COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2864 **Cir. Ct. No. 98CV196**

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

BROOKE A. PTACEK,

PLAINTIFF-APPELLANT,

PFL LIFE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

MINNESOTA FIRE AND CASUALTY COMPANY, JEREMY J. FLEMING, CHARLES E. HILL, MATTHEW MAREK AND MATTHEW WOLF,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brook Ptacek appeals an order dismissing her personal injury claim against Minnesota Fire and Casualty Company, Jeremy Fleming, Charles Hill, Matthew Marek and Matthew Wolf for failure to prosecute. Ptacek argues that: (1) the circuit court erroneously exercised its discretion by failing to determine whether Ptacek's conduct was egregious; and (2) she was denied due process because she had no prior notice regarding what would constitute failure to prosecute and what penalties for that conduct would be. We conclude that the court implicitly found that Ptacek's conduct was egregious. We further conclude that Ptacek waived her due process argument. Therefore, we affirm the order.

BACKGROUND

¶2 On October 13, 1995, Ptacek was driving a vehicle owned by Larry and Joan Schaack and insured by Minnesota Fire. She was allegedly injured when a vehicle driven by Troy Kemmerer collided with her vehicle at an intersection near Prescott, Wisconsin. Apparently, Kemmerer failed to stop at the intersection because the stop sign was missing. Ptacek subsequently settled with Kemmerer's insurance company, PFL Life Insurance Company.

¶3 On September 28, 1998, Ptacek filed a complaint against Jeremy Fleming, Charles Hill, Matthew Marek, and Matthew Wolf. Ptacek alleged that on the night before the accident, Fleming removed the stop sign from the intersection and left it lying in a ditch. According to Ptacek, Hill, Marek and Wolf were with Fleming and saw Fleming remove the sign. Ptacek also brought an underinsured motorist claim against Minnesota Fire because it refused to pay the limits of the underinsured benefits provided in its policy.

¶4 After filing the complaint, Ptacek conducted no written or deposition discovery, nor did she file any motions with the circuit court. The defendants conducted some written discovery and took Ptacek's deposition on July 13, 1999. The defendants also sought summary judgment, arguing that Ptacek had signed a general release relieving all torfeasors from liability. The circuit court denied the motion.

¶5 Ptacek did write a letter to opposing counsel in 1999 and again in 2001, proposing mediation. However, Ptacek never sought an order compelling mediation. Wolf and Marek each responded to Ptacek's first letter by asking for a settlement demand. Ptacek did not reply to either request.

¶6 On July 26, 2001, Minnesota Fire filed a motion to dismiss Ptacek's complaint for failure to prosecute. Fleming, Hill, Marek, and Wolf joined in the motion. Ptacek argued that the issues regarding coverage were complicated and that mediation would be in the best interests of the parties. Ptacek stated that she "tried to resolve this claim and move the case along."

¶7 The circuit court found that in the three years the case had been pending, Ptacek had not "initiated anything with the court." Regarding mediation, the court noted that, in its experience, "mediation never takes place prior to discovery taking place." The court stated that "[u]nder the circumstances I don't see clear and justifiable excuse." As a result, the motion to dismiss was granted.

STANDARD OF REVIEW

¶8 A motion to dismiss for failure to prosecute is addressed to the sound discretion of the circuit court, and we will affirm the court's action unless it is clearly shown that there was an unreasonable exercise of abuse of discretion.

Prahl v. Brosamle, 142 Wis. 2d 658, 666, 420 N.W.2d 372 (Ct. App. 1987) (citation omitted). One seeking to "avoid such a dismissal must show a 'clear and justifiable' excuse for the delay." ***Id.*** (citation omitted). While this has been recognized as a strict standard, it is appropriate in light of the "duty" of trial courts to "refuse their aid to those who negligently or abusively fail to prosecute the actions which they commence." ***Trispel v. Haefer***, 89 Wis. 2d 725, 733, 279 N.W.2d 242 (1979). Because dismissal is a harsh sanction, the remedy is appropriate "only in cases of egregious conduct by a claimant." ***Id.*** at 732.

DISCUSSION

I. EGREGIOUS CONDUCT

¶9 Ptacek argues that the circuit court erroneously exercised its discretion by applying the wrong legal standard. Ptacek claims that a two-part standard applies to discretionary dismissals. Ptacek contends that dismissals for failure to prosecute are only within the court's discretion if the court expressly finds that a party's conduct is: (1) egregious; and (2) there is no clear and justifiable excuse for the conduct.

¶10 Here, the circuit court relied on ***Prahl*** and concluded that it would be an abuse of discretion not to grant the motion to dismiss for failure to prosecute. The court stated:

> [W]here no justification for delay is shown it is an abuse of discretion not to dismiss …. Under the circumstances I don't see clear and justifiable excuse, and therefore as I see the law, I am required, it would be [an erroneous exercise] of discretion not to grant the motion to dismiss.

