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DISTRICT III

July 15, 2025

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

2023AP1759 Judith Froeba-Anderson v. Town of Ogema (L. C. No. 2019CV44)

Before Stark, P.J., Hruz, and Gill, 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).

Judith Froeba-Anderson[1] appeals a circuit court order granting a motion to dismiss her complaint due to a failure to timely prosecute her case. Froeba-Anderson argues that the court erroneously exercised its discretion by determining that her conduct was egregious and that she

[1] The parties' briefs refer to the appellant as "Judith Froeba-Anderson," as did the complaint, but some of the documents filed in the circuit court refer to "Judith Anderson-Froeba," including affidavits signed by the appellant. When docketing this appeal, the clerk of this court advised the parties that if they did "not agree with the caption, please immediately notify this office in writing." We see no indication that either party disagreed with the caption, so we refer to the appellant as Froeba-Anderson.

did not have a clear and justifiable excuse for the delay. In addition, Froeba-Anderson argues that the dismissal violated her due process rights. 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 (2023-24).[2] We reject Froeba-Anderson's arguments and affirm.

On June 25, 2019, Froeba-Anderson filed a complaint against the Kenneth Lee Ebbens Living Trust[3] ("Ebbens"), seeking an easement to use a road on Ebbens' property. Ebbens' property is located in the Town of Ogema ("the Town"). On July 15, 2019, Ebbens filed an answer with affirmative defenses together with a motion to dismiss for failure to state a claim on which relief could be granted. On July 26, 2019, Froeba-Anderson filed an amended complaint against Ebbens that added new allegations to support her easement claim. On October 5, 2020, Froeba-Anderson amended the complaint a second time, adding new defendants, including the Town.[4] In addition to Froeba-Anderson's claim for an easement over Ebbens' property, the second amended complaint sought a declaration that the property in question was part of a longer town road and therefore a public highway.

Froeba-Anderson filed several pretrial motions, including, as relevant here, a motion for summary judgment. Ebbens and the Town opposed Froeba-Anderson's motion and argued in favor of summary judgment for the defendants. The circuit court denied summary judgment on

[2] All references to the Wisconsin Statutes are to the 2023-24 version.

[3] According to a brief filed by Ebbens, Froeba-Anderson filed a third amended complaint on October 12, 2020, which dismissed the Kenneth Lee Ebbens Living Trust and added Kenneth Lee Ebbens as Trustee of the Kenneth Lee Ebbens Living Trust dated August 12, 2004. This third amended complaint is not part of the record.

[4] The other defendants reached a resolution with Froeba-Anderson, and the claims against them were dismissed on October 14, 2020.

October 13, 2021. The order explained that there were "factual disputes on so many of the components in this case" and that a "summary judgment analysis is not to be a trial on affidavits."

On February 8, 2022, Froeba-Anderson's initial attorney filed a motion to withdraw from the case. The motion stated that Froeba-Anderson had discharged the firm on February 7, 2022. The circuit court granted the motion to withdraw on February 17, 2022.

The record does not indicate that any further activity in the case occurred until August 10, 2022, when Ebbens filed a motion to dismiss Froeba-Anderson's amended complaint for failure to prosecute. As grounds for the motion, Ebbens argued that Froeba-Anderson had "disregarded her duty to proceed in a reasonable amount of time by failing to take any action or communicate with the parties in over a year." The Town joined Ebbens' motion on August 24, 2022. The circuit court declined Ebbens' proposed order of dismissal, in part because "[t]here is no indication of record that the Plaintiff ha[d] received a copy of any of the motion[-]related documentation." Ebbens subsequently filed an affidavit of mailing stating that the motion had been mailed to Froeba-Anderson on August 11, 2022.

The record does not show any response or other activity from Froeba-Anderson until April 5, 2023, when her new attorneys filed notices of retainer. On April 13, 2023, Froeba-Anderson filed a brief opposing the defendants' motion to dismiss, arguing that she had good cause for the delay in prosecuting the case. Froeba-Anderson also filed a supporting affidavit, stating that she had "parted ways" with her prior attorney "after certain differences with the prosecution of this action" and that her prior attorney "led [her] to believe the action was over." Froeba-Anderson further explained that she had spoken "with several attorneys over

several months regarding this action," but none of them had agreed to take the case. Froeba-Anderson noted that prior to hiring her new attorneys, she was "completely unaware of this action's current status" and that "it was only within the last few weeks … that [she] discovered this action was still pending."

