

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1997

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. 96-1819

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**ROHINI AVVARU AND LAL AVVARU,
HER HUSBAND,**

PLAINTIFFS-APPELLANTS,

V.

DR. GERALD D. O'MARRO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Reversed and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Rohini and Lal Avvaru appeal from a judgment entered after a jury ruled in favor of Dr. Gerald D. O'Marro. They claim that the trial court erred in not granting them default judgment against O'Marro because he

did not timely answer their complaint. We reverse and remand for further fact-finding as to whether O'Marro's failure to timely answer the complaint was the result of excusable neglect.

I.

This dental malpractice case was commenced on October 20, 1994, by the filing of a summons and complaint. An amended summons and complaint was filed on October 24, 1994, and was served on O'Marro on December 9, 1994. On December 15, 1994, O'Marro's counsel sent to the Avvarus' counsel a letter seeking an extension to respond to the complaint until January 6, 1995. Counsel for O'Marro asked opposing counsel to let him know "immediately" if he "will not agree to that extension." The Avvarus' counsel did not respond to the extension request.

On February 28, 1995, O'Marro's counsel's office noticed that an answer had not been filed in the case. That same day, counsel for O'Marro faxed a signed answer to opposing counsel. The next day, O'Marro's counsel hand-delivered a copy of the answer to the trial court.

The Avvarus' counsel filed motions to strike the answer as untimely and for default judgment. O'Marro's counsel, in turn, brought a motion to enlarge the time to file the answer. At the hearing on the motions, O'Marro's lawyer represented to the trial court that the delay in responding to the complaint by the lawyer to whom the case was assigned was the result of "the press of very, very heavy trial calendar, the press of the holiday season, and a very, very serious personal matter -- which [the lawyer to whom the case was originally assigned] would address in-camera but would not want to address in open court." In an affidavit in support of his motion for enlargement of time to answer, the lawyer

originally assigned to represent O'Marro offered to "reveal to the court and opposing counsel in camera" the specifics of his personal problems. The trial court declined the invitation to explore whether the alleged personal problems of the lawyer to whom O'Marro's defense was originally assigned constituted excusable neglect, but, rather, determined that the failure to answer was not the result of excusable neglect. Nevertheless, the trial court, invoking what it characterized as "the principles of justice," denied the motion for a default judgment, and granted to O'Marro leave to file an untimely answer.¹

II.

A decision to grant a party additional time to answer a complaint is within the discretion of the trial court and will not be disturbed on appeal unless an erroneous exercise of discretion is clearly shown. *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 470, 326 N.W.2d 727, 732 (1982). We will find an erroneous exercise of discretion "if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard." *Oostberg State Bank v. United Sav. & Loan Ass'n*, 130 Wis.2d 4, 11-12, 386 N.W.2d 53, 57 (1986).

The only issue is whether the trial court erroneously exercised its discretion in granting O'Marro additional time to serve and file his answer.²

¹ The transcript misspells "principles" as "principals."

² The Avvarus also argue the trial court erred when it denied their motion to strike O'Marro's answer and for default judgment. The law applicable to both is the same. See *Martin v. Griffin*, 117 Wis.2d 438, 442, 344 N.W.2d 206, 209 (Ct. App. 1984) ("The excusable neglect standard for determining whether to strike an untimely answer is substantially equivalent to the excusable neglect standard for granting a default judgment."). We will, therefore, respond to both claims in our discussion of a single issue.

Section 802.06(1), STATS., requires a defendant to serve an answer upon the plaintiff within 20 days after service of the complaint upon the defendant, but § 801.15(2)(a), STATS., grants the trial court power to enlarge the time for serving an answer.³ A trial court may grant relief under § 801.15(2)(a) if there are reasonable grounds for the noncompliance with the statutory time period; that is, where there is excusable neglect and the interests of justice would be served by the enlargement of time. *Hedtcke*, 109 Wis.2d at 468, 326 N.W.2d at 731. Press of business or holiday concerns are not, without more, sufficient to constitute “excusable neglect.” See *Giese v. Giese*, 43 Wis.2d 456, 461, 168 N.W.2d 832, 834 (1969). If the trial court determines there is no excusable neglect, the motion for enlargement must be denied. *Gerth v. American Star Ins. Co.*, 166 Wis.2d 1000, 1009, 480 N.W.2d 836, 840 (Ct. App. 1992) (“[B]efore the interests of justice compel a court to grant a motion to enlarge time, there must first be evidence of excusable neglect.”).

Here, the trial court did not find that the failure to timely answer was the result of excusable neglect. The trial court should not have, therefore, considered the interests of justice and prejudice to the parties. Yet, this is what the trial court did:

Really, what we get down to in this thing is a question of excusable neglect....

....

³ Under § 802.06(1), STATS., O’Marro was required to serve and file his answer on December 29, 1994. O’Marro’s counsel requested, and presumably received, an eight-day extension after sending the Avvarus’ counsel a letter requesting an extension to respond to the complaint until January 6, 1995. As noted, the letter asked the Avvarus’ counsel to respond immediately if he was not agreeable to that extension. Nevertheless, the answer was not filed by January 6, 1995.

First of all, I think the case law is well settled. Private workload of an attorney is not grounds for excusable neglect.

I think the personal reasons -- I don't think I want to subject [defense counsel] to that at this time, of going in chambers and indicating the personal reason for not being able to supply the Answer. There were other people in the law firm that, I think, probably could have taken over. Nevertheless, that's not the determining factor that this Court will address.

I think, in looking at it you have to look at all of the factors, you have to balance now the prejudice to all parties.

....

The Answer is on file. I don't see any prejudice to the plaintiff. I do think that -- I am not going to say this was "excusable neglect." I don't see it as being "excusable neglect."

Maybe if I took the in-camera statement from [defense counsel], I might have a different finding. I don't see it as that.

....

I think the Court finds this is just insensitive to the princip[les] of justice....

....

I did not ask [defense counsel] what the personal reason was. I don't want to go into his privacy and invade his privacy.

So, I am saying today that the excusable neglect argument to me is weak; but I think it is counter-balanced by the other factors I indicated.

The trial court erroneously exercised its discretion by applying the wrong legal standard; that is, it considered the interests of justice and prejudice to the parties before finding evidence of excusable neglect on the part of O'Marro's counsel in failing to timely file his answer. The trial court also erred in denying O'Marro's counsel an opportunity to develop a full and complete record regarding the facts and circumstances of his personal problems that may have led the trial

court to conclude that the late filing of O'Marro's answer was the result of excusable neglect. The lawyer's explanation may support his excusable-neglect argument. We, therefore, reverse and remand to the trial court with directions that it hold a hearing to determine whether O'Marro's counsel's alleged personal problems constituted excusable neglect. If the trial court concludes that the failure to timely file O'Marro's answer was the result of excusable neglect, the trial court should apply the interest-of-justice considerations. If the trial court finds excusable neglect and that the interest-of-justice considerations weigh against entering default judgment, it should reinstate the judgment entered on the jury verdict. If, however, the trial court determines that the failure to timely file the answer was not the result of excusable neglect, the trial court should enter default judgment against O'Marro and conduct further proceedings as necessary.

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

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

