

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2356

Cir. Ct. No. 2010SC1333

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DEAN ANDERSEN,

PLAINTIFF-APPELLANT,

V.

MONCO LAW OFFICES,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Waukesha County:
DONALD J. HASSIN JR., Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Dean Andersen appeals from an order dismissing his case with prejudice as a sanction for failure to comply with a court order and the denial of his motion for reconsideration. We affirm.

¶2 Andersen sued Monco Law Offices, alleging various causes of action related to debt collection. In preparation for trial, the circuit court ordered Andersen to produce a list of witnesses and a summary of their anticipated testimony.

[Y]ou're going to give over within 30 days a list to Ms. Bates of each and every witness and a summary. By a summary I believe somewhere between 50 and 100 words ... as to what you intend to have that witness testify about.

The list was due on July 13, 2011. Andersen filed a document on July 18, 2011, but the document was not a list of witnesses with a summary of their testimony. Rather, it was a document titled “Plaintiff’s Brief Regarding Amy Bates as Witness.” Counsel for Monco Law moved to dismiss pursuant to WIS. STAT. § 805.03, and the circuit court granted its motion. Andersen argues the dismissal was an erroneous exercise of discretion.

¶3 The circuit court has discretion to impose sanctions for failure to comply with court orders. See *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. Dismissal is warranted for egregious conduct without any clear and justifiable excuse. See *Selmer Co. v. Rinn*, 2010 WI App 106, ¶35, 328 Wis. 2d 263, 789 N.W.2d 621. The circuit court need not make an explicit finding of egregiousness as long as the facts

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

support such a finding. *Id.*, ¶36. Failure to comply with the court’s scheduling or discovery orders without a clear and justifiable excuse can constitute egregious behavior. See *Industrial Roofing*, 299 Wis. 2d 81, ¶43. WISCONSIN STAT. § 805.03 gives sufficient notice to litigants that failure to comply with court orders may result in sanctions under WIS. STAT. § 804.12(2)(a), one of which can be dismissal. See *Gaertner v. 880 Corp.*, 131 Wis. 2d 492, 502, 389 N.W.2d 59 (Ct. App. 1986).

¶4 Andersen’s failure to submit his witness list on time without a clear and justifiable excuse constitutes egregious behavior. Andersen told the circuit court that his document was scheduled to be faxed from his automated fax machine on July 11, 2011—several days before it was due. According to Andersen, the document was faxed late due to a power outage during a portion of the day on July 11. Andersen said he did not realize that the document had not gone out until the following Monday, when he saw it in his out box. The circuit court asked Andersen why he had not hand delivered it to the courthouse, and Andersen said “I thought it was faxed through.” The circuit court replied, “I don’t accept your excuse as reasonable. It was untimely filed.” Later, at the hearing on Andersen’s motion for reconsideration, the circuit court stated, “To rely on an electronic system that you don’t back check is inexcusable.”

¶5 Moreover, Andersen never filed the required witness list and summary. Andersen never explained to the circuit court, initially or on reconsideration, why he filed the document titled “Plaintiff’s Brief Regarding Amy Bates as Witness” rather than the court-ordered witness list with a summary of testimony. Andersen’s failure to comply with the circuit court’s order and failure to offer any explanation whatsoever, much less any clear and justifiable

excuse, constitutes egregious behavior. Indeed, Andersen ignores this failure altogether and, even now, on appeal, he fails to address this issue.

¶6 The circuit court did not erroneously exercise its discretion when it dismissed Andersen's case. The circuit court indicated, "[T]he Court's empowered to do several things concerning these types of matters but in the event that the schedul[ing] order is set and simply not complied with because of timeliness the Court is empowered to dismiss the action." The court did so, stating, "This case is dismissed with prejudice just simply for failure to comply with the Court's scheduling order" As indicated above, failure to comply with scheduling orders, without any clear and justifiable excuse, can warrant dismissal.

¶7 Andersen argues that the circuit court should have considered lesser sanctions. When the circuit court advised Andersen that it was empowered to dismiss the action, Andersen suggested that the circuit court "not take the harsh punishment of dismissing the action." The circuit court listed some of its reasons for the sanction, including: what was supposed to be the list of witnesses was filed four or five days late, the filed document was not actually a list of witnesses and a summary of their anticipated testimony, and Andersen had filed irrelevant documents attacking a court commissioner.² Given these reasons, and Andersen's failure to offer a justifiable excuse initially or upon reconsideration, we cannot say the circuit court erroneously exercised its discretion in dismissing Andersen's case.

² The circuit court included Andersen's misrepresentation of the status of his bankruptcy case as a contributing factor to the dismissal. Andersen had told the circuit court that he was going to voluntarily withdraw his bankruptcy petition, when in fact it was dismissed by the bankruptcy court due to nonpayment of the filing fee.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.