COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1982 **Cir. Ct. No. 01 SC 31229**

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

DON KEMP,

PLAINTIFF-APPELLANT,

V.

STEPHEN WOLFF, AND JIM HEGARTY'S PUB, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN P. BUCKLEY, Reserve Judge. *Reversed and cause remanded with directions*.

¶1 FINE, J. Don Kemp appeals from an order denying his motion to reopen the dismissal of his small claims case against his former employer, identified by the small-claims summons as "Stephen Wolff (Jim Hegarty's Pub, LLC)." We reverse.

I.

¶2 The record in this case is reminiscent of Winston Churchill's October 3, 1939, observation about the then inscrutable Soviet Union: "It is a riddle, wrapped in a mystery, inside an enigma." (Quoted at: http://www.davidmrowell.com/russthtchurchill.htm (last accessed Feb. 11, 2003)).

¶3 Kemp appears *pro se*, and his voluminous submissions in the record are larded with scurrilous attacks upon every judge and court commissioner through whose courts this case has passed. Indeed, not only has this court reprimanded Kemp for his torrents of baseless charges, but the supreme court has as well: "This court also joins with the court of appeals in warning Kemp that offensive language, blatantly improper appellate procedure and lack of civility in his filings will not be tolerated."

¶4 Additionally, the record does not have transcripts of any of the proceedings before the circuit court. Kemp filed a Statement of Transcript, checking the box that: "A transcript is not necessary for prosecution of this appeal." In a letter filed with this court some two weeks later, counsel for the defendant indicated that he "disagree[d] with [Kemp's] opinion that transcripts are not necessary for ruling on his appeal," and identified transcripts that he believed were necessary. Counsel for the defendant did not, however, beyond that letter, follow the procedure in WIS. STAT. RULE 809.11(5) for getting those transcripts. The proponent of an argument on appeal has the burden to ensure that the record is sufficient to support that argument, *see* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986), and when the appellate record is incomplete in connection with an issue, we assume that the missing material supports the trial court's ruling,

see ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

¶5 Kemp's action sought $1,620, which he claimed were wages he earned but was not paid. A court commissioner held an evidentiary hearing on Kemp's claim, and awarded him $450. *See* WIS. STAT. § 799.207(1) & (2). Kemp filed a timely demand for trial. *See* WIS. STAT. § 799.207(3). Pursuant to WIS. STAT. § 799.207(5), "A timely filing of a demand for trial shall result in a new trial before the court on all issues between the parties."

¶6 According to the docket entries, on March 15, 2002, the matter was set for a June 5, 2002, trial before the circuit court. The docket entries note that on May 24, 2002, in response to Kemp's motion to adjourn the trial date so he could get a lawyer, the circuit court changed the June 5 trial date to a date for a scheduling conference.[1] Kemp's written motion alleged that he was taking medications for a back injury and that the drugs "make me periodically disoriented, and they interfere with my concentration and memory." Kemp also asserted: "Frequently, I am unable to comprehend my surroundings or the events around me." Extensive documentation on the drugs Kemp said he was taking was attached to Kemp's motion.

¶7 In his brief on this appeal, but unsupported by evidentiary material in the record, Kemp alleges that on June 5, 2002, he was in his lawyer's office, but that the lawyer was not there and that, accordingly, there was a mixup in the

[1] The Wisconsin Circuit Court Access material included in the record by Kemp erroneously notes that on May 24, 2002, the circuit court granted the adjournment to permit the "Defendant, Don Kemp" to get a lawyer. Kemp, of course, was the plaintiff.

arrangements that he asserts were made with the court to handle the conference by telephone. The docket entry for that date reads as follows:

> Hearing
> Plaintiff NOT in court. Defendants in court by Attorney Jim Moczydlowski for Attorney Stephen Chick. Plaintiff had told the court he had hired Attorney Tom Antholine. I called Attorney Antholine's office and spoke with his secretary. Plaintiff has not hired Attorney Antholine. Court orders case reopened, vacates the 1/21/02 judgment and orders case dismissed. CMG

(Uppercasing in original, the "I" apparently refers to the circuit court's deputy clerk.)[2] On June 10, 2002, according to the docket entry for that date, Kemp appeared before the circuit court and made a motion to reopen. The entry for that date recites, as material:

> Other in-court activity
> Plaintiff in court pro se. Defendants NOT in court. Application for motion to reopen reviewed. Court finds excusable neglect and that the applicant asserts a legal defense. Application for hearing on motion to reopen granted. Motion to Reopen scheduled for July 22, 2002 at 9:45 a.m.

(Uppercasing in original.) The circuit court, then presided over by a different judge, denied Kemp's motion to reopen.

[2] The Wisconsin Circuit Court Access material included in the record by Kemp merely recites for June 5, 2002: "Default/uncontested judgment." Kemp contends in his brief on appeal that he believed that "a default judgment had been entered in my favor, and that the full amount claimed by me was to be awarded, due to the defendant's rescission of his contesting my claims." Kemp's brief references the Wisconsin Circuit Court Access material in support of that contention.

II.

¶8 Although WIS. STAT. § 799.29(1) provides that "[t]here shall be no appeal from default judgments" entered in proceedings brought under chapter 799, a party may appeal from the denial of a motion to re-open a default judgment. ***General Tel. Co. v. A Corp.***, 147 Wis. 2d 461, 464–466, 433 N.W.2d 264, 265–266 (Ct. App. 1988).

¶9 Relief from a default judgment is warranted when a party's failure to appear resulted from "excusable neglect" and, also, if the party has a meritorious claim or defense. ***Hollingsworth v. American Fin. Corp.***, 86 Wis. 2d 172, 184, 271 N.W.2d 872, 878 (1978). Whether to vacate a dismissal or to reopen a default judgment is within the circuit court's discretion. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865, 867 (1977).

¶10 Although WIS. STAT. § 799.22(1) gives to the circuit court authority to "enter a judgment for the defendant dismissing the action" if "the plaintiff fails to appear on the return date or on the date set for trial," it is not clear from anything in the record why, if as the docket entries indicate, the circuit court found both "excusable neglect" for Kemp's non-appearance on June 5 and that Kemp had asserted a "legal defense" (which can only mean that it found that Kemp had a meritorious claim because Kemp was the plaintiff, not the defendant) it did not simply grant Kemp's motion to reopen rather than schedule a hearing on Kemp's motion to reopen. Perhaps it was because the June 10 proceeding was *ex parte*, but the record does not tell us.

¶11 Had the circuit court found that Kemp's non-appearance was not the result of "excusable neglect" or that he did not have a meritorious claim, we would affirm because without the transcripts Kemp could not show that the circuit court

erroneously exercised its discretion by not granting his motion to reopen. But that is not what happened, and because we do not have the transcripts we assume that they support the circuit court's determination that Kemp's non-appearance was the result of "excusable neglect" and that he had a viable claim against the defendant. In light of this, the circuit court's refusal to permit Kemp to pursue his claim in circuit court is, as is much of the record, inexplicable. Accordingly, the order denying Kemp's motion to reopen is reversed and the case is remanded to the circuit court with directions that it give him the trial *de novo* he requested timely.

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

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