COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2410 **Cir. Ct. No. 2009CV4460**

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

COURIER COMMUNICATIONS CORP., EARNESTINE JONES, JERREL JONES AND MARY ELLEN STRONG,

PLAINTIFFS-RESPONDENTS,

V.

RADIO MULTI MEDIA, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO and TIMOTHY G. DUGAN, Judges. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Radio Multi Media, Inc., appeals the judgment awarding damages in favor of plaintiffs Courier Communications Corporation,

Earnestine Jones, Jerrel Jones, and Mary Ellen Strong.[1] Radio Multi Media argues that the trial court erroneously exercised its discretion by entering default judgment in favor of Courier and dismissing Radio Multi Media's counterclaims when the company failed to appear at a pretrial hearing. Additionally, it argues that the trial court erroneously exercised its discretion in denying its motion for relief from default judgment. We conclude that the trial court properly exercised its discretion with respect to both decisions, and affirm.

BACKGROUND

Nature of the Case

¶2 This case involves disputes over the purchase of WNOV ("860 AM"), an urban contemporary radio station located in Milwaukee. Prior to 2007, WNOV was wholly owned by Courier Communications; plaintiffs Strong and the Joneses are Courier's shareholders. In 2007, Courier agreed to sell WNOV to Radio Multi Media, whose president is Rene Moore.

¶3 The purchase of WNOV was structured as two agreements: (1) an asset purchase agreement, which governed the sale of the real property, business

[1] Although the appeal is from the final judgment, the substance of the appeal concerns the trial court's non-final orders granting default judgment against Radio Multi Media's counterclaims and denying Radio Multi Media's motion for relief from default judgment. *See* WIS. STAT. RULE 809.10(4) (2011-12) ("An appeal from a final judgment … brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant…."). The final judgment was entered by the Honorable Dominic Amato. The orders granting default judgment against Radio Multi Media's counterclaims and denying Radio Multi Media's motion for relief from default judgment were entered by the Honorable Timothy G. Dugan.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Hereafter we refer to the plaintiffs collectively as "Courier."

assets, and FCC license; and (2) a local marketing agreement, which provided the terms under which Radio Multi Media would be permitted to provide programming for WNOV under Courier's FCC license while the parties awaited FCC consent to the license transfer. The parties agreed upon a purchase price of $1.55 million, payable in two separate installments and closings. The first payment would be made upon the transfer of the real estate and other station assets. The second payment would be made upon the transfer of the FCC license.

¶4 In January 2008, the closing on the asset purchase agreement took place, and Radio Multi Media paid Courier $850,000; however, the second closing and the payment of the $700,000 balance did not occur, and, in March 2009, Courier filed an action alleging, among other things, breach of contract regarding the asset purchase agreement and requesting injunctive relief as to the local marketing agreement. Several months later, Radio Multi Media filed an amended answer alleging various counterclaims against Courier, including breach of contract regarding the asset purchase agreement and breach of contract regarding the local marketing agreement.

Default Judgment

¶5 On July 15, 2010, the scheduling order was amended and the final pretrial hearing was scheduled for September 17, 2010. The second page of the scheduling order provided a notice in bold type warning that "[t]he court will sanction parties who fail to comply with the provisions of this order. Sanctions may include entering judgment or dismissing claims or defenses. *See* WIS. STATS. §§ 804.12 and 805.03." (Some formatting altered; bolding omitted.) A week before the final pretrial hearing was scheduled to take place, Courier filed a "motion to compel compliance with the court's October 26, 2009 order and for a

finding of contempt." The motion hearing and the final pretrial hearing were consequently both rescheduled, via phone conference on September 16, 2010, for October 7, 2010.

¶6 On September 30, 2010, about a week before the rescheduled final pretrial date, Radio Multi Media's attorney sent the trial court a stipulation and proposed order that would allow Radio Multi Media's attorney to withdraw as counsel. In the September 30 letter, counsel also asked that the final pretrial conference be rescheduled so that Radio Multi Media would have time to obtain substitute counsel. Radio Multi Media did not, however, file a motion to reschedule the final pretrial conference, nor did Radio Multi Media contact the court about rescheduling the final pretrial conference at any point thereafter.

¶7 On October 6, 2010, the trial court entered the order allowing Radio Multi Media's attorney to withdraw. Court records do not reflect any change in scheduling regarding the final pretrial conference. On October 7, 2010, the final pretrial hearing was held.

¶8 At the October 7, 2010 final pretrial hearing, Radio Multi Media's former counsel appeared as a courtesy; however, Radio Multi Media was not formally represented, and Moore was not present.[2] Former counsel expressed his surprise that Moore was not there, and said that he anticipated that Moore would be at the hearing. The trial court stated that the failure to appear by an experienced litigant such as Moore was "substantial":

[2] We note that Moore is not individually a party to this action.

