COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 27, 1996

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. 96-1876-FT

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

PATRICIA A. ANDRESHAK, individually and as surviving spouse of Timothy Andreshak, and NORTH CENTRAL HEALTH PROTECTION PLAN,

Plaintiffs,

v.

CHRIS CHILDREY, WERNER LEMBKE, d/b/a LEMBKE TRUCKING, and THRESHERMENS MUTUAL INSURANCE COMPANY,

Defendants,

GREAT DIVIDE INSURANCE COMPANY,

Defendant-Third Party Plaintiff-Respondent,

v.

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Third Party Defendant-Appellant.

APPEAL from an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Commerce and Industry Insurance Company (C&I) appeals an order denying its motion to vacate a default judgment in favor of Great Divide Insurance Company.[1] The trial court ruled that C&I failed to establish excusable neglect for its failure to timely answer the third-party complaint. C&I argues that its neglect was excusable and that, even absent excusable neglect, the trial court was required to consider its meritorious defense and the fairness of granting default judgment. We reject these arguments and affirm the order.

C&I admits the summons and complaint were served on April 21, 1995.[2] C&I did not answer the third-party complaint and, on September 14, 1995, the trial court granted Great Divide's motion for default judgment. On February 12, 1996, Great Divide contacted C&I in an attempt to collect the default judgment. C&I filed its motion to vacate the default judgment on April 22, 1996.[3]

The trial court may vacate a judgment upon a showing of excusable neglect. *See* § 806.07, STATS. Excusable neglect is not synonymous with neglect, carelessness or inattentiveness. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 468, 326 N.W.2d 727, 721 (1982). Excusable neglect is "neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Dugenske v. Dugenske***, 80 Wis.2d 64, 67, 257 N.W.2d 865, 867

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] Great Divide served a second summons and complaint on May 17, 1995 due to some perceived potential defect in the first service. C&I does not dispute the validity of the first service.

[3] The trial court did not base its refusal to vacate the default judgment on C&I's failure to file its motion within a reasonable time. Therefore, we will not review that issue, although C&I took seventy days to file the motion to vacate the default judgment after it was notified of the judgment's existence.

(1977). Whether a party has established excusable neglect is a matter committed to the trial court's discretion and its decision is accorded deference by this court. ***Martin v. Griffin***, 117 Wis.2d 438, 442, 344 N.W.2d 206, 209 (Ct. App. 1984).

The trial court properly exercised its discretion when it refused to vacate the default judgment. The affidavits submitted by C&I show that upon receipt of the summons and complaint, C&I forwarded them to American International Group Claims Services (AIGCS). AIGCS handles certain claims for C&I and its affiliates. On May 9, 1995, AIGCS sent the complaint to its regional processing office in Iowa. There, the senior case control technician, Susan Ewald, determined that C&I was not the insurance carrier on the trailer. On May 10, she sent the complaint by facsimile to an independent claims processor company which she believed would handle appearances for C&I. Ewald never followed up on the disposition of the complaint. The trial court properly refused to characterize this conduct as excusable neglect. Each of the recipients of the complaint merely passed it to another entity on the assumption that it would be taken care of, with no specific instructions, no regard for the deadline and no follow-up to ensure that the complaint would be answered.

C&I cites cases in which this court upheld the exercise of the trial court's discretion when it granted a motion to vacate a default judgment. Those cases are easily distinguishable. First, in light of the deferential standard of review, this court has not ruled that certain facts constitute excusable neglect, but only that the trial court did not improperly exercise its discretion when it found excusable neglect. Second, in ***Firemens Fund Ins. Co. v. Pitco Frialator Co.***, 145 Wis.2d 526, 534, 427 N.W.2d 417, 421 (Ct. App. 1988), the defaulting defendant was not a frequent litigator like an insurance company and relied in part on its established practice of turning the case over to an insurance agency. Here, C&I is a large and sophisticated insurance company with experience in litigation. It did not establish that this complaint was processed according to any usual practice.

The trial court properly refused to consider C&I's defense or issues relating to fairness and justice. These matters need only be considered after a party has established excusable neglect. *See* ***Gerth v. American Star Ins. Co***, 166 Wis.2d 1000, 1008-09, 480 N.W.2d 836, 840 (Ct. App. 1992). C&I again cites cases in which this court has upheld the trial court's consideration of defenses and fairness when a defendant defaults "if it doubts the justice of the case after

reading the complaint, and the complaint alleged that a statute or ordinance was unconstitutional." *See* ***Davis v. City of Elkhorn***, 132 Wis.2d 394, 400-01, 393 N.W.2d 95, 98 (Ct. App. 1986). This court upheld the trial court's discretionary decision to require additional proof based on concerns arising out of the complaint and the presumption of constitutionality. ***Davis*** should not be construed to require the trial court to grant relief based on inexcusable neglect merely because the defendant has tardily presented an arguably meritorious defense and complains that the default judgment was unfair.

By the Court.—Order affirmed.

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