COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 No. 2011AP479

Cir. Ct. No. 2007CV1708

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

CINDY LE,

PLAINTIFF-APPELLANT,

V.

KWAN MEI TJOE D/B/A HAPPY WOK OF BELOIT,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed*.

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

¶1 LUNDSTEN, P.J. This appeal involves a business dispute between Cindy Le and Kwan Mei Tjoe. Le sold a restaurant business to Tjoe and rented to Tjoe the space to operate that business. Several disputes arose, and Le evicted Tjoe. Initially, Le sued in small claims court for eviction. When Tjoe counter-

claimed, the matter was moved to circuit court. Le's claim was dismissed, and default judgment and damages were awarded to Tjoe. Subsequently, Tjoe moved for additional damages, and Le moved for relief from judgment under WIS. STAT. § 806.07.[1] The circuit court awarded Tjoe $50,000 in additional damages and denied Le's motion for relief from judgment. It is these two latter decisions that Le challenges on appeal. We affirm the circuit court.

Background

¶2 In 2002, Tjoe purchased from Le the "Happy Wok" restaurant business located at 1802 Harrison Avenue in Beloit. The sale included the trade name "Happy Wok."

¶3 At the same time, Tjoe entered into a lease agreement with Le that permitted Tjoe to operate the Happy Wok at the 1802 Harrison Avenue address. The lease term was set to expire on September 30, 2007, with options to extend the lease for a total of ten years.

¶4 On July 25, 2007, Le sued Tjoe in a small claims action, seeking eviction of Tjoe. A judgment of eviction was entered on August 10, 2007. The writ of eviction was executed on September 4, 2007, and Tjoe was removed from 1802 Harrison Avenue. After she was evicted, Tjoe filed an answer and counterclaim. Because of the nature of the counterclaim, the case was transferred to circuit court.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 In the original counterclaim and three subsequent amendments, Tjoe alleged that, during the term of the lease, Le breached the lease agreement by failing to maintain the building and parking lot, thereby causing Tjoe lost income and profits. Tjoe alleged that she was wrongfully evicted and that, in the process of eviction, Le wrongfully took possession of property owned by Tjoe and refused to return the property. Tjoe alleged that, as a result of the wrongful eviction, Tjoe lost the opportunity to renew her lease for ten years and was forced to relocate the Happy Wok to a new, more expensive location. Tjoe alleged that she incurred expenses because of the move (including attorney's fees) and that she lost income because Le's wrongful possession of Tjoe's property delayed opening the Happy Wok at the new location. Tjoe alleged that, after the eviction, Le operated a restaurant at 1802 Harrison Avenue using the Happy Wok name on its signage, menu, and advertising, resulting in confusion and the substantial loss to Tjoe of customers, goodwill, and revenue.

¶6 Le retained counsel and filed an answer to the counterclaims. However, on January 2, 2008, Le's attorney, Rebecca Labant, moved to withdraw. In an affidavit, Labant averred that Le failed to pay according to a fee agreement for "a significant period of time," and that "Le has failed to provide ... documents required to be produced, including an insurance policy, copies of citations, and copies of tax records." The circuit court granted Labant's motion to withdraw.

¶7 It is undisputed that by August 27, 2008, Le retained attorney Mario Tarara to represent her. There is some dispute about the interaction between Le and Attorney Tarara, but it is undisputed that, after Tjoe's attorney filed a third amended answer and counterclaim, Attorney Tarara failed to timely file an answer to the amended counterclaim.

¶8 On March 2, 2009, Tjoe moved for default judgment based on Le's failure to file an answer to the amended counterclaim. A hearing on that motion was held on March 18, 2009, but there is no transcript of that hearing in the record. The minutes indicate that the motion was granted and that a time was set for a hearing on damages.

¶9 A written order granting default judgment was entered on March 16, 2010. The order stated that the basis for granting default judgment was Attorney Tarara's failure to file a timely answer to Tjoe's third amended counterclaim. The order indicated that a trial on damages would be scheduled.

¶10 On March 31, 2010, the trial on damages was held, and Attorney Tarara represented Le. Based on the evidence presented, the circuit court found in favor of Tjoe. Among the court's findings were the following:

- Le was not a credible witness. "Where there is a dispute on a question of fact, and there is no other corroboration, I do not believe Ms. Le."

- Le breached the lease agreement by failing to make adequate repairs, Tjoe was justified in withholding rent, and Tjoe was wrongfully evicted.[2]

- Le wrongfully retained property belonging to Tjoe.

- Le violated the purchase agreement by using the Happy Wok name at 1802 Harrison Avenue.[3]

[2] The finding of wrongful eviction was an implied finding. The only reasonable interpretation of the court's discussion and later order is that the court found Le wrongfully evicted Tjoe.