> THE COURT: … Today is set for two things, a final pretrial and, secondly, a motion for contempt. And … [to former counsel] there's no appearance by your client.
>
> [FORMER COUNSEL]: That's correct, Your Honor. I have not had any contact with my client the last several days, and frankly, [I] anticipated he would probably be here, but have not seen him. And have tried to reach him this morning, but without success.
>
> THE COURT: All right. And he's aware of today's date, and it's not him, he is the – it is a corporation. I've advised him on numerous occasions he can't appear, he is a[n] individual party in several other lawsuits that happen to be assigned to this court, and he also has corporate status in those lawsuits as well, and he's fully aware that he can't appear on behalf of the corporation.
>
> So that leaves a tough strait at the moment, particularly for the purpose of the final pretrial. I know you filed a response on behalf of the motion for contempt, and certainly the Court can take that under consideration, but the failure to appear for the final pretrial by the defendant is substantial.

¶9 After its initial remarks, the trial court then began to address Courier's "motion to compel compliance with the court's October 26, 2009 order and for a finding of contempt." In that motion, Courier alleged that Radio Multi Media had violated an earlier court order—made nearly a year earlier—requiring Radio Multi Media to, among other things, reimburse Courier for numerous bills associated with operating WNOV.

¶10 The trial court ultimately decided contempt was not the appropriate remedy for any violations of the court's October 26, 2009 order; it did, however, find that Radio Multi Media's failure to have representation at the final pretrial was egregious, given the company's and/or Moore's experience with the legal system and the trial court's numerous admonitions that the company was required to be represented in court. Consequently, it granted a default judgment in Courier's favor and dismissed Radio Multi Media's counterclaims:

> [T]he bigger issue is [Radio Multi Media] isn't here for a final pretrial conference. That's a substantial egregious violation for which there is an appropriate sanction….
>
> [COUNSEL FOR COURIER]: Judge, I would certainly request this Court's – any sanction the Court has available to it to impose that. If that's the capias, then that would be a capias.
>
> THE COURT: Oh, it would be default judgment in favor of the plaintiff and dismissal of any counterclaims and setting a scheduling conference for how we would proceed to prove damages on behalf of the plaintiff.
>
> [COUNSEL FOR COURIER]: I would so request that, Your Honor.
>
> THE COURT: … As indicated, Mr. Moore has been in court, he's been present in numerous litigation both in this court, in this particular branch of the circuit court. It's been presented in other matters, those matters that he has been a party to many other lawsuits, and he is fully aware of the issue regarding the need for counsel to appear on behalf of the corporation and the need to be in court under the circumstances.
>
> The Court does find that the failure to appear is an egregious violation, that it was knowingly made by the client and not as a result of any conduct by the attorney, and therefore the Court finds that it is an appropriate sanction to grant a default judgment in favor of the plaintiff against the defendant and dismiss the defendant's counterclaims.

Denial of Radio Multi Media's Motion for Relief from Default Judgment

¶11 After the trial court dismissed Radio Multi Media's counterclaims, Radio Multi Media hired a new attorney and filed a motion for relief from default judgment. Radio Multi Media's motion sought relief from the default on two grounds: (1) that there was "excusable neglect" pursuant to WIS. STAT. § 806.07(1)(a); and (2) that there were "extraordinary circumstances" justifying relief pursuant to WIS. STAT. § 806.07(1)(h). In an affidavit attached to the

motion, Moore stated that he was unable to personally appear at the October 7, 2010 pretrial hearing because he was required to be in court in Los Angeles for another case on October 8, 2010. To prove that he had a mandatory court appearance on October 8, Moore submitted minutes from a status conference in a Los Angeles County Superior Court case where he was the plaintiff. Interestingly, the minutes from the status conference indicate that Moore failed to appear, and that the court in that case set an "Order to Show Cause as to why sanctions of $150.00 should not be imposed as to each side for their failures to appear."

¶12 On January 18, 2011, the trial court held a motion hearing on Radio Multi Media's WIS. STAT. § 806.07 motion. At the hearing, the trial court raised a number of concerns regarding Radio Multi Media's failure to appear at the pretrial conference, including that Moore, an experienced litigant, had delayed litigation numerous times in other cases before this particular court by substituting counsel, that Moore knew that his company was required to appear by an attorney at all hearings, and that Moore's excuse of having a personal appearance in the California case suggested a lack of respect for adhering to the rules in Wisconsin cases:

> THE COURT: … I'm troubled by Mr. Moore's conduct. He's not an innocent pro se individual unfamiliar with litigation. He has been a party to a substantial number of cases before this court. He has changed lawyers in the course of the various actions….
>
> In another case, he stipulated to the removal or withdrawal of [former counsel] on September 28th of 2010, that being in cases 08CV4076 and 08CV4499. So obviously he knew that his relationship with [former counsel] was terminating.
>
> In those cases, other cases, he had been first represented by Mr. Teper, then Mr. Toran, and then [former counsel]. He has a track record of agreeing to have substituted counsel and allowing counsel to withdraw.

