COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2814

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

AMY M. KORDUS,

PLAINTIFF-APPELLANT,

V.

KATHERINE A. PARKS AND
AMERICAN FAMILY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER and THOMAS P. DONEGAN, Judges.[1] *Affirmed.*

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

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[1] Judge Schellinger entered the dismissal order and heard the first motion to reconsider. Judge Donegan presided over the second motion to reconsider.

¶1 PER CURIAM. Amy M. Kordus appeals from the trial court's orders denying her motions for reconsideration of the order dismissing her case entered on June 3, 1999. On appeal, Kordus argues that the trial court erroneously exercised its discretion in refusing to overturn the dismissal order entered after her attorney failed to appear at a pretrial conference. She claims the facts surrounding her attorney's failure to appear constituted excusable neglect under WIS. STAT. § 806.07(1)(a)[2] and, therefore, the court should have relieved her of the dismissal order. We disagree and, we affirm.

I. BACKGROUND.

¶2 These proceedings began when Kordus, who was a passenger in a car driven by Kathryn Parks, was injured in a motor vehicle accident that occurred on August 18, 1995. John Miller Carroll, Kordus' attorney, sued Parks and her auto insurer, American Family Insurance Company, claiming she suffered personal injuries as a result of the accident.

¶3 After several substantial delays, a scheduling conference was held on December 28, 1998. An associate of Attorney Carroll's appeared for Kordus. At that time, a final pretrial conference was scheduled for June 3, 1999. However, on June 3, 1999, no one appeared on behalf of Kordus. The trial court contacted Attorney Carroll's office and was informed that he was in court in Sheboygan on another matter. The trial court reviewed the history of the case and made a record of the various extensions and delays caused by Kordus and her attorney. At the conclusion of the hearing, the trial court dismissed the case with prejudice.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 Attorney Carroll, on Kordus' behalf, filed a motion for reconsideration alleging that he failed to appear at the pretrial conference because he was never notified of the hearing date. He first argued that his absence was excused because he was not the attorney of record, but the trial court found to the contrary. Next, Attorney Carroll argued that the file did not contain a scheduling order and that the pretrial date had not been entered on his calendar. Attorney Carroll blamed the oversight on his associate who, according to Attorney Carroll, was undergoing chemotherapy treatment for cancer at the time of the scheduling conference, which, Attorney Carroll alleged, caused his associate's failure to properly document the pretrial conference date. In refusing to accept that excuse, the trial court noted that opposing counsel had faxed a pretrial report to Attorney Carroll's office the day before the pretrial conference. The court indicated that the report should have alerted counsel to the fact that a pretrial conference had been scheduled and was imminent. Counsel offered no explanation as to why his office failed to contact the court to inquire as to the date of the pending pretrial conference, except to say that the pretrial report was filed late. The trial court found insufficient evidence to warrant a finding of excusable neglect and denied Attorney Carroll's motion.

¶5 Attorney Carroll filed a second motion for reconsideration. In support of the second motion, Attorney Carroll attached a copy of his calendar in an effort to demonstrate that the date of the pretrial conference was not noted. Attorney Carroll again argued that his failure to appear at the pretrial conference constituted excusable neglect because the associate's illness caused him to fail to notify him of the date of the pretrial conference. The trial court observed that Attorney Carroll's argument in the second motion for reconsideration appeared to mirror his argument in the first motion, but the trial court allowed him to proceed

based upon his representations that new information relevant to the proceedings was forthcoming. Attorney Carroll then offered testimony from the associate who, contrary to Attorney Carroll's representations, indicated that his illness had not impaired his ability to perform his obligations, and that he had, in fact, placed the pretrial order into the case file for entry into the master calendar. Additional testimony followed from one of the office secretaries who indicated that the pretrial date did not appear on any of the office calendars. The trial court found that the issues presented at the second motion were identical to the issues raised at the first motion. Thus, the trial court concluded that the second motion failed to raise any new arguments and the trial court then denied Kordus' second motion for reconsideration.

