COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1163 **Cir. Ct. No. 02SC002289**

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

ERNEST J. PAGELS, JR.,

PLAINTIFF-APPELLANT,

V.

JOHN VARGAS AND JESSICA VARGAS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] The circuit court properly exercised its discretion in reopening the default judgment after it found that John Vargas' and Jessica Vargas' failure to appear at a de novo hearing was the result of excusable

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

neglect. Further, the circuit court appropriately dismissed this action because Ernest J. Pagels, Jr.'s, evidence fell short of the burden of proof. Therefore, we affirm.

¶2 Before turning to the merits of this appeal, we address the failure of John[2] and Jessica Vargas to file a response brief. In an order dated October 1, 2003, we warned the respondents:

> If the respondents do not file a brief in response to this order, the right to file a brief will be forfeited. Further, because the failure to file a brief means that the respondents have ignored two orders of this court, the respondents will be deemed to have abandoned this appeal and to have acted egregiously. In such circumstances, *we are free to exercise our discretion* to summarily reverse the circuit court. (Emphasis added.)

We elect not to summarily reverse the circuit court because the above-quoted order did not clearly and unequivocally state that the penalty for failing to file a responsive brief would be summary reversal. ***Raz v. Brown***, 2003 WI 29, ¶36, 260 Wis. 2d 614, 660 N.W.2d 647. Because the order is equivocal concerning the imposition of a sanction, we conclude that we must address the merits of this appeal without the benefit of a response brief from either John or Jessica Vargas.

¶3 Pagels challenges the circuit court's reopening of the small claims default judgment he obtained against the Vargases. WISCONSIN STAT. § 799.29(1)(a) provides the exclusive procedure for reopening a default judgment in small claims proceedings. ***King v. Moore***, 95 Wis. 2d 686, 690, 291 N.W.2d

[2] Pagels originally filed this small claims action against John Vargas and Jessica Vargas; John's correct name is either Norbert or Norberto and the caption of this action in the circuit court was corrected sometime during the proceedings. We will use the name of John Vargas because the notice of appeal was filed using that name in the caption.

304 (Ct. App. 1980). It provides: "There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown." Sec. 799.29(1)(a).

¶4 The determination whether to vacate a default judgment is within the sound discretion of the circuit court. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). A circuit court's exercise of discretion will be sustained if it has applied the proper law to the established facts and if there is any reasonable basis for the circuit court's ruling. ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). An appellate court will generally look for reasons to sustain a discretionary determination. ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185, 502 N.W.2d 156 (Ct. App. 1993). This court may independently search the record to determine whether additional reasons exist to support the circuit court's exercise of discretion. ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995).

¶5 No Wisconsin appellate case has defined good cause in the context of reopening a small claims default judgment. This court determines that a court may consider the factors set forth in WIS. STAT. § 806.07(1) in considering whether good cause has been shown for reopening a default judgment under WIS. STAT. § 799.29(1)(a). Because Jessica contends that they did not receive timely notice, the inquiry is limited to whether their mistake, inadvertence or neglect was excusable, thereby providing good cause for reopening the default judgment. With regard to the excusable neglect, the basic question is whether the dilatory party's conduct was excusable under the circumstances, "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Hansher v. Kaishian***, 79 Wis. 2d 374, 391, 255 N.W.2d 564 (1977). Excusable neglect is "that neglect which might have been the act of a

reasonably prudent person under the same circumstances." ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984) (citation omitted). However, it does not include situations brought about by the moving party's own carelessness or inaction. ***Id.***

¶6 Pagels sought a de novo review of the court commissioner's dismissal of his small claims action against the Vargases under WIS. STAT. § 799.207(3) and (4). Neither of the Vargases appeared at the scheduled trial date of November 8, 2002, although notice of that date was mailed to them by the clerk of courts on August 9, 2002; nor did they appear at the adjourned hearing on November 15, 2002, although notice of that date was mailed to them on November 8, 2002. The trial court entered judgment in the amount of $1391.11 plus costs in favor of Pagels at the conclusion of the November 15, 2002 hearing.

¶7 The Vargases filed a motion to reopen the default judgment after Pagels sought to collect on his judgment through garnishment. At the hearing on the Vargases' motion, Jessica testified that she never received notice of the November 8, 2002 hearing and received notice of the November 15, 2002 hearing on that date, but it was too late to appear in court. She also testified that she never received the notice of entry of judgment or the financial disclosure forms she was required to complete. Based upon this testimony and the fact that Jessica had made all appearances in the case prior to the November 8, 2002 de novo hearing, the circuit court vacated the default judgment that was granted on November 15, 2002, and scheduled the action for further testimony.

¶8 Pagels now argues that Jessica's self-serving testimony that she did not receive timely notice of the November 8 and 15, 2002 hearings is not sufficient to overcome the presumption that a properly mailed notice of trial was

delivered to her. We agree with Pagels that "[p]roof of the mailing of a letter in time to reach the person to whom it was addressed, in the regular course of the mails, *prima facie* establishes the fact that it was so received." ***McDermott v. Jackson***, 97 Wis. 64, 75, 72 N.W. 375 (1897). However, proof of mailing does not create an irrebuttable presumption that the notice was received. As we explained in ***Mullen v. Braatz***, 179 Wis. 2d 749, 753, 508 N.W.2d 446 (Ct. App. 1993):

> The mailing of a letter creates a presumption that the letter was delivered, but such presumption may not be given conclusive effect without violating the due process clause. A rebuttable presumption, which merely shifts to the challenging party the burden of presenting credible evidence of nonreceipt, is constitutional.… [O]ur supreme court [has held] that the proof of mailing raised a presumption of receipt and, together with testimony that the notice was not received, created a question of fact. (Citations omitted.)

¶9 The circuit court had to decide whether the Vargases had overcome the rebuttable presumption of receipt. The court had to weigh the individual facts and circumstances to determine whether the Vargases actually received notice. It was the circuit court's function to assess the weight and credibility of the testimony. ***Id.*** at 756. We will defer to a court's assessment and findings of fact and will not upset them unless they are clearly erroneous. ***Id.*** Here, the circuit court concluded that Jessica's history of making all court appearances prior to November 8, 2002, corroborated her assertion that she did not receive the notice for the November 8, 2002 hearing and that she received the notice for the November 15, 2002 hearing too late. Under the circumstances, we conclude that these findings are not clearly erroneous. We agree with the circuit court that Jessica established that it was because of excusable neglect that she failed to appear on either November 8 or November 15, 2002.

¶10 Establishing excusable neglect is not enough to support the reopening of a default judgment; in addition, the Vargases had to establish a meritorious defense to Pagels' claim. *See* ***Hollingsworth v. Am. Fin. Corp.***, 86 Wis. 2d 172, 184, 271 N.W.2d 872 (1978). The circuit court did not address whether or not there was a meritorious defense after it concluded there was excusable neglect. Rather, it temporarily vacated the judgment and scheduled another hearing to permit the Vargases to present testimony to refute the testimony Pagels had previously presented. Although this procedure may be unorthodox considering the summary nature of small claims actions, it was a discretionary decision that conserved judicial resources because it permitted the circuit court to consider whether the Vargases had a meritorious defense and, at the same time, finally resolve the dispute between the parties.

¶11 The final hearing is the origin of Pagels' second issue. Pagels asserts that the parental liability act, WIS. STAT. § 895.035,[3] imposes liability upon the Vargases for the damage that two young Vargas children did to his automobile. He argues that there is no dispute that the "Vargas[es] are the parents of the children; they had custody over the children during the time in which Mr. Pagels' car was vandalized; and, the children are not emancipated minors." He contends that through the testimony of the investigating police officer, he established that the vandalism was the result of the children's commission of a willful, malicious

[3] The pertinent portions of WIS. STAT. § 895.035(2) provide:

> **(2)** The parent or parents with custody of a minor child, in any circumstances where he, she or they may not be liable under the common law, are liable for damages to property, for the cost of repairing or replacing property … attributable to a willful, malicious or wanton act of the child.

or wanton act. In other words, Pagels argues that there was sufficient evidence to support his claim and the circuit court erred in holding otherwise. We will not reverse factual findings made by a circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶12 The circuit court held that Pagels had failed to prove the Vargas children were the ones that damaged his car. The court held that from the evidence it was clear that Pagels did not see his car damaged by the Vargas children, that neither Pagels nor the investigating officer ever found the white pipes Pagels claims the children used to vandalize his car, and there were no admissions attributable to the Vargas children. We have independently reviewed the record in this case, paying particular attention to the testimony of the investigating officer, and we conclude that the circuit court's findings of fact are not clearly erroneous and that the court correctly concluded that Pagels failed to present credible evidence that any of the Vargas children damaged his car in a willful, malicious or wanton manner.

By the Court.—Order affirmed.

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