

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2007

David R. Schanker
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. 2007AP424

Cir. Ct. No. 2005SC1689

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WILLIAM F. WILLIAMS,

PLAINTIFF-APPELLANT,

v.

CAPITOL MOTEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Reversed and cause remanded with
directions.*

¶1 VERGERONT, J.¹ William Williams, pro se, appeals the circuit court's order denying his motion to reopen the judgment dismissing his small

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

claims complaint against Capitol Motel. For the reasons we explain below, we reverse and remand.

BACKGROUND

I. Proceedings in Trial Court

¶2 Williams, acting pro se, filed this small claims action against Capitol Motel on February 15, 2005. The court issued an order permitting the action to be commenced without payment of filing fees on the ground that the court found Williams indigent. The complaint alleges that on or about July 13, 2004, Williams was given a voucher for emergency housing by his parole or probation agent for two weeks rent at the Capitol Motel. He was intending to move from the motel on July 26, 2004. After leaving that morning to call a friend to help him move, he returned to the motel at 8:45 a.m. and found that the door to his room was locked. This was two hours before checkout time and his property was in the room. He was not allowed to remove his property and his efforts to recover his property from the motel management were not successful. The complaint sought \$4,999.99 in damages. The complaint shows that at the time he filed the complaint his address was the Dane County Jail.

¶3 The summons notified the defendant that it had to either appear on March 8, 2005 at 9:00 a.m. at an identified room in the City-County Building, or file a written answer on or before that date and time. Capitol Motel responded to the complaint by letter from its attorney dated February 28, 2005, denying all the allegations in the complaint and asserting as a counterclaim that the complaint was frivolous and without any reasonable basis in law or equity, and that it was commenced in bad faith. Capitol Motel sought dismissal of the complaint and an award of costs and reasonable attorney fees pursuant to WIS. STAT. § 814.35.

¶4 A minute sheet for the return date, March 8, 2005, indicates that the case was set for a trial, but the minute sheet does not contain a date for the trial.

¶5 The next item in the record is a minute sheet for April 19, 2005, which indicates that the attorney for Capitol Motel appeared, but not Williams. This minute sheet also indicates that on March 21, 2005, there was “[r]eturn of unclaimed/undelivered mail service notice of hearing of plaintiff William Frederick Williams/no forwarding address.” The minute sheet shows that the court commissioner entered a default judgment against Williams that dismissed the complaint. The court commissioner’s notation states “if [plaintiff] files motion to reopen, [defendant] shall be awarded \$300 attorney fees for [plaintiff’s] nonappearance on 4/19/05.”

¶6 The next entry in the record is a letter from Williams dated January 25, 2006, to the clerk of small claims court stating that he had submitted a motion to reopen in December 2005, which included a petition for a waiver of fees and costs, and an affidavit, but had not heard anything about the motion. The letter also stated that he did not have copies of the original summons and complaint or answer and asked to be sent copies of those. The clerk of court responded to this letter advising Williams that the case was dismissed and he would need to complete the enclosed motion to reopen form in order to request that this case be reopened and to have a hearing scheduled. On April 13, 2006, Williams filed a motion to reopen the judgment on the form along with a petition for waiver of filing and service fees and an affidavit of indigency. This motion stated that the judgment dismissing his case for his nonappearance should be reopened because his failure to appear was the result of inadvertence and excusable neglect. Specifically, the circumstances he described were “I was homeless. I checked with the clerk several times, called once and did not have a

date scheduled, plus I have been in jail four times in between.” He also stated that if the case were opened he would prevail because “state law forbids acts committed by defendant: property thrown out within a week, no notice.”

¶7 The circuit court, the Honorable John Albert, wrote a letter to Williams dated April 19, 2006, in care of the Dane County Jail (the address on Williams’ motion) stating that the court had received the motion to reopen. The letter stated:

My review of the file indicates that Capitol Motel filed a counterclaim against you on March 1, 2005 via Attorney Linda Monroe.

The file also shows your case was dismissed because of your failure to appear on April 19, 2005.

