COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1192 **Cir. Ct. No. 2008SC12055**

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

MARK A. PERRY,

PLAINTIFF-RESPONDENT,

V.

ZURICH INSURANCE, A/K/A
ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded with directions.*

¶1 CURLEY, P.J.[1] Zurich Insurance, a/k/a Zurich American Insurance Company (Zurich) appeals from the order denying its motion to reopen a default

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08).

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

judgment in this small claims action.[2] Zurich contends that the trial court erroneously exercised its discretion when it denied Zurich's motion to reopen the default judgment. Zurich argues that pursuant to WIS. STAT. § 806.07(1)(a),[3] Zurich's request to reopen the judgment should have been granted because the failure of Zurich's attorney to appear at the hearing on March 24, 2009, at 8:45 a.m., was a mistake caused both by the clerk's office, which advised the attorney's office that the hearing was scheduled for 3:45 p.m., and by a CCAP[4] entry that also reflected a hearing time of 3:45 p.m. As a result, the attorney's failure to appear constituted excusable neglect. Because the trial court erroneously exercised its discretion in denying the motion to reopen the default judgment, this court reverses the order and remands to the trial court for an evidentiary hearing.

I. BACKGROUND.

¶2 Mark A. Perry brought a small claims action against Zurich as a result of damages that he claimed occurred when his semi-truck was towed away by Ray's Towing, Zurich's insured. Zurich's attorney filed a timely notice of retainer and an answer.

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[2] Zurich cannot appeal the default judgment. This is so because WIS. STAT. § 799.29(1)(a) prohibits an appeal from a default judgment.

[3] WISCONSIN STAT. § 806.07(1)(a) provides:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect….

[4] CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online site reflects case information entered by court staff.

¶3 According to the affidavit submitted by Zurich's attorney in support of the motion to reopen the default judgment, the case was initially scheduled for a hearing on September 30, 2008. The affidavit stated that a temporary attorney in the law firm appeared at the September proceeding. Based upon information supplied by this temporary attorney,[5] the matter was adjourned to March 24, 2009, because one of Perry's witnesses did not appear. However, the parties stipulated that the damages to Perry's truck totaled $2,285.99. After the hearing, the temporary lawyer supplied the law office with information that the hearing was scheduled to be heard on March 24, 2009, at 8:45 a.m.

¶4 Upon taking over the case, the second Zurich attorney directed her paralegal to prepare a subpoena for a witness. The paralegal advised the attorney that she was unsure of what time to direct the witness to appear because the time of the hearing supplied by the temporary attorney conflicted with the time of the hearing shown on CCAP. Due to the conflict, the attorney asked the paralegal to call the clerk of court's office to confirm the time. The paralegal was told by the clerk of court's office that the hearing was scheduled for 3:45 p.m.

¶5 When the attorney appeared on March 24, 2009, at 3:45 p.m., she was told that the case had been called at 8:45 a.m. and that a default judgment in favor of Perry had been entered. After the attorney explained that she had relied on the time given by the CCAP entry, the court clerk looked the case up on CCAP and acknowledged that the incorrect time was listed. The attorney then promptly filed a motion seeking to reopen the default judgment. Believing that the mistake

[5] Perry does not contest the veracity of this information.

in times occurred due to the Zurich's attorney's office "downsiz[ing]," the trial court denied the motion.

II. ANALYSIS.

¶6 Zurich argues that it was entitled to have the default judgment reopened because "the default judgment was obtained as a result of both a mistake by the court staff and excusable neglect by defense counsel." This court agrees.

¶7 A trial court determination to deny or grant a motion seeking to reopen a default judgment is a discretionary act. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). Before a party is entitled to relief from a default judgment, the party must show that the judgment was a product of mistake, inadvertence, surprise or excusable neglect on his or her part and that a meritorious defense to the action exists. ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977). The burden is on the movant to show that one of the requisite conditions exists such that the defendant is entitled to relief from the default judgment. WIS. STAT. § 806.07(1)(a); ***Carmain v. Affiliated Capital Corp.***, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265.

¶8 "Mistake is defined as an 'error or a fault resulting from defective judgment, deficient knowledge, or carelessness,' or a 'misconception or misunderstanding.'" ***Wisconsin Cent. Ltd. v. DOR***, 2000 WI App 14, ¶11, 232 Wis. 2d 323, 606 N.W.2d 226 (quoting AMERICAN HERITAGE COLLEGE DICTIONARY 873 (3d ed. 1993)). "'Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the circumstances.'" ***Hansher***, 79 Wis. 2d at 391 (citation and one set of quotation marks omitted). In determining whether to reopen a default judgment the trial court should consider whether the defaulting party acted promptly, whether the default judgment

imposes excessive charges, and whether the default judgment would result in a miscarriage of justice. ***Dugenske***, 80 Wis. 2d at 68-69.

