COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1494 **Cir. Ct. No. 2004CV212**

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

VEARL MILLER, WANDA MILLER AND ROSS, DAYNE AND WADE MILLER, BY GUARDIAN AD LITEM ROBERT MUBARAK,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

THE HANOVER INSURANCE COMPANY AND MASSACHUSETTS BAY INSURANCE COMPANY,

DEFENDANTS,

ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 DYKMAN, J. Vearl Miller, Wanda Miller, and Ross, Dayne and Wade Miller[1] appeal from an order for damages after they obtained a default judgment on their amended complaint seeking underinsured motorist (UIM) coverage from Zurich American Insurance Company. The Millers contend that the court erred in limiting their damages based on the language in their amended complaint and in prorating the damages award between the plaintiffs.[2]

¶2 Zurich cross-appeals from the orders granting default judgment to the Millers, denying its motion for relief from the default judgment, and determining the Millers' damages. Zurich argues that default judgment was improper because the Millers did not properly file or serve the amended complaint, and neither the Millers nor the court notified Zurich's attorney of the case's proceedings. Alternatively, it argues that it is entitled to relief from the default judgment based on excusable neglect or in the interests of justice. Finally, Zurich argues that the trial court erred in assessing damages following the default judgment.

¶3 We conclude, first, that the trial court properly granted default judgment to the Millers and denied Zurich relief from the judgment, and therefore affirm on this issue. Then, addressing the parties' arguments regarding the court's

[1] Because the plaintiffs share a last name, for clarity we will refer to them in their individual capacities by their first names.

[2] Counsel for Vearl and Wanda Miller has briefed the issues on appeal. The guardian ad litem for the minor Miller children has submitted a letter stating that he concurs in Vearl and Wanda Miller's attorney's arguments, and he has also signed their reply brief along with their counsel.

damages award, we conclude that the trial court properly limited the Millers' award to $2,000,000 based on their complaint, but that no interested party has asserted a basis to uphold the court's decision to prorate the damages award. We also conclude that Zurich has conceded that the trial court properly assessed the Millers' damages. Accordingly, we affirm the court's orders granting default judgment to the Millers and assessing their damages, and the part of its order limiting the Millers' damages award to $2,000,000. We reverse the part of the court's order prorating the damages award between the Millers.

Background

¶4 The following facts are undisputed. In August 2003, Vearl Miller was seriously injured in an automobile accident which occurred in the scope of his employment with Car Quest. In June 2004, Vearl and his wife, Wanda, sued the driver of the other vehicle, alleging negligence. Vearl claimed damages for his injuries and Wanda claimed damages for loss of consortium, and society and companionship. The Millers included as defendants the other driver's insurer, and Vearl's UIM insurer. The Millers also named Zurich, which had issued a policy to Car Quest's parent company, General Parts, as a party claiming subrogation for worker's compensation it had paid or would pay to Vearl.

¶5 When Zurich received the Millers' summons and complaint, it followed the special claims handling instructions of its insured, General Parts, to forward the claim to GAB Robins Risk Management Services, a third-party claims administrator. Zurich, represented by Attorney James Ratzel, answered the

complaint in July 2004.[3] Zurich affirmatively asserted a subrogation interest, and demanded judgment against the other defendants to the full extent of the worker's compensation benefits it had paid or would pay to Vearl.

¶6 In November 2004, the Millers' counsel, Jay Urban, wrote to Ratzel as follows: "My understanding is that you are representing Zurich in a subrogation capacity, but are you also counsel on the potential UIM claim? If so, kindly provide me with any and all certified policies of possible UIM coverage …." Ratzel wrote back later that month with this response:

> I only represent Zurich to the extent of the worker's compensation interest. I don't know if the issue of UIM coverage has ever been explored. In my discussions, I am not aware of anyone raising that issue and as such, I cannot state one way or another whether there is UIM coverage….
>
> …. As you are aware, my worker's compensation interest attaches to the [tortfeasor's insurance] policy limits … but would not come into play as it pertains to any UIM claim.

In December 2004, Urban wrote GAB as follows:

> This is also to advise you that [the tortfeasor's insurer] has tendered its underlying liability policy limits of $100,000 and their insured is supplementing this with $2,000 in settlement of this claim. Please advise pursuant to the ***Vogt*** case[4] whether you would like to substitute UIM funds from this policy in lieu of our acceptance of this offer …. Please also view this as a request for your position on the handling of the UIM claim that we will be making against these UIM policy(ies) with Zurich ….

