COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3432

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

GIBBS, ROPER, LOOTS & WILLIAMS, S.C.,

PLAINTIFF-RESPONDENT,

V.

MEWS COMPANIES, INC. AND MEWS TRUCKING, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Mews Companies, Inc., and Mews Trucking, Inc., (collectively, "Mews") appeal from the trial court judgment, following a bench trial, awarding $65,040 in attorney's fees, plus interest, to Gibbs, Roper, Loots & Williams, S.C., (Gibbs), for its representation of Mews. Mews argues that the trial court erred in: (1) finding that no excusable neglect allowed for the amending of

the scheduling order to permit Mews to demand a jury trial; (2) failing to rule on Mews's motion for the trial court's disqualification; and (3) allowing Gibbs to recover attorney's fees for certain items which, Mews maintains, should not have been charged. We affirm.

I. BACKGROUND

In November 1994, Mews asked Attorney Chuck Magyera, who had represented Mews in numerous matters for many years, to take over the prosecution of a Waukesha County civil suit, in which Mews was the plaintiff, from another lawyer with whom Mews had become dissatisfied. Magyera recognized that the suit would be difficult and, as he advised Mews, that trying the case would be "a very expensive proposition." Nevertheless, Magyera agreed to represent Mews.

On January 1, 1995, Magyera joined the Gibbs firm. He advised Mews that, with his change of firms, his hourly rate had increased to $175. Mews retained Gibbs to replace Magyera's previous firm. In light of certain difficulties in the case, Magyera recommended settling the case. Magyera also advised Mews that trying the case would be expensive and asked whether, if no settlement were possible, Mews still wanted to try the case. Mews instructed Magyera to try the case.

The case was tried before a jury for seven days. The jury returned a verdict in favor of the defendants. Gibbs billed Mews for $65,040; Mews refused to pay. Gibbs offered a discount to resolve the bill and also offered to submit the matter to arbitration. When Mews refused both offers, Gibbs filed the action leading to this appeal.

On January 31, 1996, the trial court conducted a scheduling conference and set a trial date of August 8, 1996. The January 31 scheduling order provided, *inter alia*, "[j]ury fees shall be paid within 30 days of today's date or the jury shall be deemed waived." No jury demand was filed, however, and no fees were paid.

In April 1996, Mews's attorney, Daniel Fay, advised Mews that he knew of no meritorious defense to Gibbs's action. Fay asked for Mews's agreement allowing him to withdraw as counsel. When Mews did not agree, Fay filed a motion to withdraw stating "that the Defendant and counsel are unable to agree on strategy as to the defense of this case," and, in his supporting affidavit, stating his "belie[f] that this case cannot substantially be defended."

Several weeks later, Mews retained new counsel who, on July 31, 1996, filed a motion to, *inter alia*, (1) adjourn the trial; (2) amend the scheduling order to allow Mews to demand a jury trial and pay the jury fee, and/or (3) have the trial court make "a disability determination … pursuant to § 757.19(2)(g)."[1] On September 30, 1996, the trial court heard argument on the motion and concluded, in part:

> I'm also satisfied that Mr. Fay is an experienced lawyer. He's been practicing for many years. I'm also satisfied that there at least appears to be information that I think is reliable that Mr. Mews has been in and around the courts before. He's been in lawsuits before, been in litigation before, and he also then, like any other citizen, is bound to know the law, the Statutes of Wisconsin that apply to him like anybody else; and I'm satisfied that he had an opportunity to either pay the fees himself or to talk

[1] Section 757.19(2)(g), STATS., provides that "[a]ny judge shall disqualify himself or herself from any civil or criminal action or proceeding when … a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

> to Mr. Fay about what happened in the scheduling conference and what should we do, and to tender the monies to Mr. Fay to either pay the fees – and that either he or Mr. Fay could have done that. None of the fees were paid.
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> We're now about 18 days before trial; and now there is a request to pay the jury fees. I'm satisfied that … there is no justification for the delay in paying the fees, that there's not excusable neglect, and both the lawyer for the defendant and the defendant were knowledgeable people, and they knew their responsibilities, and as such I'm not going to grant the request to adjourn this case and to order a jury trial and allow fees to be paid at this time.
>
> I'm satisfied that further delay would have no meritorious position for either side in this case.