> Now, on this particular case in front of us, [former counsel] did represent him from the start, but I'm also troubled by [that] he didn't have to be here today, but the explanation is he didn't come on the final pretrial date because he had other legal business in California which required him to be in court first thing in the morning on October 8th. He seems to think California is more important than Wisconsin.
>
> He knew [former counsel had] withdrawn, he stipulated to their withdrawal. It was awaiting an order of the Court to be signed, and I'm troubled that he didn't have counsel prepared to step in or that anyone told the Court that he didn't have counsel ready to step in and appear.
>
> … [Moore] knew specifically and was reminded in that case as he has been in the cases that he can't represent the corporation. They have to appear by an attorney. So he knew that if [former counsel] were allowed to withdraw, the corporation needed a lawyer to appear in court.
>
> And I may well have refused to allow the withdrawal. We're at a final pretrial in this case, and it needs to go forward. And so I'm concerned that Mr. Moore is attempting delay and has more respect for another court in another state than he cares about what's going on in this case. Where am I wrong on that one?

The court also noted that on October 7, 2010, neither Radio Multi Media nor Moore provided any explanation for not having new counsel:

> THE COURT: He could've explained to me why he didn't have successor counsel at the time that he's willing to allow his lawyers to withdraw on the eve of a final pretrial.

¶13 Given the concern with Radio Multi Media's decision to withdraw counsel just two weeks after the final pretrial conference had been rescheduled, and Moore's history of delaying litigation, the trial court asked Radio Multi Media to provide additional facts explaining its decision to consent to the withdrawal of former counsel. The hearing was continued to February 25, 2011.

¶14 Following the January 28, 2011 hearing, Radio Multi Media's successor counsel submitted additional materials for the trial court's review, including another affidavit from Moore and affidavits from former counsel. Again, Moore claimed that he could not appear at the October 7, 2010 final pretrial hearing because he was personally required to appear at a hearing in California the next day. Moore also explained that he stipulated to former counsel's withdrawal from the Courier case because he was experiencing financial difficulties. He also stated that it took him time to find successor counsel because no firm would "make an immediate commitment." Former counsel stated in his affidavit that, beginning in late July or early August 2010, Moore was told that he needed to pay his legal bills or the firm would seek the court's permission to withdraw from the case. Former counsel stated that he brought up the "need for payments" on "a number of occasions." Former counsel also stated that Moore said that if he was not able to secure funding for his legal bills, that he would stipulate to counsel's withdrawal. Former counsel stated that he emailed Moore the consents for his firm's withdrawal on the Courier case and other cases in which the firm was representing Moore on September 23, 2010. Moore sent back the consents for the other cases on September 26 and for the Courier case on September 29, 2010.

¶15 On February 25, 2011, the trial court held another hearing on Radio Multi Media's motion for relief from the default judgment. The trial court, having reviewed the additional briefs and supplemental materials submitted by the parties, responded to the parties' arguments in detail, ultimately finding that Moore's claims that he struggled to find successor counsel and that he had a hearing in California were not substantive enough to be persuasive, and again noting that Moore had a track record of not appearing in court:

> I guess what I'm troubled by is that Mr. Moore on behalf of the defendant certainly knew there were issues regarding whether or not [former counsel was] going to continue to represent him, knew of the court date. Although there's an affidavit that he was contacting some lawyers, he doesn't identify who the lawyers are, what period of time he made those contacts, and what efforts he made in the timing of any of that.
>
> I don't know anything about the California case, why it was mandatory that he be there, and that he couldn't be here. It is a short trip in between, certainly he could have made arrangements to be here on the seventh and there on the eighth, and he must be involved in substantial litigation going on out in California because [there have been] a couple times that he has [had] a conflict in appearing in court in California with appearing in court here on the various cases that he has.
>
> For whatever reason this case – this court seems to be the court in which Radio Multi Media's cases seem to all have been directed to, and so I'm familiar with his appearance and lack of appearance and the issue regarding his California dates….
>
> So I'm very troubled by that, and it seems – still seems to be that he made a conscious decision, he didn't contact the court. He certainly has the means to use a telephone. He had the means to continue to communicate with [former counsel] to have made the representation on October 7th that he had some conflict and couldn't be here, but he didn't even communicate with [former counsel] who happened to be here on the seventh as well, and so I – I'm struggling to see the argument that he was in good faith diligently, more so, seeking replacement counsel and diligently communicating with the court regarding problems with retaining counsel and any conflict with appearing in court here.

¶16 The court then denied the motion:

> THE COURT: All right. The Court's going to deny the motion to reopen, and as I've said, the areas that are troubling for me I'm going to find that Mr. Moore's conduct on behalf of the corporation was clearly intentional.

He is an experienced litigator, he has multiple trials going on both individually and in corporate entities, rather complex cases because they are part of the boxes over against the wall. They're not a thin little file. And undoubtedly he has experienced litigating in California, either individually or through corporate entities. That he understands the need to appear.

He neither communicated with [former counsel], and as you point out, there was no bad relationship between them. [Former counsel] was trying to communicate with [Moore], [Moore] wouldn't return phone calls to [former counsel].

