COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2007

David R. Schanker
Clerk of Court of Appeals

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.

Appeal Nos. 2006AP1754
2006AP2707

Cir. Ct. No. 2005CV2616

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

2006AP1754
CORY ERDMAN,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES , DIVISION OF HEALTH CARE FINANCING, BUREAU OF HEALTH CARE SYSTEMS AND OPERATIONS AND MIKE LEAVITT , SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PLAINTIFFS,

V.

GENERAL INTERNATIONAL LIMITED, GENERAL MOTORS CORPORATION AND ZIMBRICK AUTOMOTIVE GROUP, INC.,

DEFENDANTS-RESPONDENTS,

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

DEFENDANT.

2006AP2707
CORY ERDMAN,

PLAINTIFF-RESPONDENT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, DIVISION OF HEALTH CARE FINANCING, BUREAU OF HEALTH CARE SYSTEMS AND OPERATIONS AND MIKE LEAVITT, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PLAINTIFFS,

V.

GENERAL MOTORS CORPORATION AND ZIMBRICK AUTOMOTIVE GROUP, INC.,

DEFENDANTS-APPELLANTS,

GENERAL INTERNATIONAL LIMITED AND UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 BRIDGE, J. This case involves two consolidated appeals. In the first, Erdman appeals the circuit court's denial of his motion to compel discovery. We conclude that the circuit court did not err in granting a default judgment in Erdman's favor and in declining to reopen the judgment. Accordingly, we do not address Erdman's appeal. In the second, General Motors Corporation and Zimbrick Automotive Group appeal the circuit court's decision granting Erdman's

motion for entry of default judgment against them for failure to file an answer to Erdman's amended complaint. They argue that their answer to the original complaint joined issue in the case so as to render a default judgment impermissible under WIS. STAT. § 806.02(1) (2005-06).[1] They argue further that the circuit court erroneously exercised its discretion in ruling that their failure to timely answer did not constitute excusable neglect; in denying their motion for an enlargement of time within which to answer; and in ruling that the default judgment should not be reopened under WIS. STAT. § 806.07(1)(h) due to extraordinary circumstances.

BACKGROUND

¶2 Cory Erdman was involved in an automobile accident when the vehicle he was driving, a Chevrolet Beretta, struck a Chevrolet C/K pickup truck. He filed this action on August 5, 2005, alleging that the injuries he sustained in the accident were caused by design defects in the vehicles. His complaint set out claims for strict liability and negligence. General Motors Corporation and Zimbrick Automotive Group, Inc., timely answered the complaint denying liability. (Hereinafter General Motors and Zimbrick will be collectively referred to as GM.)

¶3 On February 6, 2006, Erdman moved to compel discovery. The circuit court denied the motion. Erdman petitioned for leave to appeal and we granted the petition.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 On March 17, 2006, Erdman filed an amended complaint which alleged the same legal claims but added additional parties. GM filed an answer on May 18, 2006, five business days after it was due. Erdman filed a motion to strike General Motors' answer as untimely and for default judgment. Thereafter, GM moved for enlargement of time within which to file an answer. On October 18, 2006, the circuit court denied GM's motion for enlargement of time and granted Erdman's motion for default judgment. GM appeals, and we consolidated its appeal with that of Erdman. We reference additional facts as needed in the discussion below.

DISCUSSION

¶5 We review a circuit court's decision whether to grant a default judgment and a motion for enlargement of time within which to answer under an erroneous exercise of discretion standard. ***Binsfeld v. Conrad,*** 2004 WI App 77, ¶20, 272 Wis. 2d 341, 679 N.W.2d 851 (default judgment); ***Rutan v. Miller***, 213 Wis. 2d 94, 101, 570 N.W.2d 54 (Ct. App. 1997) (enlargement of time). Similarly, whether to grant relief from judgment under WIS. STAT. § 806.07(1)(h) is a decision within the discretion of the circuit court. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. We affirm discretionary decisions provided they are based on the facts of record, the appropriate law, and the court's reasoned application of the correct law to the relevant facts. ***Binsfeld***, 272 Wis. 2d 341, ¶20.

¶6 WISCONSIN STAT. § 802.06(1) requires a defendant to serve an answer within forty-five days of being served with the complaint. Time periods set by statute may be enlarged upon motion. *See* WIS. STAT. § 801.15(2)(a). However, "[i]f a motion is made after the expiration of the specified time, it shall

not be granted unless the court finds that the failure to act was the result of excusable neglect." ***Id***.

