

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 29, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**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.

**Appeal No. 2012AP1009**

**Cir. Ct. No. 2011CV2389**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**NAKEITA V. MONTGOMERY SHAW,**

**PLAINTIFF-APPELLANT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND  
EXECUTIVE MANAGEMENT,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Nakeita V. Montgomery Shaw, *pro se*, appeals the circuit court's order denying her motion to reopen an order dismissing her action

for want of prosecution. *See* WIS. STAT. § 806.07 (2011-12).<sup>1</sup> The issue is whether the circuit court properly exercised its discretion in denying the motion to reopen. We affirm.

¶2 Shaw sought unemployment insurance benefits after separation from employment with Executive Management Service. The Labor and Industry Review Commission ruled that she was not entitled to benefits because she voluntarily terminated her employment. Shaw sought judicial review of the commission's decision. Four months later, the circuit court issued a notice stating that Shaw's cause of action would be dismissed in two weeks unless she asked for a continuance and filed an affidavit indicating that she had served the commission. Shaw did not respond, so the circuit court dismissed her action for failure to prosecute. Seven months later, Shaw brought a motion to reopen the circuit court's judgment, explaining that she had just received the circuit court's notice that the case was going to be dismissed. She attributed the delay to a problem with the post office. After a hearing, the circuit court denied the motion to reopen.

¶3 Shaw argues that the circuit court should have reopened the order dismissing her case because she did not receive notice that the case was set for dismissal. We review a circuit court's order denying a motion to reopen brought pursuant to WIS. STAT. § 806.07 for an erroneous exercise of discretion. *See Franke v. Franke*, 2004 WI 8, ¶54, 268 Wis. 2d 360, 674 N.W.2d 832.

¶4 The circuit court issued its oral ruling denying the motion to reopen at a hearing on April 12, 2012, but Shaw has not provided us with a transcript of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that hearing. We are unable to determine whether the circuit court misused its discretion in denying the motion to reopen unless we examine a transcript of the proceeding because the circuit court explained the reasons for its decision orally, not in writing. See *Jocius v. Jocius*, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998). Where, as here, “an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court’s ruling.” *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). Therefore, we assume that the circuit court properly exercised its discretion in denying Shaw’s motion to reopen, and affirm the circuit court’s order.

¶5 Even if Shaw had shown that she did not timely receive notice that the case was going to be dismissed due to an error by the post office, she would not be entitled to relief from the order dismissing her case for failure to prosecute because she has presented no proof that she served the commission in the underlying case. When Shaw moved to reopen, she did not present any proof to contradict the commission’s affidavit stating that it had never been served. Because Shaw has not presented any proof that she served the commission, the circuit court properly dismissed her action for failure to prosecute her claim.

*By the Court.*—Order affirmed.

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