Ebbens filed a reply brief on April 19, 2023, noting that Froeba-Anderson did "not contend that she has not received copies of documents filed in this matter subsequent to her former attorney's withdrawal" and arguing that Froeba-Anderson's excuses were not believable. Froeba-Anderson then filed a supplemental affidavit reiterating her assertion that she believed that summary judgment had terminated the action and also stated that she "honestly did not receive anything filed with this Court after summary judgment, otherwise I would have certainly retained counsel sooner to continue this [a]ction."

The circuit court granted the defendants' motion to dismiss the amended complaint with prejudice on August 7, 2023. In a written decision, the court explained that Froeba-Anderson's assertion that she was not aware that the case was still pending was "incredible" and "defie[d] logic and reason." Accordingly, the court concluded that Froeba-Anderson had not "shown a clear and justifiable excuse for, or good cause for, the delay." Froeba-Anderson appeals.

We review a circuit court's decision to dismiss an action for failure to prosecute for an erroneous exercise of discretion. *See* ***Theis v. Short***, 2010 WI App 108, ¶6, 328 Wis. 2d 162, 789 N.W.2d 585. "We will affirm the [circuit] court's exercise of discretion unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances." ***Id.*** (citation omitted). "[W]e will sustain the sanction of dismissal 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." ***Id.*** (citation omitted).

Froeba-Anderson's first argument is that her conduct was not egregious enough to warrant dismissal. *See* ***Trispel v. Haefer***, 89 Wis. 2d 725, 732, 279 N.W.2d 242 (1979) ("Because of the harshness of the sanction, a dismissal … should be considered appropriate only in cases of egregious conduct by a claimant."). Froeba-Anderson argues that her conduct was not intentional or done in bad faith. This argument does not help Froeba-Anderson because the sanction of dismissal may be imposed for conduct that is "either egregious or in bad faith." ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶13, 265 Wis. 2d 703, 666 N.W.2d 38. Moreover, whether Froeba-Anderson's conduct was intentional has no bearing on whether her conduct was egregious. *See* ***id.***, ¶14 ("Egregious conduct is conduct that, although unintentional, is 'extreme, substantial and persistent.'" (citation omitted)).

In determining that Froeba-Anderson's conduct was egregious, the circuit court explained that "[n]othing was heard from [Froeba-Anderson] until … about a year and a half after the Court's denial of summary judgment." Furthermore, "[a] total of 14 months passed after [Froeba-Anderson's] counsel withdrew, before [Froeba-Anderson] hired different counsel, and about seven of those months were after [Ebbens'] motion to dismiss." Although Froeba-Anderson reiterates her explanation for these lengthy delays, she does not identify any authority that would undermine the conclusion that this lengthy delay was "extreme, substantial, and persistent." *See* ***id.*** (citation omitted). We therefore conclude that the circuit court had a

reasonable basis for determining that Froeba-Anderson's conduct was egregious enough to warrant dismissal. *See* ***Theis***, 328 Wis. 2d 162, ¶6.[5]

Froeba-Anderson's second argument is that, even if her conduct was egregious, the circuit court erred by determining that she lacked a "clear and justifiable excuse." *See* ***id.***, ¶7 ("If the noncomplying party shows a clear and justifiable excuse for his [or her] conduct, then dismissal is improper."). Froeba-Anderson contends that "she honestly did not know that this action was still pending." She asserts that although she "took steps to seek alternative legal access by speaking with several other attorneys," none of these attorneys "informed her of the action's status," and "[s]he is not familiar with the court system enough to check on her own that the action was still pending." Froeba-Anderson concedes that these facts do not amount to "a complete exoneration," but she argues that they are nonetheless sufficient to establish a clear and justifiable excuse.

In determining that Froeba-Anderson did not have a clear and justifiable excuse, the circuit court reasoned that Froeba-Anderson's "prior counsel was experienced and clearly consulted with [her] on the pleadings that had been filed, the strategy employed in the case, and the procedural details involving summary judgment." After the court denied summary judgment, Froeba-Anderson's prior "counsel would have explained … how the case would go forward." The court further pointed out that "[t]here was no suggestion of dismissal in any documentation."