II. ANALYSIS.

¶6 WISCONSIN STAT. § 806.07(1)(a) permits the trial court to relieve a party from a judgment or order if the party is able to demonstrate "excusable neglect." "Excusable neglect … is that neglect which might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness." ***Price v. Hart***, 166 Wis. 2d 182, 194-95, 480 N.W.2d 249 (Ct. App. 1991). Whether a judgment or order should be vacated because of excusable neglect under § 806.07 is a discretionary decision which this court will not overturn absent an erroneous exercise of discretion. *See* ***Breuer v. Town of Addison***, 194 Wis. 2d 616, 625, 534 N.W.2d 634 (Ct. App. 1995). "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.***; *see also* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982) ("[A]ll that this court need find to sustain a discretionary act is that the trial court

examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.").

¶7 Attorney Carroll argues that the trial court erred in dismissing Kordus' case and denying the motions for reconsideration because his failure to appear at a pretrial conference constituted excusable neglect. Attorney Carroll contends that he failed to appear at the pretrial conference because he was never notified of the date on which the pretrial was to be held. Attorney Carroll asserts that the associate's chemotherapy treatment caused him to fail to convey the information regarding the pretrial conference to the proper person. Attorney Carroll avers that his "actions were nevertheless the acts of a reasonably prudent person under the circumstances ... because it cannot reasonably be expected that the lead attorney in a lawsuit will be looking over the shoulders of an associate at every moment to make sure that the associate carries out every ministerial action assigned to him." Therefore, Attorney Carroll concludes the trial court erroneously exercised its discretion in denying the motions to reconsider. We disagree.

¶8 We are satisfied that the trial court properly exercised its discretion in denying Attorney Carroll's motions to reconsider. At the hearing on Attorney Carroll's first motion to reconsider, the trial court made a thorough record and provided numerous reasons supporting its decision to deny the motion. In response to Attorney Carroll's argument that he failed to appear at the pretrial because his associate never notified him of the date and time of the pretrial conference, allegedly due to the associate's illness, the trial court indicated that Attorney Carroll failed to provide affidavit testimony from the associate supporting these assertions.

¶9 At the first hearing, Attorney Carroll maintained that he was not counsel of record, but rather, his associate was counsel of record at the pretrial conference. In response, the trial court provided a detailed litany of the correspondence and proceedings relating to this case from its inception, identifying Attorney Carroll as counsel of record. The trial court indicated that while it was certainly proper for the associate to appear on the client's behalf at the scheduling conference, the record conclusively demonstrated that the associate was not counsel of record for purposes of this case.

¶10 The trial court then discussed concerns about Attorney Carroll's office procedures and whether sufficient procedures were in place to ensure that files were properly handled. The trial court indicated that, as counsel of record, it was Attorney Carroll's responsibility "to ask the appropriate questions of people who go to court for you." Further, the trial court relied on a pretrial report sent to Attorney Carroll from opposing counsel prior to the pretrial conference. The trial court noted that the report should have caused Attorney Carroll to inquire about the obviously impending pretrial. Attorney Carroll, however, contacted neither the court nor opposing counsel. The court averred that it did not believe Attorney Carroll's contentions that he had never received the report because his assertion was contrary to the record. The trial court also indicated that when Attorney Carroll failed to appear, it contacted his office directly to inform him that he was due in court, but that it was told that counsel was out of town.[3] Finally, in denying the motions, the trial court stated, "I don't have what amounts to a brief on excusable neglect before me today. I don't have a detailed recitation of fact with

[3] Opposing counsel also correctly indicated that the trial court's dismissal was not only predicated on counsel's failure to appear at the pretrial conference, but also the history of delays prompted by Kordus and Attorney Carroll which plagued this case.

accompanying affidavits that explain why this should be deemed excusable neglect. I just have your statements on the record not even supported by documentation."

¶11 We agree with the trial court's reasoned analysis. The trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a reasonable conclusion. We are satisfied that the trial court properly exercised its discretion in denying Attorney Carroll's first motion for reconsideration.

¶12 Attorney Carroll also challenges the denial of his second motion for reconsideration before a different trial court. "'Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [previous motion]." ***Rothwell Cotton Co. v. Rosenthall***, 827 F.2d 246, 251 (7th Cir. 1987) (citation omitted). We are satisfied that the trial court correctly determined that Attorney Carroll failed to present any new information in the second motion.