[Former counsel] came to court on October 7th even though the consent to withdraw had already been signed and he was here, he responded to the contempt, even though he'd already been withdrawn.

But Mr. Moore had every opportunity to communicate with [former counsel], but he also had the opportunity to communicate directly with plaintiff. He knows and understands there can be conference calls with the Court, and he could've communicated with my clerk to say, I just can't come. I have a conflict. And these are my efforts that I'm trying to get a lawyer, but I can't be here.

I still don't know what the California case is. I don't know why it was mandatory for him to be there. I don't know why he couldn't have explained to that court that he was set for a final pretrial here in a long-standing complicated case.

And we get back to where does the Court stand on October 7th when Mr. Moore isn't here, [former counsel] doesn't know what efforts he's making to find new counsel. He can't advise the Court of that. He can't tell the Court when I might be justified or appropriately set the matter for anything else on the calendar because we have no input from the defendant.

We don't know what the financial status is. He may have come in and said, you know, Judge, I can't get another – the funding for another lawyer for two months. Apparently he was able to get it pretty quickly because he's entered into a relationship with you, [current counsel], but the Court didn't know any of that.

> And so it leaves from the standpoint of respect for the judicial system, the calendaring of cases, but the authority of the Court when somebody just chooses not to come to court and not advise the Court of any reason not to.
>
> And it's not infrequent that, as I tell virtually everybody at my scheduling conferences, I have to tell you you can't change the dates in the scheduling order without the Court's approval. The reason why I have to do it is we have problems throughout the division, we get a call or the Court's favorite is the letter the day before the final pretrial saying, Judge, we don't think we should come in for that final pretrial. We haven't complied with your order for discovery, our experts aren't completed as you've ordered, and we didn't even think about mediation even though you ordered that as well.
>
> And then surprisingly they may call on that day before or the morning and say, do we really have to come in? We sent this letter in. You should tell us something because we sent this letter in. It's not our obligation to communicate further with the Court because we sent you a letter that just got there.
>
> And I had one which it was a pro se party who just sent the letter in and said, Judge, I'm not going to come. Here's my phone number. If you want me, call me. If we allow this to happen, we just undermine the authority of the Court, we undermine the respect for the system, and in this particular case where you have a seasoned, experienced litigant, I find that that conduct under these circumstances in ignoring this Court, failing to come without any justification, explanation to the Court constitutes egregious conduct, and I'll deny the motion to reopen.

¶17 As can be seen from the lengthy text above, the trial court considered numerous factors in denying Radio Multi Media's motion, including Moore's vast experience with the legal system; his track record of delaying litigation; his failure to communicate with his own counsel, opposing counsel, and the trial court; the lack of information substantiating his excuses for the company's non-appearance; and the need for respect for the court and the judicial system.

¶18 Radio Multi Media now appeals. Further facts will be developed as necessary below.

ANALYSIS

¶19 On appeal, Radio Multi Media argues that the trial court erroneously exercised its discretion by entering default judgment against its claims when it failed to appear at the October 7, 2010 final pretrial hearing. Additionally, it argues that the trial court erroneously exercised its discretion in denying its motion for relief from default judgment pursuant to WIS. STAT. § 806.07(1)(a) & (h).

¶20 We review the trial court's decisions under the deferential, erroneous exercise of discretion. *See* ***Industrial Roofing Servs., Inc., v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898 (default judgment); *see also* ***Werner v. Hendree***, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423 (motion to vacate order pursuant to WIS. STAT. § 806.07). "The exercise of discretion requires a record of the trial court's reasoned application of the appropriate legal standard to the relevant facts in the case." ***Gaertner v. 880 Corp.***, 131 Wis. 2d 492, 498, 389 N.W.2d 59 (Ct. App. 1986). Thus, we will sustain the trial court's decisions if the court "'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.'" *See* ***Marquardt***, 299 Wis. 2d 81, ¶41 (citation omitted). "Our job is not to Monday-morning quarterback the decision with the advantage of 20/20 hindsight." *See* ***id.***, ¶40. Indeed, we will affirm even if the evidence favoring the trial court's decision "is slight," "unless it was impossible for the trial court" to render its decision "in the exercise of its discretion." *See* ***Gaertner***, 131 Wis. 2d at 498. To this end, we may "examine the record to

determine whether the facts support the trial court's decision" if we conclude that the trial court has not adequately explained its decision. *See* ***id.***

A. The trial court properly exercised its discretion in granting the default judgment on Radio Multi Media's counterclaims.

¶21 We turn first to the default judgment. Default judgment is governed by WIS. STAT. §§ 802.10(7), 805.03 and 804.12(2)(a). *See* ***Gaertner***, 131 Wis. 2d at 497 n.6. Section 802.10(7) provides that "[v]iolations of a scheduling or pretrial order are subject to … [§] 805.03." Section 805.03 provides, "[f]or failure of any claimant ... to obey any order of 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 s. 804.12(2)(a)." Section 804.12(2)(a)3. provides that the court may make an order: "dismissing the action or … rendering a judgment by default against the disobedient party." To grant a default judgment for failure to comply with a court order, a trial court must find that the "non-complying party has acted egregiously or in bad faith." *See* ***Marquardt***, 299 Wis. 2d 81, ¶43. A party's failure to comply with a court order is egregious when there is no "'clear and justifiable excuse.'" *See* ***id.*** (citation omitted).

¶22 In evaluating whether the trial court properly exercised its discretion, we must keep in mind the policies underlying our review. "[T]he law views default judgments with disfavor and prefers, whenever reasonably possible, to afford litigants a day in court." ***Gaertner***, 131 Wis. 2d at 498. On the other hand, justice also requires that cases are promptly adjudicated, and we must not enforce rules in a way that excuse neglect, "'foster delay in litigation[,]'" or compromise "the quality of legal representation." *See* ***id.*** (citation omitted).

¶23 Radio Multi Media argues that the trial court erroneously exercised its discretion in granting default judgment because its (Radio Multi Media's) conduct was not egregious. It directs us to the fact that the trial court did not enter the order allowing former counsel's withdrawal until October 6, 2010, the day before the pretrial hearing. According to Radio Multi Media, its failure to appear at the October 7, 2010 final pretrial hearing was not egregious because there simply was not enough time to hire new counsel. Radio Multi Media also argues that it reasonably expected that the trial court would grant a continuance on the case.

¶24 We disagree. The record provides ample support for the trial court's decision that Radio Multi Media's conduct was egregious. As the trial court noted in its oral decision on October 7, 2010, this was not an inadvertent non-appearance by a party. Instead, this was a deliberate non-appearance by a party whose president, Moore, was an experienced litigant who had been admonished several times about the importance of appearing at each and every hearing with counsel. There is nothing in the record to indicate that Moore made any effort to communicate with the court, former counsel, or opposing counsel, about his company's lack of representation for the final pretrial hearing. Indeed, former counsel expressed his surprise that Moore was not at the final pretrial hearing; counsel thought Moore would be there, and noted that he had not been in contact with Moore for several days and was unable to reach him the morning of October 7th. Moreover, as we have seen from the minutes from the status conference of one of Moore's California cases, Moore's failure to appear has been a problem in other jurisdictions as well. Given these facts, we conclude that the trial court properly determined this was a case in which the non-appearing party (in this case,

the company's president, Moore) had full knowledge of the rules and knowingly decided that they did not apply him.

¶25 Furthermore, Radio Multi Media has not provided a clear and justifiable excuse for its failure to appear at the pretrial conference. *See* ***Marquardt***, 299 Wis. 2d 81, ¶43.

¶26 First, we are not persuaded by Radio Multi Media's argument that the October 6 entering of the stipulation allowing for former counsel's withdrawal meant that it could not have hired new counsel for the October 7, 2010 final pretrial hearing. The trial court determined that this was not a clear and justifiable excuse because Moore, an experienced litigator, knew that his company's relationship with former counsel was terminating well before the stipulation was signed, and he made absolutely no effort whatsoever to communicate his inability to appear or difficulties in hiring new counsel with the court:

> He is an experienced litigator, he has multiple trials going on both individually and in corporate entities, rather complex cases because they are part of the boxes over against the wall. They're not a thin little file. And undoubtedly he has experienced litigating in California, either individually or through corporate entities. That he understands the need to appear.
>
> He neither communicated with [former counsel], and as you point out, there was no bad relationship between them. [Former counsel] was trying to communicate with [Moore], [Moore] wouldn't return phone calls to [former counsel]….
>
> … Mr. Moore had every opportunity to communicate with [former counsel], but he also had the opportunity to communicate directly with plaintiff. He knows and understands there can be conference calls with the Court, and he could've communicated with my clerk to say, I just can't come. I have a conflict. And these are my efforts that I'm trying to get a lawyer, but I can't be here.

We agree with the trial court.

¶27 Second, we are not persuaded by Radio Multi Media's argument that it reasonably expected that the conference would be rescheduled simply because the trial court had rescheduled a hearing in another case in which Radio Multi Media's counsel withdrew. Radio Multi Media directs us to the order in that case, which provides, in pertinent part:

> The matters were set for scheduling conference on September 28, 2010. At that time [the firm originally hired] withdrew as counsel for Radio Multi Media Inc. and Rene Moore. Therefore the matter is being re-set for scheduling conference.
>
> Now therefore, it is ordered, that the matters are set for scheduling conference … in [t]his courtroom at the Milwaukee County Courthouse on December 3, 2010 at 9:00 a.m. Radio Multi Media must appear by an attorney.

(Some uppercasing and hyphens omitted.) As is evident by the order's language, the circumstances in Radio Multi Media's other case were different from what happened in the case before us. In the other case, former counsel withdrew at the scheduling conference—it is likely, given the language of the order, that all parties were present and could discuss scheduling. Also, in the other case, the matter was reset for another scheduling conference, not a final pretrial hearing. In any case, we fail to see how the circumstances in this case would cause Radio Multi to "reasonably believe" that the final pretrial hearing in the Courier case would be rescheduled.

