

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 96-1012

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MUSICLAND GROUP, INC.,

PLAINTIFF-RESPONDENT,

v.

SEAN SIMPSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICK J. MADDEN, Reserve Judge. *Affirmed.*

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

PER CURIAM. Sean Simpson appeals from an order granting Musicland Group, Inc., a permanent injunction. The injunction enjoins Simpson from entering Musicland's stores, purchasing its products and harassing its employees, and also requires Simpson to obtain permission from the circuit court before filing any additional lawsuits against Musicland. Simpson, acting *pro se*,

claims that the circuit court erroneously exercised its discretion by granting the permanent injunction more than five days after a temporary restraining order was issued. We conclude that because Simpson failed to appear at the hearing on Musicland's motion for a permanent injunction, and failed to move the court to vacate the order, he has waived his claims. Therefore, we affirm the circuit court's order.

I. BACKGROUND.

The circuit court found that from early 1990 to the present time, Simpson engaged in a pattern of harassment of Musicland's stores and employees, based on his disagreement with Musicland's return policy. The court found that Simpson repeatedly attempted to return merchandise which he had purchased, including merchandise he had opened, for a cash refund. When Musicland employees pointed out that the store's posted policy did not allow cash refunds, Simpson became extremely angry and harassed Musicland employees by arguing with them, shouting at them and threatening them with physical harm. Beginning on or about April 26, 1995, Simpson began filing numerous frivolous small claims complaints against Musicland and its employees.

On January 16, 1996, the circuit court issued a temporary restraining order enjoining Simpson from entering Musicland stores and harassing Musicland employees. On January 18, 1996, Simpson was served with the temporary restraining order, summons and complaint, affidavits and notice of an injunction hearing scheduled for January 23, 1996. Simpson failed to appear at the injunction hearing and an order granting a permanent injunction against Simpson was entered on January 24, 1996. Simpson now appeals.

II. ANALYSIS.

The record shows that Simpson, although properly served with notice, failed to appear at the hearing on Musicland's motion for a permanent injunction. Because he did not appear, Simpson failed to present any evidence or arguments to the circuit court concerning the factual or legal basis of Musicland's motion. Further, although Simpson could have moved the circuit court to vacate its order on the grounds that his failure to appear resulted from mistake, inadvertence, surprise or excusable neglect, he did not. *See* § 806.07, STATS. Having bypassed the circuit court, Simpson now seeks appellate review of claims which the circuit court could and should have first examined.

A decision to vacate an order or judgment under § 806.07, STATS., is addressed to the discretion of the trial court. *See Martin v. Griffin*, 117 Wis.2d 438, 442, 344 N.W.2d 206, 209 (Ct. App. 1984). Because of Simpson's failure to move the court to vacate the order, the circuit court was never given the opportunity to exercise its discretion. This court may not exercise the discretion vested in the trial court. *See Preloznik v. City of Madison*, 113 Wis.2d 112, 125, 334 N.W.2d 580, 587 (Ct. App. 1983). Therefore, we conclude that Simpson has waived his right to challenge the permanent injunction order. *See Olson v. Dunbar*, 149 Wis.2d 213, 218-19, 440 N.W.2d 792, 794 (Ct. App. 1989) (failure to move to reopen default judgment constitutes waiver of issues raised on appeal).

As a general rule, this court will not address issues raised for the first time on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Because neither the record nor Simpson's brief reveals any excuse for his absence from the injunction hearing, we are "unpersuaded that justice would be served" by entertaining Simpson's arguments where the trial court was not afforded an opportunity to do so. *See Olson*, 149 Wis.2d at 219, 440 N.W.2d at 794.

By the Court.—Order affirmed.

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