¶7 Excusable neglect "is conduct that 'might have been the act of a reasonably prudent person under the same circumstances.'" ***Binsfeld***, 272 Wis. 2d 341, ¶23. It is not synonymous with mere neglect, carelessness, or inattentiveness. ***Connor v. Connor***, 2001 WI 49, ¶16, 243 Wis. 2d 279, 627 N.W.2d 182. The basic question is whether the conduct was excusable under the circumstances "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984) (citation omitted). The burden of establishing excusable neglect is on the party moving for the extension. ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc***., 2002 WI 66, ¶50, 253 Wis. 2d 238, 646 N.W.2d 19.

¶8 GM first argues that default judgment is not permissible in this case. It points to WIS. STAT. § 806.02(1), which authorizes a court to enter a default judgment "if no issue of law or fact has been joined," and contends that under ***Snowberry v. Zellmer***, 22 Wis. 2d 356, 126 N.W.2d 26 (1964),[2] issue is joined for the duration of a lawsuit once a defendant answers the original complaint and disputes any issue of fact or law. Hence, GM contends, because it disputed liability in its original answer, issue was joined without respect to any subsequent pleadings. We disagree.

[2] GM also cites to an unpublished opinion of this court which supports its reading of ***Snowberry v. Zellmer***, 22 Wis. 2d 356, 126 N.W.2d 26 (1964). However, an unpublished opinion is of no precedential value. *See* WIS. STAT. § 809.23(3); *also* ***City of Madison v. Lange***, 140 Wis. 2d 1, 6 n.2, 408 N.W.2d 763 (Ct. App. 1987).

¶9 In ***Snowberry,*** the defendant timely answered the complaint. He later obtained leave to amend his answer, and approximately two weeks after that, moved for summary judgment. The supreme court held that the motion was untimely under the relevant statute, which provided that a motion for summary judgment "shall be served within 40 days after issue is joined." ***Snowberry***, 22 Wis. 2d at 357-58. The court observed that the purpose of the statute was to prevent the use of summary judgment to delay proceedings, and in keeping with that purpose, the 40 days were to be counted from the "original joinder of issue" rather than from the service of the amended answer. ***Id***. at 358. However, the court did not address whether the original joinder of issue would be affected by the filing of an amended complaint because no amended complaint was filed in that matter.

¶10 Filing an amended complaint has an effect on joinder of issue as it relates to default judgment. WIS. STAT. § 802.09(1) provides that a defendant "shall" answer an amended complaint within 45 days.[3] In ***Bell v. Employers Mut. Cas. Co.***, 198 Wis. 2d 347, 363, 541 N.W.2d 824 (Ct. App. 1995), we held that a defendant's answer to an original complaint does not stand as an answer to an amended complaint, and that an amended answer must be filed. ***Id***. at 363. We did not address the issue of the effect of the amended complaint (and the required amended answer) as they relate to joinder of issue.

[3] WISCONSIN STAT. § 802.09(1) provides that "[a] party shall plead in response to an amended complaint within [45] days after service of the amended pleading unless: (a) the court otherwise orders; or (b) no responsive pleading is required or permitted under § 802.01(1)." GM does not argue that either of the two exceptions is applicable in the present case.

¶11 When an amended complaint makes no reference to the original complaint and incorporates no part of the original complaint by reference, the amended complaint supersedes or supplants the prior complaint. ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 487, 596 N.W.2d 358 (1999).[4] It then becomes the only live, operative complaint upon which default judgment can be entered. ***Id***. Although issue may be joined as between the original complaint and the original answer, the filing of an amended complaint renders the original complaint a nullity. It follows that an original answer does not join issue with a subsequently filed amended complaint. An amended answer is required to join issue with the only live, operative complaint—the amended complaint. Unlike ***Snowberry***, the original complaint in the present case was rendered a nullity once it was supplanted by the amended complaint. Accordingly, GM was required to file an amended answer in order to join issue for purposes of WIS. STAT. § 806.02(1).