[3] It is unclear whether GAB hired Ratzel to represent Zurich or Zurich hired Ratzel directly.

[4] ***Vogt v. Schroeder***, 129 Wis. 2d 3, 383 N.W.2d 876 (1986).

In letters dated January and February 2005, GAB, represented by Attorney Timothy Lyons, wrote Urban that there was no UIM coverage under the Zurich policy.

¶7 By February 2005, the Millers had resolved their disputes with the tortfeasor and his insurer, and those defendants were dismissed from this case. The court entered a stipulation and order for disbursement of the settlement funds provided by the tortfeasor and his insurer. The order provided for payments to both Zurich for its subrogation claim and Ratzel as Zurich's counsel. Around the same time, co-counsel for the Millers, Attorney Robert Mubarak, wrote a letter to the court stating: "We are keeping this case open as to all other named defendants. There are potentially other claims involving these defendants and other issues of UIM…." Urban then wrote the court a letter stating: "Kindly keep this case open for future proceedings, and we will expect to have additional motions and/or pleadings in the case within the next couple of months." The court wrote at the bottom of the letter: "Request approved," and notified plaintiff and defense counsel, but not Zurich or Ratzel.

¶8 On June 7, 2006, the Millers filed an amended complaint, naming Zurich as a defendant and claiming Zurich provided UIM coverage in the policy it issued to Car Quest. Vearl sought damages for his injuries, and Wanda, Ross, Dayne and Wade sought damages for loss of consortium and society and companionship. The amended complaint asserted that Zurich provided $2,000,000 of UIM coverage. It demanded actual and punitive damages, attorney fees, costs, and any other compensation deemed appropriate.

¶9 The Millers then attempted to serve Zurich through Lyons, the attorney representing GAB in the Millers' claims against Zurich. In response, Lyons wrote Urban as follows:

> I have not made an official appearance in this action. I am not authorized to accept service on behalf of Zurich …. You will need to serve Zurich through normal channels, since I have not been authorized to accept service on their behalf. Now that you have actually made the claims against them, I do not know if I will even be the one that handles the matter. You will need to serve them directly and we'll have to go from there.

¶10 Also on June 7, 2006, the Millers served Zurich with a complaint in a new and separate case alleging medical malpractice. Zurich was named in the medical malpractice action as a subrogated party.

¶11 On June 20, 2006, the Millers served Zurich with the amended summons and complaint in this case. They served Zurich through its registered agent, Stanley Lowe. According to standard Zurich procedure, Lowe forwarded the amended summons and complaint to Caroline Fountain, a Zurich employee, for processing. Fountain mistakenly believed that the amended summons and complaint in this case were duplicates of the Millers' medical malpractice pleadings she had processed several days earlier, which also included Zurich as a defendant. Therefore, she did not send the pleadings in this case to GAB.

¶12 Zurich did not timely answer the amended complaint, and the Millers moved for default judgment. Several weeks later, Zurich, by Attorney Craig Nelson, filed an answer and a motion for extension of time to file an answer. After several hearings, the court entered a default judgment in favor of the Millers. Zurich moved for reconsideration, which the court denied. Zurich then moved for

relief from the default judgment in the interests of justice, which the court also denied.

¶13 Following a damages hearing, the court found that the Millers' damages were $9,666,314.98. It then issued an order limiting the Millers' recovery to $2,000,000, based on the language in their amended complaint. It also ordered the damages prorated between the Miller plaintiffs. The Millers appeal from the judgment award, and Zurich cross-appeals from the orders granting default judgment, denying it relief from the judgment, and the judgment award.

Standard of Review

¶14 We review an order granting default judgment under the erroneous exercise of discretion standard. *See* ***Pliss v. Peppertree Resort Villas***, 2003 WI App 102, ¶8, 264 Wis. 2d 735, 663 N.W.2d 851. We apply the same standard when reviewing rulings on motions for relief from default judgment. *See* ***id.*** A proper exercise of discretion requires the trial court to apply the facts in the record to the correct legal standard and to reach a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶15 The parties challenge the trial court's damages award on grounds that the trial court proceeded on erroneous legal theories. We review questions of law de novo. ***Carolina Builders Corp. v. Dietzman***, 2007 WI App 201, ¶13, 304 Wis. 2d 773, 739 N.W.2d 53.