Please read carefully the ruling of the Commissioner on that date. The Commissioner states “if the plaintiff files a motion to reopen, the defendant shall be awarded \$300.00 in attorney’s fees for the plaintiff’s non-appearance on 4/19/05.”

You can either withdraw your motion to reopen or you can persist in having me rule on it.

However, if I rule on it, you start by owing Capitol Motel \$300.00, which would need to be paid before you could proceed with your case.

¶8 On April 24, 2006, the clerk of court received a letter from Williams dated April 20, 2006, inquiring about the status of his motion and informing the court that he had been moved to the Dodge Correctional Institution and the address at the institution. The clerk of court responded in a letter dated May 3, which stated that no motion to reopen had been received.² Williams responded in

² Because Judge Albert had responded to the motion, it appears that the motion must have been received by some court personnel.

a letter dated May 6, 2006, which was received by the clerk of court on May 9, explaining that on or about April 11, 2006, he had given the onsite deputy at the Dane County Jail a stamped, sealed, and addressed envelope containing the motion, the petition for waiver of prepayment of fees and costs, and affidavit of indigency, and a copy of the letter instructing him on the filing procedures, with a cover letter. He asked that the clerk of court to let him know if the documents were located and stated that he was going to contact the Dane County Sheriff's Department to check on them.

¶9 The record does not show any response to this letter. On August 21, 2006, Williams followed up on this letter by filing a “motion to allow late filing of a motion to reopen small claims judgment and order” in which he repeated what he had already explained in his May 6 letter. The record shows that also on August 21, 2006, the clerk of court was notified of a change of address for Williams and that the address was now at the Dane County Jail.

¶10 A hearing was held on September 18, 2006, before a court commissioner, at which Williams appeared as did the attorney for Capitol Motel. A “Motion for Personal Appearance” filed by Williams a few days before that hearing indicates that he was at the time in the Dane County Jail. The minute sheet for the September 18 hearing states “plaintiff advised that no relief will be addressed until [Capitol Motel's attorney] has been copied on all documents submitted to court” and also “nothing properly before the court—any pending motions denied.”

¶11 About a week after the September 18 hearing, Williams filed with the court a motion for review of the commissioner's decision or a reconsideration of that motion. The motion indicated that a copy had been sent to Capitol Motel's

attorney. The motion asserted that the grounds were stated in the original motion to reopen that had been heard on September 18, 2006. On October 16, 2006, Williams filed with the court a document entitled “affidavit,” which was not notarized, in which he set forth his argument that Capitol Motel had not given notice for terminating his tenancy as required by WIS. STAT. § 704.17(1)(c), WIS. STAT. § 704.19, and WIS. STAT. § 704.21(1), and had not stored his property or given him notice as required by WIS. STAT. § 704.05(2) and (5).

¶12 A hearing was held on Williams’ motion to review or reconsider the court commissioner’s September 18 decision at 2:00 p.m. on November 15, 2006, the Honorable Michael Nowakowski presiding. The minute sheet shows that this was a telephone motion hearing “to review [court commissioner’s] decision.” Apparently counsel for Capitol Motel appeared by telephone. Williams had failed to appear by 2:15 p.m. and the hearing was adjourned at 2:20 p.m. The court stated that Williams had provided nothing in the way of excusable neglect for why he failed to appear at the time of the original trial date. “He claims to have been in jail at that time, but the notice was sent to him at the jail, and he nonetheless failed to appear at the time of the trial.” The court also noted that he had already filed the motion to reopen the very same dismissal order and that Judge Albert had addressed the motion in a letter

which made it clear to [Williams] that he would need to pay \$300, which had been awarded to the defendant in the event of his failure to appear at the time of the trial when the defendant was there with counsel ready to proceed. And Judge Albert made it clear that he would need to pay that before the case could proceed.

Obviously, he did not pay that and, nonetheless, simply filed another motion asking apparently that another judge rule on it.

The court concluded by stating that the motion “to reopen and/or to reconsider the Commissioner’s decision will be denied ... with prejudice, and no further motions to reopen should be entertained in this case.”