¶28 Third, we are not persuaded by Radio Multi Media's argument that it reasonably expected that the final pretrial conference would be rescheduled based on its one-line request for a continuance in the letter accompanying the stipulation for former counsel's withdrawal. Radio Multi Media never formally requested a

continuance. And, as noted above, Moore made no effort whatsoever to contact the court once the order allowing counsel to withdraw was filed. Radio Multi Media had no further contact with the court until three weeks later, on October 27, 2010, when it filed its WIS. STAT. § 806.07 motion.

¶29 Thus, for all of the foregoing reasons, we conclude that the trial court properly exercised its discretion in determining that Radio Multi Media's conduct was egregious and granting default judgment for Courier and dismissing Radio Multi Media's counterclaims.

B. The trial court properly exercised its discretion in denying Radio Multi Media's motion for relief from the default judgment.

¶30 We turn next to Radio Multi Media's motion for relief pursuant to WIS. STAT. § 806.07(1)(a) & (h). Those subsections provide:

> **(1)** On motion and upon such terms as are just, the court … may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect; [or]
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.

See ***id.*** As each subsection of the statute is governed by its own standard, we consider Radio Multi Media's arguments regarding its § 806.07 motion in turn.

1. The trial court did not erroneously exercise its discretion in denying Radio Multi Media's motion pursuant to WIS. STAT. § 806.07(1)(a).

¶31 As Radio Multi Media's motion for relief under § 806.07(1)(a) alleged that its actions were the result of "excusable neglect," our inquiry is straightforward: we must determine whether the trial court erroneously exercised

its discretion in deciding "whether the conduct of the moving party was excusable under the circumstances." *See* ***State v. Schultz***, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). "'Excusable neglect' is that neglect which might have been the act of a reasonably prudent person under the circumstances." *See* ***id.*** (citation omitted). "It is not synonymous with neglect, carelessness or inattentiveness." ***State v. A.G.R.***, 140 Wis. 2d 843, 848, 412 N.W.2d 164 (Ct. App. 1987).

¶32 Though its brief is not entirely clear on the matter, Radio Multi Media seems to point to two factors supporting its argument that its failure to appear at the pretrial hearing constituted excusable neglect: (1) the fact that Moore allegedly did not know that the stipulation for the withdrawal was not filed until October 7, 2010 (even though it was actually filed with the court on October 6, 2010); and (2) the fact that Moore was personally required to appear at a hearing in California on October 8, 2010.

¶33 As noted, the trial court considered these arguments and determined that Radio Multi Media's and Moore's actions did not constitute excusable neglect. Though we will not restate the entirety of the court's oral rulings here, we refer first to the court's remarks at the January 18, 2011 hearing:

> In another case he stipulated to the removal or withdrawal of [former counsel] on September 28th of 2010, that being in cases 08CV4076 and 08CV4499. So obviously he knew that his relationship with [former counsel] was terminating.
>
> In those cases, other cases, he had been first represented by Mr. Teper, then Mr. Toran, and then [former counsel]. He has a track record of agreeing to have substituted counsel and allowing counsel to withdraw.
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> Now, on this particular case in front of us, [former counsel] did represent him from the start, but I'm also troubled by [that] he didn't have to be here today, but the

> explanation is he didn't come on the final pretrial date because he had other legal business in California which required him to be in court first thing in the morning on October 8th. He seems to think California is more important than Wisconsin.
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> He knew [former counsel] have [*sic*] withdrawn, he stipulated to their withdrawal. It was awaiting an order of the Court to be signed, and I'm troubled that he didn't have counsel prepared to step in or that anyone told the Court that he didn't have counsel ready to step in and appear.
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> … [Moore] knew specifically and was reminded in that case as he has been in the cases that he can't represent the corporation. They have to appear by an attorney. So he knew that if [former counsel] were allowed to withdraw, the corporation needed a lawyer to appear in court.
>
> And I may well have refused to allow the withdrawal. We're at a final pretrial in this case, and it needs to go forward. And so I'm concerned that Mr. Moore is attempting delay and has more respect for another court in another state than he cares about what's going on in this case. Where am I wrong on that one?

¶34 We also refer to the court's remarks at the February 25, 2011 hearing:

> I don't know anything about the California case, why it was mandatory that he be there, and that he couldn't be here. It is a short trip in between, certainly he could have made arrangements to be here on the seventh and there on the eighth, and he must be involved in substantial litigation going on out in California because he's had a couple times that he has a conflict in appearing in court in California with appearing in court here on the various cases that he has.
>
> For whatever reason this case – this court seems to be the court in which Radio Multi Media's cases seem to all have been directed to, and so I'm familiar with his appearance and lack of appearance and the issue regarding his California dates….
>
> So I'm very troubled by that, and it seems – still seems to be that he made a conscious decision, he didn't contact the court. He certainly has the means to use a telephone. He had the means to continue to communicate

> with [former counsel] to have made the representation on October 7th that he had some conflict and couldn't be here, but he didn't even communicate with [former counsel] who happened to be here on the seventh as well, and so I – I'm struggling to see the argument that he was in good faith diligently, more so, seeking replacement counsel and diligently communicating with the court regarding problems with retaining counsel and any conflict with appearing in court here.