Neither at the September 30 hearing nor at any subsequent proceeding did Mews renew its request for the trial court's consideration of disqualification.[2]

II. DISCUSSION

Mews first argues that in denying its motion to modify the scheduling order to allow for the jury demand and jury fee payment, the trial court "erroneously exercised its discretion by basing its ruling upon mutually inconsistent findings of fact." Mews explains:

> It is undisputed that Mews instructed Atty. Fay to request a jury in this matter. It is undisputed that Fay failed to do so by the March 3, 1996, deadline. It is undisputed that Mews did not learn until July 15, 1996, that Fay had failed to request a jury. Until then, Mews had no reason to suspect that Fay had not done what his client had instructed.

[2] In fact, in his argument at the September 30 hearing, counsel for Mews commented: "Would the result of this case differ in front of the judge or jury? I don't know." He also commented that his determination of whether to call expert witnesses was made, in part, "with anticipation of a court trial." Although counsel was seeking a jury trial, he never objected to Judge Lee Wells presiding over either a jury or bench trial.

> The Circuit Court specifically found, however, "that Mr. Fay is an experienced lawyer. He's been practicing for many years." The Court further ruled that Fay and Mews "knew their responsibilities …." The Court's own findings support the inference that it was perfectly reasonable for Mews to rely on Atty. Fay to comply with his client's instructions to demand a jury.
>
> The Circuit Court then ruled, however, that Mews' failure to discover that Fay had not requested a jury was not excusable neglect. The Court puts the responsibility on Mews to guess that Fay did not follow instructions.
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> > [Mews has] been in lawsuits before. He's been in litigation before, and he also then, like any other citizen, is bound to know the law, the Statutes of Wisconsin that apply to him like anybody else; and I'm satisfied that he had an opportunity to either pay the fees himself or talk to Mr. Fay about what happened in the scheduling conference and what should we do, and to tender the monies to Mr. Fay to either pay the fees – and that either he or Mr. Fay could have done that.
>
> The issue, however, was not whether Mews knew the statutory requirement to demand a jury. Clearly Mews did know; that's why Mews instructed Fay to do so. Rather, the issue is whether it was reasonable for Mews to count on Fay to request a jury when so instructed.
>
> This is where the Circuit Court's logic breaks down. On one hand, the Court finds that Fay "is an experienced lawyer" who knows his responsibilities. On the other, the Court rules that Mews should have somehow known that Fay had not done his job and requested a jury. The Court cannot have it both ways. If Fay is indeed an experienced lawyer who knows his responsibilities, as the Court explicitly ruled, then Mews had every reason to expect Fay would demand a jury when told to do so by his client. Instead, the Court found it *inexcusable* on Mews' part to fail to discover that Fay had not requested a jury.

(Record references omitted).

When a jury fee has not been timely paid, a court may, in its discretion, enlarge the time for payment upon a finding of "excusable neglect." ***Chitwood v. A.O. Smith Harvestore Products, Inc.***, 170 Wis.2d 622, 628-29, 489

N.W.2d 697, 701 (Ct. App. 1992). "The decision of whether a scheduling order will be modified is within the trial court's discretion, and its decision will only be reversed for an [erroneous exercise] of discretion." ***Alexander v. Riegert***, 141 Wis.2d 294, 298, 414 N.W.2d 636, 638 (1987). Further, "[t]he test is not whether [an appellate] court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised." ***Id.***

In this case, we acknowledge the logic of certain aspects of Mews's argument, and we realize that the trial court could have granted Mews's request. We also must recognize, however, that the trial court's decision was, as Gibbs argues, "consistent with settled law that if a litigant fails to stay reasonably apprised of the matter … the mistakes of his counsel are appropriately laid at his own door." Indeed, Mews offers no reply to Gibbs's argument that "settled law bind[s] a litigant to the acts of its counsel irrespective of the client's asserted personal lack of fault." *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Gibbs is correct. In ***Wagner v. Springaire Corp.***, 50 Wis.2d 212, 184 N.W.2d 88 (1971), the supreme court explained:

> [M]istakes, ill advice, or other failures of an attorney may constitute "excusable neglect" by a client, where the client has acted as a reasonable and prudent person in engaging an attorney of good reputation, has relied upon him to protect his rights, *and has made reasonable inquiry concerning the proceedings* …. [W]hile the trial court need not impute the negligence of the attorney to the client, it has the discretionary power to do so. In each case, the trial court must exercise its "equitable powers to secure substantial justice between the parties." This may or may not call for imputation, depending on the facts of each case.

