

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 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. 00-1295

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT 1

HENRY J. GEFKE,

PLAINTIFF-RESPONDENT,

v.

**RUTHANNES RIVER CENTRE CLEANER,
RUTHANNE PROKO AND STEVEN C. PROKO,**

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Reversed and cause remanded with directions.*

¶1 WEDEMEYER, P.J.¹ Ruthannes River Centre Cleaner, Ruthanne Proko and Steven C. Proko appeal from an order denying a motion seeking to open a default judgment entered in favor of Henry J. Gefke. River Centre claims

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

that the failure to appear constituted excusable neglect and, therefore, the trial court erroneously exercised its discretion when it denied the motion to open the case. Because the trial court erroneously exercised its discretion when it denied the motion to open, this court reverses the order and remands the case for further proceedings consistent with this opinion.²

I. BACKGROUND

¶2 This is an appeal from a small claims case with a rather unusual and confusing procedural history. On October 1, 1999, Gefke filed a summons and complaint against River Centre for failure to pay for legal services rendered. The appearance date was October 25, 1999. Counsel for River Centre did not appear on the return date because of a family emergency. The first default judgment was entered. After explaining the reason for his failure to appear, counsel for River Centre and Gefke filed a stipulation and order to open the case. The new hearing was scheduled for December 13, 1999. On that date, both sides appeared in court, but the court file was missing and the case was adjourned to February 2, 2000.

¶3 Before that date, counsel for River Centre met with the judgment clerk because the original default judgment had appeared on the client's credit report. Counsel discovered that the stipulation and order to open had not been properly signed. Counsel then proceeded to have the stipulation and order signed so the default judgment would come off the credit report.

¶4 Shortly thereafter, counsel for River Centre received a notice of dismissal of the case. As a result, counsel contacted the clerk of court about the

² River Centre filed a motion seeking costs and fees pursuant to WIS. STAT. § 809.25(3) (1997-98) on the basis that this appeal is frivolous. That motion is denied.

dismissal and its effect on the February 2, 2000 hearing date. The clerk advised counsel that if a dismissal was entered, the February 2, 2000 date would be removed and a new court date would need to be requested. Based on this information from the court, counsel for River Centre did not appear for the February 2, 2000 date. Gefke, however, did appear at the scheduled hearing and a default judgment was entered against River Centre.

¶5 The trial court denied River Centre's motion to re-open the case in March 2000, and a motion to reconsider that decision was denied by the trial court in May 2000. River Centre now appeals.

II. DISCUSSION

¶6 River Centre argues that the trial court erroneously exercised its discretion when it denied the motion seeking to re-open the default judgment. This court agrees. The standard of review in this matter is whether the trial court erroneously exercised its discretion. *See Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). If the trial court reaches a reasonable decision based on the pertinent facts and the applicable law, this court will not overturn that decision.

¶7 Where a defendant fails to abide by any court rule, the trial court may adjudicate against him on the merits. *See* WIS. STAT. § 805.03 (1997-98).³ The only way such a trial court ruling can be overturned is upon proof of one of the reasons listed in WIS. STAT. § 806.07. Among other reasons, the court may

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

relieve a party from an order on the grounds of “[m]istake, inadvertence, surprise, or excusable neglect.” WIS. STAT. § 806.07(1)(a).

¶8 Excusable neglect has been equated with good cause, a satisfactory explanation, or a justifiable reason for the failure to act. See *Kisten v. Kisten*, 229 Wis. 479, 485, 282 N.W. 629, 632 (1938). “Excusable neglect is not synonymous with neglect, carelessness or inattentiveness. [Rather, it] ‘is that neglect which might have been the act of a reasonably prudent person under the same circumstances.’” *Giese v. Giese*, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969) (citations omitted).

¶9 In the instant case, this court concludes that counsel for River Centre has satisfied the excusable neglect standard. Upon receiving a notice of dismissal in a case that was scheduled for a February 2, 2000 hearing, counsel phoned the court to check on the status of the case. He was advised that the February 2, 2000 hearing would not take place and would need to be re-scheduled. Although it would have been wise for counsel to also contact opposing counsel on the case, his failure to do so is not dispositive.

¶10 This is not a case where counsel received a somewhat ambiguous notice of dismissal and simply chose to ignore the scheduled hearing. Counsel was not neglectful, inattentive or careless. Rather, counsel took the affirmative steps of trying to find out what effect the dismissal had on the February 2, 2000 date. He was told by the court that the hearing would be rescheduled. This constitutes a justifiable reason for his failure to appear. Accordingly, the order

denying the motion to re-open is reversed, and the case is remanded with instructions to dismiss the default judgment and conduct a trial on the merits.

By the Court.—Order reversed and cause remanded with directions.

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

