

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2010

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP453

Cir. Ct. No. 2007CV188

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KOPP, MCKICHAN, GEYER, SKEMP & STOMBAUGH, LLP,

PLAINTIFF-RESPONDENT,

V.

JOHN D. DELANEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. John Delaney appeals a default judgment which was entered against him after he failed to appear at a scheduling conference. We affirm for the reasons discussed below.

BACKGROUND

¶2 The law firm of Kopp, McKichan, Geyer, Kemp & Stombaugh, LLP sued its former client Delaney to recover unpaid attorney fees. Delaney filed a counterclaim for malpractice and requested a change of venue. The law firm answered the counterclaim, and the fee agreement and an invoice for the unpaid amount were attached to its pleadings. Delaney subsequently filed an amended answer and counterclaim.

¶3 A scheduling conference was set for October 3, 2008. Delaney failed to appear at the conference, either in person or telephonically, despite having been provided with notice of its date and time. Following the conference, the trial court entered a default judgment granting the law firm the amount requested in its complaint and dismissing Delaney's counterclaim for lack of prosecution. Delaney appeals.

DISCUSSION

¶4 A trial court may enter a default judgment as a sanction for a party's failure to comply with a scheduling order or other order of a court. *See* WIS. STAT. §§ 802.10(7) (providing that the violation of a pretrial or scheduling order is subject to various sanctions including under § 804.12); 805.03 (providing that the failure of any party to prosecute an action or obey any order of the court is subject to sanction under § 804.12(2)(a)); and 804.12(2)(a)2. and 3. (authorizing the court to disallow a disobedient party from supporting or opposing designated claims or defenses as a sanction for failure to comply with a court order or to grant a default judgment against the disobedient party). In order to warrant the ultimate sanction of dismissal, a party's conduct must have been either egregious or in bad faith, and without clear and justifiable excuse. *Sentry Ins. v. Davis*, 2001 WI App 203,

¶¶20-21, 247 Wis. 2d 501, 634 N.W.2d 553. We review a circuit court’s decision whether to grant a default judgment under the erroneous exercise of discretion standard. *Connor v. Connor*, 2001 WI 49, ¶18, 243 Wis. 2d 279, 627 N.W.2d 182.

¶5 Once a default judgment has been entered, a party may seek relief from it. The available grounds for relief include mistake, inadvertence, surprise, and excusable neglect. WIS. STAT. § 806.07(1)(a).

In determining whether the party seeking relief from a default judgment has proven excusable neglect, the circuit court should consider whether the moving party has acted promptly to remedy the default judgment, whether the default judgment imposes excessive damages, and whether vacatur of the judgment is necessary to prevent a miscarriage of justice.

Mohns, Inc. v. TCF Nat’l Bank, 2006 WI App 65, ¶10, 292 Wis. 2d 243, 714 N.W.2d 245. “The circuit court must also consider that the law favors the finality of judgments, and the reluctance to excuse neglect when too easy a standard for the vacatur of default judgments would reduce deterrence to litigation-delay.” *Id.* Excusable neglect is “that neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (quoted source omitted). We also review the trial court’s decision whether to reopen a judgment under the standard for discretionary decisions, considering only whether the trial court reasonably considered the facts of record under the proper legal standard. *See Nelson v. Taff*, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993).

¶6 Delaney does not dispute that he failed to appear at the scheduling conference. He alleges, however, that it was error for the court to enter a default judgment because he was available to attend the conference telephonically, and

was simply waiting for a phone call which never came. The main problem with this assertion (aside from Delaney's failure to develop any argument regarding either the egregiousness or the excusable neglect standard) is that it is based on materials outside the record.

¶7 It is the appellant's responsibility to ensure that the record is sufficient to facilitate appellate review. See *Seltrecht v. Bremer*, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

¶8 Here, Delaney has included in his appendix a letter which he claims to have sent to the circuit court explaining that he was waiting for someone to call him at the scheduled time. It is unclear whether he intended that letter to serve as a motion to reopen the default judgment. In any event, the letter itself is not included in the appellate record; the copy of the letter included in the appendix is not stamped as having been received by the circuit court; CCAP entries do not show any correspondence received by the court at or around the time the letter is dated; and we see nothing else in the record to suggest that the court ever received the letter. Certainly, the court never made any factual findings accepting Delaney's assertions regarding his availability for the conference as true. Moreover, given the lack of transcript, minutes, or affidavits documenting what happened during the conference, we simply do not know what if any efforts were made to contact Delaney during the conference.

¶9 Therefore, we can only evaluate the trial court's granting of a default judgment in this case based upon the facts found by the trial court that Delaney was

notified of the scheduling conference and failed to appear. Without any explanation in the record for Delaney's failure to appear, it would not be an erroneous exercise of discretion for the trial court to determine that the nonappearance was egregious. We therefore see no basis to set aside the trial court's decision.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

