**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

October 9, 1997

**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, STATS.**

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

**No. 96-2362**

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

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**RANDAL L. BELL AND MARY BELL,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**EMPLOYERS MUTUAL CASUALTY COMPANY OF DES MOINES, IOWA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. Employers Mutual Casualty Company of Des Moines, Iowa appeals from an order denying its motion for enlargement of time to file an answer to the amended complaint; the order granting plaintiffs' motion to strike its answer to the amended complaint; and a judgment of default

against it. We conclude that the circuit court erroneously exercised its discretion when it granted default judgment to the plaintiffs and that it should have entered judgment in favor of Employers Mutual. Therefore, we reverse the judgment of the circuit court and remand with directions to vacate the judgment against Employers Mutual and to dismiss the lawsuit.

## BACKGROUND

This is the second time this case has been before us. It arises out of an injury Randal Bell sustained on August 22, 1989 in Iowa, when he was struck by a vehicle driven by Mark McAllister. Both Bell and McAllister were alleged to have been employees of Iverson Construction Company and acting within the scope of their employments when the accident occurred. Bell was a resident of Wisconsin and Iverson Construction was a Wisconsin corporation, with its principal place of business in Platteville, Wisconsin. At the time of the accident, Iverson Construction had a business automobile liability policy, as well as a workers compensation policy through Employers Mutual. Employers Mutual paid benefits to Bell under the workers compensation policy, but did not pay any compensation under the business automobile liability policy, and Bell claims not to have had knowledge of that policy at the time benefits were paid.

On February 24, 1992, Bell and his wife, Mary, filed a summons and complaint against Employers Mutual alleging coverage for the accident with McAllister, under the business automobile liability policy. Employers Mutual filed a timely answer and a motion to dismiss the Bells' complaint on the ground that the action was barred by Iowa's two-year statute of limitations, made applicable to actions brought in Wisconsin by the borrowing statute, § 893.07, STATS.

On April 27, 1992, after receiving Employers Mutual's answer and motion to dismiss, the Bells filed an amended summons and complaint which they mailed to Employers Mutual's attorney on May 1, 1992. In the amended complaint, the Bells repeated the allegations made in the original complaint and added a claim for relief, which they asserted arose in Wisconsin by virtue of the alleged negligence of Iverson Construction's safety superintendent while working in Platteville, Wisconsin. In so doing, the Bells attempted to capture Wisconsin's three-year statute of limitations, rather than Iowa's two-year limitations period.

On May 30, 1992, Employers Mutual mailed an answer to the amended complaint and a second motion to dismiss, this time aimed at the amended complaint, alleging that both of the Bells' claims were barred by Iowa's two-year statute of limitations. After they had received the answer to the amended complaint, the Bells brought a motion to strike and a motion for default judgment, contending that Employers Mutual failed to answer their amended complaint within the twenty days allotted in § 802.09(1), STATS. The trial court denied the Bells' motion for default judgment on the ground that service of the amended summons and complaint on Employers Mutual's counsel, rather than on Employers Mutual itself was ineffective, pursuant to § 801.11(5), STATS.

An appeal was taken and we concluded that the circuit court erred in deciding that service of the amended complaint was insufficient and that defective service was not a valid basis for denying default judgment in this case. We explained that once Employers Mutual's attorney appeared and responded to the original summons and complaint, service of all other papers was proper under § 801.14(2), STATS., unless the circuit court directed that service should be made in another manner. ***Bell v. Employers Mut. Cas. Co.***, 198 Wis.2d 347, 360, 541

N.W.2d 824, 829 (Ct. App. 1995).[1] We also concluded that all of the Bells' claims were barred by Iowa's two year statute of limitations and remanded the case to the circuit court, directing it to exercise its discretion in regard to the Bells' motion for a default judgment. ***Id.*** at 355, 541 N.W.2d at 827. We further directed that,

> in the event the trial court denies the Bells' motion for default judgment, summary judgment must be entered in favor of Employers Mutual because all claims contained in the amended complaint are barred by the Iowa two-year statute of limitations.