¶12 GM argues that this reading of WIS. STAT. § 806.02(1) would lead to an absurd result, namely that once the amended complaint was filed, a defendant would be unable to move for judgment on the pleadings or make a statutory settlement offer. This is so, it argues, because these matters may only be raised after issue is joined. *See* WIS. STAT. § 802.06(3) (judgment on the pleadings) and WIS. STAT. § 807.01(1) - (3) (statutory settlement offers). GM apparently assumes that issue would be permanently "unjoined" under our ruling. However, once a timely amended answer is served and an issue of fact or law is thereby joined, a

[4] Erdman asserts, and GM does not dispute, that the amended complaint in the present case neither references nor incorporates by reference any part of the original complaint.

party is free to move for judgment on the pleadings or make a statutory settlement offer as provided by statute.

¶13 GM next contends that the circuit court erred with respect to its ruling that its conduct did not constitute excusable neglect excusing it from the entry of default judgment. In the affidavit filed in opposition to the motion for default judgment, GM's counsel asserted that he received the amended complaint on March 27, 2006, and placed it on his desk. He stated that it was his usual practice when receiving such a document to calendar the response date on his electronic calendar. However, he stated, he was engaged in final preparation for an out-of-state trial which was scheduled to begin a week later, and, as a result, did not do so. He stated that on March 28 he learned that the trial had been continued, and the following day as he and his secretary were organizing materials in his office, the amended complaint was mistakenly removed from his office and placed into the case file. Counsel stated that on May 17, while reviewing the file, he became aware of his failure to calendar the response date and calculated that the amended answer was due as of May 11.

¶14 GM argues that the circuit court held it to an unduly high excusable neglect standard, and asserts that counsel's conduct is comparable to that found to be excusable neglect in ***Lambert v. Hein***, 218 Wis. 2d 712, 582 N.W.2d 84 (Ct. App. 1998), and ***Rutan***. However, both cases are readily distinguishable because they involve situations in which the conduct of others resulted in the lawyer's failure to timely file pleadings. In ***Lambert***, counsel drafted an answer to the amended complaint but it was erased from his computer without his knowledge. As a result, he was not aware that the response had not been mailed by his secretary. ***Lambert***, 218 Wis. 2d at 721-22. In ***Rutan***, counsel's answer was not timely filed because he relied to his detriment on a courtesy agreement extending

the time to answer and a statement by opposing counsel that all parties had not been served. ***Rutan***, 213 Wis. 2d at 102-03. Here, the failure to timely answer the amended complaint is attributable to counsel's own conduct, not the conduct of others.

¶15 GM's failure to timely answer Erdman's amended complaint went unnoticed because counsel was engaged in matters other than this case and neglected to properly calendar the date upon which the answer was due. Although it argues to the contrary, the essence of GM's argument is that the press of business resulted in excusable neglect. However, the pressures of a busy law office, generally asserted and standing alone, do not justify an attorney's failure to meet a statutory deadline. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 472-73, 326 N.W.2d 727 (1982).

¶16 In ***Hedtcke***, defense counsel filed an affidavit in which he asserted that his failure to file an answer occurred because the complaint arrived while he was preparing for a complex trial. ***Id***. at 473. He stated that the complaint was served on August 14 and the trial in question occurred during the week of August 18; the answer was due by September 3. ***Id***. The attorney asserted that in addition to the press of business, the complaint was misplaced and not discovered until September 9. ***Id***. The attorney stated that he promptly remedied the problem when it was discovered, and that the answer was only twelve days late. ***Id***. at 465-66. On these facts, the supreme court held that counsel had not demonstrated excusable neglect. In so holding, the court ruled that excusable neglect should be predicated not on a mere statement of the press of other business, but rather on "specific incidents and a persuasive explanation which justify the attorney's neglect during the entire period of his or her inattention." ***Id***. at 472-73.

¶17 As the circuit court noted, the facts in ***Hedtcke*** are remarkably similar to those in the present case.[5] As in ***Hedtcke***, here GM provides no explanation, much less persuasive explanation, to justify its counsel's failure to file an answer, except the failure to calendar the answer date. We conclude that the circuit court acted within its discretion when it determined that GM's neglect was not excusable.

¶18 GM next contends that the circuit court erred in declining to grant its motion for an enlargement of time within which to answer. However, "when the circuit court determines that there is no excusable neglect, the motion [to enlarge] must be denied." ***Williams Corner Investors, LLC v. Areawide Cellular, LLC***, 2004 WI App 27, ¶19, 269 Wis. 2d 682, 676 N.W.2d 168 (citing ***Hedtcke***, 109 Wis. 2d at 468). Accordingly, the circuit court did not err in denying the motion.

