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DISTRICT II

March 30, 2022

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You are hereby notified that the Court has entered the following opinion and order:

2021AP399

Precious L. King v. Andrew Alexander, MD (L.C. #2020CV1099)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Precious King appeals from circuit court orders dismissing her medical malpractice case against Dr. Andrew Alexander, Ascension All Saints Hospital and others (hereafter Alexander) and denying her WIS. STAT. § 806.07 (2019-20)¹ motion seeking relief from the dismissal

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

order.² Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See WIS. STAT. RULE 809.21.* We conclude that the circuit court misused its discretion when it denied King's § 806.07 motion. We reverse the March 5, 2021 order denying § 806.07 relief and remand to the circuit court with directions to vacate the March 4, 2021 dismissal order.

King was *pro se* in the circuit court. She failed to appear at a February 18, 2021 scheduling conference. At that hearing, the circuit court noted that no one had heard from King. Rather than scheduling a hearing at which the court could address the consequences of King's failure to appear, the court *sua sponte* dismissed King's case. The court began by reviewing the procedural history of the case, including King's failure to appear at the hearing (while noting that she had appeared at all prior hearings) and her failure to comply with the scheduling order and discovery requests. The circuit court then stated the following as its basis for dismissing King's case:

The matter was set for 9:00. It's now 9:34. The plaintiff, in spite of knowing about today's hearing, elected not to appear. Under Wisconsin Statute Section 805.03, failure to prosecute [sic] or comply with procedure statutes reads as follows: For failure of any claimant to prosecute or for failure for any party to apply with the statutes governing procedure in civil actions or to obey any order of the court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under 804.12(2)(a).

As to the failure to comply with discovery, which is what I referenced earlier, 805.03 of the Wisconsin Statutes goes on to

² Although King's notice of appeal only refers to the March 4, 2021 dismissal order, the record contains a March 5, 2021 order denying her WIS. STAT. § 806.07 (2019-20) motion. The parties make arguments relating to the § 806.07 order. The § 806.07 order is properly before this court. *See WIS. STAT. § 808.04(8).*

read, quote, "Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with 806.07, which is a motion for relief from a judgment or order.

Based on the records, filings and proceedings herein, again, this is a second time that Miss King has violated a court order. The order this time was to appear at this hearing and the Zoom information was sent to her. The fact she has done that on a number of occasions previously in this file, she knows how to do that, and the facts stated about her refusal to sign until compelled by court order releases that were obviously relevant material, the court orders this matter dismissed with prejudice. So ordered.

It's now 9:38 a.m. and one of the considerations is the burden placed on defendants with this claim pending and the way this has been handled. While the court is appreciative she is appearing pro se and she has the right to do that, she also has a standard to be held to and she's basically flaunting or flying in the face of court orders. So that's an additional rationale for my decision.

On February 22, King filed a motion seeking Wis. STAT. § 806.07 relief from the dismissal because on the date of the hearing, she was very ill with Covid-19. King included a document showing that she was receiving medical care at 8:43 a.m., shortly before the hearing was scheduled to start at 9:00 a.m. The court denied King's § 806.07 motion, again focusing on King's conduct during discovery and finding that even though King had Covid-19, "[s]he was not hospitalized and not incapacitated from notifying the Court concerning her failure to appear." King appeals.

On appeal, King argues that she established excusable neglect under Wis. STAT. § 806.07(1)(a) for failing to appear at the February 18 hearing. Alexander counters that the circuit court properly exercised its discretion when it denied King's § 806.07 motion because she did not notify anyone that she could not attend the February 18 hearing and because she did not comply with discovery requests.

We are not bound by the manner in which the parties present the issues. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). We conclude that the circuit court applied the wrong legal standard when it dismissed King's case under WIS. STAT. §§ 804.12(2)(a) and 805.03 without considering whether King's failure to appear at a scheduling conference and comply with discovery was egregious, i.e., that she lacked a clear and justifiable excuse such that dismissal was warranted. *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898, *opinion clarified on denial of reconsideration*, 2007 WI 62, 301 Wis. 2d 30, 731 N.W.2d 634.

Violations of scheduling and discovery orders cannot be the basis for dismissing a case unless the court finds that the conduct was egregious, i.e., without a clear and justifiable excuse, or in bad faith.

WIS[CONSIN] STAT. § 804.12(2)(a) and § 805.03 limit the sanctions that circuit courts may impose for failure to prosecute and for failure to comply with court orders to those that are "just." Wisconsin courts have interpreted this limitation to mean that dismissal requires that the non-complying party has acted egregiously or in bad faith. "[F]ailure to comply with circuit court scheduling and discovery orders without clear and justifiable excuse is egregious conduct." Where the circuit court finds that failures to respond to discovery and follow court orders are "extreme, substantial, and persistent" it may dismiss the action with prejudice on the grounds that the conduct is egregious.

Indus. Roofing Servs., 299 Wis. 2d 81, ¶43 (citations and footnote omitted).

The record shows that while King failed to appear at the scheduling conference on February 18, she had appeared at other hearings. The record shows that two business days after she missed the February 18 hearing, King explained and documented the reason she failed to appear. Alexander did not offer contradictory facts. The circuit court rejected King's

explanation because she “was not hospitalized and not incapacitated from notifying the Court concerning her failure to appear.” However, the undisputed facts in the record show that King was receiving medical care within fifteen minutes of the hearing’s start time. While the circuit court set the bar at “hospitalization,” King averred that she was very ill with Covid-19, and there was no evidence to support the court’s conclusion that she was not “incapacitated.” This record does not provide a basis for the circuit court to conclude that King did not have a clear and justifiable excuse. Indeed, it does not establish anything other than one missed hearing.

The record also shows that discovery had been compelled, a procedure contemplated by WIS. STAT. § 804.12 (discovery sanctions). In short, this record does not establish that King’s conduct was “extreme, substantial or persistent” with regard to the court’s order for a scheduling conference or discovery. Because the circuit court failed to make the necessary egregious conduct finding, the court erred when it dismissed King’s case. *See id.*

“Under Wisconsin law, a dismissal for failure to prosecute should ‘operate[]as an adjudication on the merits’ WIS. STAT. § 805.03.” *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶47, 291 Wis. 2d 259, 715 N.W.2d 620. “A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with[WIS. STAT. §] 806.07.” Section 805.03.

In seeking relief, King filed WIS. STAT. § 806.07 motion because the court dismissed her case *sua sponte* in her absence. Had she not been required to file a WIS. STAT. § 806.07 motion, our analysis would end here with a reversal of the circuit court’s dismissal order. We now turn to King’s § 806.07 motion.

Whether to grant relief under WIS. STAT. § 806.07 was within the circuit court's discretion. *See Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. A court properly exercises its discretion when it employs a process of reasoning based on the facts of record and reaches "a conclusion based on the application of the correct legal standard." *Id.*

The parties argue about whether King established excusable neglect under WIS. STAT. § 806.07(1)(a), under an analysis that typically applies to a party's default—a one time lapse. Even though we question whether the excusable neglect standard and the shifting of the burden to King should apply in a situation where the circuit court failed to make the necessary findings before dismissing the case with prejudice *sua sponte* in King's absence as a sanction, we nevertheless consider whether § 806.07(1)(a) relief was available under the framework the parties discuss. "Excusable neglect is not the same as neglect, carelessness or inattentiveness." *Connor v. Connor*, 2001 WI 49, ¶16, 243 Wis. 2d 279, 627 N.W.2d 182. Rather, it is "'that neglect which might have been the act of a reasonably prudent person under the same circumstances.'" *Id.* (citation omitted). The party seeking relief bears the burden of demonstrating excusable neglect. *See id.*, ¶28.

As explained above, the record shows that two business days after she missed the February 18 hearing, King explained and documented the reason she failed to appear. Alexander did not offer contradictory facts. We conclude that King's uncontested facts established excusable neglect for not having informed the court or the parties on February 18 that she could not attend the hearing, i.e., King acted as "a reasonably prudent person under the same circumstances." *Connor*, 243 Wis. 2d 279, ¶16. King met the WIS. STAT. § 806.07(1)(a) burden. *Connor*, 243 Wis. 2d 279, ¶28. Because the court's hospitalization/incapacitation

standard does not support its decision to deny § 806.07 relief, the court misused its discretion when it denied King's § 806.07 motion. *Sukala*, 282 Wis. 2d 46, ¶8 (correct legal standard not applied to facts of record).

We conclude that the circuit court erred when it dismissed King's case on February 18 and misused its discretion when it denied King's WIS. STAT. § 806.07 motion. The March 5, 2021 order denying § 806.07 relief is reversed, and the cause is remanded to the circuit court with directions to vacate the March 4, 2021 dismissal order.

Upon the foregoing reasons,

IT IS ORDERED that pursuant to WIS. STAT. RULE 809.21, the March 5, 2021 order of the circuit court is reversed and the cause is remanded to the circuit court with directions to vacate the March 4, 2021 dismissal order.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

*Sheila T. Reiff
Clerk of Court of Appeals*