[3] There was a dispute at this hearing regarding Le's control over the restaurant that was operated at 1802 Harrison Avenue after Tjoe's eviction. The evidence and the circuit court's findings indicate that Le's control was actually a mixture of direct action and permitting another (continued)

The court enjoined Le from further use of the Happy Wok name and informed Le that there would be a $500 per day penalty for continued use of the name. The written judgment, entered April 22, 2010, awarded Tjoe $59,800 in damages and $1,477.54 in statutory costs.

¶11 There was no appeal from the default judgment or subsequent written order granting damages and injunctive relief.

¶12 On September 8, 2010, Tjoe moved to amend the judgment to add damages for Le's continued use of the Happy Wok name. It appears thereafter that Le retained a third attorney, Darryl Lee, who represented Le before the circuit court and whose firm represents Le on appeal.

¶13 On December 9, 2010, the circuit court held an evidentiary hearing on Tjoe's request for additional damages. Pertinent facts relating to this hearing are recited as necessary in the discussion section below. It is sufficient to say here that the circuit court once again found Le to be not credible, and awarded Tjoe $50,000 in additional damages for Le's continued use of the Happy Wok name. The written order amending the judgment was entered January 5, 2011.

¶14 On February 4, 2011, a hearing was held on Le's motion to vacate the default judgment.[4] The circuit court orally denied the motion at the end of that hearing, and a written order was entered on February 18, 2011.

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individual, Duc Chi Dang, to use the Happy Wok name. For purposes of this opinion, it is not necessary to get into this additional layer of complicating facts.

[4] Le had moved before the December 2010 hearing for relief from the judgment, but was not prepared to proceed on that motion during that hearing. Le filed a second motion for relief from the judgment on December 28, 2010, and that motion was heard on February 4, 2011.

¶15 Le appeals the January 5, 2011 order amending the judgment to add $50,000 in damages and the February 18, 2011 order denying relief from the default judgment.

Discussion

¶16 As set forth in the background section, this litigation began with a small claims eviction action by Le against Tjoe. But soon thereafter the litigation moved to the circuit court and focused on Tjoe's counterclaims against Le. Briefly stated, Tjoe contended that in 2002 she purchased from Le the Happy Wok restaurant, located at 1802 Harrison Avenue in Beloit, then rented that location from Le in order to continue operating the restaurant at that location. Tjoe alleged that, in 2007, Le wrongfully evicted Tjoe, forcing Tjoe to relocate her Happy Wok business to a new location. And, Tjoe alleged that Le violated the purchase agreement by continuing to operate a restaurant at the 1802 Harrison Avenue address under the Happy Wok name.

¶17 The challenges on appeal fall into two groups. The first group consists of arguments directed at the added $50,000 in damages based on Le's continued use of the Happy Wok name after the first damages hearing. The second group consists of arguments directed at the circuit court's decision to deny Le's motion under WIS. STAT. § 806.07 to vacate the default judgment. We reject each of Le's arguments under both groups.

I. Le's Arguments Relating To The Circuit Court's Decision To Add $50,000 In Damages To The Original Judgment

¶18 After it entered default judgment, the circuit court held a hearing on damages. During that hearing orally, and in a written order thereafter, the court ordered Le to stop using the Happy Wok name and further ordered that, for each

day Le violated this order, $500 would be added to the judgment. Approximately four and a half months later, Tjoe moved the court to amend the judgment based on Tjoe's allegation that Le was still using the Happy Wok name. The court held an evidentiary hearing on this issue on December 9, 2010, and concluded that Le violated the court's order and that violations occurred up until the time of the hearing. Among the violations were posted menus with the Happy Wok name and a phone book listing under the Happy Wok name.[5] In this context, and based on the court's comments during the December 9, 2010 hearing, it is clear that the court considered Le's continued use of the Happy Wok name to be a serious and intentional violation of the court's order. The court calculated that it could award $125,500 to Tjoe, but chose instead to award $50,000.

¶19 Under several headings and in several arguments, Le attacks the $50,000 addition to the judgment. We have identified the following five arguments: (1) the circuit court's finding that Le operated the restaurant after Tjoe was evicted is based, in part, on inadmissible evidence; (2) the circuit court could not impose additional damages for Le's continued use of the Happy Wok name because Le was unaware of the court's written order; (3) the circuit court should have concluded that Le "substantially complied" with the court's order; (4) there is no evidence supporting the statement in the circuit court's January 5, 2011 order

[5] Very briefly at the end of her brief-in-chief, Le seems to argue that testimony relating to the "Yellow Book" was inadmissible. As with several other of Le's arguments, this one is insufficiently developed. In this part of Le's brief, she recounts that she objected to testimony on this topic as hearsay and argued there was no evidence that she had anything to do with the phone book listing. But Le does not explain why these challenges should have been successful. Le also does not come to terms with the circuit court's reasoning that, because Le owned and operated the restaurant at the 1802 Harrison Avenue address after Le evicted Tjoe, it was reasonable to infer that Le was responsible for the phone book listing, even if she did not personally arrange for the listing.

that an entity named "Kwik Wok" is involved in this matter; and (5) Tjoe was not entitled to any additional damages because Tjoe did not have "clean hands." We address each argument in turn.

