

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 13, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-2255-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MERRICK'S INC.,

PLAINTIFF-RESPONDENT,

V.

MICHAEL SEUBERT D/B/A CHILI FEED PRODUCTS,

JUDGMENT DEBTOR,

TERRY SEUBERT D/B/A SEUBERT FARMS,

GARNISHEE-APPELLANT.

APPEAL from an order of the circuit court for Juneau County:
JOHN W. BRADY, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Terry Seubert, d/b/a Seubert Farms, appeals from an order denying his motion to reopen a default judgment.¹ We conclude that the default judgment was not authorized by law and the trial court erroneously exercised its discretion by refusing to set it aside. We therefore reverse.

Merrick's Inc. obtained a substantial money judgment against Michael Seubert. Michael is Terry Seubert's son and has worked in some capacity for his father at Seubert Farms. Some time after the money judgment was filed, Merrick's commenced an earnings garnishment proceeding against Terry and served him with an authenticated earnings garnishment notice. After two months, Terry never responded to the notice and Merrick's moved for a default judgment against him. During the hearing on the default judgment motion, Terry appeared *pro se* and attempted to present documents to the court showing the amounts he paid Michael since the notice had been served. The trial court refused to consider the documents and found that Terry offered insufficient reasons for failing to respond to the notice. Having found Terry in default, the court ordered judgment for the full amount of Michael's debt, along with interest and costs totaling over \$46,000.

Terry obtained counsel and filed a motion to vacate the judgment. The trial court denied relief, holding that Terry presented insufficient evidence to establish excusable neglect for his failure to respond to the garnishment notice. Terry appeals from that decision.

Whether to grant relief under RULE 806.07, STATS., is a matter within the discretion of the trial court. *State ex rel. Cynthia M.S. v. Michael F.C.*,

¹ This is an expedited appeal under RULE 809.17, STATS.

181 Wis.2d 618, 624, 511 N.W.2d 868, 871 (1994). The trial court erroneously exercises its discretion, and is subject to reversal, when its decision is based on a misapplication or erroneous view of the law. *Datronic Rental Corp. v. DeSol, Inc.*, 164 Wis.2d 289, 292, 474 N.W.2d 780, 781 (Ct. App. 1991).

The default judgment in this matter and the decision refusing to vacate it were both based on the trial court's erroneous view of the law. A garnishee must respond to a garnishment notice by either promptly informing a creditor that it does not and will not owe the debtor within the next thirteen weeks, or deducting and paying over the required amounts from the debtor's earnings. Sections 812.35(5) and 812.39(1), STATS. If the garnishee owes the debtor, but fails to timely pay the creditor, "the creditor may ... move the court for judgment against the garnishee in the amount of the unsatisfied judgment plus interest and costs." Section 812.41(1), STATS. However, the motion under this section is not a motion for a default judgment. A garnishee, even one who has never responded, may appear and affirmatively defend against the motion by showing "that the amount of the debtor's nonexempt disposable earnings that the creditor should have been paid is less than the amount of the unsatisfied judgment balance." *Id.* That is precisely what Terry attempted to do when he appeared on the motion for judgment with his record of payments to Michael. The trial court therefore misapplied the law by refusing Terry the opportunity to present that defense on Merrick's claim for the balance due.

On remand, the trial court shall consider Michael's earnings record, and any other evidence the parties wish to introduce, to determine the amount due Merrick's in this proceeding. If the garnishee proves that "the amount of the debtor's nonexempt disposable earnings ... is less than the amount of the

unsatisfied judgment balance,.... liability is limited to the amount the creditor should have been paid or \$100, whichever is greater.” Section 812.41(1), STATS.

By the Court.—Order reversed and cause remanded.

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

