

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0483

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

DAVID J. BONIN,

Plaintiff-Respondent,

v.

MUWONGE & ASSOCIATES, S.C.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM D. GARDNER, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Muwonge & Associates, S.C., appeals from the trial court's order denying Muwonge & Associates' motion to vacate a default judgment.

David Bonin, a mechanical engineer, had provided consulting services to Muwonge & Associates. Bonin billed the firm for his services, but he

did not receive payment. He then filed suit. On the day the trial was set to begin, counsel for defendant did not appear in court. The court then entered a default judgment in favor of the plaintiff. Muwonge & Associates sought to reopen the default. The trial court denied the motion. We reverse.

The facts before the trial court are undisputed. Defendant's counsel, Susan Kaye, did not appear for trial in Bonin's action against Muwonge & Associates because she was detained in Children's Court for over three and a half hours. Aware that her appearance in Children's Court might create a conflict, Kaye notified the attorney for the plaintiff and the trial court's clerk. Bonin's attorney agreed to an adjournment, but the clerk would not accept the stipulation. Kaye then informed Emmanuel Muwonge, a partner at her law firm, of the potential conflict. He told her that he would be present at the time the case was set to begin. The night before the scheduled trial date, however, Muwonge had a medical emergency relating to his sickle cell anemia and was hospitalized. When he called the trial court the day of trial, the trial court directed his staff to "tell Mr. Muwonge, the case is going on right now, nobody's here, it's a default as far as I'm concerned." As noted, the trial court denied Muwonge & Associates' motion to vacate the default judgment.

Whether to vacate a default judgment is within the discretion of the trial court, and can only be overturned on appeal if that discretion is misused. See *Hansher v. Kaishian*, 79 Wis.2d 374, 389, 255 N.W.2d 564, 572 (1977). "The exercise of discretion must depend on facts that are of record or that are reasonably derived ... and the basis of that exercise of discretion should be set forth." *Howard v. Duersten*, 81 Wis.2d 301, 305, 260 N.W.2d 274, 276 (1977).

Section 806.07, STATS., provides, in part:

(1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect.

Excusable neglect is “that neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 468, 326 N.W.2d 727, 731 (1982) (citation omitted). The trial court denied Muwonge & Associates' motion to vacate because it concluded that the firm did not meet the “burden of proving ... that its failure to appear for the August 17, 1994 trial ... was the result of excusable neglect.”

In deciding whether there is excusable neglect, under § 806.07(1)(a), STATS., a trial court must determine if there are “reasonable grounds for the noncompliance.” *Hedtcke*, 109 Wis.2d at 468, 326 N.W.2d at 731. A trial court should also “consider whether the person has acted promptly to remedy his situation and whether vacation [*sic*] of the judgment is necessary to prevent a miscarriage of justice.” *Charolais Breeding Ranches, Ltd. v. Wiegel*, 92 Wis.2d 498, 512, 285 N.W.2d 720, 727 (1979) (citation omitted). Additionally, the “law views default judgments with disfavor and `prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues.’” *Hedtcke*, 109 Wis.2d at 469, 326 N.W.2d at 731 (citation omitted). Here, Kaye tried to alert the trial court that she had a potential conflict. After the trial court would not adjourn the case, Kaye arranged for Muwonge to be in court. Unfortunately, Muwonge became seriously and suddenly ill. He did, however, contact the court to explain why he could not appear. Kaye and Muwonge did everything they could have done under the circumstances. The trial court's failure to vacate the default judgment was unreasonable and an erroneous exercise of its discretion.

By the Court. — Order reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.