A. Reliance On A Settlement Negotiation Statement

¶20 Le argues that the circuit court's factual finding that Le operated the restaurant located at 1802 Harrison Avenue during the relevant time period is based, in part, on inadmissible evidence, specifically, that the court relied on a statement from a settlement negotiation. During the December 9, 2010 hearing, Le denied being an owner, manager, or operator of the restaurant after the 2002 sale and, thus, after Tjoe's eviction in 2007. To impeach that denial, Tjoe's counsel showed Le a copy of a written stipulation Le signed in connection with a failed settlement negotiation. In that stipulation, Le asserted that she owned and operated the restaurant after the sale to Tjoe.

¶21 Le now contends that the circuit court's consideration of this statement violates WIS. STAT. § 904.08, which limits the admissibility of statements made in compromise negotiations. Le appears to argue that, under this statute, the document could not be used to impeach her denial because such impeachment was based on using the document as proof of the fact asserted—i.e., that Le was the owner and operator of the restaurant. We deem this argument forfeited because the record shows that Le's counsel made an insufficient objection and then abandoned that objection.

¶22 During the hearing, after Le denied having control over the restaurant, Tjoe's counsel confronted Le with the signed stipulation, and Le denied having seen the document before. When Tjoe's counsel showed Le her signature on the document, Le admitted it was her signature. Upon further questioning, Le

admitted signing on the page with her signature, but denied having seen the document. Following this exchange, Le's counsel stated: "I just object *to the extent* it's a settlement discussion[], *and I don't know the admissibility of it.*" (Emphasis added.)

¶23 The circuit court responded to Le's counsel by stating that the proposed stipulation was not being admitted "as a settlement discussion," but rather to impeach Le's assertion that she was not the "operator" of the restaurant. At no time did Le's counsel direct the court's attention to WIS. STAT. § 904.08 or, in more general terms, make an argument tracking the statute. In fact, moments later, Le's counsel affirmatively stated "[n]o objection" when Tjoe's counsel offered the document into evidence.

¶24 Thus, we conclude that Le has forfeited the legal argument she makes on appeal. It follows that, for purposes of this appeal, we will assume the circuit court properly relied on the negotiation document as evidence that Le was an owner and operator of the restaurant during the relevant time period.

¶25 Furthermore, we agree with Tjoe that, even if reliance on the negotiation document was error, the circuit court had before it other evidence supporting a finding that Le owned and operated the restaurant. For example, Le admitted that, shortly after Tjoe was evicted, Le signed a Rock County Health Department application for the Happy Wok restaurant identifying herself as the "manager." Also, Le's testimony supports the factual inference that she continued to have a hand in decision making at the restaurant. Le testified that, after the circuit court issued its oral order directing Le to stop using the Happy Wok name, she ordered and paid to send out to area households 10,000 new menus with the Quik Wok name and she ordered and personally helped install a new outdoor sign.

Le further testified that, after she saw the more detailed written order, she called the restaurant and said "they got to change all that," referring to the interior use of the Happy Wok name. Based on this evidence, and more that we do not take the time to detail, the circuit court could reasonably conclude that Le had the ability to comply with the ordered injunctive relief and that she was liable for violations of that order.

¶26 Our discussion here also disposes of Le's argument that there is insufficient evidence to support the circuit court's finding that she was an owner of the restaurant operated at 1802 Harrison Avenue after Tjoe's eviction.

B. Unaware Of Circuit Court's Written Order

¶27 Le argues that the circuit court could not impose additional damages for her continued use of the Happy Wok name because she was unaware of the circuit court's written order. More specifically, Le argues that there was no evidence that she saw the written order detailing the prohibitions on her use of the Happy Wok name and that she complied with her understanding of the circuit court's oral order. Le apparently contends that it was reasonable for her to believe, based on the oral ruling, that she was required to change only the large outdoor signage and the menus. We are not persuaded.

¶28 First, Le does not explain why the circuit court was required to believe her assertion that she was unaware of the circuit court's written order.[6]

[6] In support of her factual assertion that she was never furnished a copy of the circuit court's order, Le's appellate brief does not cite to a circuit court finding or to undisputed evidence. Rather, Le cites to her own affidavit, an affidavit that contains other factual assertions by Le that the circuit court ultimately found not credible.

¶29 Second, assuming for argument's sake that Le did not learn of the contents of the written order, Le does not explain why her continued use of the Happy Wok name on indoor signs and displayed menus complies with the oral order. It is true that the circuit court's oral order only generally enjoins, in the court's words, "the continuing use of the name Happy Wok restaurant at [the 1802 Harrison Avenue] location," and that the written order is much more specific in that it gives examples of prohibited uses of the Happy Wok name, including on menus. But that difference does not explain why Le would think she could continue to use the Happy Wok name on a limited basis in the restaurant.

