COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 22, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-1891

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

Richard Eggers and Cindy Eggers,

Plaintiffs-Respondents,

v.

Cumberland Farmers Union and Farmland Mutual Insurance Company,

Defendants-Third Party Plaintiffs-Appellants,

v.

Cargill Incorporated, a Foreign Corporation and ABC Insurance Company

Third Party Defendants.

APPEAL from an order of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Cumberland Farmers Union and Farmland Mutual Insurance Company (Cumberland) appeal an order granting Richard and Cindy Eggers' motion to vacate a default judgment in favor of Cumberland. Cumberland argues that the conduct of the Eggers' attorney, Bruce Scott Johnson, did not constitute mistake, inadvertence or excusable neglect, and the motion was not commenced within a reasonable amount of time. We agree that Johnson's conduct was not mistake, inadvertence or excusable neglect, and reverse the order.

This appeal arises from a lawsuit filed on June 21, 1995, by the Eggers against Cumberland for negligently selling them bad cattle feed.[1] On July 28, 1995, Cumberland served Johnson with interrogatories, a request for production of documents, and a request for production of statements. Johnson did not respond. On September 26, 1995, Johnson was served with a request for admissions, but did not respond. On September 28, 1995, Cumberland sent a letter to Johnson, inquiring when he would respond to the discovery requests. Johnson did not respond.

On October 5, 1995, Cumberland filed a counterclaim for payment of the Eggers' outstanding balance on their Cumberland charge account. Johnson did not answer or respond to the counterclaim. On October 31, 1995, Johnson was served with a notice of motion and motion to compel discovery. Johnson did not respond, and neither he nor the Eggers appeared at the motion hearing on December 6, 1995.

At the conclusion of the December 6 hearing, the court ordered the Eggers to produce discovery responses by December 22, 1995, and at the court's request, Cumberland sent Johnson an authenticated copy of the order via certified mail, return

[1] Cumberland filed a third-party action against Cargill, Inc., and its insurer because Cargill manufactured an ingredient in the feed. Cumberland and Cargill appeared at the hearing and argued against the Eggers' motion to vacate judgment and reopen the case, but Cargill did not submit an appellate brief.

receipt requested. The return receipt was signed by Jackie Otto, Johnson's secretary, and indicated receipt by Johnson's office on December 11. Johnson neither produced the discovery responses nor contacted Cumberland.

On December 13, 1995, Johnson was served with a notice of motion and motion for default judgment on the counterclaim. These pleadings were sent via certified mail, return receipt requested. The return receipt, signed by Otto, showed receipt of the pleadings at Johnson's office on December 18, 1995. Johnson did not respond.

Cumberland's motion to dismiss for failure to prosecute, served via Federal Express, was delivered to Johnson's office on January 4, 1996, and signed for by Otto. At Cumberland's request, the court scheduled a hearing for January 11, 1996, regarding Cumberland's motion to dismiss for failure to prosecute. Johnson did not respond.

On January 11, Cumberland appeared for its motion for default judgment and motion to dismiss. Neither Johnson nor the Eggers appeared. The court granted Cumberland's motion for default judgment on the counterclaim, with costs, and dismissed the Eggers' case with prejudice. Cumberland sent notices of entry of judgment to Johnson's office on February 12, 1996, via Federal Express. The notices were received at Johnson's office on February 13, 1996, and signed for by Otto. Johnson did not respond to these notices.

On April 18, 1996, Richard Eggers met with the Cumberland Co-op's board of directors to discuss the counterclaim judgment. At the meeting, Eggers gave the board members a copy of a notice of motion and motion to reopen the case and a supporting affidavit from Johnson, and told the board that Johnson would be attempting to reopen the case. The parties reached a settlement on the counterclaim.

On June 5, 1996, the Eggers filed a motion to reopen their negligence case pursuant to § 806.07(1), STATS. At the June 11 hearing, the court found the existence of mistake, inadvertence, surprise and excusable neglect under § 806.07(1)(a), and granted the motion.[2] Cumberland now appeals the order.[3]

The issue is whether the court properly granted the Eggers' motion to vacate the judgment and reopen the case. The resolution of a motion for relief from judgment pursuant to § 806.07, STATS., is directed to the sound discretion of the trial court. ***Brown v. Mosser Lee Co.***, 164 Wis.2d 612, 616-17, 476 N.W.2d 294, 296 (Ct. App. 1991). The trial court has wide discretion when it rules on a motion to vacate a judgment. ***Town of Seymour v. City of Eau Claire***, 112 Wis.2d 313, 322, 332 N.W.2d 821, 825 (Ct. App. 1983). We will uphold a trial court's exercise of discretion if, from the record, it is apparent that the court's expressed rationale shows that it applied the proper legal standard to the relevant facts, and reached a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

In relevant part, § 806.07, STATS., provides the following:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court may relieve a party … from a judgment, order or stipulation for the following reasons:
> (a) Mistake, inadvertence, surprise or excusable neglect;
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> ….

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[2] The parties dispute whether the motion was brought and/or granted pursuant to § 806.07(1)(a) or (h), STATS. Our review of the record reveals that the motion was brought pursuant to § 806.07 and granted pursuant to § 806.07(1)(a). Therefore we do not address the Eggers' argument that § 806.07(1)(h) applies to this case.

[3] Cumberland's petition for leave to appeal this nonfinal order of the trial court was granted by the court of appeals.

> **(2)** The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made.

Our review of the trial court's determination is guided by the following principles: "(1) The statute relating to vacating default judgments is remedial and should be liberally construed; (2) the law favors affording litigants their day in court; and (3) default judgments are particularly disfavored." ***Hollingsworth v. American Fin. Corp.***, 86 Wis.2d 172, 184, 271 N.W.2d 872, 878 (1978) (citing ***Dugenske v. Dugenske***, 80 Wis.2d 64, 68, 257 N.W.2d 865, 867 (1977)). In order to succeed on a motion to vacate a judgment, the moving party must demonstrate valid grounds for the motion and a meritorious defense. ***Rhodes v. Terry***, 91 Wis.2d 165, 172-73, 280 N.W.2d 248, 251 (1979) (citing ***Wagner v. Springaire Corp.***, 50 Wis.2d 212, 220, 184 N.W.2d 88, 92-93 (1971)).

The trial court decided to grant the Eggers' motion on the grounds of mistake or inadvertence or excusable neglect.[4] "Excusable neglect allowing relief from judgment is that neglect which might have been the act of reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness." ***Price v. Hart***, 166 Wis.2d 182, 194-95, 480 N.W.2d 249, 254 (Ct. App. 1991). To determine whether this standard has been met, the trial court "should consider whether the person has acted promptly to remedy his situation and whether vacation of the judgment is necessary to prevent a miscarriage of justice." ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis.2d 498, 512, 285 N.W.2d 720, 727 (1979).

[4] Although the court granted the motion on the basis of "mistake or inadvertence or excusable neglect," our analysis focuses on the principles of excusable neglect because the parties concentrate on excusable neglect, and the strongest argument for the Eggers is excusable neglect.

While the Eggers contend that the court's result-oriented ruling secured substantial justice between the parties, Cumberland argues that the trial court did not conduct a proper inquiry into whether Johnson's neglectful conduct may be imputed to the Eggers.[5] However, as stated by our supreme court in ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 285, 470 N.W.2d 859, 868 (1991),

> [W]hen an attorney's egregious failure to obey court orders implicates the court's ability to administer judicial business, it is more equitable to allow the adverse consequences to fall upon the shoulders of the party who has chosen the attorney, rather than on the adversary and the other litigants who await their day in court. In addition, the noncomplying party has a possible remedy in a malpractice action, particularly when the dismissal is entirely attributable to his attorney's conduct.

Johnson v. Allis Chalmers Corp., 162 Wis.2d 261, 285, 470 N.W.2d 859, 868 (1991) (footnote omitted) (citing ***Link v. Wabash R.R. Co.***, 370 U.S. 626, 634 n.10 (1962); ***Village of Big Bend v. Anderson***, 103 Wis.2d 403, 308 N.W.2d 887 (Ct. App. 1981)).

Here, the trial court explained its decision to grant the Eggers' motion as follows:

> When we get to punitive sanctions for failure to respond to discovery, the question becomes what the ultimate effect will be and who is, in fact, being punished. And I am satisfied that in this case, if punishment were to be had, it would have been had against Mr. Johnson's office and not against Mr. and Mrs. Eggers. I have heard nothing here to suggest that Mr. and Mrs. Eggers are at fault for failing to appear or failing to respond to discovery. I would vastly prefer that cases of this nature be resolved based on the merits and not on punitive sanctions for failure to respond to discovery.

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[5] *See* ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis.2d 498, 514, 285 N.W.2d 720, 727 (1979).

> I acknowledge that the level of neglect here likely exceeds excusable neglect, but because I am entering a result oriented decision today so that plaintiffs and their cause of action do not unduly suffer, I am finding that there is mistake or inadvertence or excusable neglect or a combination of all three and I am granting the motion.

At the hearing, Johnson admitted receiving the discovery, but denied receiving the court order compelling him to respond to discovery, Cumberland's motion for default judgment and motion to dismiss for failure to prosecute, and the notices of entry of judgment on the counterclaim and the underlying action. He acknowledged that his secretary verified her signature on the return receipt for Cumberland's motion for default judgment, and did not deny that she had signed the other receipts.

Johnson asserted that he never received the documents because the new tickler system in his office either malfunctioned or did not work. Even if we assume that Johnson had no notice, this alone would be insufficient to support his motion to vacate judgment and reopen the case. *See* ***Kingsley v. Steiger***, 141 Wis. 447, 452, 123 N.W. 635, 637 (1909). Although Johnson described his diligent efforts to find the documents, he offered no explanation for his repeated failure to respond to Cumberland.

The facts of this case indicate that Johnson failed to answer discovery, failed to respond to a motion to compel discovery, failed to answer a counterclaim, failed to respond to a default judgment on the counterclaim, failed to respond to a motion to dismiss for failure to prosecute, and failed to take any affirmative steps to move his clients' case toward trial after filing the negligence lawsuit. We conclude that because a reasonable person would not have engaged in such conduct, Johnson's neglect of the Eggers' case was egregious and inexcusable. The trial court did not apply the appropriate legal standards to the facts of this case and did not reach a reasonable conclusion.

Therefore, the court's decision to grant the motion was an erroneous exercise of discretion, and we reverse.[6]

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[6] Because our conclusion that relief from judgment was not warranted under § 806.07(1)(a), STATS., is dispositive, we do not consider the timeliness of the Eggers' motion. *See* ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground ….").