

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 99-0157
99-1042**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ANDERSON B. CONNOR AND THELMA A. CONNOR,

PLAINTIFFS-RESPONDENTS,

V.

SARA CONNOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Sara Connor appeals a default judgment and an order denying her motion to vacate the judgment. The trial court found that her former attorney had not been granted a courtesy extension for filing the answer, and concluded that his alleged belief that he had a courtesy extension did not

constitute excusable neglect. Sara argues that the court should have conducted an evidentiary hearing to resolve the conflict in the affidavits presented by the parties, that it considered improper factors and failed to consider mandatory factors when deciding these issues, and that the court should not have imputed counsel's neglect to his client. We reject these arguments and affirm the judgment and order.

¶2 Anderson and Thelma Connor commenced this action on June 10, 1998, alleging a violation of easement rights and requesting injunctive relief and damages. The summons notified Sara that she was required to file an answer within forty-five days. During the forty-five day period, the court held a hearing on a temporary injunction and granted the injunction. After the hearing, Sara informed her attorney, Steven Polich, that he would be replaced by other counsel. Polich served an answer and affirmative defenses on August 4, 1998, five days after the time for answering expired. He was then substituted out of the case by order dated August 26, 1998.

¶3 Polich submitted two affidavits stating that Anderson and Thelma's counsel granted him a courtesy extension for filing the answer until discovery was completed. Anderson and Thelma's counsel denied granting any extension. The trial court found that no extension had been granted and it entered a default judgment. The court also denied Sara's motion to vacate the judgment, concluding that Polich's alleged belief that he had been granted an extension did not constitute excusable neglect, and imputing his inexcusable neglect to his client.

¶4 The trial court properly decided the motion for default judgment and the motion to vacate the judgment on the basis of the parties' affidavits. The court offered Sara's new counsel an evidentiary hearing but counsel declined the offer,

choosing instead to rely on Polich's affidavits. Therefore, Sara waived the issue of whether an evidentiary hearing was required.

¶5 Sara argues that the court improperly considered whether the fourteen days after the hearing on the preliminary injunction provided sufficient time to draft an answer and that the court erred in implying that a courtesy extension must be in writing. The trial court properly considered these factors because they relate to Polich's credibility.

¶6 The record supports the trial court's findings that Polich's affidavits are not credible and that no courtesy extension had been granted. Polich's explanation for requesting an extension was that he wanted to complete discovery before filing the answer. As the trial court noted, this action did not require discovery before the answer could be filed. In fact, Polich filed the answer with affirmative defenses before discovery was completed, underscoring the lack of need for an extension. Polich contends that he filed the answer so that his replacement counsel would not have to rely on his courtesy extension. This explanation makes no sense because replacement counsel would have to rely on the courtesy extension in any event. Finally, none of the letters between counsel contain any reference to a courtesy extension. In the absence of documentary evidence supporting the assertion that a courtesy extension had been granted, and considering the lack of need for an extension, the trial court properly found that Polich's affidavits were not credible.

¶7 Sara argues that the trial court failed to consider established judicial policy favoring granting litigants their day in court when it resolved the conflict in the affidavits and found no excusable neglect. The trial court's duty to determine the credibility of witnesses should not be influenced by a desire to avoid default

judgments. Likewise, despite the desire to give litigants their day in court, the court may not grant relief from a default unless excusable neglect is established. *See Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). Excusable neglect is “that neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Id.* The court’s preference to give litigants their day in court does not extend to excusing or tolerating a lawyer’s neglect that fosters delay in litigation and lowers the quality of legal representation. *See Dugenske v. Dugenske*, 80 Wis. 2d 64, 70, 257 N.W.2d 865 (1977). Polich’s alleged confusion over the courtesy extension is not supported by anything other than his subjective expectations. The trial court properly exercised its discretion when it refused to characterize Polich’s beliefs as excusable neglect.

¶8 Sara next argues that the trial court was required to consider whether she had effective assistance of counsel, whether her failure to timely answer was the result of a conscious, deliberate and well-informed choice and whether there existed a meritorious defense to the complaint. The cases she cites involve a motion for relief from a stipulation, not a default judgment, and these factors relate to whether the court should apply WIS. STAT. § 806.07(1)(h) (1997-98) after the time for proving excusable neglect has expired. *See Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 150-51 (1994); *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 551-54, 363 N.W.2d 419 (1995). Neither of these cases require the court to consider the effectiveness of counsel or the defendant’s conscious choice when considering relief from a default judgment in which excusable neglect is alleged. In fact, almost all of the appellate cases in which inexcusable neglect is found can be attributed to ineffective counsel and negligence rather than conscious, deliberate and well-informed choices of the defendant. To apply these rules to

determine excusable neglect in a default judgment setting would render the deadlines meaningless by creating excusable neglect in virtually every case.

¶9 The court also properly reached its decision without considering whether the untimely answer presented a viable defense. That issue arises only if the court finds excusable neglect. *See Hansher v. Kiashian*, 79 Wis. 2d 374, 391, 255 N.W.2d 564 (1977).

¶10 Finally, the court properly imputed counsel's inexcusable neglect to his client. A factor in determining whether to impute the attorney's negligence is whether the client made reasonable inquiry into the proceedings. *See Charolais Breeding Ranches v. Wiegel*, 92 Wis. 2d 498, 514, 285 N.W.2d 720 (1979). Nothing in the record suggests that Polich informed Sara that he had a courtesy extension or that she ever asked. Knowing that she had informed Polich that he would be substituted as counsel before the answer was due, Sara did not inquire about the status of the answer. A reasonable client would have realized the potential for default that arises from switching counsel before the due date, and would have made reasonable inquiry to ensure that the answer was timely filed.

By the Court.—Judgment and order affirmed.

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