¶30 In sum, the circuit court was entitled to reject the proposition that Le believed she could continue to use the Happy Wok name in limited ways.

C. Substantial Compliance

¶31 Le argues that the circuit court should have concluded that her violations of the court's order were minor and that she "substantially complied" with the order. Le's sole authority for the proposition that "substantial compliance" with a court order is sufficient is a contracts case. Le relies on ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 434 N.W.2d 97 (Ct. App. 1988). In that case, we stated: "The test for substantial performance is whether the performance meets the essential purpose of the contract." ***Id.*** at 516. We conclude that Le's "substantial compliance" argument was not preserved and is not sufficiently developed on appeal.

¶32 Before the circuit court, Le's counsel made a "substantial compliance" argument, but did so in the context of arguing that Le substantially complied with the court's order *as Le understood the order* and that *Le took action when violations of the order were brought to her attention*. However, the

italicized assertions are factual allegations that the circuit court rejected either expressly or implicitly. Le's counsel did not attempt to explain to the circuit court why the court should apply contract notions of substantial compliance to compliance with court orders or why there was substantial compliance under the circuit court's view of the evidence.

¶33 Before this court, Le's arguments have the same problems. She does not explain why we should apply contract law to the situation here, where the question is compliance with a court order. And Le does not attempt to apply such law to the circuit court's view that Le intentionally continued using the "Happy Wok" name. To the contrary, Le continues to couple her substantial compliance argument with other assertions that were plainly rejected by the circuit court, such as Le's assertions that her violations were either inadvertent or due to excusable neglect and that she acted in good faith.

D. "Quik Wok," Not "Kwik Wok"

¶34 Le argues that there is no evidence supporting the statement in the circuit court's January 5, 2011 order that an entity named "Kwik Wok" is involved in this matter. This argument is meritless. It is beyond dispute that the references to "Kwik Wok" in the order were intended by the court to be references to "Quik Wok." There is no possible alternative. As Le herself points out, there is no entity named "Kwik Wok" involved in this matter.

¶35 If Le means to suggest that the circuit court did not carefully consider the evidence or her arguments, the record belies the suggestion. For example, the court engaged in an extended discussion with Le's counsel in an effort to understand and deal with all of counsel's arguments.

E. Unclean Hands

¶36 Le contends that Tjoe "should not have been awarded any additional monies" because Tjoe did not have "clean hands." Le argues that a party seeking equitable relief must have "clean hands" and that Tjoe does not have clean hands because she failed to inform Le of the violations and then, after obtaining proof of the violations, let weeks pass before moving to amend the damages award.

¶37 We deem this argument insufficiently developed, and reject it on that basis. Assuming, without deciding, that the "clean hands" doctrine applies here, Le does not provide a meaningful discussion of the doctrine. We note that the doctrine is more demanding than Le's argument seems to suggest. In ***Security Pacific National Bank v. Ginkowski***, 140 Wis. 2d 332, 410 N.W.2d 589 (Ct. App. 1987), we stated: "For relief to be denied a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief ... [and] 'it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct.'" ***Id.*** at 339 (quoted source omitted). Further, Le does not explain why Tjoe had an obligation to inform Le of violations that were visible to all or why a delay by Tjoe should mean that Tjoe is entitled to *no* additional damages.

II. Whether The Circuit Court Erred In Denying Le's Motion To Vacate Under WIS. STAT. § 806.07

¶38 Le contends that the circuit court erred when it denied her motion under WIS. STAT. § 806.07 for relief from the default judgment. The structure of Le's brief-in-chief makes it difficult to identify and respond to all of Le's arguments. For example, a proper analysis of whether a circuit court misused its

discretion when denying relief under § 806.07(1)(h) calls for consideration of *all the facts*. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶12, 282 Wis. 2d 46, 698 N.W.2d 610. But Le's brief never takes a comprehensive approach to this topic. Under one heading, she argues reasons why the circuit court could have concluded that she had a meritorious defense, but does not discuss contrary evidence. In another section of her brief, she discusses evidence suggesting that she was blameless in the sequence of events leading up to the default judgment, but again does not address contrary evidence. Both arguments should have been made in a combined section that addressed the evidence that supported Le's view *and* the circuit court's competing view. Nonetheless, we address the arguments that we were able to identify.

¶39 We begin here with general principles governing relief under WIS. STAT. § 806.07. We then address Le's specific arguments in the sections below.

¶40 In ***Miller v. Hanover Insurance Co.***, 2010 WI 75, 326 Wis. 2d 640, 785 N.W.2d 493, the court explained:

> A circuit court's authority to vacate a default judgment derives from Wis. Stat. § 806.07. "Section 806.07(1) lists conditions under which a circuit court may exercise its discretion and open a default judgment." In exercising its discretion in deciding whether to vacate a default judgment, the circuit court must be cognizant of three general considerations. First, § 806.07(1) is remedial in nature and should be liberally construed. Second, "the law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." Third, "default judgments are regarded with particular disfavor." Indeed, on this last point we have stated that "default judgment is the ultimate sanction." Consequently, default judgments ought to attract close scrutiny on appellate review.

