COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0473 **Cir. Ct. No. 01-SC-1330**

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

CLAYTON FOX AND SARAH STURINO FOX,

PLAINTIFFS-RESPONDENTS,

V.

TERRY KALBERG AND PAT KALBERG,

DEFENDANTS-APPELLANTS.

APPEAL from orders of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

¶1 BROWN, J.[1] This is a review of trial court orders denying a motion to vacate a default judgment in a small claims case and a motion to reconsider. The plaintiffs, Clayton Fox and Sarah Sturino Fox, were pro se, and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

the defendants, Terry and Pat Kalberg, appeared by their attorney, David Berman. Default judgment was entered against the Kalbergs after neither the Kalbergs nor Berman appeared at trial. On the Kalbergs' motion to vacate, Berman contended that the two sides had agreed to an adjournment. But the trial court noted that no adjournment is for certain unless or until the court grants one, and Berman had no business failing to appear unless or until he received notice from the court that the matter had been adjourned. We affirm the trial court's decision that no excusable neglect was shown.

¶2 The parties spend a lot of time in their briefs arguing about the factual history between them that led to the default judgment. We will not address these factual disputes in depth because we do not need a resolution of the factual disputes to decide this case. Besides, no fact finder made findings of fact on the disputed issues of fact. So, all we are left with are allegations of fact made by both sides. Suffice it to say, Berman claims that the Foxes called him, asking if the Kalbergs would stipulate to an adjournment of the trial and Berman said he would have to consult with his clients first. Berman contends that he called the Foxes back and told them that he would stipulate and Clayton indicated that he would contact the clerk for Judge Fisher and get a new date. Then Berman just assumed that a new trial date would be forthcoming and neither he nor his clients appeared. The Foxes dispute the contention and claim that Berman never called them back in reply to their request and they therefore assumed that the trial was still scheduled.

¶3 Taking Berman's factual account as true, he has still not shown excusable neglect. As a member of the bar, he should not just assume that the other side would be granted an adjournment by the court. He had an obligation to follow up by verifying with the court whether an adjournment had been granted.

Berman told the trial court that his conduct was excusable because he "took it on good faith it was going to be agreed to, it wouldn't be a problem." The trial court was obviously dismayed by Berman's assumption that the court would agree to the adjournment and it "wouldn't be a problem." The court stated: "It should be known that until the Court agrees to an adjournment there is no adjournment that the parties can agree to whatever they want but until the Court puts its stamp of approval on it it is not a done deal." Berman then responded: "I know that … not to make light of it, but with everything else that was going on in the early part of September this sort of got back burnered; and that's certainly my fault." Berman then implored the trial court not to punish his clients for his mistake, which he thereafter labeled as "at worse, procedural mistake." The court was not convinced that excusable neglect had been shown.

¶4 The decision to grant or vacate a default judgment is within the discretion of the trial court. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). We will not reverse unless the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court holds that the trial court applied the wrong legal standard. ***Id***. at 11-12. The supreme court has upheld circuit court decisions that a lawyer's failure to answer due to the pressure of work, without some additional persuasive information, is not excusable neglect. ***Wagner v. Springaire Corp.***, 50 Wis. 2d 212, 217-18, 184 N.W.2d 88 (1971).

¶5 Here, Berman first appeared to argue that it was reasonable for him to rely on the assumption that the court would grant an adjournment. When the trial court took issue with this line of reasoning, Berman conceded that he had the obligation to check with the court to see whether the court had granted the adjournment. But he then characterized his conduct as having "back burnered" the

matter because of all that went on during the early part of September. We do not know if he was referring to the events of September 11 or to a heavy load of office work during the early part of September. Either way, whether it was the events of September 11, which conceivably brought emotional pressure at work, or the actual pressure of work in his office, without some additional persuasive information, the neglect is not excusable. The trial court did not erroneously exercise its discretion in refusing to vacate the default judgment.

By the Court.—Orders affirmed.

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