¶13 The next document in the file is a statement by Williams asserting that he

did appear for the scheduled reconsideration hearing on 11-16-06 in which I was mistakenly under the impression the hearing was to held. [sic] I have lost everything I have due to the action of the Capitol Motel.

I am homeless and disorganized and mistakenly thought today was the schedule[d] court date.

This document has a handwritten note on it signed by “Vickie Jo Jolbe__”³ stating “[d]efendant appeared [at] COC office today 11-16-06 for [a court] appearance before Nowakowski scheduled for 11-15-06.” This document has a date stamp on it of November 16, 2006.

¶14 On January 18, 2007, Williams filed with the clerk of court a petition for waiver of filing and service fees and affidavit of indigency and order and a motion to reopen the small claims judgment and order. The motion to reopen states that his failure to appear was a mistake and “I am homeless and was under the impression the hearing was set 11-16-06. I had to come from Milwaukee. I appeared on 11-16-06.” The blank after “if the case were reopened I would prevail because,” Williams wrote, “state law requirements clearly support my position. I never was serve [sic] with a notice.”

³ The signature is not completely legible.

¶15 On April 16, 2007, Williams filed a notice of appeal of the circuit court's November 16, 2006 order. It does not appear that there was any action on the January 18, 2007 motion and petition for fee waiver. Williams filed a motion to waive the costs of preparing transcripts for the appeal on the ground that he could not afford them and that he lost all of his possessions when Capitol Motel illegally disposed of his property; Williams then lists his debts. The circuit court denied this motion in a written order. After first noting that the motion had not been filed on the prescribed form, the court stated as follows:

The Judgment of Dismissal had previously been granted. The Plaintiff made a request to review the Court Commissioner's decision and a hearing was scheduled before the Court on November 15, 2006. At the time the motion was filed, the Plaintiff was incarcerated in the Dane County Jail. As a result, the Court in noticing the hearing for November 15, 2006 indicated that it would allow the parties to appear by telephone with the Court initiating the call to both parties. In advance of that hearing, it was determined that the Plaintiff had been released from jail. At the time of the hearing, the Plaintiff failed to appear and provided thereafter no explanation for his failure to appear. The record indicates that the Plaintiff appeared at the Small Claims Court, not at the Judge's courtroom, on November 16, 2006, but again offered no plausible explanation for his failure to have appeared on November 15, other than that he was mistaken. Because of the Plaintiff's nonappearance and because it was clear that the Plaintiff had failed to comply with the conditions of an order entered by Judge Albert as a result of a Motion to Reopen brought by the Plaintiff, the request to review and reverse the decision of the Court Commissioner was denied and the decision to dismiss was allowed to stand. The motion now before the Court provides no basis to question the propriety of this decision made on November 15, 2006, and thus there is no merit to his appeal.

II. Proceedings on Appeal

¶16 After Williams filed his brief on this appeal, counsel for Capitol Motel informed this court that Capitol Motel had instructed her not to file a brief

for economic reasons, even though it believes the trial court's decision was correct. In our order in response dated October 1, 2007, we stated that ordinarily the failure to file a respondent's brief implicitly concedes that the circuit court erred and allows this court to assume that the respondent concedes the issues raised by the appellant. We also stated that summary reversal is a potential sanction for a respondent's failure to file a brief. We decided that we would not summarily reverse without first reviewing the record and appellant's brief, because we concluded that Capitol Motel had not entirely "abandoned the trial court's order or acted egregiously here, where counsel has explained that the failure to file the brief is the result of economic circumstances." However, we stated we might ultimately choose to consider certain arguments waived because of Capitol Motel's failure to file a brief.