Id., ¶31 (citations omitted). Subsections (a) through (g) in WIS. STAT. § 806.07(1) describe specific circumstances in which relief may be granted. *See* ***Miller***, 326 Wis. 2d 640, ¶32. Subsection (h) is a "catch-all" provision giving courts broad discretionary authority to grant relief for other reasons in order to accomplish justice. ***Id.***, ¶¶32-33. Le contends that she was entitled to relief from the default judgment under subsections (a) and (h).

A. Excusable Neglect

¶41 Default judgment was entered against Le based on Attorney Tarara's failure to file an answer to Tjoe's third amended counterclaim. Le contends that the circuit court should have granted her relief from this default judgment under WIS. STAT. § 806.07(1)(a) based on "excusable neglect."

¶42 Generally, when determining whether there is "excusable neglect," courts look to the actions of the attorney or party who failed to act. *E.g.*, ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 472-74, 326 N.W.2d 727 (1982) (attorney's preoccupation with other legal business not excusable neglect). But Le does not contend that her counsel's failure to file the answer here was based on excusable neglect. Rather, Le relies on cases holding that excusable neglect is present when, apart from the attorney's performance, the client acted reasonably. According to Le, excusable neglect is present here because she acted reasonably in retaining and relying on Attorney Tarara and she otherwise acted reasonably in pursuing the litigation. We reject the argument.

¶43 Le relies on ***Connor v. Connor***, 2001 WI 49, 243 Wis. 2d 279, 627 N.W.2d 182. The ***Connor*** court repeated the holding in ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis. 2d 498, 514, 285 N.W.2d 720 (1979), that courts

are not bound to punish a client for a lawyer's neglect. More specifically, ***Charolais*** explains:

> A court is not bound to impute to a client everything his lawyer does or omits to do. Mistakes, ill advice, or other failures of a lawyer may constitute excusable neglect on the part of the client, when the client has acted as a reasonable and prudent person in engaging a lawyer of good reputation, has relied upon him to protect his rights, and has made reasonable inquiry concerning the proceedings. In deciding whether to impute the negligence of the lawyer to the client, the trial court must exercise its "equitable powers to secure substantial justice between the parties." This discretion may or may not call for imputation, depending on the facts of each case.

Charolais, 92 Wis. 2d at 514 (citations omitted).

¶44 Thus, the question here is whether the circuit court misused its discretion when it rejected Le's argument that the court should not impute to her Attorney Tarara's neglect.

¶45 There are two problems with Le's excusable neglect argument. The first problem is factual. Le argues that, if we ignore improper factual inferences made by the circuit court, and look solely at the admissible evidence regarding her behavior, the only reasonable inference is that she acted reasonably within the meaning of ***Charolais***. In effect, Le argues that the circuit court should have assumed that she was an innocent victim of an incompetent attorney, Attorney Tarara. We disagree with Le's view of the record.

¶46 The record supports the circuit court's finding that Le personally bore some blame and was undeserving of another chance to litigate her liability. For example, the circuit court relied on Le's failure to cooperate with the attorney that preceded Attorney Tarara. During the early stages of the litigation, and following a motion by Tjoe's attorney to compel discovery, Le's first attorney

moved to withdraw, alleging in an affidavit that "Le has failed to provide ... documents required to be produced, including an insurance policy, copies of citations, and copies of tax records." When denying Le's motion to vacate the default judgment, the circuit court noted that this failure to cooperate led to the withdrawal of a competent counsel and, thus, to Le hiring Attorney Tarara.[7] Le's current counsel presented no reason why the court could not consider this as a fact and weigh it against Le.

¶47 Another factual finding regarding Le's behavior that supports the circuit court's rejection of Le's excusable neglect argument is the finding that Le lied at the two damages hearings about her role in owning and operating the restaurant located at 1802 Harrison Avenue. Earlier in this opinion, we detail why this finding was reasonable. *See* ¶25, *supra*. For now, it is sufficient to say that the circuit court was justified in believing that Le was not a mere innocent victim of Attorney Tarara and this was a proper consideration under the ***Charolais*** standard permitting courts to exercise discretion to secure substantial justice between the parties. *See* ***Charolais***, 92 Wis. 2d at 514.

¶48 Apart from the factual problem with Le's excusable neglect argument, there is a legal problem. Le seemingly assumes that, if she acted reasonably within the meaning of ***Charolais***, the circuit court here was required to find excusable neglect under WIS. STAT. § 806.07(1)(a) and vacate the default judgment. Le, however, does not support this legal proposition with developed

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[7] Le's first counsel also complained that Le failed to pay for services, but the circuit court explained that it does not permit counsel to withdraw over issues of payment and would not have done so here. Thus, the only reason the court permitted Le's first attorney to withdraw was because of Le's failure to cooperate with discovery.

argument. Our review of ***Charolais*** and our non-exhaustive review of related case law indicates there is no such requirement and, indeed, no requirement that the circuit court even consider Le's conduct leading up to the default judgment.