¶13 At the hearing on Attorney Carroll's second motion for reconsideration, the trial court began by inquiring whether Attorney Carroll was able to present any new information. Attorney Carroll asserted that the new information consisted of his associate's testimony, as well as the fact that he had not been aware that the associate appeared at the pretrial conference. However, the trial court indicated that Attorney Carroll made this argument in the first motion. Reading from the transcript of the first hearing, the trial court noted that counsel had argued at that first hearing, "Judge, I just learned some new

information on this case that was brought by the defendant's counsel. Apparently there was a scheduling order." The trial court then surmised, "[s]o back at that period you were saying there was a scheduling order you didn't know about, and that's what you're saying now." Attorney Carroll responded that although the argument may be the same, the trial court failed to address the issue during the first motion. Again, this assertion is belied by the record.

¶14 The transcript of the hearing on Attorney Carroll's first motion indicates that the trial court considered Attorney Carroll's argument that his associate, who was allegedly ill, was responsible for failing to notify counsel of the pretrial conference. Specifically, the trial court asserted:

> I'm told there's an attorney who is very sick[,] and you know how very sick[,] who is handling cases for you. There's no indication you've done anything to make sure your [sic] apprised of upcoming dates, and you knew for sure this case hadn't been resolved, so there would have to be an upcoming date of some sort.

Therefore, contrary to Attorney Carroll's assertions at the second hearing, the record indicates that this argument was presented at the first hearing and the trial court considered it, but chose to place the obligation to be aware of impending proceedings on the counsel of record and not his associate.

¶15 Moreover, at the second hearing the trial court indicated that "the fact that [counsel] didn't know what was going on in [his] office was discussed then, and it is being discussed now." Further, the trial court, reading from the transcript of the first hearing, indicated that Attorney Carroll stated, "I'm not blaming Mr. Bailey. I'm just indicating to [the court] I think there was some confusion, and I think you might need Mr. Bailey here to figure that out." The reviewing court asserted, "[s]o you made the same argument. [But] [y]ou didn't

have him there." We agree with the reviewing trial court's conclusion that no new information was presented at the second motion.

¶16 At the later hearing, Attorney Carroll also argued that, although a similar argument may have been presented at the earlier hearing, he had not been able to put on any proof at the first hearing. In response, the trial court allowed him to make an offer of proof in the form of testimony from his associate, as well as a member of his office staff. In support of the offer of proof, first the associate testified that he had been undergoing chemotherapy at the time of the scheduling conference, but that contrary to Attorney Carroll's allegations, the treatment did not affect his performance and that he specifically recalled placing the scheduling order in the case file. Next, Attorney Carroll's secretary testified that the date of the pretrial conference did not appear on the office calendar and that she has never found the scheduling order. The trial court denied the motion, finding that this testimony did not relieve counsel of the obligation to inquire about the impending pretrial conference when he received the pretrial report faxed by opposing counsel. Thus, in again denying the motion, the trial court asserted:

> Well I think the sole issue I have to address first is whether or not this hearing can even go forward, and I raised some questions about that at the beginning of the proceedings. And Mr. Carroll basically argued that there are new facts beyond what was argued previously or beyond what was brought to Judge Schellinger's attention that in effect makes this a new motion and ... hearing what those new facts are, I did not find that this is a new motion.
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> The argument was that there was excusable neglect that should have made the judge reconsider dismissing the case back when she did. The essentials of that argument were brought forward last time, and I think Judge Schellinger was clear in her basis for dismissing that it was the actions of missing the pretrial that she did not find excusable and other actions that preceded during the case prior to that all lead to the judge's decision to dismiss and not to grant the motion to reconsider. I don't find there's anything

> materially new that supports this attempt to have a second motion. And, therefore, I don't believe it is properly before me.

We agree with the trial court's reasoned analysis that Attorney Carroll's offer of proof failed to establish excusable neglect. Therefore, we conclude that the trial court properly exercised its discretion in denying the second motion for reconsideration. For all of the above stated reasons, we affirm.

By the Court.—Orders affirmed.

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