COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP485-FT **Cir. Ct. No. 2007CV725**

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

TOWN OF RIB MOUNTAIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT KURZYNSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Scott Kurzynski appeals a default judgment entered in favor of the Town of Rib Mountain.[1] Kurzynski argues that an error in the summons effectively deprived him of the full statutory time to file an answer. We agree. Because the Town should not benefit from its own error, we reverse the judgment.

¶2 On July 3, 2007, the Town filed suit against Kurzynski alleging trespass, common law nuisance and a nuisance ordinance violation. It is undisputed that Kurzynski was personally served with the summons and complaint on July 16, 2007. Although Kurzynski should have had forty-five days to answer, the summons stated in relevant part: "Within 20 days of receiving this Summons, you must respond with a written answer." On day eighteen of his answer time, Kurzynski slid the summons and complaint under his attorney's office door. The documents were not discovered until approximately day twenty-eight of the answer time. In the interim, the Town filed a motion for default judgment based on Kurzynski's failure to answer. When Kurzynski's counsel subsequently sought the Town's approval for an extension of the time for answering, Kurzynski's counsel was informed that it was too late. Kurzynski nevertheless filed an extension motion with a proposed answer attached. After a hearing, the circuit court denied Kurzynski's motion on grounds that Kurzynski had not shown excusable neglect. The court later granted the Town's motion for default judgment and this appeal follows.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Kurzynski argues that the Town failed to include the correct answer time on the summons and this was prejudicial error. The Town argues Kurzynski has waived this argument by failing to raise it in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Although Kurzynski concedes he failed to raise this argument below, he nevertheless urges this court to address the argument directly. Although the argument was not preserved, the waiver rule is one of judicial administration, not authority. *See* ***State v. Freymiller***, 2007 WI App 6, ¶17, 298 Wis. 2d 333, 727 N.W.2d 334. We opt in our discretion to address the merits.

¶4 WISCONSIN STAT. § 801.09 provides, in relevant part:

> The summons shall contain:
>
> ….
>
> (2) A direction to the defendant summoning and requiring defendant to serve upon the plaintiff's attorney, whose address shall be stated in the summons either an answer to the complaint if a copy of the complaint is served with the summons or a demand for a copy of the complaint. The summons shall further direct the defendant to serve the answer or demand for a copy of the complaint within the following periods:
>
> (a) 1. Except as provided in subds. 2. and 3., within 20 days, exclusive of the day of service, after the summons has been served personally upon the defendant.
>
> ….
>
> 3. Within 45 days, exclusive of the day of service, after the summons has been served personally upon the defendant … if any of the following applies:
>
> ….
>
> b. Any cause of action raised in the complaint is founded in tort.

¶5 It is undisputed that the claims alleged in the complaint sound in tort. Therefore, the Town erred by indicating a twenty-day, rather than forty-five-day, answer time on the summons. In ***Canadian Pac. Ltd. v. Omark-Prentice Hydraulics, Inc.***, 86 Wis. 2d 369, 372, 272 N.W.2d 407 (Ct. App. 1978), our supreme court concluded that defects in a summons did not relieve defendants of their statutory duties unless the defects misled the defendants to their prejudice. There, the court noted that a transmittal form accompanying the summons and complaint "made the omitted time for filing an answer conspicuous by its absence." ***Id.*** at 373. The court ultimately concluded the defendant was not prejudiced by the omission of an answer time on the summons. ***Id.*** In contrast to the summons in ***Canadian Pacific***, the summons here did not fail to include an answer time but, rather, provided an incorrect answer time. Kurzynski therefore argues that he was misled by this defect to his prejudice. We agree.[2]

¶6 After including the incorrect answer time on the summons, the Town mistakenly moved for default judgment when there was, in fact, no default. When the parties' respective counsels discussed the possibility of an extension for answering, the Town's counsel indicated it was too late, thus effectively deflecting Kurzynski from making a timely answer. Because the Town should not benefit by virtue of the default judgment from its own error, we reverse the judgment and remand the matter for further proceedings.

[2] We do not discuss the alternate arguments advanced by Kurzynski. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

By the Court.—Judgment reversed and cause remanded for further proceedings.

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