COURT OF APPEALS DECISION DATED AND FILED

April 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 02-2733

Cir. Ct. No. 01-TR-8213

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

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

THEODORE J. PLANA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed*.

¶1 BROWN, J.[1] We make clear at the outset of this appeal that we are reviewing the circuit court's denial of Theodore J. Plana's motion to reopen a default judgment. Contrary to his assertions in his appellate briefs, Plana does not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

appeal from a pretrial motion for a continuance. Thus, it is the standards governing the reopening of a default judgment in a civil forfeiture action that apply in this appeal and the issue properly before us is whether the circuit court erred in concluding that Plana's counsel failed to establish that his conduct leading to his nonappearance at the set trial date constituted excusable neglect. We will nevertheless also address Plana's contention that the circuit court erred by failing to consider the six-factor test our supreme court set forth in ***Phifer v. State***, 64 Wis. 2d 24, 31-32, 218 N.W.2d 354 (1974), that circuit courts are to apply when deciding a motion for a continuance. We conclude that the circuit court did not erroneously exercise its discretion in either instance and therefore affirm.

¶2 Plana was issued a citation for operating a motor vehicle while under the influence of an intoxicant. Plana retained Kalal & Associates to represent him in the matter. An October 18, 2001 trial date was set by notice sent out on September 5. Plana's counsel informed him that his personal appearance was not required at the October 18 trial.

¶3 A motions hearing had been scheduled for October 3. Neither Plana nor his counsel appeared on the date set for the motions hearing. The circuit court noted that someone, other than Plana's counsel, from the Kalal firm notified the court that the issues scheduled for the motions hearing had been resolved. During that conversation, the circuit court was not advised of any problem with the October 18 trial date.

¶4 By letter sent via facsimile on October 17, Plana's counsel requested that the circuit court "set over" the trial scheduled for the following afternoon. Plana's counsel informed the court that he was involved in a jury trial in Dane county scheduled for the same date. Plana's counsel further informed the court

that he had not previously requested a continuance as he had not anticipated the Dane county case proceeding to trial, indicating that "it is near impossible in Dane county to plan on which cases will go to trial, thus necessitating the scheduling of other court appearances such as this on the same day."

¶5 Upon the failure of Plana or his counsel to appear at the date and time set for trial, judgment in default was entered on October 18. Thereafter, Plana filed a motion to open the default judgment pursuant to WIS. STAT. § 345.37(2) on February 13, 2002. The circuit court heard the motion on July 18, 2002. Plana's counsel argued that the circuit court should reopen the default judgment entered

> upon the grounds that the inability to appear at the time scheduled for the trial in this case was due to a scheduling conflict that was not the responsibility of the defendant and which, leaving aside the question of whether or not it could have been avoided, was at least within the statutory category a mistake, inadvertence, or excusable neglect.

¶6 The circuit court denied the motion to reopen noting that Plana appeared in the action only by counsel, the law firm of Kalal & Associates; that the trial date had been set by notice sent out on September 5; that there had been a motions hearing date set at which there was no appearance by or on behalf of Plana; and there had been no notice to the court of the problem with the trial date until the day prior to trial. The court rejected Kalal's argument that he was the only attorney at the firm who could have handled the matter. The court indicated that it was relying on its previous experience with the firm. The court observed that in the past, associates had appeared in court on behalf of the firm and the firm's letterhead read "Kalal & Associates." The court stated that there was no explanation for "why an associate couldn't have appeared and handled the court trial on what seems to be a very simple matter." The court concluded that Plana

had not demonstrated to its satisfaction that his nonappearance was due to mistake, inadvertence, or excusable neglect. Plana then filed this appeal.

¶7 Whether to reopen a default judgment is a decision that lies within the sound discretion of the circuit court. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). Similarly, whether to grant or deny a continuance is within the discretion of the circuit court. ***Phifer***, 64 Wis. 2d at 30. We will not overturn a discretionary determination if the court considered the relevant facts, applied the proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989).

¶8 We first address Plana's counsel's argument that his scheduling conflict and failure to appear at the hearing constitute excusable neglect and hence the circuit court erred in refusing to reopen the default judgment. A party is entitled to relief from a default judgment if the judgment was the product of mistake, inadvertence, surprise or excusable neglect. WIS. STAT. § 345.37(2). Excusable neglect is not synonymous with neglect, carelessness or inattentiveness. ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969). Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances. ***Id.*** Neglect due to the pressure of a lawyer's work, without more, is not excusable. *See* ***id.*** The burden is on the defendant to show that excusable neglect exists. *See* ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977).