Discussion

¶16 The Millers appeal from the trial court's damages award following a default judgment against Zurich. Zurich cross-appeals from the orders granting default judgment, denying relief from the judgment, and determining the Millers'

damages. We first address Zurich's arguments regarding the default judgment. We then discuss the parties' disputes over the damages award.

Default

¶17 Zurich argues that procedural errors rendered the Millers' amended complaint a nullity, thus precluding a finding that Zurich was in default for failing to answer it. We disagree.

¶18 First, Zurich argues that the amended complaint is a nullity because it was not properly filed.[5] Zurich argues that the Millers did not properly obtain leave from the court to file an amended complaint under WIS. STAT. § 802.09(1) (2007-08),[6] because (1) the Millers did not file a motion to amend, (2) the court did not enter an order granting their request, and (3) Zurich was not notified that the Millers intended to file an amended complaint. Zurich also argues that the amended complaint was not properly filed because the Millers filed the amended complaint without first serving Zurich, contrary to WIS. STAT. § 801.14(4). We reject these contentions.

¶19 WISCONSIN STAT. § 802.09(1) provides that separate from amendments as a matter of course, "a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires." The statute does not specify a

[5] The Millers argue that Zurich has forfeited this argument because it did not raise it in the trial court until its motion for reconsideration. Because we conclude that Zurich's filing argument fails on the merits, we will not address whether Zurich forfeited this argument.

[6] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

required method for a party to request or a court to grant leave to amend. It specifies that consent of an adverse party must be in writing. Here, the record reveals that the Millers' counsel wrote to the court: "Kindly keep this case open for future proceedings, and we will expect to have additional motions and/or pleadings in the case within the next couple of months." The court wrote at the bottom of the letter: "Request approved." Zurich has cited no authority for its proposition that more was needed.

¶20 Moreover, we are not persuaded by Zurich's contention that it had to be notified that the court granted the Millers leave to amend. The record reveals that in the original complaint, Zurich was named only as a party with a subrogation interest. The Millers settled with the tortfeasor and his insurer, and they were dismissed from the case. The court entered an order in February 2005 for disbursement of the settlement funds between the Millers and Zurich. The parties agree that this resolved Zurich's worker's compensation interest in the case.

¶21 Zurich contends, however, that because it was not dismissed from the case along with the other defendants, and because the Millers requested the court to keep the case "open" as to them, the Millers were required to notify Zurich when the court granted them leave to amend their complaint. Thus, Zurich argues, the Millers' failure to notify Zurich of the court's granting the Millers leave to amend the complaint renders the amended complaint a nullity. We disagree.

¶22 It is undisputed that Zurich was only named as a defendant in the original complaint for subrogation purposes. The Millers settled with the tortfeasor and his insurer, and the court approved a stipulation for disbursement of

those proceeds based on Zurich's subrogation interest. Thus, Zurich's interest in the proceedings concluded at that point. This remains true regardless of the language the Millers used in requesting leave from the court to file an amended complaint. Because Zurich's interest in the litigation had been resolved by the time the Millers obtained leave to amend the complaint, we do not agree that Zurich was a party that needed to be notified of that leave to amend.

¶23 We are also not persuaded that filing the amended complaint prior to serving the amended complaint on Zurich requires reversal of the default judgment. While Zurich is correct that WIS. STAT. § 801.14(4) states that "[a]ll papers after the summons required to be served upon a party … shall be filed with the court within a reasonable time after service," and that "[t]he filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served," it is not established that the failure to comply with subsection (4) with respect to timing means that the amended complaint is a nullity. We will not reverse a trial court judgment based on procedural error absent a showing that the error affected the substantial rights of the complaining party. WIS. STAT. § 805.18(2). Zurich has not made that showing here.

¶24 Zurich cites ***Below v. Norton***, 2007 WI App 9, 297 Wis. 2d 781, 728 N.W.2d 156, and ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 596 N.W.2d 358 (1999), in support of its contention that the default judgment must be set aside because the Millers' amended complaint was filed before it was served on Zurich. In ***Below***, 297 Wis. 2d 781, ¶21, the trial court granted Below's motion to amend the complaint, and directed Below to file and serve the amended complaint. Below did neither. ***Id.*** We therefore concluded that the amended complaint, which had *never* been filed or served, was a nullity. ***Id.***, ¶23. It does not follow

that the amended complaint in this case—which *was* filed and served, only in the improper order—was also a nullity.