¶11 In ***Prahl***, we referenced the egregious conduct standard where a plaintiff did nothing to advance a case for three years. Even though the circuit

court made no findings that the conduct was egregious, we concluded that a "plaintiff who has invoked the judicial process to advance a claim … cannot sit back for three years, waiting for someone else to take the initiative, and then be heard to argue that the case should not be dismissed for lack of prosecution." ***Id.*** at 670-71.

¶12 Contrary to Ptacek's argument, the law does not require a circuit court to make an explicit finding of bad faith or egregious conduct before imposing a sanction. *See* ***Monson v. Madison Family Inst.***, 162 Wis. 2d 212, 215 n.3, 470 N.W.2d 853 (1991). It is sufficient if the record contains a reasonable basis for a determination that the sanctioned conduct was egregious and that there was no clear and justifiable excuse. ***Id.*** at 215. The failure of a court to utter precise magic words does not result in reversible error if the circuit court made the unmistakable but implicit findings to the same effect. ***Id.*** at 215 n.3 (citing ***Englewood Apts. P'ship v. Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (Ct. App. 1984)).

¶13 In ***Monson***, the supreme court upheld a circuit court's dismissal that was based on, among other things, the plaintiff's failure to undertake any discovery during the twenty-one months between filing and dismissal. ***Monson***, 162 Wis. 2d at 221. In a footnote, the court stated that "implicit in the circuit court's statements contained in the record is a finding that plaintiffs' conduct in this case was egregious. Therefore, the circuit court's failure to label the plaintiffs' conduct as 'egregious conduct' is immaterial." ***Id.*** at 215 n.3 (citation omitted).

¶14 Here, the record supports a finding of egregious conduct. Ptacek wrote two letters dated two years apart and never followed up on them. Opposing

counsel sought a settlement demand before agreeing to mediation, but Ptacek did not reply. Ptacek never sought an order to mediate. She never sought discovery. She never initiated any court activity after filing the action. Both the court's stated reasons and the record support the conclusion that Ptacek egregiously failed to prosecute her complaint by sitting idle for three years.

¶15 When the court reviewed the record, it found that the plaintiff had not prosecuted her case in three years:

> [D]efendants scheduled a … deposition of the plaintiff. Defendant has scheduled a summary judgment motion. The defendants submitted one medical authorization. The defendants in this case submitted a motion for reconsideration. And the defendants have submitted a motion for dismissal. And in the three years the case has been pending the plaintiff has not initiated anything with the court.

The circuit court considered and rejected Ptacek's argument that she had pursued mediation instead because "mediation never takes place prior to discovery taking place."

¶16 Ptacek cites ***Trispel*** and ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), to argue that a circuit court must find egregious conduct before it can dismiss a case. Her reliance on ***Trispel*** and ***Johnson***, however, is misplaced. Those cases involved a dismissal for failure to comply with a court order, not a failure to prosecute. ***Trispel***, 89 Wis. 2d at 729; ***Johnson***, 162 Wis. 2d at 270. ***Trispel*** and ***Johnson*** are clear that in order to demonstrate that the court erroneously exercised its discretion when it entered an order of dismissal under WIS. STAT. § 805.03, no matter what the grounds, the aggrieved party must show "a clear and justifiable excuse" for the delay. ***Trispel***, 89 Wis. 2d at 733. That Ptacek has not done.

¶17 It is firmly established that in order to demonstrate that a dismissal order based upon the failure to prosecute was an abuse of discretion, the aggrieved party must show a "clear and justifiable excuse." ***Id.*** The circuit court's finding that Ptacek had no clear and justifiable excuse for delay is unchallenged. Ptacek does not even attempt to argue that she had a clear and justifiable excuse for delaying the prosecution of her case.

¶18 We conclude that the circuit court's finding of egregious conduct is implicit. We further conclude that the record contains a reasonable basis for such a determination and also for the circuit court's dismissal.

II. PRIOR NOTICE

¶19 Ptacek argues that she was denied due process when the circuit court dismissed the case for failure to prosecute because she had no prior notice regarding what would constitute failure to prosecute and what the penalties for that conduct would be.

¶20 We generally do not review an issue raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Although this rule is one of judicial administration and not jurisdiction, we have declined to review issues raised for the first time on appeal unless there is reason to do so. *See* ***id.*** at 489-90. In the specific context of a due process challenge, our supreme court has declined to review the issue because the appellant did not raise it before the circuit court. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). In ***Hopper***, our supreme court found that the circuit court "had no opportunity to pass" on the issue and that the "facts and circumstances" of the case did not justify review. ***Id.***

¶21 Here, the record reveals that Ptacek never indicated to the circuit court that her due process rights had been violated. Therefore we conclude that Ptacek raises the issue for the first time on appeal. As a result, we do not address her argument.

By the Court.—Order affirmed.

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