

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 2, 2001

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. 00-1848**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JASON M. BYFORD,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL EDWARDS,**

**DEFENDANT-APPELLANT,**

**STEVEN R. FORTNER, MARC A. FORTNER,  
RICHARD M. STILES, CHARLES E. KENNEDY  
AND CHRISTOPHER M. OTT,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Kenosha County:  
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Michael Edwards appeals from an order denying his motion for relief from a default judgment. Because we conclude that the circuit court properly denied relief from the judgment, we affirm.

¶2 On December 9, 1998, Jason M. Byford sued Edwards and five others claiming that they attacked and battered him. It is undisputed that the summons and complaint were served at the home of Edwards's parents on December 10 and left with Edwards's brother, Brian. A scheduling conference notice accompanied the summons and complaint. Edwards appeared pro se at the April 29, 1999 scheduling conference in the case. However, Edwards never filed an answer to the complaint. In June 1999, the circuit court granted Byford's motion for default judgment against Edwards.<sup>1</sup> Byford settled the case in November 1999 and moved the court to assess damages against Edwards as a result of the default judgment entered against him. In January 2000, the court entered a \$102,731 judgment against Edwards.

¶3 In March 2000, Edwards, having retained counsel, moved the court for relief from the default judgment under WIS. STAT. § 806.07 (1999-2000)<sup>2</sup> on the grounds of excusable neglect and lack of service of the summons and complaint. In an affidavit in support of the motion, Edwards averred that he was never personally served with the summons and complaint, the documents were left at his parents' home with his brother, he did not reside at his parents' home, his brother did not tell him that the papers had been served, and he was not involved

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<sup>1</sup> The transcript of this hearing is not included in the record on appeal. These facts are taken from the circuit court order granting the default judgment against Edwards.

<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

in the fight in which Byford was injured. Edwards also submitted a proposed answer which denied liability. Edwards contended that he learned of the scheduling conference because Robert Zapf, counsel for another defendant, mentioned it in a telephone conversation. Edwards denied receiving notice of Byford's May 1999 default judgment motion. Edwards claimed that he learned of the default judgment in January 2000.

¶4 In response to Edwards's motion to vacate the default judgment, Byford contended that Edwards was properly served because the pleadings were left at his parents' home with his brother who was of an age to accept service and that Edwards knew about the scheduling conference because he received the notice with the summons and complaint. The minutes of the April 29 scheduling conference reflect that Edwards appeared pro se.<sup>3</sup> Edwards was also in court on November 15, 1999, when the parties announced a settlement. Byford noted that none of the other materials sent to Edwards at his parents' address were returned to counsel with an indication that Edwards could not be found at that address.

¶5 The court found that Edwards appeared at and participated in the scheduling conference and that this constituted an appearance for purposes of personal jurisdiction. The court noted that under WIS. STAT. § 801.06, a court with subject matter jurisdiction may, without a summons having been served, exercise personal jurisdiction over any person who appears in the action and waives a lack of personal jurisdiction defense. The court denied Edwards's motion for relief from the default judgment because he made a general appearance

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<sup>3</sup> While the minutes are not in the record on appeal, the parties do not disagree about their contents. Therefore, we accept the parties' representations as to their contents.

in the case and did not answer the complaint. Edwards moved the court to reconsider.

¶6 At an evidentiary hearing on the reconsideration motion, Edwards's mother testified that her son did not reside at her house when the summons and complaint were left there on December 10, 1998. Edwards had moved out in the last part of October or the first part of November 1998. However, Edwards continued to receive mail at the family home through the fall of 1999.

¶7 Edwards testified that he appeared at the scheduling conference because Attorney Zapf called him the night before and mentioned it to him. Attorney Zapf also told Edwards that he should retain counsel. Edwards sat through the scheduling conference but did not understand what was happening. He moved out of his parents' house in November 1998. Edwards "figured out" that he had been sued civilly some six months after he moved out of his parents' house.

¶8 The process server testified that he left the summons and complaint with Edwards's brother who told the process server that Edwards lived there.