¶25 In ***Holman***, 227 Wis. 2d at 480, the supreme court addressed whether Family Health Plan's failure to answer the original complaint supported a default judgment "when prior to the expiration of the 20-day period in which to answer the original complaint, [the Holmans] filed an amended complaint in the circuit court but did not serve it on Family Health Plan." The Holmans argued that under WIS. STAT. § 801.02(1), they had sixty days from filing the amended complaint to serve it on Family Health Plan, and that an amended complaint is not operative until served. ***Holman*** at 489. Thus, the Holmans argued, their amended complaint did not supersede the original complaint because their amended complaint was never served on American Family, and thus never became operative. ***Id.*** The court explained that "[t]his argument fails because WIS. STAT. § (Rule) 801.02(1) applies to an original summons and complaint to commence an action and not to an amended complaint such as the one in this case." ***Id.*** The court explained:

> The plaintiffs have confused Wis. Stat. § (Rule) 801.02, which governs commencement of actions, with Wis. Stat. § (Rule) 801.14(1) and (2) …. Thus the plaintiffs in the present case were required to serve the amended complaint on Family Health Plan in accordance with Wis. Stat. § (Rule) 801.14(1) prior to filing the amended complaint.

Id. at 490. The court also said:

> The rules assume that the parties will be served before the paper is filed with the circuit court. Section 801.14(4) further provides that "the filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served …." In this case counsel for the plaintiffs filed affidavits of

> service on two defendants but no affidavit of service was filed for service on Family Health Plan.

Id. at 490 n.16. The ***Holman*** court, however, did not address whether a party's failure to comply with the requirement to serve an amended complaint before filing it rendered the amended complaint a nullity. Instead, the court concluded that, under the facts of the case, the amended complaint supplanted the original complaint, and therefore the default judgment entered on the original complaint was a nullity. ***Id.*** at 487. ***Holman*** therefore does not guide our analysis of whether the Millers' failure to serve the amended complaint on Zurich before filing, in and of itself, requires reversal of the default judgment.

¶26 We conclude that Zurich has not shown that its rights were affected by the procedural defect of the Millers filing the amended complaint before serving it on Zurich, and thus reversal is not warranted. The record reveals that the Millers filed their amended complaint on June 7, 2006. They served Zurich through its registered agent two weeks later, on June 20, 2006. Without more, we cannot conclude that this noncompliance with WIS. STAT. § 801.14(4) requires a reversal of the default judgment.

¶27 Next, Zurich contends that the amended complaint was not properly served. It points to WIS. STAT. § 801.14(2), which provides that "[w]henever under these statutes, service of pleadings … is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney." Zurich argues that its attorney of record after it answered the original complaint was Ratzel, and that therefore the Millers were required to serve Ratzel rather than serve Zurich directly. We conclude that the facts of this case do not support Zurich's reliance on § 801.14(2).

¶28 The Millers named Zurich in their original complaint as a party with a subrogation interest in their action. Ratzel answered as Zurich's attorney. The Millers then wrote to Ratzel and asked him if he represented Zurich as to a potential UIM claim. Ratzel responded that he represented Zurich only as to its subrogation interest. The subrogation interest was then resolved.[7] The Millers subsequently filed an amended complaint asserting a UIM claim against Zurich, and served Zurich directly.

¶29 We are not persuaded that the Millers were required to serve Ratzel with the amended complaint in light of Ratzel's statement that his representation of Zurich was limited to Zurich's subrogation interest. While we agree with Zurich that WIS. STAT. § 801.14(2) requires a plaintiff to serve an amended complaint through a represented party's attorney, we do not agree that a plaintiff must do so after the represented party's attorney clearly expresses that his or her representation is limited to a resolved claim under the original complaint. After Ratzel informed the Millers that his representation of Zurich was limited to the claim in the original complaint, and that claim was resolved, the Millers were not required to serve Ratzel with an amended complaint asserting a separate claim.[8]

[7] The Millers then received correspondence from Lyons, an attorney representing GAB in handling the Millers' claim against Zurich. Lyons stated that he was not sure if he or someone else would handle a UIM claim against Zurich, and that the Millers should serve their UIM claim on Zurich directly. The parties dispute the significance of this communication. We do not place any weight on Lyons's communication to the Millers, and instead focus on Ratzel's communication to the Millers as to the scope of his representation of Zurich.

