COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 12, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1240

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

THERESA D. ROTHSCHILD,

Plaintiff-Respondent,

v.

CROIXLAND PROPERTIES LIMITED PARTNERSHIP, ST. CROIX MEADOWS CONCESSIONS, INC. and XYZ INSURANCE COMPANY,

Defendants,

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. National Union Fire Insurance Company of Pittsburgh appeals a judgment awarding Theresa Rothschild $49,418.68 for injuries that arose out of a slip-and-fall accident at a greyhound track. National Union answered the complaint four days late. The trial court entered a default judgment on liability and, after a hearing on damages, entered the judgment. National Union argues that the trial court improperly exercised its discretion when it ordered a default judgment, that it was only one day late filing the answer and that the evidence does not support the damage award. We reject these arguments and affirm the judgment.

The summons and complaint were served on the insurance commissioner on November 8, 1993 and were mailed to National Union by the insurance commissioner's office on the same day. National Union's New York office received the summons and complaint on November 11. The New York office sent the documents to the executive claim office which acknowledged receipt on November 22. They sent them to the Des Moines, Iowa, regional office, which in turn sent them to an adjusting company on November 30. The answer was filed by facsimile on December 2, 1993.

Pursuant to § 601.73(2)(c), STATS., the answer was due twenty days from the date of mailing by the commissioner of insurance. Thus, the answer was due Monday, November 29, 1993. National Union contends that it should have been granted twenty-three days to answer under § 801.15(5)(a), STATS., which allows three additional days if the pleading was served by mail. We conclude that § 801.15(5)(a) does not apply when the office of the insurance commissioner notifies the defendant by mail that a summons and complaint were served on the commissioner. Section 601.73(2)(c) specifically provides that default judgment in cases where the insurance commissioner is served is appropriate after "expiration of 20 days from the date of mailing of the process ...." The specific statute prevails over the general statute. *See* ***City of Milwaukee v. Kilgore***, 193 Wis.2d 168, 185, 532 N.W.2d 690, 696 (1995).

The trial court properly exercised its discretion when it refused to allow National Union to file a late answer. National Union gave no explanation for its failure to timely answer the complaint. An enlargement of time is not a favor to be granted a litigant as a matter of grace. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 468, 326 N.W.2d 727, 730-31 (1982). Rather, it must be based on a showing of excusable neglect. ***Id***. Excusable neglect is not synonymous with

neglect, carelessness or inattentiveness, but rather is conduct that might have been the act of a reasonably prudent person under the same circumstances. ***Giese v. Giese***, 43 Wis.2d 456, 461, 168 N.W.2d 832, 834 (1969). National Union would have this court authorize "very minor untimeliness" without a showing of any reason for its failure to timely file an answer. To apply such a rule to an insurance company, whose employees regularly respond to lawsuits and are trained to recognize the importance of timely responding to legal documents, would entirely vitiate the deadline established by § 601.73(2)(c), STATS. ***Baird Contracting, Inc. v. Mid Wisconsin Bank***, 189 Wis.2d 321, 326, 525 N.W.2d 276, 278 (Ct. App. 1994).

National Union claims to have a defense on the merits and argues that it should have an opportunity to have its day in court. Whether it had a defense on the merits has no bearing on the issue of excusable neglect. ***Martin v. Griffin***, 117 Wis.2d 438, 443-44, 344 N.W.2d 206, 209 (Ct. App. 1984). Even though default judgments are regarded with disfavor and prompt action by the defaulting party to remedy the situation is a factor in determining whether neglect was excusable, the trial court properly refused to extend the time for filing an answer in the absence of any acceptable explanation for National Union's failure to answer within twenty days.

Sufficient evidence supports the trial court's finding on damages. Its findings must be upheld unless they are clearly erroneous. *See* ***Noll v. Dimiceli's Inc.***, 115 Wis.2d 461, 463, 340 N.W.2d 575, 577 (Ct. App. 1983). Rothschild estimated that she spends $10 per week on over-the-counter medication that Dr. Leider testified is appropriate treatment for pain from the bursitis she suffers as a result of the fall. Multiplying this expense by Rothschild's life expectancy equals over $9,500 for pain relievers. National Union asserts that conflicting medical testimony regarding the permanency of Rothschild's condition should defeat her claim. It is the function of the trial court, not this court, to resolve conflicts in the testimony, and to judge the credibility of the witnesses and the weight of the evidence. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979).

National Union contends that Rothschild failed to mitigate her damages by timely seeking treatment that would have improved her condition. Neither of the medical witnesses was able to testify to a reasonable medical certainty that anything Rothschild might have done would have changed her

condition. The burden of proving failure to mitigate is on the party asserting that defense. *See* ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis.2d 749, 752, 266 N.W.2d 382, 384 (1978). The trial court could reasonably find that Rothschild's failure to undergo earlier treatment had no effect on her present condition. The damage award constitutes a reasonable compensation for Rothschild's past and future medical expenses and the chronic pain she suffers as a result of the accident.

By the Court.—Judgment affirmed.

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