***Id.*** at 375, 541 N.W.2d at 835.

On remand, the circuit court appeared to believe that our decision required it to grant the Bells' motion to strike the answer and enter a default judgment. In so concluding, the circuit court reasoned that because we had held that § 802.09(1), STATS., required an answer be made to an amended complaint within twenty days, which was not done, and because it found Employers Mutual's failure to be based upon a misinterpretation[2] of § 802.09(1), which could not constitute excusable neglect, it was compelled to grant default judgment.

[1] This case will be referred to hereinafter as ***Bell I***.

[2] In support of its motion to extend the time for answer, Employers Mutual's attorney relayed to the court that he believed the original answer was sufficient and no answer to the amended complaint was required, notwithstanding § 802.09(1), STATS. The circuit court concluded that was a mistake of law and that a mistake of law could not constitute excusable neglect.

## DISCUSSION

As we begin this discussion, we are assisted by the circuit court's examination of the issues presented and its attempt to follow what was believed to be the directive of this court.

**Standard of Review.**

Whether to grant a default judgment is a decision committed to the sound discretion of the circuit court. ***Midwest Developers v. Goma Corp.***, 121 Wis.2d 632, 650, 360 N.W.2d 554, 563 (Ct. App. 1984). As part of the exercise of discretion, the circuit court must apply the proper standard of law. We review whether the trial court has done so, *de novo*. ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745,770 (1985) (overruled on other grounds). It is an erroneous exercise of discretion to apply the wrong legal standard. ***Beaupre v. Airriess***, 208 Wis.2d 238, 243, 560 N.W.2d 285, 287 (Ct. App. 1997). Questions of statutory interpretation are also reviewed by us, *de novo*. ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997).

**Default Judgment.**

Default judgments are generally disfavored under the law because they preclude a party from having his day in court to assert what may be meritorious defenses. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 469, 326 N.W.2d 727, 731 (1982). Section 806.02, STATS., sets forth the prerequisites for default judgment. These stated statutory requirements must be met before a circuit court may grant default judgment. Section 806.02 states in relevant part:

> **Default judgment.** (1) A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or

> fact has been joined and the time for joining issue has expired.

Because the decision whether to grant a default judgment is discretionary, the circuit court must examine the relevant facts; apply the proper standard of law; and use a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Once it has been established that the requirement of § 802.09(1), STATS., to answer an amended complaint in twenty days has not been met, the starting point for the circuit court in exercising its discretion under § 806.02(1), STATS., is to determine whether any issue of law or fact has been joined. Joining of issue is a legal phrase, which has a judicially determined meaning. It occurs when "the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact (or a legal proposition) to be so, and the other denies it." BLACK'S LAW DICTIONARY, 836 (6th ed. 1990).

In ***Snowberry v. Zellmer***, 22 Wis.2d 356, 126 N.W.2d 26 (1964), the supreme court concluded that issue is joined when the original answer is served, notwithstanding subsequent pleadings. The ***Snowberry*** appeal arose when the circuit court denied Zellmer's motion for summary judgment as untimely because it was filed more than forty days after issue was joined, as then required by statute. On appeal, Zellmer contended that his motion was timely because it was filed within forty days of the date of his amended answer, which raised new issues. In affirming the circuit court, the supreme court explained that issue was joined upon service of the original answer, even when new issues were raised in a subsequent pleading. ***Id.*** at 358, 126 N.W.2d at 28.

Here, it is uncontested that an answer was served in a timely fashion. The answer asserted that the Bells' claims were barred by the applicable statute of limitations. Issue was joined by that answer. Later, the Bells filed an amended complaint, the effects of which the circuit court properly considered under § 802.09, STATS. However, the circuit court did not consider § 806.02(1), STATS., and the facts of record which bear on whether default judgment should have been granted as the remedy for the lateness of the answer to the amended complaint. It never considered the statutory predicates necessary to deciding a motion for default judgment. It did not examine whether any issue of law or fact had been joined, as § 806.02(1) requires. Therefore, it erroneously exercised its discretion because it did not apply the correct standard of law as stated in § 806.02(1) to the relevant facts of this case.