[8] Zurich also argues that the trial court and the Millers failed to serve any of the papers in this case on Ratzel beginning in November of 2005, rendering the default judgment a nullity. We reject this argument for the same reasons discussed above.

Additionally, Zurich asserts that various other procedural errors tainted the default judgment in this case, including a delay in entering an attorney of record in the CCAP system, the court's inexplicable signing of an unnecessary order that it later withdrew, and the treatment of (continued)

¶30 Finally, Zurich argues that the default judgment should be vacated based on excusable neglect and in the interests of justice. It argues that the law disfavors default judgment; it favors allowing litigants their day in court; and laws allowing courts to vacate default judgments should be liberally construed. *See* ***Maier Construction, Inc. v. Ryan***, 81 Wis. 2d 463, 472, 260 N.W.2d 700 (1978) *overruled on other grounds by* ***J. L. Phillips & Assocs., Inc. v. E. & H. Plastic Corp.***, 217 Wis. 2d 348, 577 N.W.2d 13 (1998). It argues that the trial court failed to adequately consider its arguments to vacate the default judgment based on excusable neglect or in the interests of justice, and therefore did not properly exercise its discretion in denying Zurich relief.[9] We disagree.

¶31 A trial court may grant a party relief from a default judgment based on the party's excusable neglect.[10] *See* WIS. STAT. § 806.07(1)(a). Excusable

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Attorney Mubarak as guardian ad litem for the Miller children for several years before he was actually appointed as such. Because none of these errors affected the default judgment, we decline to address them.

[9] The parties dispute whether a trial court is required to consider the established interests of justice factors as part of its analysis as to whether a party's act or omission was due to excusable neglect. *See* ***Williams Corner Investors, LLC v. Areawide Cellular, LLC***, 2004 WI App 27, ¶19 n.4, 269 Wis. 2d 682, 676 N.W.2d 168 (recognizing that "[t]here does not seem to be a consensus among our court of appeals decisions regarding whether excusable neglect is a threshold determination or whether the trial court must consider both excusable neglect and the interests of justice"). However, Zurich also raised the interests of justice as a separate ground for relief from the default judgment under WIS. STAT. § 806.07(1). We therefore address it separately. Because we conclude that the interests of justice do not require relief, those factors do not affect our excusable neglect analysis.

[10] Additionally, a court may grant a party's motion to enlarge the time to file an answer, but, "[i]f the 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." *See* WIS. STAT. § 801.15(2)(a). The term "excusable neglect" has substantially the same meaning under WIS. STAT. §§ 801.15(2)(a) and 806.07(1), and thus cases addressing a motion to enlarge time to file an answer after the time to answer has expired are beneficial to our analysis of whether excusable neglect allows relief from the default judgment in this case. *See* ***Leonard v. Cattahach***, 214 Wis. 2d 236, 248-49 & n.6, 571 N.W.2d 444 (Ct. App. 1997).

neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances. It is not synonymous with neglect, carelessness or inattentiveness." *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted).

¶32 Zurich argues that it was entirely reasonable that Fountain would view the two pleadings she received only several days apart and conclude that the second set was a duplicate of the first. The problem, however, is that the two sets of pleadings are *not* duplicates. It is true that both pleadings name the Millers as plaintiffs and Zurich as a defendant, but additional defendants differ between the sets. The case numbers are different, and the stated causes of action are different. The trial court said:

> The court considered whether clerical error can be excusable neglect and the case law regarding the opportunity for defendants to answer and the policy of disfavor in considering this neglect and applying the facts and circumstances to the case law, and cannot find that these are facts and circumstances that support a case of "excusable" neglect under a reasonable review of Wisconsin law ….

¶33 We review a trial court's finding on excusable neglect "not [for] whether this court would or would not have granted … relief but rather [for] whether the [trial] court [erroneously exercised] its discretion in reaching its decision." ***Id.*** at 470-71. Thus, the supreme court has upheld findings of no excusable neglect where a client failed to forward service to others responsible for answering, and where a lawyer failed to timely answer because he was busy with other business. *See* ***Williams Corner Investors, LLC v. Areawide Cellular, LLC***, 2004 WI App 27, ¶12, 269 Wis. 2d 682, 676 N.W.2d 168. Similarly, we cannot say that it was an erroneous exercise of the court's discretion to decline to find excusable neglect on the facts of this case.