¶9 In an affidavit offered by Byford at the hearing, Attorney Zapf stated that he represented a codefendant. Before the scheduling conference, he called Edwards to arrange his deposition. During that conversation, Edwards indicated that he had been "subpoenaed" to appear in court the next day. Counsel surmised that Edwards was referring to the scheduling conference, notice of which had accompanied the summons and complaint. Edwards stated that he had received the subpoena at his parents' house and was planning to appear the next day. After the scheduling conference, counsel and Edwards spoke about Edwards's need for representation. At the deposition, counsel and Edwards spoke again about

Edwards's need for representation. Edwards stated that he had spoken to an attorney but remained unrepresented.

¶10 During Edwards's August 1999 deposition, he testified that he used his parents' address as a location for his mail, he understood that his deposition was being taken in conjunction with his status as a defendant in a civil action commenced by Byford seeking damages for his injuries, and he was unrepresented in the civil action. He acknowledged that he had directed Attorney Zapf to send notices relating to the case to his parents' address and that he had received notices there.

¶11 In a written decision on the reconsideration motion, the court found that the summons and complaint were served on Edwards's brother at the family home. Edwards appeared at and participated in the scheduling conference in April 1999. Notice of that date was included with the summons and complaint served at the family home. The notice of application for default judgment was also mailed to the family home. At the August 1999 deposition, Edwards stated that he received mail at the family home. In November 1999, notice of application for judgment in a specific amount was sent to the family home. Edwards did not complain about service until after entry of the default judgment. The evidence did not support Edwards's claim that he was never served with the summons and complaint or the default judgment motion.

¶12 The circuit court's factual findings are reviewed under a clearly erroneous standard, and we give due regard to that court's ability to assess the credibility of witnesses. WIS. STAT. § 805.17(2). A court's factual findings will be upheld as long as they are supported by any credible evidence or reasonable inferences that can be drawn therefrom. *Cavanaugh v. Andrade*, 202 Wis. 2d

290, 306, 550 N.W.2d 103 (1996). The circuit court’s findings regarding service and participation in the litigation are not clearly erroneous based on the record. Sec. 805.17(2).

¶13 We turn to the circuit court’s refusal to grant relief from the default judgment. “Before the defaulting party may enter the litigation, the party must make a showing under § 806.07, STATS., sufficient to reopen the case.” *O’Neill v. Buchanan*, 186 Wis. 2d 229, 234, 519 N.W.2d 750 (Ct. App. 1994). Part of that showing relates to excusable neglect, i.e., “that neglect which might have been the act of a reasonably prudent person under the circumstances.” *Baird Contracting, Inc. v. Mid Wis. Bank*, 189 Wis. 2d 321, 324, 525 N.W.2d 376 (Ct. App. 1994). The court “must also look beyond the causes for neglect to the interests of justice” and consider “such factors as ‘whether the dilatory party has been acting in good faith, and whether the opposing party has been prejudiced.’” *Rutan v. Miller*, 213 Wis. 2d 94, 101-02, 570 N.W.2d 54 (Ct. App. 1997) (citations omitted). Relief from a default judgment is within the circuit court’s discretion. *Holman v. Family Health Plan*, 227 Wis. 2d 478, 483, 596 N.W.2d 358 (1999).

¶14 Edwards contends that he demonstrated excusable neglect. The record supports the circuit court’s discretionary decision to deny relief from the default judgment.<sup>4</sup> Edwards was served with the summons and complaint in December 1998, attended a scheduling conference in April 1999, received a motion for default judgment in May 1999, and attended a court session in November 1999 at which time a settlement was announced. It was not reasonably prudent to sit through

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<sup>4</sup> Even if the circuit court did not explicitly address good faith and prejudice, we are obliged to uphold a discretionary determination if we can independently conclude that the facts of record applied to the proper legal standards support the circuit court’s decision. *Andrew J.N. v. Wendy L.D.*, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993).

a scheduling conference and never inquire regarding the subject matter. Edwards attended a deposition in August 1999 at which he acknowledged his status as a defendant in a civil action and discussed his need for representation. Byford settled the case after he obtained a default judgment against Edwards. Edwards did not seek relief from the default judgment until March 2000, well after monetary damages were awarded. The court did not find Edwards's testimony at the evidentiary hearing credible. The record supports the conclusion that Edwards did not demonstrate excusable neglect or act in good faith and that Byford was prejudiced by Edwards's failure to answer.

¶15 Edwards argues that he was not notified of the specific amount of damages sought by Byford. Edwards did not make this argument in the circuit court, and we do not consider it here. *Seagall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

*By the Court.*—Order affirmed.

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