¶19 GM argues further that the circuit court erred in declining to consider whether the interests of justice, such as its prompt remedial action after discovering its error, warranted setting aside the judgment. However, a finding of excusable neglect is a prerequisite to considering the interests of justice in deciding whether to grant a motion for default judgment. ***Id***. Because the circuit court found no excusable neglect, it properly did not consider the interests of justice. *See also* ***Estate of Otto v. Physicians Ins. Co. of Wisconsin, Inc.***, 2007 WI App 192, ¶16, 738 N.W.2d 599.

[5] *See also* ***Wagner v. Springaire Corp.***, 50 Wis. 2d 212, 184 N.W.2d 88 (1971) (pressure of work and personal affairs including distress by reason of prolonged illness of his wife during the preceding three months did not constitute excusable neglect); and ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 257 N.W.2d 865 (1977) (mislaying files in the course of moving a law office did not constitute excusable neglect).

¶20 Next, GM argues that even if the default judgment was properly granted, the circuit court erred in not relieving it from the judgment. GM seeks relief under WIS. STAT. § 806.07(1)(h) which permits reopening a default judgment for "any other reasons" besides those specifically identified. In order to establish grounds for relief under § 806.07(1)(h), a party must demonstrate "extraordinary circumstances" that justify relief. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 549-50, 363 N.W.2d 419 (1985). Subsection (h) is to be used sparingly and is to be used "only when the circumstances are such that the sanctity of the final judgment is outweighed by 'the incessant command of the court's conscience that justice be done in light of all the facts.'" ***Id***. at 550. As the circuit court noted, in exercising its discretion the court is to consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including:

> [W]hether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id. at 552-53.

¶21 GM contends that: (1) the extraordinary circumstances in the present case are that it timely answered the initial complaint and denied all liability; (2) the amended complaint raised no new claims; (3) GM had been defending the case for almost a year; and (4) Erdman was not prejudiced by the five-business-day delay in answering. The circuit court determined that there was nothing extraordinary about these circumstances. We agree. As the court

observed, facts similar to these are present in almost any situation in which a defendant fails to answer an amended complaint.

¶22 GM also advances as an extraordinary circumstance that its insurers remain parties to the litigation and will therefore be required to litigate the issue of GM's liability regardless of any default judgment against it. GM relies on ***Johns v. County of Oneida***, 201 Wis. 2d 600, 549 N.W.2d 269 (Ct. App. 1996), in which county corporation counsel defaulted in answering a complaint because the matter was improperly calendared. *See* ***id***. at 604. In weighing whether extraordinary circumstances existed, we considered the fact that the county asserted a meritorious defense to the Johns' claim and also the fact that the delay was nine days, was inadvertent and did not prejudice the Johns. ***Id***. at 609. However, we determined that the most compelling factor was that the Johns' suit was a collateral attack on a foreclosure judgment that had been entered three years previously. ***Id***. at 608-09. We noted that in the meantime, the property in question had been conveyed to a third party and, accordingly, a judgment affecting the county's title would not resolve the title dispute between the Johns and the third party. ***Id***. Under these circumstances, we determined that granting a default judgment "would have created mischief rather than resolve the issues between the parties." ***Id***. at 609.

¶23 GM contends that, as in ***Johns***, a default judgment here will not resolve the litigation and will instead complicate it. This is so, it argues, because under ***Frow v. De La Vega,*** 82 U.S. 552 (1872), its insurers are entitled to a trial on liability regardless of whether a default judgment has been entered against GM. However, ***Frow*** does not support GM's position. In that case, De La Vega sued eight defendants, including Frow, who he accused of joint tortious conduct. Although Frow defaulted, the remaining defendants did not. A default judgment

was entered against Frow, but De La Vega lost the trial on the merits with respect to the remaining joint tortfeasors. The Supreme Court ruled that it was unreasonable and illegal to let the default judgment stand against Frow because it was entirely inconsistent with the determination on the merits against the remaining defendants. ***Id***. at 554. Unlike ***Frow***, the present case does not involve joint and several liability. Any liability on the part of GM's insurers is dependent on their insurance contracts with GM and whether they have contractually agreed to indemnify GM for the claims upon which GM has been found liable by default.

¶24 For the above reasons, we affirm the circuit court's entry of a default judgment against GM. Because this issue is dispositive, we do not address Erdman's interlocutory appeal regarding discovery. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.