¶49 First, the ***Charolais*** holding itself indicates that whether to grant relief under this theory is discretionary. ***Charolais***, 92 Wis. 2d at 514. The ***Charolais*** court stated only that a court "is not bound" to find a lack of excusable neglect if a client acted reasonably. ***Id.*** Neither ***Charolais*** nor any subsequent case we have identified requires a court to vacate a prior judgment when the reasonable client standard is met. For that matter, there appears to be no requirement that a court even consider the topic.

¶50 ***Charolais***'s relief-after-a-final-judgment context stands in contrast with a different situation in which our supreme court *has* chosen to impose the sort of rule that Le apparently assumes applies here. That different situation is the decision whether to impose the sanction of dismissal in the first instance. In ***Industrial Roofing Services, Inc. v. Marquardt***, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898, the supreme court addressed whether a circuit court erroneously exercised its discretion by dismissing a plaintiff's complaint with prejudice as a sanction for failing to respond to discovery and violating court orders. ***Id.***, ¶39. In the context of a court deciding whether to dismiss a lawsuit in the first instance due to a failure on the part of counsel, the ***Marquardt*** court adopted a new rule of law requiring consideration of whether the client is blameless. ***Id.***, ¶¶57-61. The ***Marquardt*** court further concluded that, when a client is blameless, dismissal with prejudice is not an available sanction. ***Id.***, ¶61.

¶51 Le's argument overlooks the different treatment in case law of the initial decision to dismiss a lawsuit based on an attorney's failure (the ***Marquardt***

situation) and the decision whether to reopen a case following a final judgment (the ***Charolais*** situation). In the ***Charolais*** situation, which we have here, there is no requirement that a court grant relief, even if the client is blameless.

¶52 Accordingly, we reject Le's argument that she is entitled to have the default judgment vacated on the ground that, with respect to the litigation of this matter, she was an innocent victim of an incompetent attorney.

B. Lack Of A Law License

¶53 Le argues that there is an extraordinary circumstance in this case warranting relief under WIS. STAT. § 806.07(1)(h), namely, the fact that her attorney during the relevant time period had a suspended law license. Le's argument on this topic is not clear, but she appears to assert that her counsel's licensing status, standing alone, is reason to grant relief under § 806.07(1)(h). We agree with the circuit court that counsel's licensing status has no apparent relevance.[8]

¶54 As the circuit court explained, in effect, there is no necessary relationship between performance and licensing status. In particular cases, an attorney who has let his or her license lapse might perform well. Conversely, an attorney who has a current law license might perform deficiently. What matters

[8] Because we agree with the circuit court that the mere fact that Attorney Tarara was not licensed to practice law in Wisconsin was not a reason for the court to grant relief from the judgment, we need not address Le's complaint that the circuit court had an insufficient factual basis on which to find that Attorney Tarara was properly licensed in Illinois and that the reason his Wisconsin license lapsed was because of non-payment of dues and failure to comply with CLE requirements.

here is Attorney Tarara's actual performance, not whether he was licensed to practice law in Wisconsin. We discuss the matter no further.

C. Absence Of Proposed Answer

¶55 Whether viewed as a request for relief under WIS. STAT. § 806.07(1)(a) or (h), a proper consideration here is whether Le demonstrated that she had a meritorious defense to the counterclaims that were the subject of the default judgment. *See* ***J.L. Phillips & Assocs., Inc. v. E&H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13 (1998) ("[A] party moving to vacate a default judgment [under § 806.07(1)(a)] must ... demonstrate that he or she has a meritorious defense to the action."); ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985) ("In exercising its discretion [under § 806.07(1)(h)], the circuit court should consider ... whether there is a meritorious defense to the claim ....").

¶56 Le complains that the circuit court erroneously believed that she was required to show that she had a meritorious defense by filing a proposed answer to Tjoe's third amended counterclaim at the same time Le filed her motion to vacate the default judgment. According to Le, "the trial court seemed to indicate that not filing a proposed answer was fatal to Le's request for relief." We reject this argument for three reasons.

¶57 First, the argument has been forfeited. The remarks Le points to come at the end of the February 4, 2011 hearing. There, the circuit court asked Le's counsel whether he had filed a proposed answer to the amended counterclaim, and counsel responded that he had not, but "would be prepared to file one today." The court went on to rule, commenting toward the end of its remarks that Le had not filed a proposed answer showing a reasonable prospect of

success on the merits. Le's counsel did not object to this statement and, therefore, the argument is forfeited. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (issues not presented to the circuit court will generally not be considered for the first time on appeal).

