COURT OF APPEALS DECISION DATED AND FILED

December 14, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1593-FT

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT IV**

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

V.

DAVID W. DEMLER II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Reversed and cause remanded with directions*.

¶1 DYKMAN, P.J.[1] David W. Demler II appeals from a judgment convicting him of following too closely and reckless driving. His case was originally dismissed with prejudice after the County failed to subpoena witnesses

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98) and expedited under WIS. STAT. RULE 809.17 (1997-98).

for the trial. However, the trial court granted the County's motion to reconsider after determining that its failure to subpoena witnesses was excusable neglect. The issue is whether the trial court erroneously exercised its discretion in determining that the County's failure to subpoena witnesses for the original trial date constituted excusable neglect. We conclude that the trial court erroneously exercised its discretion in concluding excusable neglect existed when the County provided no explanation for its failure to subpoena the witnesses. We therefore reverse.

BACKGROUND

¶2 On October 1, 1999, Demler received two traffic citations. One was for following too closely contrary to WIS. STAT. § 346.14(2)(a) (1997-98)[2] and the other was for reckless driving contrary to WIS. STAT. § 346.62(2). On the day of trial, the County moved to adjourn because it had failed to subpoena citizen witnesses who were necessary to prove its case. Demler moved for dismissal with prejudice, and Reserve Judge Eberhardt granted Demler's motion and denied the County's motion.

¶3 The County then reissued the same citations to Demler. Demler moved to dismiss the reissued citations because the citations had previously been dismissed with prejudice. Judge Koschnick determined that the County was precluded from reissuing citations but that it could move to reconsider Judge Eberhardt's dismissal. The County did so.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 Judge Koschnick concluded that the County's failure to subpoena witnesses for the original trial constituted excusable neglect under WIS. STAT. § 806.07(1)(a)[3] and set the matter for trial. At trial, the court found Demler guilty of following too closely and reckless driving. Demler appeals.

DISCUSSION

¶5 Demler contends that the trial court erroneously exercised its discretion in granting the County's motion to reconsider under WIS. STAT. § 806.07(1)(a). The primary question is whether the trial court erroneously determined that the County's failure to subpoena witnesses for the original trial date was excusable neglect.

¶6 The burden to show excusable neglect is on the County. ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977). We review a determination that excusable neglect exists for an erroneous exercise of discretion. ***Howard v. Duersten***, 81 Wis. 2d 301, 305, 260 N.W.2d 274 (1977). We are obliged to uphold a discretionary decision if we can conclude that it is based on facts in the record, applies the correct law, and is the product of a rational mental process. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). An erroneous exercise of discretion occurs if the facts do not support the trial court's

---

[3] WISCONSIN STAT. § 806.07(1)(a) provides:

> On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.

decision or if the trial court applied the wrong legal standard. ***Carl v. Spickler Enters., Ltd.***, 165 Wis. 2d 611, 622-23, 478 N.W.2d 48 (Ct. App. 1991).

¶7 Excusable neglect is defined as "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969). No finding of dishonesty, intentional bad faith, or the like is necessary. ***Kohlmetz v. Fabyan***, 113 Wis. 2d 160, 169, 336 N.W.2d 176 (Ct. App. 1983).

¶8 Excusable neglect is not synonymous with neglect, carelessness, or inattentiveness. ***Giese***, 43 Wis. 2d at 461. For example, a bare assertion of the "press of other legal business" is, at best, a weak reason for excusable neglect. ***Id.*** Where a lawyer did not answer a complaint because he misplaced the file while moving law offices, the trial court properly determined that no excusable neglect existed. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 70-71, 257 N.W.2d 865 (1977). Excusable neglect should be predicated on "specific incidents and a persuasive explanation which justify the attorney's neglect …." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 473, 326 N.W.2d 727 (1982).

¶9 In ***Wagner v. Springaire Corp.***, 50 Wis. 2d 212, 218, 184 N.W.2d 88 (1971), an attorney's failure to timely answer did not constitute excusable neglect where he asserted that his tardiness was due to the pressure of work and personal affairs, including a spouse's long illness. Because the attorney gave no specific explanation of why these circumstances caused his failure to timely answer, the supreme court upheld the trial court's determination that excusable neglect was lacking. ***Id.***

¶10 In ***Gerth v. American Star Ins. Co.***, 166 Wis. 2d 1000, 1008, 480 N.W.2d 836 (Ct. App. 1992), we emphasized the absence of a real explanation,

just as the supreme court did in ***Wagner***. As in ***Wagner***, in ***Gerth*** the defendant failed to timely answer a complaint, and we upheld the trial court's determination that the defendant had failed to show excusable neglect. ***Gerth***, 166 Wis. 2d at 1003, 1005. After the defendant was served in Wisconsin, it took nineteen days to transfer the documents to its California office. ***Id.*** at 1004, 1008. The defendant's answer was due the day after the documents arrived in California, and the defendant missed the deadline. ***Id.*** at 1005. The defendant made two assertions in support of its position that its failure to timely answer was excusable. First, it asserted that the transfer of the documents from one jurisdiction to another required extra time. ***Id.*** at 1007. Second, it asserted that the documents were addressed to the attention of the wrong person. ***Id.*** We concluded that these bare assertions were "in effect, no explanation." ***Id.*** at 1008.

¶11 Jefferson County did not provide an explanation for why it failed to subpoena witnesses. The only explanation the district attorney gave was in an affidavit, which stated, "the file had not been attended to in time for the subpoenas to go out." As in ***Gerth***, this is not an explanation but a statement of fact. On the day the trial was originally scheduled, the attorney appearing for the County said, "I don't have an explanation for why [the failure to subpoena] occur[ed]—obviously, an oversight on the part of our office and our office staff." The County's failure to subpoena witnesses in a timely manner cannot be excusable absent an explanation. Furthermore, forgetting deadlines is simply not, as a matter of law, "the act of a reasonably prudent person under the circumstances," as the case law requires.

¶12 The trial court did not explain the factual basis for its decision or why it found the County's assertions excused the County's neglect. The trial court explained:

> I will grant the County's Motion to Reopen. Find that the Brief and Affidavit, as alleged, do constitute excusable neglect.
>
> I would treat similar facts from the Defendant in the same manner.
>
> Normally I give each party the facts alleged in the Brief and the Affidavit—normally I give each party one chance at rescheduling, with proper notice. So if a defendant showed up the day before, the day of, and said they have neglected to subpoena someone, I would normally adjourn the matter for the defendant as well, with the same types of facts.

However, this is not an analysis of whether the County's neglect was excusable. Therefore, we conclude that the trial court erroneously exercised its discretion because it applied the wrong legal standard.

¶13 We therefore reverse the judgment and direct the trial court to dismiss Demler's citations.[4]

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports. WIS. STAT. RULE 809.23(1)(b)4.

---

[4] We need not address Demler's additional argument that the County failed to prove by clear and convincing evidence that Demler operated his vehicle recklessly.