Id. at 221, 184 N.W.2d at 93 (emphasis added; citation omitted). Further, in ***Dugenske v. Dugenske***, 80 Wis.2d 64, 257 N.W.2d 865 (1977), a case in which the supreme court considered whether the trial court erroneously exercised discretion in denying a party's motion to vacate a default judgment resulting from the party's former lawyer misplacing the case files while in the process of relocating his law office, ***id.*** at 66-67, 257 N.W.2d at 866-67, the court explained that, even in such circumstances that would seem to militate against the imputation of a lawyer's negligence to a client,

> there are countervailing factors to be considered. Among them are, a policy in favor of the finality of judgments, the probability that a policy which excused or tolerated a lawyer's neglect would foster delay in litigation and a further belief that the quality of legal representation is best maintained by refusing to overlook the effects of a lawyer's negligence.

Id. at 70, 257 N.W.2d at 868.

In the instant case, Mews has failed to establish that it "made reasonable inquiry" of its lawyer "concerning the proceedings" to determine whether the jury demand had been made and the jury fee paid. Mews has failed to show any specific factor that would establish that its neglect was excusable or that it should escape imputation of its former counsel's failure. Mews was responsible to make such "reasonable inquiry" and make that showing. As Gibbs argues:

> Mews did not explain to the Trial Court why the failure to demand a jury or pay the fee for over 150 days was reasonable, or why these failures were not discovered until July 1996, or why these failures resulted from anything other than ordinary neglect, carelessness or inattentiveness.

Although the trial court's comments were brief and its analysis less thorough than we would expect, the trial court did consider the specific facts of the case in exercising "its 'equitable powers to secure substantial justice between the parties,'" ***Wagner***, 50 Wis.2d at 221, 184 N.W.2d at 93. Based on this record, we

cannot conclude that the trial court erroneously exercised discretion in denying Mews's motion.[3]

Mews also argues that the trial court erred in failing to act on its motion for disqualification, based on its concern that the trial judge, having been informed by Attorney Fay that the case could not "substantially be defended," could not be impartial. As noted, however, while Mews's motion presented its request for the trial court's consideration of disqualification, Mews never again raised any disqualification issue or challenged the impartiality of the trial judge. Thus, Mews has waived this issue on appeal. *See* ***Berna-Mork v. Jones***, 173 Wis.2d 733, 739-40, 496 N.W.2d 637, 641 (Ct. App. 1992) ("'The burden is on the party making a motion to obtain a ruling from the court and failure to do so constitutes a waiver of the motion precluding its consideration on appeal.'") (Citation omitted.)

Finally, Mews argues that the trial court erred "in awarding recovery for items on the legal bills for which the defendant undisputedly was never informed it would be charged." Specifically, Mews maintains that charges for the time of paralegals and lawyers other than Magyera were improper, and that Gibbs's "bills were not itemized to allow Mews to know for who's [sic] services he was being charged." Mews also contends that "when more than one Gibbs' [sic] attorney worked on an issue, Gibbs would remove any reference to a second

[3] Mews also argues, "Fundamental Fairness and the Interests of Justice Require That Mews Be Allowed to Try this Case to a Jury." Mews has not, however, cited any additional authority in support of this undeveloped argument. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments); *see also* ***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.").

attorney's work on that issue, but still bill for that attorney's time, hiding the charge in the lump sum total."

Once again, however, Mews offers no reply to Gibbs's response. Gibbs argues:

> Judge Wells heard a great deal of evidence at trial that the fees sought by Gibbs, Roper were reasonable, based on the complexity and difficulty of the [Waukesha County case] litigation; the experience and skill of Gibbs, Roper attorneys who worked on the matter; the quality of the services they provided; and the damage done to the case by acts and omissions of Mews' previous counsel. Judge Wells concluded that all of the fees sought by Gibbs, Roper were reasonable under SCR 20:1.5(a)[, setting forth "[t]he factors to be considered in determining the reasonableness of a fee"].

(Record references omitted). Further, Mews offers no reply to Gibbs's explanation (1) that Mews retained not only Magyera, but Magyera's law firm, and (2) as the trial court reasoned, that the work of paralegals and other lawyers, billed at lower rates that Magyera's, actually reduced what otherwise would have been Mews's legal costs.

A determination of whether legal fees are reasonable is committed to a trial court's discretion and will not be upset on appeal unless the trial court erroneously exercised discretion. ***Standard Theatres, Inc. v. DOT***, 118 Wis.2d 730, 747, 349 N.W.2d 661, 671 (1984). Mews has offered absolutely nothing to suggest that the trial court erroneously exercised discretion in determining that the Gibbs legal fees were reasonable.

By the Court.—Judgment affirmed.

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