¶17 In his brief on appeal Williams asserts that he was incarcerated in the Dane County Jail from November 12, 2005 until April 19, 2006, when he was transferred to the Dodge County Correctional Institution where he remained until July 21, 2006. He was then in the Dane County Jail from July 22, 2006 until October 23, 2006. He was released on bail from the Dane County Jail on October 23, 2006, with the condition that he reside at his aunt's home in Milwaukee and remain in Milwaukee until a sentencing date in case nos. 2005CF2345 and 2006CF1724. He also asserts that at the bail hearing in case nos. 2005CF2345 and 2006CF1724, the court approved his return to Dane County to attend the proceeding in this small claims action. According to his brief, Dane County Jail deputies informed him and Attorney Geier, his attorney in case nos. 2005CF2345 and 2006CF1724, that the sheriff's department's computer showed the hearing date in the small claims action to be November 16, 2006; this information was given to them when they left the Public Safety Building on

October 23, 2003. Attorney Geier, Williams asserts, drove him to the station so that he could take the bus to Milwaukee on October 23, 2006. Before leaving the sheriff's department, Williams states, he and Attorney Geier "informed the sheriff's department and the court, and the bailiff of the address and phone number to the resident [sic] in Milwaukee where plaintiff would be living" until the sentencing in the case nos. 2005CF2345 and 2006CF1724.

¶18 Williams argues in his brief that his appearance to appear on November 16, 2006, instead of on November 15, was due to excusable neglect because he was misinformed by the sheriff's deputies in central booking on the correct date of the hearing. He also asserts that he appropriately gave his address in Milwaukee to the clerk of court and the sheriff's department, but he received no notice of the date of the November 15, 2006 hearing at his residence in Milwaukee. He asserts that the CCAP file reflects his Milwaukee address.

¶19 Attached to Williams' brief is a copy of a transcript from a bail hearing in 2005CF2345 and 2006CF1724 dated December 14, 2006, prompted by the State's motion to modify the bond by adding a condition that Williams not be on State Street in Madison. The transcript shows that Attorney Geier informed the court, in the context of arguing on that motion, that Williams was released on October 23, 2006, that he took him to the bus station, and that Williams stayed in Milwaukee until November 16 because he believed he had a hearing in the small claims case on that date, but that the court date was apparently on the November 15. Also attached is a copy of a page from CCAP in 2006CF1724 which has an entry dated October 23, 2006, showing Williams' address in Milwaukee.

¶20 Williams’ brief also addresses the merits of his claim against Capitol Motel. He argues that under WIS. STAT. § 704.17(1), as a week-to-week tenant, he was entitled to a five-day notice in compliance with WIS. STAT. § 704.19 before being evicted if he failed to pay rent, but that his rent was not due until 11:00 a.m. on the date on which he was locked out. In addition, he argues that Capitol Motel did not store his belongings or give notice as required by WIS. STAT. § 704.05(5).

DISCUSSION

¶21 Under WIS. STAT. § 799.22(1) a court commissioner may dismiss a small claims action for plaintiff’s failure to appear on the date set for trial. WISCONSIN STAT. § 799.29(1)(a) provides the exclusive procedure for reopening a default judgment in a small claims proceeding. See *King v. Moore*, 95 Wis. 2d 686, 690, 291 N.W.2d 304 (Ct. App. 1980).⁴ Under that provision “the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.” Section 799.29(1)(a). Because the court “may” reopen the judgment, the decision is discretionary. See *Dugenske v. Dugenske*, 80 Wis. 2d 64, 67-68, 257 N.W.2d 865 (1977). We will affirm the circuit court’s exercise of its discretion if the record reflects a reasoned application of the correct legal standard to the relevant facts. See *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶22 Although the term “good cause” is not defined in the statute, it is generally appropriate to consider the factors set forth in WIS. STAT. § 806.07(1),

⁴ *King* was decided under the 1977 statutes in which WIS. STAT. § 299.29(1), rather than WIS. STAT. § 799.29(1) governed reopening default judgments in small claims actions. The *King* opinion notes that this statute was renumbered to the current numbering, § 799.29(1), in the 1979 statutes.

which includes “mistake, inadvertence, and excusable neglect.”⁵ Williams’ contention is that his failure to appear at the April 19, 2005 trial and the November 15, 2006 hearing was due to excusable neglect. “Excusable neglect is ‘that neglect which might have been the act of a reasonably prudent person under the same circumstances.’” *Hollingsworth v. American Fin. Corp.*, 86 Wis. 2d 172, 185, 271 N.W.2d 872 (1978). In addition to excusable neglect, the moving party must also show there is a meritorious claim or defense. *Id.* at 184-85.

