COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2000

Cornelia G. Clark
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.

No. 00-1202

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

ROBERT WALDMAN,

PLAINTIFF-APPELLANT,

V.

GREG REA AND EXCEL AUTO BODY, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Robert Waldman filed this action seeking return of his automobile from Greg Rea and Excel Autobody, Inc., and double damages and attorney fees for violations of WIS. ADMIN. CODE § ATCP 132. He appeals

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98).

the trial court's order denying his motion to reopen the order dismissing his action for failure to respond to discovery requests. We conclude the trial court properly exercised its discretion in denying the motion to reopen, and we affirm. We therefore do not address Waldman's contention that the trial court erred in denying his motion for pretrial replevin.

BACKGROUND

¶2 The amended complaint, filed on December 18, 1998, alleged that Rhea refused to return Waldman's 1956 Chevrolet Model 210 and claimed more money was due for the body work and repainting, even though the original estimate had been $9,275 and Waldman had already paid Rhea $22,690. The amended complaint asserted that the failure to provide an initial written estimate or an estimate of any kind for certain additional repairs discussed after the initial estimate was a violation of WIS. ADMIN. CODE §§ ATCP 132.02(2)(3) and 132.04(2)(a). With the complaint, Waldman filed a motion for immediate return of the automobile under WIS. STAT. § 810.02 (1997-98)[2] along with his affidavit. Rhea filed an answer, a counterclaim for a mechanics lien, and his affidavit opposing the motion. He averred that all the work done had been at Waldman's request; he had never agreed to perform all the work for $10,000; and Waldman still owed $8,859.06.

¶3 After a hearing, the trial court issued a memorandum decision on February 17, 1999, denying the motion. The court concluded that, based on the submissions, there was an issue of fact concerning whether Waldman authorized

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

Rhea to do further work on his automobile, and, therefore, whether Rhea had a valid mechanic's lien.

¶4 About a year later, on February 2, 2000, the defendants' attorney moved to dismiss the action on the ground that Waldman had failed to respond to discovery requests delivered on February 25, 1999. They were prejudiced, the defendants asserted, because they had been unable to conduct meaningful discovery for the trial set for March 1, 2000. The motion also asserted that by failing to respond to requests for admissions, Waldman had admitted facts which, in order to prevail at trial, he must prove were untrue. The motion was accompanied by the defendants' counsel's affidavit attesting to the service on Waldman's attorney of interrogatories, requests for admissions, and request for production of documents on February 25, 1999, to extensions given, and to a letter dated December 9, 1999, asking for the responses within one week, to which there had been no response.

¶5 Neither Waldman nor his attorney appeared at the February 11, 2000 hearing on the motion. The court granted the defendants' motion to dismiss. The written order, entered on February 14, 2000, dismissed the action with prejudice on two grounds: (1) Waldman's failure to respond to the requests for admissions in a timely manner constituted admissions under WIS. STAT. § 804.11(2), with the result that Waldman would be unable to prove his case at trial; and (2) Waldman had failed to timely respond to the discovery documents despite repeated requests and had failed to present any reason for that failure; therefore, the court was striking the pleadings.

¶6 On February 15, 2000, Waldman filed a motion to reopen on the grounds of mistake, inadvertence, or excusable neglect under WIS. STAT.

§ 806.07(1)(a),[3] accompanied by an affidavit of Waldman's counsel. He averred that he had received the notice of motion hearing for February 11, but had mistakenly entered it in his computer calendar for February 18, "in the speed of current office practice"; when he discovered the error on the afternoon of February 11, he had faxed letters to the court and opposing counsel, and the responses to the discovery requests had now been provided.