[5] Froeba-Anderson also points to the circuit court's own "periods of inactivity," suggesting that this inactivity undermines the conclusion that her own inactivity was egregious. We can easily reject this line of argument because "it is not the judge's duty … to see to it that trial proceeds swiftly." *See* ***Theis v. Short***, 2010 WI App 108, ¶9, 328 Wis. 2d 162, 789 N.W.2d 585. Instead, "it is the plaintiff's burden to proceed with [the] prosecution of the action within a reasonable period of time." ***Id.***

In addition, the circuit court found it significant that Froeba-Anderson was copied on the cover letter accompanying her prior attorney's motion to withdraw,[6] which would have alerted her to the pending case in four ways. First, counsel would not have even needed to withdraw as counsel of record if the case were over. Second, the letter specifically referred to "the next thing to occur in this case," which indicated that "the case [wa]s ongoing." Third, the letter asked the court to give Froeba-Anderson "enough time to hire different counsel in this case." Fourth, the letter requested that case notices be sent to Froeba-Anderson. In view of these facts, the court concluded that "for [Froeba-Anderson] to state that she believed the case to be concluded is incredible."

Lastly, the circuit court pointed to the defendants' motion to dismiss, which had been pending for around seven months by the time Froeba-Anderson retained her new attorneys. The court explained that Froeba-Anderson "could not somehow interpret that motion to mean that the case had been dismissed some eleven months earlier."

Froeba-Anderson's opening brief does not engage with these detailed reasons for concluding that she failed to show a clear and justifiable excuse. In her reply brief, Froeba-Anderson contends that the circuit court's determination was based "on unwarranted assumptions," including the assumption that Froeba-Anderson had received her attorney's cover letter and that her prior attorney must have explained the status of the case to Froeba-Anderson. Froeba-Anderson argues that there is nothing in the record to support the court's conclusions.

[6] The cover letter referred to in the circuit court's order is not included in the record. "[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

She contends that the only record evidence establishes instead that Froeba-Anderson truly believed the case was over and that she did not receive anything filed in court after her attorney withdrew.

Froeba-Anderson is incorrect that there is nothing in the record to support the circuit court's conclusions. On the contrary, the court relied on several aspects of the record that contradict Froeba-Anderson's assertion that she was not aware that the case was still pending throughout her year-and-a-half delay. First, the decision denying summary judgment clearly indicated that the case was not over. Specifically, the court denied summary judgment because it determined that there were genuine issues of fact for "the trier of fact." The court's order also addressed several evidentiary issues raised by the parties due to "the potential for further proceedings in this case" and provided guidance "[f]or subsequent proceedings." In addition, when rejecting the Town's argument that Froeba-Anderson had failed to submit a timely notice of claim pursuant to WIS. STAT. § 893.80, the court explained what would happen "if the Plaintiff prevails in this case." In short, the decision denying summary judgment made clear that the case would continue.

Second, the motion to withdraw filed by Froeba-Anderson's attorney, together with the accompanying cover letter, directly contradict Froeba-Anderson's assertion that "she honestly believed that this action terminated at the summary judgment stage [and] her previous counsel did not tell her otherwise." We agree with the circuit court that it defies logic to conclude that an attorney who was taking steps on the record to help ensure that Froeba-Anderson had enough time to obtain new counsel would simultaneously have failed to inform Froeba-Anderson of the importance of finding a new attorney in order to continue her case.

Third, Ebbens' motion to dismiss clearly alerted Froeba-Anderson to the fact that the action was still pending, as well as the need for urgency in moving forward. These three aspects of the record gave the circuit court a reasonable basis for concluding that Froeba-Anderson had not established a clear and justifiable excuse for her lengthy delay.

Regarding these latter two aspects of the record, Froeba-Anderson points to her supplemental affidavit stating that she "honestly did not receive anything filed with this Court after summary judgment." The problem for Froeba-Anderson is that this belated assertion is contradicted by the record. Specifically, her former attorney indicated that he emailed his motion to withdraw to Froeba-Anderson and copied her on the cover letter, and Ebbens submitted an affidavit stating that the motion to dismiss was properly mailed to Froeba-Anderson. In order for us to reverse the order of dismissal, Froeba-Anderson must convince us that the circuit court lacked a reasonable basis for its finding that she lacked a clear and justifiable excuse. *See* ***Theis***, 328 Wis. 2d 162, ¶6. Her excuse that she allegedly—albeit inexplicably—did not receive either of these documents is anything but "clear" in the face of contradictory evidence from two different attorneys.

Froeba-Anderson's final argument is that the circuit court's dismissal deprived her of due process. The Town argues that Froeba-Anderson has forfeited this argument by raising it for the first time on appeal. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 (explaining that "the forfeiture rule requires that, to preserve its arguments, a party must 'make all of their arguments to the [circuit] court'" (citation omitted)).

