Draves asked that under WIS. STAT. § 802.09(2), the pleading be conformed to the evidence already presented to the circuit court and that the temporary injunction be issued as a permanent injunction. Priegel's response was that there was no prejudice in not earlier naming witnesses because the motion hearings were "sort of free-form discovery." Priegel argued that a permanent injunction could not be ordered absent a finding

³ Priegel's counsel indicated that an unanticipated dispute involving the municipal court for which counsel served as a judge consumed his time throughout December and January. Personal matters also required a scaling back of business hours. Counsel conceded that he should have requested an extension. Priegel's witness list was presented at the pretrial conference held on February 4, 2000. Inadvertence was the reason for not filing a witness list when requested by Draves in September 1999.

⁴ Draves recognized that portions of the motion in limine were moot by virtue of the circuit court's February 8, 2000 decision.

that the access easement exists. By his motion in limine, Priegel sought to exclude at trial the very type of evidence that had already been presented during the motion hearings.⁵

¶7 The circuit court denied Priegel's motion in limine. Relying on the parties' failure to name medical or psychiatric experts for the purpose of laying a foundation for the claims of emotional distress, the court found those claims moot. The court ordered that the pleadings be amended to conform with the proof adduced at the motion hearings. It found that Priegel's failure to timely submit his brief regarding the injunction issues and timely explain his default to be egregious conduct in violation of the scheduling order. It noted that Priegel had not named witnesses by the time required by the scheduling order. The court struck Priegel's answer and converted the temporary injunction into a permanent one. In doing so, the court acknowledged that the motion hearings had been the equivalent of a trial on the merits of equitable (nonjury) issues and that Draves' request for judgment under WIS. STAT. § 806.01(2), was appropriate.⁶

¶8 Priegel argues that he was deprived due process when the circuit court adjudicated the claim for an access easement without conducting a trial and in the absence of a motion for summary judgment. Priegel's attempt to fashion the

⁵ Specifically, Priegel argued that Draves should not be able to claim an easement of record by reliance on the "access easement" language appearing on a certified survey map. He also sought to exclude evidence of any use of a former gravel road and use of his driveway from a different direction by anyone other than Draves' predecessors in title.

⁶ The decision was entered on February 14, 2000. Apparently at a subsequent telephonic status conference, the parties waived their claims for punitive damages. (A transcript of that conference is not in the record.) The case was subsequently removed from the jury trial calendar. Priegel sought reconsideration of the judgment on the ground that additional research established that he was entitled to a jury trial on the issues of fact of whether a prescriptive easement exists. The circuit court denied reconsideration because of the parties' agreement not to proceed to a jury trial and Priegel's opportunity to research the question in advance of the pretrial conference.

circuit court's decision as a refusal to grant a trial fails. Removing Priegel's due process cloak, the underlying material ruling is the striking of Priegel's answer as a sanction for failing to abide by the scheduling order.

¶9 Under WIS. STAT. § 805.03, the circuit court may make such orders “as are just” as a sanction for the failure to obey any order of the court. The court's authority to impose sanctions is broad so that it may “fashion equitable remedies appropriate to the individual circumstances of each case.” *Hur v. Holler*, 206 Wis. 2d 335, 343, 557 N.W.2d 429 (Ct. App. 1996). Specifically, the court's decision to strike a pleading as a sanction is discretionary and will not be disturbed unless the party claiming to be aggrieved by the decision establishes that the court has erroneously exercised its discretion. *Geneva Nat'l Cmty. Ass'n, Inc. v. Friedman*, 228 Wis. 2d 572, 579, 598 N.W.2d 600 (Ct. App. 1999). A discretionary decision will not be disturbed if the court 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.*

¶10 We recognize that the striking of an answer may result in a default judgment and that default judgments are disfavored. *Connor v. Connor*, 2001 WI 49, ¶17, ___ Wis. 2d ___, 627 N.W.2d 182. Thus, the striking sanction should be used only in cases of “egregious conduct” on the part of the noncomplying party. *Friedman*, 228 Wis. 2d at 580. We will sustain the sanction if there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991).

¶11 The record is clear that Priegel failed to file his brief on the pending injunction issues as required by the circuit court's briefing schedule. Indeed, the brief was filed more than two months late with no intervening indication to Draves' attorney or the court as to when the brief would be filed. It was Priegel himself who sought an interim ruling by filing his motions to dissolve the temporary injunction and enjoin Draves from lighting his property in an allegedly offensive manner. Priegel's present characterization of these motions as "interlocutory" trivializes the importance he placed on them at the time. The importance placed on the motions and the amount of time consumed in litigating them makes Priegel's subsequent neglect of this aspect of the litigation egregious. With the trial fast approaching, judicial resources expended on the injunction issues were in danger of being wasted.

¶12 The circuit court made known at the final hearing on the injunction issues that the briefs were necessary because the testimony had been spread out over four or five hearings. It also indicated that the February 28, 2000 trial date was being preserved. Priegel's failure to timely file his brief directly affected the court itself by impeding its attempt to get the motions resolved well in advance of trial. Priegel's argument that Draves was not prejudiced by the untimely brief is of little consequence when court administration is impeded. The general control of the judicial business before the circuit court is essential to the court's ability to function. *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964).

¶13 Additionally, the record demonstrates that Priegel had not complied with the circuit court's scheduling order to advance the case to trial. As of the final pretrial conference held on February 4, 2000, Priegel had not filed a witness list, proposed jury instructions, proposed verdict, or his motion in limine. Without

these submissions, the issues to be tried to a jury were not fully defined. Indeed, the court's written decision of February 14, 2000, harbored doubts about the issues to be presented to the jury at the February 28, 2000 trial. While that decision did not specifically mention the failure to make timely submissions for trial preparation, Draves' motion for sanctions did and it was part of the totality of the conduct reviewed at the hearing on Draves' motion.⁷ The court adopted Draves' assertion that Priegel's conduct was egregious and therefore implicitly relied on the range of conduct explored at the hearing. See *Friedman*, 228 Wis. 2d at 586 n.7. We appropriately look to these additional grounds which support the court's ruling. *Id.* at 585.

¶14 We conclude that the record supports the circuit court's finding that Priegel's failure to comply with the court's orders was egregious conduct. That finding is "tantamount to a determination that the conduct was neither justified nor excused." *Id.* at 582 n.6. Priegel's argument here that he was denied his right to due process and to a trial do little to advance any suggestion that there was a justifiable excuse for the failure to comply.

¶15 We reject Priegel's contention that the circuit court was obligated to explore alternative and less harsh sanctions. A circuit court need only explore alternative remedies where the noncomplying party's conduct is unintentional. *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 545-46, 535 N.W.2d 65 (Ct.

⁷ For the first time in his reply brief, Priegel argues that the circuit court failed to make an adequate record in imposing sanctions. We will not, as a general rule, consider arguments raised for the first time in a reply brief. *Schaeffer v. State Pers. Comm'n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). We reject the suggestion that the court's three written decisions in this matter did not constitute an adequate record. Moreover, "that the court did not specifically articulate its consideration of [appropriate] policy factors does not mean that it was not cognizant of these factors." *Connor v. Connor*, 2001 WI 49, ¶25, ___ Wis. 2d ___, 627 N.W.2d 182.

App. 1995). Even if Priegel's noncompliance was unintentional, the need to explore alternative sanctions is commensurate with the severity of the sanction imposed. Here, striking the answer made the case ripe for a decision on the merits by default judgment. However, in this case, the sanction is not the equivalent of a dismissal or judgment without regard to the merits because, as the court noted, the hearings conducted on the injunction motions were in essence a trial of the merits. The court's recognition that there had been exhaustive litigation of the merits was not a ruling that Priegel was not entitled to a trial but an explication that the sanction of striking the answer and granting judgment to Draves was not the harshest possible sanction.⁸ The already exhaustive litigation was an appropriate consideration in balancing the competing interests of a default judgment. *See Connor*, 2001 WI 49 at ¶17. The court did not erroneously exercise its discretion by striking Priegel's answer as a sanction.

¶16 Having struck Priegel's answer, the allegations in the complaint are to be taken as true. *See Kramer Heating & Mfg., Inc. v. United Bonding Ins. Co.*, 47 Wis. 2d 191, 195-96, 177 N.W.2d 119 (1970). The complaint stated a claim for relief for an easement by prescription. Judgment on that claim was appropriate. Although Priegel argues that there is insufficient evidence to support a finding of either an easement of record or by prescription, only one easement form is necessary. We summarily conclude that the evidence adduced at the hearings on the injunction issues provides sufficient evidence of record to support the court's findings and conclusions. *See WIS. STAT. § 840.07* (in an action

⁸ For this reason, we need not address Priegel's claim raised for the first time in his reply brief that he did not waive his right to a jury trial. Although waiver was mentioned in ruling on Priegel's motion for reconsideration, it was not the basis for the court's ultimate decision.

regarding an interest in real property, “[n]o default judgment may be granted unless evidence supporting the court’s findings and conclusions is in the record”).

¶17 Priegel makes the additional argument that the circuit court erroneously exercised its discretion in permitting the complaint to be amended to conform to the evidence adduced at the motion hearings. We need not address this claim. Since judgment was appropriate on the complaint, the claim for a permanent injunction (effectuated by amendment of pleadings) merely is an alternative form of sustaining the judgment in Draves’ favor.

By the Court.—Judgment affirmed.

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

