

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 2002

Cornelia G. Clark
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 Nos. 02-0906
02-0907**

**Cir. Ct. Nos. 01-TR-5611, 01-TR-5613
01-FO-671**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARATHON COUNTY,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. HART,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Marathon County:
RAYMOND THUMS, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Daniel J. Hart appeals orders denying his motion to reconsider the court's default judgment against him. He argues that the trial court erroneously exercised its discretion because his failure to be present at a

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

pretrial conference was due to mistake, inadvertence or excusable neglect, and good cause. We disagree and affirm the orders.

BACKGROUND

¶2 On June 17, 2001, Hart received citations for operating a motor vehicle while under the influence of intoxicants and for operating a motor vehicle with a prohibited alcohol concentration.

¶3 Hart attended a pretrial conference on September 12, 2001, but failed to appear at the final pretrial conference on November 2. As a result of his failure to appear, the court entered a default judgment against him. Hart filed a motion to reopen the default judgment on November 20, which was denied. He then filed a motion to reconsider on December 7. Hart's given reason for not attending the November 2 hearing was that he did not receive a letter from his attorney advising him of the hearing date. He filed an affidavit stating that there were new postal workers on his route and mail had been delivered incorrectly. As a result, he claims he was unaware of the date of the conference. The court denied the motion for reconsideration. Hart now appeals.

STANDARD OF REVIEW

¶4 In reviewing an order denying a motion for reconsideration, we apply the same erroneous exercise of discretion standard as we do in reviewing an order denying the underlying motion. Exercising discretion contemplates a reasoned application of proper principles of law to the facts of the case. *See Resong v. Vier*, 157 Wis. 2d 382, 387, 459 N.W.2d 591 (Ct. App. 1990).

ANALYSIS

¶5 Hart argues that his failure to appear was justified by mistake, inadvertence or excusable neglect, citing WIS. STAT. § 345.37(1)(b), which states:

If the defendant moves to open the judgment within 6 months after the court appearance date fixed in the citation, and shows to the satisfaction of the court that the failure to appear was due to mistake, inadvertence, surprise or excusable neglect, the court shall open the judgment, accept a not guilty plea and set a trial date.

Hart also cites WIS. STAT. § 345.51, which allows for reopening of a default judgment upon showing of good cause.

¶6 Hart's main excuse for his failure to appear is that he never received a copy of the letter from his attorney listing the appearance date. This letter, dated August 1, 2001, noted three court dates: (1) the September 12 pretrial conference that Hart attended, (2) the November 2 final pretrial conference that Hart did not attend, and (3) a November 14 jury trial. Hart does not explain the contradiction of how he knew about the September 12 date but not the November 2 date when he received notice of both dates in the same document. The trial court was understandably skeptical of Hart's explanation.

¶7 Furthermore, the trial court observed that the November 2 date would have been discussed at the September 12 pretrial conference. Because Hart was present on September 12, he should have been aware of the November 2 date.

¶8 Additionally, at least as to excusable neglect there must "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) (citation omitted). The trial court concluded that Hart did not act reasonably under these circumstances.

Instead, the court concluded that a reasonable person would have taken the steps of calling the court or their attorney to determine the court dates. The court said this was especially true given Hart's knowledge that his mail was being delivered improperly.

¶9 Finally, while the trial court may not have used the exact words "mistake," "inadvertence," "excusable neglect" or "good cause," it did apply the proper standard in its decision. The court discussed Hart's claims as to why he failed to appear, and explained why they were not sufficient to reopen the case. This is the essence of exercising discretion.

By the Court. – Orders affirmed.

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