Here, Froeba-Anderson does not dispute that she failed to make a due process argument when opposing Ebbens' motion to dismiss. Nonetheless, she argues that she has not

"sandbagged" the Town because the Town is now aware of the argument and was able to respond in its brief. This argument misses the point because "the 'fundamental' forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the *circuit court*." ***Id.*** (emphasis added; citation omitted).

Froeba-Anderson contends that she had to raise this argument for the first time on appeal because there was no due process violation until the circuit court dismissed the case. To support this argument, she cites ***Robinson v. McCaughtry***, 177 Wis. 2d 293, 300, 501 N.W.2d 896 (Ct. App. 1993), in which the circuit court dismissed an inmate's due process claim against various prison officials based on their "handling and review of his disciplinary hearing." ***Id.*** at 295. In affirming the dismissal, we explained that "[w]hen a procedural due process violation is claimed, the first question is whether the plaintiff has been deprived of a constitutionally protected interest. If such deprivation has occurred, we reach the second level of analysis: what process was provided and whether it was constitutionally adequate." ***Id.*** at 300. We concluded that a deprivation had occurred, but we further concluded that the process provided was constitutionally adequate. ***Id.*** at 302-03.

Froeba-Anderson focuses on the phrases "has been deprived" and "[i]f such deprivation has occurred," arguing that our use of the past tense means that she was unable to "claim a deprivation of due process until such violation actually has occurred." This argument plainly misreads the quoted language from ***Robinson***, in which we were merely setting forth our approach to analyzing a due process claim that had already been presented to the circuit court. Nothing in ***Robinson*** suggests that a litigant who is opposing a motion to dismiss cannot argue prospectively that dismissal would violate due process.

Froeba-Anderson also contends that "public policy disfavors forcing parties to pre-argue procedural due process matters," relying on ***State v. Coffee***, 2020 WI 1, ¶18, 389 Wis. 2d 627, 937 N.W.2d 579. In ***Coffee***, a criminal defendant filed a postconviction motion arguing that his sentence violated "his due process right to be sentenced based on accurate information." ***Id.***, ¶24. The State argued that the defendant had forfeited his request for resentencing by failing to object on the foregoing basis at the original sentencing hearing. ***Id.***, ¶25. Our supreme court held that "the forfeiture rule does not preclude the ability to later challenge the State's spontaneous presentation at sentencing of previously unknown, inaccurate information." ***Id.***, ¶26. The court explained that "[a]pplying the forfeiture rule to these claims would not promote the fair, efficient, and orderly administration of justice." ***Id.*** This holding is narrow and does not reflect a broad public policy against requiring litigants to preserve their due process claims in the circuit court when they can do so.

Froeba-Anderson further argues that ***Coffee*** stands for the proposition that a litigant should not have to "(1) guess a court might commit a due process violation; and (2) brief the issue on a right that has not yet been violated." Even if we agreed with Froeba-Anderson's characterization of ***Coffee***, we can easily reject this argument because there was no need for Froeba-Anderson to have to guess that the defendants' motion to dismiss could result in the dismissal of her complaint.

Moreover, ***Coffee*** is readily distinguishable because the alternative in ***Coffee*** was to "require[] defense counsel to object contemporaneously at sentencing to previously unknown and largely unavailable information and to spontaneously understand the importance of that information to sentencing." ***Id.***, ¶27. Here, there was nothing "spontaneous" about a motion to dismiss that had been pending for seven months, nor was Froeba-Anderson forced to respond

"contemporaneously … to previously unknown and largely unavailable information." *See* ***id.*** Froeba-Anderson could have argued to the circuit court that if the court granted the motion, doing so would violate her due process rights by failing to first provide her adequate notice or warning of that result. In addition, the importance of the circuit court's decision on the pending motion to dismiss was undoubtedly apparent to Froeba-Anderson because after Ebbens filed a reply brief in support of the motion, she filed a supplemental affidavit setting forth additional facts for the court's consideration.

Froeba-Anderson now wants yet another opportunity to make a new argument against dismissal, even though she has not identified any reason that she could not have made this argument to the circuit court in the first instance. Under the circumstances, we agree with the Town that "applying the forfeiture rule promotes efficient and fair litigation." *See* ***Townsend***, 338 Wis. 2d 114, ¶26.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals