

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 99-0616-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF ELM GROVE,

PLAINTIFF-APPELLANT,

V.

LAURA L. GILLILAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Reversed and cause remanded with directions.*

BROWN, J. The Village of Elm Grove appeals from an order denying its motion for a new trial. The Village's motion was based upon the trial court's granting of Laura L. Gillilan's motion to dismiss at the end of the Village's case. Gillilan claimed that the Village had failed to prove an essential element of its case, namely, that the person present in the courtroom was the same Laura Gillilan arrested for operating a motor vehicle while intoxicated (OWI) by the

officer who testified about the event. The Village also claims that the court erred earlier on by granting Gillilan's motion to reopen the case after a default judgment had been entered against her. The trial court did not erroneously exercise its discretion in reopening the case. However, the trial court did err when it granted Gillilan's motion to dismiss based on the lack of an explicit in-court identification of her. The jury could have inferred from the testimony that Gillilan was the person arrested. We thus reverse and remand for a new trial.

Gillilan was arrested for OWI and operating with a prohibited alcohol concentration (PAC) on July 3, 1996. A status conference was scheduled for September 5, 1997, to which Gillilan's attorney was late and Gillilan herself did not show. The court entered a default judgment against Gillilan. On November 12, 1997, Gillilan wrote the court, stating that her case was "still pending trial" and that she had "not received notification of the new pretrial date and court date." She also requested that the court "notify the Department of Transportation that [she had] not been convicted as of [the date of the letter]." There is no indication that Gillilan's attorney or counsel for the Village received a copy of this letter. Then, in January 1998, Gillilan wrote the trial judge a more detailed letter, claiming that the Village attorney had "erroneously entered a guilty plea on [her] behalf" on the day of the status conference. She asked the court to dismiss the charges. That letter was copied to Gillilan's attorney, but not to the Village attorney.

The court apparently construed Gillilan's letter as a motion to reopen because a hearing was held on "defendant's motion to reopen and set dates." There, Gillilan's attorney explained what had happened on the day of the status conference. He arrived late, ran into the attorney representing the Village, but did not recognize her as such. When he realized that a default judgment had been

entered, he contacted counsel for the Village in an attempt to stipulate to reopening the case. The Village refused. Furthermore, the Village argued that the case should not be reopened because there was little likelihood that the defense would prevail. Also, the Village pointed out that Gillilan's presence had been required at that status conference, but she never showed up. Finally, the Village asserted that the defense had not shown excusable neglect, a ground for relief from judgment under § 806.07, STATS., because it gave no explanation as to why counsel was late to and the defendant absent from the status conference. The court granted Gillilan's motion to reopen the case.

The case was tried to a jury on October 14, 1998. At the conclusion of the Village's case, Gillilan moved to dismiss, alleging that the Village had failed to prove all elements of the charge since no explicit in-court identification had been made of her. In other words, the Village's counsel never asked the "magic question" of the arresting officers: Is the woman you arrested present in court and can you point her out? The court granted the motion to dismiss, finding that "it just never was asked by anybody that indeed, that this is the person that they [the officers who testified] were talking about or dealing with." The court opined that identification of the defendant is "not an issue that can be left to reasonable inferences." The Village moved for a new trial, alleging that the court had erred in granting the dismissal. It is from the denial of this motion that the Village appeals.

We first address the challenge to the trial court's decision to reopen the case. Whether to grant relief from judgment is within the broad discretionary authority of the trial court. *See Allstate Ins. Co. v. Konicki*, 186 Wis.2d 140, 148, 519 N.W.2d 723, 726 (Ct. App. 1994). This court will not overturn such a decision absent a clearly erroneous exercise of discretion. *See id.* at 149, 519

N.W.2d at 726. Instead, we will search the record to find a reasonable basis to uphold the trial court's decision. *See id.*

Here, the record supports a finding of excusable neglect or mistake, both of which are grounds for relief under § 806.07(1)(a), STATS. Gillilan's counsel was late. It was not unreasonable for the trial court to conclude that such a circumstance warranted reopening the default judgment to allow Gillilan her day in court. *See Baird Contracting, Inc. v. Mid Wis. Bank*, 189 Wis.2d 321, 325, 525 N.W.2d 276, 277 (Ct. App. 1994) (noting disfavor with which the law looks upon default judgments and the general policy of giving litigants their day in court). Furthermore, "[t]he prompt action of the defendant in seeking relief from the judgment is also a factor to be considered." *Id.* The trial court here took into account Gillilan's speedy effort to correct the situation. We will not disturb the trial court's decision to reopen the case.¹

We now turn to the trial court's decision to dismiss. A motion to dismiss at the end of the plaintiff's case should only be granted if the evidence, viewed in the light most favorable to the plaintiff, is clearly insufficient to sustain a verdict in the plaintiff's favor. *See Gries v. First Wis. Nat'l Bank*, 82 Wis.2d 774, 777, 264 N.W.2d 254, 256 (1978). If the jury could disagree on the facts or on inferences to be drawn from the facts, the motion must be denied and the case submitted to the jury. *See id.* In reviewing the trial court's decision to grant a motion to dismiss, this court views the evidence in the light most favorable to the appellant. *See Olfe v. Gordon*, 93 Wis.2d 173, 185, 286 N.W.2d 573, 579 (1980).

¹ The Village does not challenge the court's acceptance of Gillilan's letter, which was not copied to the Village, as a motion for relief under § 806.07, STATS. We therefore do not address this point. *See Fritz v. McGrath*, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

However, we will not reverse the trial court's decision unless it was clearly wrong. *See id.* at 186, 286 N.W.2d at 579.

Here, the court's decision to grant the motion to dismiss was based on an incorrect view of the law and thus must be reversed. The trial court found the Village's evidence insufficient in that there was no explicit courtroom identification of Gillilan. That is, Village counsel never asked the arresting officer, John M. Krahn, "Is the person you arrested present in the courtroom and would you identify her?" There is no requirement in Wisconsin that this magic question be asked. When sufficient evidence is presented the jury is "undoubtedly at liberty to look at parties in court in determining questions of identity." *Knox v. Bigelow*, 15 Wis. 455, [*415], 462, [*421-22] (1862). Here, there was plenty of evidence for the jury to conclude that Gillilan was the person Krahn arrested. Krahn, in his testimony, compared Gillilan's speech, balance and appearance at trial and on the night of the arrest. Gillilan, when she testified, identified herself as Laura Gillilan; that is the name that appears on the citation. During her testimony she related her encounter with Krahn. The record does not reveal any doubt or confusion about who was who. The jury could easily have inferred that the Gillilan in court was the Gillilan Krahn arrested. Because the trial court's decision to grant the motion to dismiss was clearly wrong, we reverse and remand with directions that there be a new trial.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