¶58 Second, the language used by the circuit court does not conflict with the law. The court did not state that the *only* way to demonstrate a meritorious defense was to file a proposed answer. Rather, the court stated something that is true—that Le had not filed a proposed answer. Le's interpretation of the court's comments do not give the court the benefit of the doubt. We, however, start with the presumption that a judge knows and correctly applies the law. *See* ***Arave v. Creech***, 507 U.S. 463, 471 (1993). Here, the circuit court's comments fall far short of demonstrating that the court did not understand the applicable law.

¶59 Third, our review of all of the circuit court's comments persuades us that the absence of a proposed answer was not a significant factor in the court's decision. Instead, we understand the thrust of the circuit court's reasoning to have the three components we list in ¶71 of this opinion.

¶60 Accordingly, we are not persuaded that the circuit court's comments about Le's failure to file a proposed answer warrant reversal.

D. Meritorious Defense

¶61 Le argues that the circuit court had before it information showing she had a meritorious defense. Le is referring to information indicating that she did not own or control the restaurant that commenced operating at 1802 Harrison Avenue after Tjoe was evicted. Le primarily points to her own affidavit and

testimony and to her counsel's offer of additional evidence at the February 4, 2011 hearing. At that hearing, Le's counsel stated:

> I brought the attorney who prepared the corporate documents for Happy Wok Wisconsin, Inc., establishing it is an independent entity owned solely and exclusively by John Poon, and Cindy Le has no interest in Happy Wok of Wisconsin Inc., which is the owner of the restaurant in question whereas this court found she had controlling interest.... I have also brought John Poon who is going to testify as to his exclusive ownership of the Happy Wok restaurant that took over after the eviction occurred.

¶62 We first observe that this argument, even if true, would only address part of the underlying merits, namely, whether Le breached the purchase agreement that gave Tjoe exclusive use of the Happy Wok name. Le does not address whether she has a meritorious defense to the allegation that Le breached the lease agreement by wrongfully evicting Tjoe.

¶63 As to whether Le had a meritorious defense to the allegation that she breached the purchase agreement that gave Tjoe exclusive use of the Happy Wok name, Le does not address contrary evidence in any meaningful detail nor explain why the circuit court could not rely on the contrary evidence to conclude that Le's defense was weak.

¶64 Le's defense was that she did not violate the purchase agreement by using the Happy Wok name at the 1802 Harrison Avenue address because she did not own or control the restaurant at that address after Tjoe's eviction. However, as we have already explained, there was ample reason for the circuit court to conclude that documents and Le's own admissions seriously undercut this defense. *See* ¶25, *supra*.

¶65 Moreover, the circuit court's view of Le's defense was reasonable even after Le's counsel offered to present testimony both from an attorney and from John Poon indicating that John Poon owned the restaurant business after Tjoe's eviction. Tjoe's counsel demonstrated several instances of questionable transactions involving Le and John Poon. We do not detail all of the evidence here, but note that Le's relationship with John Poon was suspect. Le denied having any kind of intimate relationship with John Poon, but at the same time admitted she lived in the same house and that she signed a quit claim deed as "Cindy Poon." Le also asserted that John Poon rented the 1802 Harrison Avenue property, but admitted there was no written lease. The circuit court found that Le "certainly is something a great deal more than just a business partner [with Poon]." It is sufficient to say that the circuit court reasonably questioned the veracity of Le's assertion that she fully relinquished control of the restaurant business to John Poon, and the court could similarly conclude that Le would have a difficult time persuading any fact finder that she did not exercise control of the restaurant during the relevant time period.

E. Attorney's Poor Performance

¶66 Le argues that the circuit court misused its discretion in declining to grant relief under WIS. STAT. § 806.07(1)(h) based on Attorney Tarara's poor performance. Le relies on ***Miller v. Hanover Insurance Co.***, 2010 WI 75, 326 Wis. 2d 640, 785 N.W.2d 493, a case explaining that the poor performance of an attorney leading to dismissal of a lawsuit is a proper consideration when determining whether to grant relief under § 806.07(1)(h). In the paragraphs below, we discuss the ***Miller*** decision and then explain why Attorney Tarara's neglect in this case did not require the circuit court to grant Le relief from the default judgment.