¶9 A trial court's discretion contemplates an exercise of judicial judgment based on three factors: (1) the facts of record; (2) logic; and (3) the application of proper legal standards. ***Shuput v. Lauer***, 109 Wis. 2d 164, 177-78, 325 N.W.2d 321 (1982). "We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶10 Against this backdrop, this court examines the trial court's reasoning. At the motion seeking to reopen the default judgment, the trial court, referencing a comment made by Zurich's attorney as to why she was not present at the first hearing, remarked:

> If they [the law firm] want to downsize their staff to the point that they don't make their court appearances, why should the judges reopen their default judgments and take away this guy's judgment for the stipulated $2,285?

Later, when the attorney argued that her failure to appear was a result of excusable neglect, the trial court stated: "I don't see that." The trial court then denied the motion.[6] Given the trial court's comments, this court concludes that the trial court erroneously exercised its discretion in denying the motion because the trial court erred in determining the reason for the mistake.

[6] The trial court remarked that Perry was able to appear at the hearing without the need of a CCAP entry. Clearly, Perry would have known the correct time, as he was there when the date and time were set.

¶11 The facts are that after taking over the case from a temporary attorney in the firm, the second attorney for Zurich encountered a conflict between the time of the hearing calendared by the former attorney and the time reflected on CCAP. This court can take judicial notice that CCAP supplies information that is routinely relied upon by courts, litigants and attorneys. Unwilling to simply depend on the accuracy of the CCAP entry, the attorney directed her paralegal to call the clerk of court's office. The paralegal called and was told that the hearing was scheduled for 3:45 p.m.

¶12 The actions taken by Zurich's attorney in establishing the correct time for the hearing were eminently reasonable. Not only did the attorney not rely on the CCAP entry, she took the additional step of having her paralegal call the clerk's office and confirm the time of the hearing. Short of going to the courtroom and looking at the court's own calendar, the attorney did all that she could to establish the correct time for the hearing. The mistake here was made by the court system. The "'deficient knowledge'" of the clerk's office as to the correct time of the hearing was imparted to the attorney. *See* ***Wisconsin Cent. Ltd.***, 232 Wis. 2d 323, ¶11 (citation omitted). Given the mistake by the court system, the next question to be answered is whether the attorney's conduct in failing to attend the hearing in the morning constituted excusable neglect. Contrary to the trial court's finding, this court concludes it did.

¶13 As noted, excusable neglect is "'that neglect which might have been the act of a reasonably prudent person under the circumstances.'" ***Hansher***, 79 Wis. 2d at 391 (citation omitted). Certainly a reasonably prudent person would have failed to appear at the hearing date in the morning after reviewing CCAP and further being advised by the clerk of court's office that the time of the hearing was in the afternoon.

¶14 Support for this conclusion can also be found in case law. In ***Edland v. Wisconsin Physicians Service Insurance Corp.***, 210 Wis. 2d 638, 563 N.W.2d 519 (1997), the supreme court concluded that the trial court's failure to give the parties notice of the initial final order constituted a "mistake" under WIS. STAT. § 806.07(1)(a). ***Edland***, 210 Wis. 2d at 648. Similarly, in ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, 281 Wis. 2d 173, 696 N.W.2d 194, the clerk's advice to the attorneys that the judgments had not been entered, when in fact another clerk had entered the judgments, was found to be a mistake that required the reopening of the judgments. ***Id.***, ¶¶59, 72-73.

¶15 The trial court believed that the mistake occurred because the law firm had "downsize[d]," resulting in two different attorneys attending two proceedings. However, the mistake had nothing to do with "downsizing." The mistake occurred because some unknown person entered the wrong time of the hearing into CCAP. Had the temporary attorney continued on the case, he may well have called the clerk's office to confirm the date he wrote down or consulted CCAP. He, too, would have been given the incorrect information.

¶16 Here, the attorney promptly filed a motion to reopen. Permitting the default judgment to stand when it was the court system that provided the wrong information is a miscarriage of justice. In addition, Zurich's pleadings reveal a meritorious defense: namely, that Perry's damages were caused by the negligence of another. *See* ***J.L. Phillips & Assocs., Inc. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 363, 577 N.W.2d 13 (1998) ("[A] meritorious defense is a defense good at law that requires no more and no less than that which is needed to survive a motion for judgment on the pleadings."). Zurich represents that it was prepared to present witness testimony to rebut Perry's allegations that the tow of his truck caused damage. Accordingly, the order denying the reopening of the default

judgment is reversed and the cause is remanded. The trial court is also directed to obtain any monies paid to Perry and have such sums held by the clerk's office until the matter is resolved.

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

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