¶23 Focusing on the circuit court’s reason for denying the motion to review or reconsider, the court commissioner’s September 18, 2006 denial of Williams’ motion to reopen, we see that the court’s basis for that ruling was Williams’ failure to appear at that hearing. Because it is undisputed that Williams did not appear and did not contact the court prior to that nonappearance, we cannot

⁵ WISCONSIN STAT. § 806.07(1) provides:

Relief from judgment or order. (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;

....

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

say it was an erroneous exercise of discretion for the court to deny Williams' motion for that reason. However, the court also decided that it would not entertain any future motions to reopen. The stated reasons were, first, that Williams had not appeared at the initial trial and was now failing to appear again and had not explained why he had not appeared at the initial trial. The court stated that Williams claimed to have been in jail at that time but that notice was sent to him at the jail and he nonetheless failed to appear. The second reason was that Williams had already filed a motion to reopen that dismissal order and Judge Albert had made it clear that he would first need to pay \$300, which he had not done.

¶24 We question whether either of these grounds is a reasonable basis for deciding not to consider any future motion by Williams to reopen. As for the first ground, although the complaint shows that he was in the Dane County Jail at the time he filed that complaint in February 2005, his motion to reopen filed on April 13, 2006, states that he was homeless and "checked with the clerk several times, called once, and did not have a date scheduled, plus I have been in jail four times in between." It thus appears that Williams may not have been in jail during the time period when the court sent a notice to the jail of the April 19, 2005 hearing. As for the second ground, we question whether the court has the authority to condition consideration of a motion to reopen the dismissal for failure to appear upon payment of the costs ordered for the nonappearance, at least where the party has been determined indigent. That effectively prevents him from showing that there was good cause for the nonappearance.

¶25 We recognize that the order that is before us on appeal is the court's November 15, 2006 order, and not a decision on Williams' subsequent motion to reopen that order, which was not ruled upon. We also recognize that Williams is now supplying on appeal more information on why he appeared on November 16

rather than November 15 than he provided to the circuit court in the subsequent motion to reopen. Rather than attempting to determine whether Williams is at fault for failing to properly present his position in the circuit court, on the one hand, or whether circuit court error may have contributed to a lack of adequate opportunity for him to do so, we choose to invoke our discretionary powers of reversal under WIS. STAT. § 752.35. We conclude that the real controversy has not been tried. In spite of numerous efforts by Williams, he has not yet had the opportunity to have the circuit court consider his explanations for his nonappearance at the April 19, 2005 trial and at the November 15, 2006 hearing and determine whether they constitute excusable neglect. We are satisfied that justice is served by permitting Williams to have the opportunity to have a determination made by the circuit court on these issues.

¶26 We recognize that a significant contributing factor to the state of affairs is Williams' intermittent periods of homelessness and incarceration at various institutions. We do not suggest that it is the responsibility of the circuit court to keep track of Williams' addresses when he does not provide the information to the clerk of courts. The most recent address we have for Williams is the Green Bay Correctional Institution. If that is not his current address, he should immediately provide the clerk of the circuit court with his current address.

CONCLUSION

¶27 For the reasons stated above, we reverse the circuit court order of November 15, 2006, denying Williams' motion for a review or reconsideration of the court commissioner's order of September 18, 2006. On remand the court shall hold a hearing, with notice sent to Williams at the Green Bay Correctional Institution or such other address as Williams provides the clerk of court, for a

hearing on (1) whether to set aside the court's decision of November 15, 2006; and, (2) if the court determines to do so in the proper exercise of its discretion, whether to grant Williams' motion to reopen the judgment of dismissal entered on April 19, 2005.

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.