¶34 Zurich also argues that the trial court failed to address its argument that it was entitled to relief from the default judgment in the interests of justice, requiring reversal. It argues that the court was required to analyze the following factors to undertake a complete interests of justice analysis:

> 1. Whether the judgment was the result of the conscientious, deliberate, well-informed choice of the claimant;
>
> 2. Whether the claimant received the effective assistance of counsel;
>
> 3. Whether relief is sought from a judgment to 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;
>
> 4. Whether there is a meritorious defense to the claim; and
>
> 5. Whether there are intervening circumstances making it inequitable to grant relief.

Allstate Ins. Co. v. Brunswick Corp., 2007 WI App 221, ¶7, 305 Wis. 2d 400, 740 N.W.2d 888 (citation omitted). Zurich argues that because the trial court did not analyze these factors on the record, its discretionary determination must be reversed.

¶35 However, the supreme court has explained that "[w]hen the [trial] court sets forth no reason or inadequate reasons for its decision, [an appellate court] may engage in its own examination of the record and determine whether the [trial] court exercised its discretion and whether the facts provide support for the [trial] court's decision." ***Hedtcke***, 109 Wis. 2d at 471. "Because the exercise of discretion is fundamental to the [trial] court's functioning, an appellate court will generally look for reasons to affirm discretionary decisions." ***Allstate***, 305 Wis. 2d 400, ¶5.

¶36 On our own review, we conclude that the record supports the trial court's exercise of discretion in denying Zurich's motion for relief from the default judgment in the interests of justice. We agree that some of the factors weigh in Zurich's favor: there has been no determination of UIM coverage under the policy on the merits, and Zurich claims there is none. However, other factors weigh against vacating the default judgment: there are no particular reasons to favor deciding this case on the merits over preserving the finality of the judgment, and the default judgment followed a human error in the course of Zurich's consciously chosen and deliberate system for processing complaints. Because there are factors weighing for and against vacating in the interests of justice, we cannot say that the court erroneously exercised its discretion in declining to grant Zurich relief.

Damages

¶37 The Millers argue that the trial court erred in limiting their damages to $2,000,000 based on their amended complaint's reference to Zurich's $2,000,000 UIM policy. They argue that the order granting them a default judgment against Zurich entitles them to the full amount of their damages as alleged in their amended complaint, which were established at the damages hearing to be $9,666,314.98. They point to language in the amended complaint alleging that Zurich issued a policy or *policies* covering the Millers' damages, and setting forth the scope of those damages, as entitling them to relief for the full extent of their damages.

¶38 Zurich argues that the Millers are limited to recovering what they have demanded in their amended complaint, and that their amended complaint clearly states they are seeking recovery under a $2,000,000 UIM policy. It argues

that the language in the Millers' amended complaint referring to other possible policies does not entitle them to a damages award greater than the limits of the $2,000,000 coverage explicitly stated.

¶39 The parties agree that, based on the default judgment, the Millers are entitled to recover damages based on the claims in the amended complaint. *See* ***Linker v. Batavian Nat'l Bank***, 271 Wis. 484, 490, 74 N.W.2d 179 (1956) ("A default judgment may be rendered for the amount claimed in the complaint, but not for a greater amount."). They disagree as to the amount claimed in the amended complaint.

¶40 The disputed language in the Millers' amended complaint reads as follows:

> **PARTIES**
>
> ….
>
> 4. Defendant, Zurich American Insurance Company (Zurich), is an insurance company that issued in Wisconsin a policy or policies of insurance, in full force and effect at all times relevant hereto, to Car Quest purporting to provide underinsured motorist [UIM] coverage to its insured, and therefore Car Quest employees, like plaintiff Miller, driving in the scope of their employment, under the declarations and terms and conditions of those policies, have coverage including but not limited to the following: $[2],000,000[11] in commercial general liability and/or business auto and/or umbrella or other excess coverage in consideration for premiums paid by Car Quest; defendant Zurich is a proper party pursuant

[11] The amended complaint actually states in this section that Zurich's policy was for $1,000,000 of coverage, and later claims the policy limit is $2,000,000. Where the Millers quote this section of their complaint in their brief-in-chief, they have changed the amount to $2,000,000 and added "(sic)." Zurich does not dispute that the Millers' complaint claims Zurich issued a policy with a $2,000,000 limit.

to direct action for issuing these policies and then denying coverage.