¶7 Both counsel filed briefs and supplemental affidavits relating to the circumstances of the late discovery responses. After a hearing the court denied the motion to reopen. The court concluded that Waldman had not shown excusable neglect or any other ground for reopening the order of dismissal. The court also concluded the factual basis for the order of dismissal, which was defendants' counsel's affidavit, had not been controverted by Waldman, and that factual basis made the order of dismissal still appropriate. The court stated it was not finding egregious conduct by Waldman or counsel in failing to respond to the discovery requests, but the failure prevented the defendants from preparing for trial. The court identified the crucial question as one of fairness: whether it was fair to the defendants to reopen the order of dismissal and reschedule a trial, on the one hand, and, on the other hand, whether it was fair to Waldman to leave the dismissal order in place, which the court acknowledged was a "drastic remedy." The court concluded the appropriate resolution was to leave the dismissal order in place

[3] WISCONSIN STAT. § 806.07 provides in part:

> (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.

because the defendants had done everything required of them in a timely manner, while Waldman had not, and he had not shown excusable neglect or any other basis to grant relief from the dismissal.

DISCUSSION

¶8 Waldman contends on appeal that the trial court erroneously exercised its discretion in granting the defendants' motion to dismiss the action for failure to respond to discovery requests. However, the threshold question is whether the trial court erred in denying the motion to reopen the order of dismissal. We therefore begin with this issue, and it is dispositive.

¶9 A trial court has wide discretion in ruling on a motion to reopen or vacate a judgment. *See* ***Price v. Hart***, 166 Wis. 2d 182, 195, 480 N.W.2d 249 (Ct. App. 1991). We affirm a trial court's discretionary ruling if it is based on the facts of record, applies the correct law, and is the product of a rational mental process. *See* ***id.*** In determining whether a party's failure to attend a hearing or to meet a deadline meets the standard imposed by WIS. STAT. § 806.07(1)(a), the court asks whether the neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984) (citation omitted). "Excusable neglect" is not synonymous with neglect, carelessness or inattentiveness, and it is not sufficient that the failure be unintentional and in that sense a mistake or inadvertent, "'since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect.'" ***Id.*** (citation omitted). Applying this standard, appellate courts have upheld trial court determinations that an attorney's failure to timely answer did not constitute excusable neglect when it was due to the pressure of work and personal affairs,

including his spouse's long illness, *see* ***Wagner v. Springaire Corp.***, 50 Wis. 2d. 212, 218, 184 N.W.2d 88 (1971), and when it was due to misplacing files in the process of relocating offices. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 257 N.W.2d 865 (1977).

¶10 We conclude the trial court properly exercised its discretion in deciding that Waldman's counsel had not shown excusable neglect. He offered no facts showing that a reasonably prudent person under the same circumstances might have made the same mistake. The trial court could reasonably conclude that a reasonably prudent lawyer has some backup system for calendaring hearings, so that if he or she does make a mistake in entering the date, that mistake is caught. If it is reasonable for a trial court to decide that the press of business coupled with a spouse's prolonged illness does not make neglect excusable, then it is reasonable for this trial court to decide that the "speed of current office practice" does not make neglect excusable.

¶11 Since no excusable neglect was shown, the trial court need not consider the merits of the position the moving party would advance if the judgment entered because of a default were vacated. *See* ***J.L. Phillips & Assoc. v. E&H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13 (1998) (party moving to vacate default judgment under WIS. STAT. § 806.07(1)(a) must demonstrate: (1) judgment was obtained as result of mistake, inadvertence, surprise or excusable neglect; *and* (2) he or she has meritorious defense to action); *see also* ***Dugenske***, 80 Wis. 2d at 71. Nevertheless, the trial court here did consider Waldman's submissions challenging the merits of the dismissal order and decided that a dismissal was still appropriate. The trial court recognized that, at bottom, decisions on the motion to reopen and on the motion for dismissal because of failure to respond to discovery requests both involved a balancing of equities. The

court thoughtfully and thoroughly explained its conclusion that the fairer result was not to reopen the judgment. We are persuaded the trial court properly exercised its discretion in doing so.

¶12 Because we are affirming the order denying the motion to reopen the order of dismissal, it is not necessary to separately address Waldman's challenge to the dismissal order, nor is it necessary to address his challenge to the order denying his motion for pretrial replevin.

By the Court.—Order affirmed.

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