¶9 At the hearing concerning Plana's motion to reopen, his counsel argued that the circuit court should grant his motion

> upon the grounds that the inability to appear at the time scheduled for the trial in this case was due to a scheduling conflict that was not the responsibility of the defendant and which, *leaving aside the question of whether or not it could have been avoided*, was at least within the statutory category a mistake, inadvertence, or excusable neglect. (Emphasis added.)

Thus, Plana's counsel's only showing to the court was that his failure to appear was due to a scheduling conflict. It is clear from the record that Plana's counsel was fully aware of the conflict prior to the trial date set for this case, but chose not to alert the circuit court until one day prior to the trial because he apparently had thought that the other case in Dane county would not go to trial on that date. We wholeheartedly agree with the circuit court that this does not constitute valid grounds for reopening the default judgment. The judge runs the court, not the lawyers. Lawyers should not schedule multiple trials for the same day, speculating that one will settle or not otherwise go to trial, and then expect the other party, the witnesses and the court to scramble their schedules when the plan goes awry. The circuit court therefore did not erroneously exercise its discretion in denying Plana's motion to reopen the default judgment.

¶10 We now turn to Plana's second argument that the circuit court erred because it did not consider the ***Phifer*** factors. We question whether ***Phifer*** even applies to this case.

¶11 Plana never formally moved the circuit court for a continuance. A motion for a continuance must be in writing, state with particularity the grounds for the motion and provide the relief requested. WIS. STAT. § 802.01(2)(a). The motion also must be served no later than five days before the date set for the hearing and must contain the supporting documentation. WIS. STAT. §§ 802.01(2)(b), 801.15(4). We also note that a motion has been defined as an

"application for an order," and the rules of practice provide that such application may be made by an order to show cause or notice of a motion served and filed. ***State ex rel. Webster Mfg. Co. v. Reid***, 177 Wis. 612, 616, 188 N.W. 67 (1922). The letter Plana's counsel sent to the circuit court via facsimile informing it of his scheduling conflict on the day before the trial was scheduled to take place clearly does not qualify as a formal motion under the case law and does not adhere to the strictures of § 802.01(2) or § 801.15(4). Therefore, the circuit court was not duty bound to hold a hearing in which Plana's counsel presented his reasons for requesting the continuance and the court did not issue an order accepting or rejecting his explanation. We doubt that the ***Phifer*** analysis is even triggered under these circumstances.

¶12 However, even if we indulge Plana and assume that ***Phifer*** does control, while the circuit court did not expressly allude to ***Phifer***, our review of the record reveals that the circuit court did effectively address the ***Phifer*** factors when it denied Plana's motion to reopen the default judgment. During the hearing concerning Plana's motion to reopen, the circuit court indicated that it had previous experience with the Kalal law firm and reasonably concluded based on its experience that given the simplicity of the matter an associate at the Kalal firm could assume responsibility for the trial. It was Plana's responsibility to inform the court otherwise. *See* ***Phifer***, 64 Wis. 2d at 31 (concluding that the answer to the balancing test "must be found in the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied"). The court also noted that Plana's counsel had plenty of opportunities to inform the court of the potential scheduling conflict and chose not to do so. Instead, Plana's counsel waited until the day prior to trial to contact the court. Then, as the court observed, without an affirmative response from the court,

Plana's counsel chose not to appear for the scheduled hearing. Thus, the record demonstrates that the circuit court considered Plana's counsel's explanation for the delay using the ***Phifer*** factors and reasonably concluded that his explanation was not legitimate.

¶13 Continuances and delay are the bane of the judicial system. ***Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.***, 166 Wis. 2d 105, 114, 479 N.W.2d 557 (Ct. App. 1991). Even when timely sought, they create disruption and uncertainty to all concerned. Given the volume of litigation burdening the circuit courts, the bar and litigants must understand that Wisconsin judges will monitor their calendars to avoid the damaging effects of unwarranted delay. ***Id.*** In this case, the circuit court properly exercised its responsibilities in this regard.

By the Court.—Judgment and order affirmed.

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