COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3353

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

BARBARA DOYLE,

PLAINTIFF-RESPONDENT,

V.

RONALD A. ARTHUR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

EICH, J. Ronald Arthur appeals from an order granting the motion of the plaintiff, Barbara Doyle, for default judgment and awarding damages. He raises several challenges to the order, all of which we reject.

Arthur, a Milwaukee attorney, owns land in Juneau County adjoining property owned by Doyle. In 1994—unbeknownst to Doyle—Arthur contracted with Statewide Log & Lumber Company (a corporation owned and controlled by Arthur's former clients, William and Randy Keefe) to harvest trees on his land, apparently in contemplation of developing the property.

According to William Keefe, who testified at the hearing on Doyle's damages, Arthur told him that, in logging the property, he "didn't have to worry about property lines" and in fact lied to him about the location of the line separating his property from Doyle's. Arthur also told Keefe that he needn't worry about how the operation might affect adjoining property because he (Arthur) and his wife, also an attorney, "could keep people tied up in court for … years and make litigation so expensive that they would give up rather than face him." As the work commenced in early 1995, the Keefes, believing they were on Arthur's property, plowed a two-hundred-foot long, ten-foot wide—and, in some places, four-foot deep—logging road across the corner of Doyle's property, knocking over trees and shrubs and creating serious erosion problems. Six large oak trees were also removed from the property. Doyle did not discover the damage until several weeks later.

Doyle had purchased her four-acre parcel largely because of its unique beauty. It is wooded land rising to bluffs in the rear, and she and her family use it on a regular basis for picnics and family botany excursions. Doyle considered the damaged area to be the most beautiful part of the property. Even with the extent of physical damage caused to the property, however, its fair market value did not decrease. However, according to Doyle's expert witnesses, it would cost at least $34,720 to restore it to a condition close to that obtained prior to the damage.

After learning that Doyle intended to sue him for the damage to her property—but before she filed the action—Arthur brought his own lawsuit in Dodge County, naming Doyle and the Keefes (along with several others) as defendants, and seeking a declaratory judgment that he was not responsible for any damage to Doyle's property. Several days later, on September 11, 1995, Doyle filed this action in Juneau County, asserting several causes of action against Arthur for the damage to her property, and seeking both compensatory and punitive damages.

Arthur didn't answer Doyle's complaint. He moved to dismiss it on several grounds: lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; failure to join a necessary party; and the pendency of another action (his Dodge County lawsuit) between the parties for the same cause. A hearing was held on Arthur's motion on November 30, 1995. The court orally denied the motion, but then decided to hold the decision in abeyance pending the outcome of a hearing in Arthur's Dodge County action on Doyle's motion to dismiss, which, if granted, would moot Arthur's jurisdictional arguments in this case. The Dodge County action was eventually dismissed, and the trial court entered its order denying Arthur's motion to dismiss this action on July 5, 1996.

On October 24, 1996, Doyle moved for default judgment against Arthur for failing to answer the complaint. Five days later, Arthur filed a document entitled "ANSWER." It is a one-paragraph statement "den[ying] each and every allegation [of the complaint]," and purporting to "incorporate[] by reference all of the pleadings and documents in [the Dodge County] Case, and all of the pleadings and correspondence between the parties and their counsel relating to this matter …." Following a hearing, the court ruled that the document did not constitute an answer to the complaint, as required by statute, and that Arthur's

failure to answer was not the result of excusable neglect. It then entered default judgment against him and set a hearing on damages.

After a two and a half day "trial" on Doyle's damages, the court issued a memorandum decision and order awarding her $34,720 in "restoration cost" damages, together with punitive damages of $75,000. This appeal followed.

Whether to grant default judgment is within the sound discretion of the trial court. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis.2d 4, 11, 386 N.W.2d 53, 57 (1986). In reviewing discretionary decisions, we determine only whether the trial court examined the facts of the record, applied proper legal standards, and reached a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). If the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision, we will affirm. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Indeed, we generally look for reasons to sustain discretionary decisions. ***Burkes v. Hales***, 165 Wis.2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991).

A court may grant default judgment under § 806.02(1), STATS., "if no issue of law or fact has been joined and if the time for joining issue has expired." Arthur argues first that the many documents he filed in his Dodge County lawsuit—documents he claims he "incorporated" into this action, and which he asserts "straightforwardly disputed the material allegations of Doyle's complaint" and thus clearly advised her of his position with respect to her claims—sufficiently joined the issues in this case that he should be considered to have adequately "answered" the complaint. Pointing to the purported "answer" he filed in this action, he also argues that, because "technical forms of pleadings" are

not required in Wisconsin (§ 802.02(5), STATS.), because "pleadings should be so construed as to do "substantial justice" (§ 802.02(6)), and because the court must disregard pleading "defects" which do not affect the substantial rights of an adverse party (§ 805.18, STATS.), his submissions, taken together, are sufficient to defeat Doyle's motion for default judgment.