The Bells imply the circuit court was not required to consider § 806.02(1), STATS. But they do not contend that issue was not joined by the original answer, or that ***Snowberry*** has no application. Instead, they contend we decided the default judgment issue against Employers Mutual in ***Bell I*** and it is now the "law of the case." They misconstrue ***Bell I***.

In ***Bell I***, we distinguished several early Wisconsin cases which held that the original answer is all that is required, when no new issues are raised in an amended complaint. We did so because § 802.09(1), STATS., had not been enacted when those cases were decided. ***Bell I***, 198 Wis.2d at 363, 541 N.W.2d at 830. However, because the issue (whether default judgment was the remedy for failing to answer an amended complaint when the original answer was timely) was never presented to us, we did not discuss the requirements of § 806.02(1), STATS., or conclude that the amended complaint nullified the joining of issue, which

joindering occurred when the original answer was served.[3] Nor could we do so, because the Wisconsin Supreme Court has decided that issue is joined when the original answer is served and a later answer does not change that. ***Snowberry***, 22 Wis.2d at 358, 126 N.W.2d at 28. In ***Bell I***, in regard to an amended complaint, we concluded only that service is properly made on the attorney of a party who has so appeared and that a party is not excused from answering an amended complaint simply because it has answered the original complaint. Section 802.09(1) conclusively establishes this, if prior common law were interpreted to the contrary. But just because an answer to an amended complaint is required within twenty days of service, it does not necessarily follow that default judgment is available under § 806.02(1) as an immediate remedy for noncompliance.[4]

The Bells also argue that even if issue were joined by the original answer, that answer does not join new issues raised in the amended complaint. While that contention may have some truth in it, it does not satisfy the

[3] Employers Mutual did not contend that even if § 802.09(1), STATS., required that it answer the amended complaint, the trial court could not as a matter of law enter a default judgment under § 806.02(1), STATS., because an issue of law or fact had been joined with the answer to the first complaint. We have no duty to consider any issues other than those presented to us. ***Waushara County v. Graf***, 166 Wis.2d 442, 453, 480 N.W.2d 16, 20 (1992). Therefore, in ***Bell I***, we restricted our inquiry to the issues argued on appeal. Neither party cited ***Snowberry*** or the effect of § 806.02(1) in ***Bell I***. Our only holding in ***Bell I*** relevant to this appeal was that service of an amended complaint is properly made on a defendant's attorney and that § 802.09(1) required that Employers Mutual answer an amended complaint within twenty days of service. It was only in Employers Mutual's petition for review to the supreme court that it made the argument that it now makes to us.

[4] Just because default judgment is not available when answer has been timely made to the complaint but not to the amended complaint, it does not follow that there will never be consequences for failing to answer an amended complaint. For example, the plaintiff could move to compel an answer and for the costs associated with such a motion, or if the plaintiff had been prejudiced by a late answer to an amended complaint, the plaintiff could move to strike those portions of the amended answer that responded to allegations made for the first time in the amended complaint. Those remedies and others not stated herein are available to the circuit court.

§ 806.02(1), STATS., predicates necessary to a default judgment. The statute establishes that default judgment is unavailable unless "*no* issue of law or fact has been joined" (emphasis added).

## CONCLUSION

Because the trial court erroneously exercised its discretion in applying the facts of this case to the legal standard required by the default judgment statute, we reverse the judgment entered against Employers Mutual and remand the case for dismissal, based on our decision in ***Bell I*** in regard to the statute of limitations.[5]

*By the Court.*—Judgment reversed and cause remanded with directions.

Recommended for publication in the official reports.

[5] ***Bell I***'s directive makes unnecessary a further consideration of the orders issued by the circuit court prior to judgment.