….

CLAIMS

….

UIM Coverage on CGL or Business Auto Car Quest Coverage From Defendant Zurich For Granting UIM Coverage At Same Level As Liability Limits

….

42. At all times relevant hereto, Car Quest/General Parts, Inc. was insured on those vehicles [driven by Vearl Miller] for commercial general liability (CGL), business auto and other liability and UM/UIM coverages for vehicles through said company as a named insured under a policy or policies of insurance with defendant Zurich, including but not limited to policy number BAP 8378227-11.

43. At all times relevant hereto, Car Quest/General Parts, Inc. paid a premium for said policy(ies) in the amount of $935,873 plus tax and surcharges for a period of 10-01-02 to 10-01-03 and as a result received valid coverage, including UIM coverage, for the Miller vehicle on the date in question as an insured under a policy or policies of insurance with defendant Zurich.

44. Upon information and belief, underinsured motorist (UIM) coverage was "included" at the level of $2,000,000 in said premium at the same level of coverage as liability based upon the plain language and/or ambiguities included within the policy.

….

46. Upon information and belief, defendant Zurich should be deemed to provide coverage for UIM by the plain language of the declaration page, and therefore the injuries sustained by plaintiffs Miller should result in responsibility for coverage upon defendant Zurich which should be directly liable for said damages under the terms and conditions of this insurance coverage.

….

> 49. As a result of the foregoing, plaintiffs Millers demand relief against defendant Zurich in the form of declaratory judgment determining that its insurance coverage applies under the facts [and] circumstances of this loss.
>
> 50. As a direct and proximate result of the foregoing, plaintiffs Miller[s] suffered economic and non-economic losses all to their great harm.
>
> ….
>
> **CONCLUSION**
>
> WHEREFORE, plaintiffs Miller[s] demand judgment against … Zurich for a monetary award of fair and just damages for their injuries and damages and/or declaratory relief as stated herein, together with attorneys fees, costs and other compensation to be determined by the court or such other relief that the court may deem appropriate.

¶41 The Millers argue that the language in their amended complaint entitles them to relief for the full extent of their damages, despite the language regarding a $2,000,000 policy limit. They argue that the language at issue here is distinguishable from the language at issue in ***Martin v. Griffin***, 117 Wis. 2d 438, 344 N.W.2d 206 (Ct. App. 1984), where the plaintiffs were limited to recovering the amount of damages pled following default, despite proving that their damages far exceeded that amount. They further argue that the contract language here is analogous to the contract language in ***Leonard v. Cattachach***, 214 Wis. 2d 236, 571 N.W.2d 444 (Ct. App. 1997), where the plaintiffs recovered a damages award for the full amount of their injuries, in excess of the insurance policy's limit, following a default judgment. Zurich responds that the language here falls within the ambit of ***Martin*** rather than ***Leonard***, and thus the Millers are limited to a $2,000,000 recovery.

¶42 In ***Martin***, 117 Wis. 2d at 440-41, the complaint alleged that Milbank Mutual Insurance Company "'had in effect a liability insurance policy covering … Griffin … against liability imposed upon him by law for damages caused by his negligent acts,' and that Martin suffered $150,000 damages caused by Griffin's negligence." Milbank's answer was untimely, and the court granted default judgment to Martin. ***Id.*** at 440. Milbank appealed from the $150,000 damages award, claiming it was entitled to a damages hearing. ***Id.*** at 445. We concluded that "[t]he trial court received proof by affidavit sufficient to support the $150,000 judgment against Milbank," and thus was not required to hold a damages hearing. ***Id.*** We also said: "The trial court found $313,454.55 damages based on Martin's affidavit. The court properly limited the damage award to $150,000 as demanded by the complaint." ***Id.*** at 445 n.1.

¶43 In ***Leonard***, 214 Wis. 2d at 250, the complaint

> alleged that Dupont [Mutual Insurance Company] had issued an insurance policy to [the tortfeasor] which was in effect at the time of their injuries and which provided that the company would "pay all sums which … [the tortfeasor] might become legally obligated to pay as a consequence of injuries resulting from her negligent acts."

