Reversed and Remanded and Opinion filed September 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00997-CV

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MICHAEL LOVE, Appellant

V.

DEREK MCCRACKEN AND SHARIE MCCRACKEN A/K/A SHARIE HOENSTEIN, Appellee

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On Appeal from the County Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 655370

M E M O R A N D U M O P I N I O N[1]

Mike Love (Plaintiff) appeals from the trial court's order dismissing his lawsuit against Derek McCracken and Sharie McCracken a/k/a Sharie Hoenstein (Defendants) for his failure to appear for trial. On appeal to this Court, Plaintiff assigns two points of error, contending that the trial court abused its discretion when it denied (1) his motion to reinstate, and (2) his motion to reconsider. We reverse and remand.

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[1] *See* TEX. R. APP. P. 47.1.

Plaintiff filed suit against Defendants under the Texas Deceptive Trade Practices Act. Plaintiff alleged that Defendants illegally "rolled back" the odometer on a 1991 Ford Explorer automobile that Plaintiff purchased from Defendants.

The case was set for trial on June 1, 1998. Plaintiff, a licensed attorney appearing in the trial court *pro se*, recorded the trial setting date as June 8, 1998. Thus, he failed to appear for trial on June 1, 1998, and the case was dismissed for want of prosecution.

At the hearing on his motion to reconsider, Plaintiff testified that "to the best of his recollection . . . the notice of the setting was for June the 8th . . . ."[2] He further testified that if an error occurred that "it was most likely an inadvertent mistake on our part." In response, the trial judge asked Plaintiff the following:

> THE COURT: What was the accident?
>
> [PLAINTIFF]: The accident was, it was mistakenly entered into our computer apparently, Your Honor.
>
> THE COURT: That don't sound like an accident to me.

The Texas Supreme Court held that when a case is dismissed for want of prosecution, "the court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney to appear was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." *Smith v. Babcock & Wilcox Construction Co.*, 913 S.W.2d 467, 468 (Tex. 1995); *see also* TEX. R. CIV. P. 165a(3). The operative standard is essentially the same as that for setting aside a default judgment. *Id.* A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification. *Id.* Proof of such justification–accident, mistake or other reasonable

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[2] We note that the trial court's docket sheet (computerized) is ambiguous concerning the date of trial. It contains an entry on July 15, 1997, identified as "SETTING CT 6-1-98 . . . ." Another entry appears on the next day, July 16, 1997, identified as "ORD ORD Trial Setting 6-8-98 . . . ."

explanation–negates the intent or conscious indifference for which reinstatement can be denied. *Id.* Also, conscious indifference means more than mere negligence. *Id.*

We review the trial court's decision to not reinstate a case under an abuse of discretion standard. *Smith*, 913 S.W.2d at 467.

Plaintiff reasonably explained his failure to appear for trial. He explained to the trial court that his office mistakenly recorded the trial setting as June 8, 1998, rather than June 1, 1998. Upon receiving the notice of dismissal on June 7, 1998, Plaintiff immediately filed his motion to reinstate. Furthermore, based upon the trial court's docket sheet, it is possible that the trial setting received by Plaintiff was indeed scheduled for June 8, 1998. *See* note 2, *supra*. Even if Plaintiff was not as conscientious as he should have been, his actions do not amount to conscious indifference. *See Smith*, 913 S.W.2d at 468.

Therefore, the denial of Plaintiff's motion for reinstatement was an abuse of discretion. Plaintiff's first point of error is sustained. Consequently, we need not address Plaintiff's second point of error.[3]

The order of the trial court is reversed, and we remand this matter to the trial court with instructions to reinstate the case.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] We note that Defendants-Appellees did not file a brief in this case.