¶67 The ***Miller*** court rejected the proposition that, if an attorney's failing leading to a default judgment does not constitute excusable neglect under WIS. STAT. § 806.07(1)(a), then the attorney's performance in that regard is not relevant in determining whether, under § 806.07(1)(h), extraordinary circumstances warrant relief in the interest of justice. ***Miller***, 326 Wis. 2d 640, ¶¶35, 40-41. The ***Miller*** court explained, in effect, that an attorney's poor performance leading to default judgment *is* a proper factor to consider under § 806.07(1)(h). *See* ***id.***, ¶¶35-46.[9]

¶68 Here, Le argues that the circuit court should have granted her relief from the default judgment because her attorney's neglect deprived her of an adjudication of the underlying merits of Tjoe's claims against Le. But this is an incomplete argument under WIS. STAT. § 806.07(1)(h). Indeed, in ***Miller*** the party seeking to preserve the prior judgment argued that, if a defaulting party can, under § 806.07(1)(h), ask a court to consider the deficient attorney performance that led to the default judgment, then "'most of the [sub. (h)] factors are satisfied simply because the issue was never joined.'" ***Miller***, 326 Wis. 2d 640, ¶46. The ***Miller*** court agreed that "many of the factors will weigh in favor of [the] party seeking relief from a default judgment entered for failure to timely answer." ***Id.*** But these factors are not the end of the analysis; there are other factors to consider.

[9] We state the holding in ***Miller v. Hanover Insurance Co.***, 2010 WI 75, 326 Wis. 2d 640, 785 N.W.2d 493, in the affirmative, that is, an attorney's poor performance leading to default judgment is a proper consideration under WIS. STAT. § 806.07(1)(h). ***Miller*** itself poses the issue differently. ***Miller*** speaks in terms of whether a finding of excusable neglect is a prerequisite to granting relief under § 806.07(1)(h). *See, e.g.,* ***Miller***, 326 Wis. 2d 640, ¶¶41, 44, 45. If there is a meaningful difference between these two formulations, we cannot discern it. More importantly, if there is a difference, it is a difference that does not matter for purposes of analyzing the case before us.

¶69 ***Miller*** explains:

> "Paragraph (1)(h) 'gives the trial court broad discretionary authority and invokes the pure equity power of the court.'" Para. (1)(h) "is to be liberally construed to provide relief from a judgment whenever appropriate to accomplish justice." However, the court should not interpret para. (1)(h) so broadly as to erode the concept of finality, nor should it interpret it so narrowly that it no longer provides relief for truly deserving claimants. "In short, we balance the competing values of finality and fairness" in deciding the motion.
>
> ... [If a hearing is required and held, and after] determining the truth of the allegations and considering any other factors bearing on the equities of the case, the circuit court exercises its discretion to decide whether to grant relief from the judgment, order or stipulation. The party seeking relief bears the burden to prove that extraordinary circumstances exist.
>
> A court appropriately grants relief from a default judgment under para. (1)(h) when extraordinary circumstances are present justifying relief in the interest of justice. "[E]xtraordinary circumstances are those where '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.'"
>
> In exercising its discretion in determining whether it should grant relief from a judgment, the circuit court "must consider a wide range of factors" in determining whether extraordinary circumstances are present, always keeping in mind the competing interests of finality of judgments and fairness in the resolution of the dispute. We have explained that these factors include, but are not limited to, the following:
>
>> "[1] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [2] whether the claimant received the effective assistance of counsel; [3] 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; [4] whether there is a meritorious defense to the claim; and [5] whether there are intervening circumstances making it inequitable to grant relief."

Id., ¶¶33-36 (citations omitted).

¶70 Le's argument is incomplete because her attention is focused on Attorney Tarara's performance. Le addresses why it was unfair to deprive her of her day in court because she had the misfortune of selecting an attorney that neglected to file an answer to Tjoe's third amended counterclaim. But Le does not meaningfully address competing considerations. In particular, Le does not explain why it was a misuse of discretion for the circuit court to conclude that granting relief to Le would have been unfair to Tjoe.

¶71 It is apparent that the circuit court was well aware of Attorney Tarara's deficient performance. The court assumed for purposes of its decision that Attorney Tarara's failure was the cause of the default judgment. And, the court plainly considered the fact that Le had been deprived of an opportunity to litigate the merits of the case. But it is also apparent that the court believed that overall fairness was not served by reopening the case and imposing substantial additional litigation expenses on Tjoe. Our review of the entire record, including the argument of counsel and the court's comments at both the December 9, 2010 and the February 4, 2011 hearings, reveals that the court properly relied on the following considerations:

- If Le had cooperated with her first competent attorney, then there would not have been a failure to answer Tjoe's third amended counterclaim and, hence, no default judgment. *See* ¶46, *supra*.
- There had not merely been a quick default judgment, but rather extended proceedings on the merits, both before and after default judgment (because of the two subsequent damages hearings), and Tjoe had incurred substantial legal expenses.
- It would be difficult for Le to succeed on the merits. Le's main defense would be that she never controlled or owned the Happy Wok or its successor, the Quik Wok, after Tjoe was evicted. Le was not

> believable on this topic because her denial of ownership and control was contradicted by her own testimony and other evidence in the case. *See* ¶25, *supra*.

We cannot say that the circuit court misused its "'broad discretionary authority'" in light of "the competing interests of finality of judgments and fairness in the resolution of the dispute." *See* ***Miller***, 326 Wis. 2d 640, ¶¶33, 36.

Conclusion

¶72 For the reasons set forth above, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.