Dupont failed to file a timely answer, and the court granted default judgment to the Leonards. ***Id.*** at 241. Dupont appealed from the damages award, which was in excess of its policy limits. ***Id.*** Dupont argued that the tortfeasor's answer, which was not stricken, alleged "that Dupont's policy of insurance had terms and limitations on DuPont's obligation to pay," and thus limited the Leonards' recovery. ***Id.*** at 251. We disagreed, because we did not read the tortfeasor's answer "to plead Dupont's policy limits and thereby increase her exposure, if damages proved to be greater than those limits." ***Id.*** We therefore concluded that

the trial court "properly entered judgment for the entire amount of damages proved." ***Id.***

¶44 We agree with the Millers that the language in their amended complaint is not analogous to the language in ***Martin*** because they have not alleged a specific amount of damages. However, it does not follow that they are therefore entitled to a judgment against Zurich for the full extent of their damages. The reason the plaintiffs in ***Leonard*** recovered an award for the full amount of their damages was that the complaint claimed the insurance company agreed to pay the full extent of the tortfeasor's liability, without stating the policy limits. The Millers' amended complaint, read as a whole, asserts a UIM claim against Zurich under a $2,000,000 policy. The fact that the complaint includes the term "policies" does not alter that fact. Because the Millers clearly alleged Zurich's UIM policy limit was $2,000,000, they are limited to recovering that amount.

¶45 Next, the Millers argue that there was no basis for the trial court to prorate the damages between the Millers, because Wanda, Ross, Dayne and Wade only asserted damages derivative of Vearl's damages. Thus, the Millers assert, Vearl's damages should have been fully compensated before any award to the other Millers. Zurich argues that Wisconsin law requires that the damages award be prorated among the parties seeking recovery under the limited damages award.

¶46 The problem with Zurich's argument is that it has not explained what interest it has in how the damages it must pay the Millers are distributed.[12]

[12] In the Millers' brief-in-chief, the Millers posit that Zurich supports prorating the damages award because otherwise it would be subject to double costs and interests under WIS. STAT. § 807.01(3) and (4), because Vearl would recover more than the settlement amount he proposed to Zurich prior to trial. Zurich, however, does not respond to this suggestion, and argues only that prorating the judgment is in the best interest of the minor Miller children. (continued)

Zurich is liable for $2,000,000, regardless of how that amount is divided among the Miller plaintiffs. The only parties with any interest in how to divide the damages are the Millers themselves, and all of the Millers have joined the argument against prorating the damages award. Thus, there has been no response by an interested party to Vearl and Wanda Miller's appeal from the part of the damages judgment prorating the award. We therefore reverse this part of the trial court's order. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (if respondent does not refute an argument, we will deem it conceded).

¶47 Finally, Zurich argues in its cross-appeal that the court erred in assessing damages. It argues that only Vearl, and not the other Miller plaintiffs, are entitled to UIM benefits under its policy. It also argues that the trial court erred in assessing the Millers' total damages by refusing to offset them by payments from worker's compensation benefits and the tortfeasor's liability insurer, and in including medical expenses which the Millers do not pay directly.

¶48 First, because we have already concluded that the Millers' damages are to be awarded to Vearl first (rather than prorated), and Vearl's personal damages exceed the $2,000,000 recovery in this case, we need not address Zurich's argument that the other Millers do not have valid derivative claims. Regardless, only Vearl will receive a damages award following our decision. Next, as to Zurich's remaining damages arguments, we conclude that it has not

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Zurich's counsel, however, does not represent the minor Miller children; they have their own counsel, who has joined the adult Millers' arguments. Zurich puts forth no reason its own interests would be affected by the way the damages award is distributed among the Miller plaintiffs.

pursued those arguments. The Millers responded to each of Zurich's arguments, asserting that the trial court properly assessed their total damages. In its reply brief, Zurich only addressed the Millers' arguments as to whether the court properly granted default judgment, and did not take up its arguments concerning the damages assessment. Thus, we will deem it to have admitted that the trial court properly assessed the Millers' damages at the hearing. *See* ***id.*** Accordingly, we affirm the trial court's orders granting default judgment to the Millers, denying Zurich relief from the judgment, and determining the Millers' damages, but reverse the part of the order prorating the award between the Millers.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.