¶35 There is no doubt that, regarding this issue, the trial court "'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.'" *See* ***Marquardt***, 299 Wis. 2d 81, ¶41 (citation omitted). The trial court properly reasoned that Radio Multi Media's conduct was not reasonably prudent under the circumstances, *see* ***Schultz***, 224 Wis. 2d at 502, and we therefore affirm its decision.

2. The trial court did not erroneously exercise its discretion in denying Radio Multi Media's motion pursuant to WIS. STAT. § 806.07(1)(h).

¶36 Regarding Radio Multi Media's motion under WIS. STAT. § 806.07(1)(h), the standard is more complex, as it "invokes the pure equity power of the court." *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶33, 326 Wis. 2d 640, 785 N.W.2d 493 (citation and quotation marks omitted). While this paragraph of the statute "'is to be liberally construed to provide relief from a judgment whenever appropriate to accomplish justice,'" it must not be interpreted "so broadly as to erode the concept of finality." *See* ***id.*** (citation omitted). Indeed, "we observe that the discretionary authority afforded the circuit courts by WIS. STAT. § 806.07(1)(h) to vacate final judgments is to be used 'sparingly.'" *See* ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶17, 305 Wis. 2d 400, 740 N.W.2d 888 (citation omitted). Thus, "[a] court is to invoke this power only

when the circumstances are such that the court's conscience demands that justice be done." ***Id.***

> A court appropriately grants relief from a default judgment under [WIS. STAT. § 806.07](1)(h) when extraordinary circumstances are present justifying relief in the interest of justice. Extraordinary circumstances are those where the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts.

See ***Miller***, 326 Wis. 2d 640, ¶35 (internal citations, quotations, emphasis and bracketing omitted).

¶37 In determining whether "extraordinary circumstances" are present under WIS. STAT. § 806.07(1)(h), a court must consider five factors: (1) "'whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant'"; (2) whether the party seeking to vacate the judgment "received the effective assistance of counsel"; (3) "'whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments'"; (4) whether the party seeking to vacate the judgment has a meritorious claim; and (5) "'whether there are intervening circumstances making it inequitable to grant relief.'" *See* ***Miller***, 326 Wis. 2d 640, ¶41 ("a circuit court is to consider the five interest of justice factors in determining whether extraordinary circumstances are present under WIS. STAT. § 806.07(1)(h) such that relief from a judgment, including a default judgment, is appropriate"); *see also* ***Miller***, 326 Wis. 2d 640, ¶¶49, 53-55, 57 (enumerating factors) (citations omitted). If the trial court does not adequately discuss the five aforementioned factors, we must "independently review the record to determine whether there is a basis for the proper exercise of discretion." *See* ***id.***, 326 Wis. 2d 640, ¶47.

¶38 Radio Multi Media argues that the trial court did not adequately consider the five ***Miller*** factors in denying its WIS. STAT. § 806.07(1)(h) motion. Courier, on the other hand, argues that the court adequately considered the five ***Miller*** factors, although it may not have expressly recited them verbatim in making its analysis.

¶39 However, it does not matter whether the trial court adequately considered the five ***Miller*** factors because we independently conclude that the factors support the trial court's decision.

¶40 First, the default judgment "'was the result of [Radio Multi Media's] conscientious, deliberate and well-informed choice.'" *See* ***id.***, 326 Wis. 2d 640, ¶49 (citation omitted). As the trial court noted numerous times, Radio Multi Media's president, Moore, is an experienced litigant. Moore knew that his company was required to appear by an attorney at all hearings, and he had delayed litigation numerous times in other cases before this particular court by various means, including substituting counsel. Moreover, we conclude as the trial court did, that Moore's claims that he struggled to hire new counsel and that he had a hearing in California are not substantive enough to persuade us that those events truly interfered with his ability to ensure that Radio Multi Media was represented at the October 7, 2010 pretrial hearing. Therefore, this factor weighs heavily in favor of affirming the judgment.

¶41 Second, Radio Multi Media "received the effective assistance of counsel." *See* ***Miller***, 326 Wis. 2d 640, ¶53. While we agree with Radio Multi Media that "in this case there is no indication or suggestion of ineffectiveness of counsel," we do not agree that this means the factor is not relevant to our analysis. On the contrary, as the trial court's analysis of this issue implies, the facts strongly

suggest that Radio Multi Media—not counsel—was at fault for its non-appearance:

> [Moore] neither communicated with [former counsel], and as you point out, there was no bad relationship between them. [Former counsel] was trying to communicate with [Moore], [Moore] wouldn't return phone calls to [former counsel].
>
> [Former counsel] came to court on October 7th even though the consent to withdraw had already been signed and he was here, he responded to the contempt, even though he'd already been withdrawn.
>
> But Mr. Moore had every opportunity to communicate with [former counsel], but he also had the opportunity to communicate directly with plaintiff. He knows and understands there can be conference calls with the Court, and he could've communicated with my clerk to say, I just can't come. I have a conflict. And these are my efforts that I'm trying to get a lawyer, but I can't be here.
>
> ….
>
> And we get back to where does the Court stand on October 7th when Mr. Moore isn't here, [former counsel] doesn't know what efforts he's making to find new counsel. He can't advise the Court of that. He can't tell the Court when I might be justified or appropriately set the matter for anything else on the calendar because we have no input from the defendant.
>
> We don't know what the financial status is. He may have come in and said, you know, Judge, I can't get another – the funding for another lawyer for two months. Apparently he was able to get it pretty quickly because he's entered into a relationship with [successor counsel], but the Court didn't know any of that.

Therefore, because Radio Multi Media did receive effective assistance of counsel, this factor weighs in favor of affirming the judgment.

¶42 Third, given the circumstances of this case, we conclude that deciding Radio Multi Media's case on the merits does not outweigh the finality of

the judgment. *See* ***Miller***, 326 Wis. 2d 640, ¶54. The trial court considered this factor in the January 18, 2011 hearing, and concluded that a consideration of the merits did not counterbalance "the court's right and authority to manage its calendar." It noted:

> [Moore] is an experienced litigator, he has multiple trials going on both individually and in corporate entities, rather complex cases because they are part of the boxes over against the wall. They're not a thin little file. And undoubtedly he has experienced litigating in California, either individually or through corporate entities. That he understands the need to appear.
>
> ….
>
> And so it leaves from the standpoint of respect for the judicial system, the calendaring of cases, but the authority of the Court when somebody just chooses not to come to court and not advise the Court of any reason not to.
>
> And it's not infrequent that, as I tell virtually everybody at my scheduling conferences, I have to tell you you can't change the dates in the scheduling order without the Court's approval. The reason why I have to do it is we have problems throughout the division, we get a call or the Court's favorite is the letter the day before the final pretrial saying, Judge, we don't think we should come in for that final pretrial. We haven't complied with your order for discovery, our experts aren't completed as you've ordered, and we didn't even think about mediation even though you ordered that as well.
>
> And then surprisingly they may call on that day before or the morning and say, do we really have to come in? We sent this letter in. You should tell us something because we sent this letter in. It's not our obligation to communicate further with the Court because we sent you a letter that just got there.
>
> And I had one which it was a pro se party who just sent the letter in and said, Judge, I'm not going to come. Here's my phone number. If you want me, call me. If we allow this to happen, we just undermine the authority of the Court, we undermine the respect for the system, and in this particular case where you have a seasoned, experienced litigant, I find that that conduct under these circumstances

> in ignoring this Court, failing to come without any justification, explanation to the Court constitutes egregious conduct, and I'll deny the motion to reopen.

We agree with the trial court. This factor weighs in favor of affirming the judgment.

¶43 Fourth, we conclude that Radio Multi Media may have a meritorious claim. *See* ***Miller***, 326 Wis. 2d 640, ¶55. It is not clear from the record whether the trial court considered this factor. As Radio Multi Media notes, and Courier does not dispute, there was no summary judgment filed on Radio Multi Media's counterclaims prior to the pretrial hearing, and it is possible that the counterclaims would have had merit. We therefore conclude that this factor weighs in Radio Multi Media's favor. Under the particular circumstances of this case, however, this factor does not weigh heavily on our decision.

¶44 Fifth, we conclude that, given the circumstances of this case, it would indeed be inequitable to overturn the trial court's well-reasoned decision. *See* ***id.***, ¶57. The trial court expressly gave Radio Multi Media the opportunity to brief this issue further at the January 18, 2011 hearing:

> And certainly whether there are intervening circumstances making it inequitable to grant relief … we're in a different circumstance than the Miller case, and I'll give Mr. Moore the opportunity to explain … why it was they didn't appear through counsel or communicate with the court.

Also, as noted in extensive detail above, after the issue was further briefed, the trial court was still unconvinced that there were any intervening circumstances warranting relief from the judgment. On appeal Radio Multi Media presents nothing new for us to consider regarding this factor. Radio Multi Media merely argues, again, that it was challenging to hire new counsel and notes that that

Moore had a court appearance in California. However, for all of the reasons discussed above, those arguments are not persuasive.

¶45 In sum, we conclude that four of the five ***Miller*** factors weigh heavily in favor of the trial court's decision to deny Radio Multi Media's WIS. STAT. § 806.07(1)(h) motion. Overturning the sound reasoning of the trial court in this case would, as the trial court noted, undermine both the court's authority and the parties' respect for the judicial system. As such, we affirm the trial court's decision.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.