We are not persuaded. The trial court signed the order denying Arthur's motion to dismiss Doyle's complaint on July 5, 1996. Under § 802.06(1), STATS., Arthur then had ten days after that date in which to file an answer, which he failed to do. It wasn't until Doyle moved for default judgment—more than three months after entry of the denial order—that he filed the document he now asks us to consider as his answer to the complaint. This document, however, is not only three months tardy, but it fails to comply with the requirements of § 802.02(2), which state that the answer should: (a) "admit or deny the averments" in the complaint; (b) state "[d]enials [which] meet the substance of the averments denied"; and (c) include "specific denials of designated averments or paragraphs" in the complaint. Arthur's "answer," and the documents with which he inundated the trial court, not only fail the test of timeliness, but are equally lacking in both form and substance.

Arthur next argues that the fact that the court accepted and considered three affidavits at the hearing on his motion to dismiss Doyle's complaint establishes that "issue was joined in the case" regardless of his failure to file a timely answer. His argument proceeds as follows: (1) Section 802.06(2)(b), STATS., states that where matters outside the pleadings are presented in connection with a motion to dismiss, and are not excluded by the court, the motion is to be treated as one for summary judgment; (2) because the trial court considered the affidavits at the hearing, the proceedings evolved into a summary-judgment

hearing; and (3) because hearing a summary-judgment motion before the pleadings are complete is not authorized by statute, it follows that the pleadings must be deemed to have been complete—that is, that issue must have been joined—by the date of the hearing. While the argument, superficially at least, has a logical form, it, too, lacks substance, for, while the trial court did consider affidavits at the dismissal-motion hearing, it did so only as an aid in considering Arthur's procedural and jurisdictional arguments.[1] Arthur's argument that the procedure followed by the court somehow waived his obligation to answer the complaint is unavailing.

Arthur next raises several challenges to the court's award of punitive damages, claiming that: (1) the complaint fails to state a claim for punitive damages; (2) even if appropriate, "punitive damages should have been limited to double damages as provided [in] § 26.09, Stats."; (3) the award is not supported by the evidence; and (4) it is excessive.

As to the first, Doyle alleged in her complaint that Arthur (through his agents) trespassed on her land, cut and removed trees, converting the proceeds therefrom to his own use, and conspired to defraud her and engage in the theft of her timber. She also alleged that these acts (and others) were undertaken "in wanton and reckless disregard of [Doyle]'s rights [and] interests …." Arthur does not argue that these allegations are insufficient in themselves to state a claim for

[1] The affidavits were submitted by Doyle's counsel to show that Arthur had filed similar actions, involving the same parties, in Milwaukee County, Marquette County and Dodge County, and that only a small portion of Arthur's Dodge County lawsuit—the existence of which he put forth as a bar to the instant action—involved Doyle. The affidavits were filed for the limited purpose of showing that Arthur was attempting to move his suit from Juneau County, where the damage occurred, in order to involve Doyle in a wholly separate action involving several other parties with whom Doyle has had no dealings whatsoever; and it appears from the record that the court used them for that purpose alone.

punitive damages; rather, he argues that they "fail[] utterly to allege a 'master-servant' relationship between Arthur and anyone else" (presumably the Keefes and/or any other people acting on his behalf). We think the allegations are sufficient, under Wisconsin's notice-pleading rules, to state a punitive damage claim. *See* ***Hertlein v. Huchthausen***, 133 Wis.2d 67, 72, 393 N.W.2d 299, 301 (Ct. App. 1986) ("fair notice of what the … claim is and the grounds upon which it rests" is all that is required of a pleading).

Citing ***Hartland Cicero Mutual Insurance Co. v. Elmer***, 122 Wis.2d 481, 363 N.W.2d 252 (Ct. App. 1984), Arthur next argues that § 26.09, STATS., which authorizes a landowner to recover "double the amount of damages suffered" by reason of "any person unlawfully cutting, removing or transporting raw forest products," limits Doyle's recovery to double her actual damages, and precludes any award of punitive damages. ***Hartland***, however, held only that the statutory double-damage provisions for "timber trespass" are not "punitive damages" within the meaning of an insurance policy excusing coverage for "all punitive damages caused by [a covered] occurrence." ***Id.*** at 483, 363 N.W.2d at 253. Beyond that, Doyle's complaint, as we have noted above, alleges more than a "timber trespass"—it also seeks damages resulting from Arthur's construction of the logging road through her property. Arthur has not persuaded us that the existence of § 26.09 either limits or nullifies the court's authority to award punitive damages in this case.

We reach a similar result with respect to his argument that the punitive-damage award is excessive and unsupported by the evidence. As to the latter, he confines his challenge to arguing that there was insufficient evidence "to prove, first, that there was a master-servant relationship [between Arthur and the Keefes], and second that Arthur ratified the acts of the Keefes." He makes no

argument with respect to the adequacy of the evidence to support the following findings made by the trial court: (1) that Arthur "abuse[d] the legal process"; (2) that his testimony was "evasive, inaccurate and unworthy of belief"; (3) that he accused various parties of extortion, conspiracy, theft and perjury (and accused the court of being biased in the action); (4) that he used his position as an attorney to create numerous "conflicts of interest"; (5) that he lied to the Keefes regarding the property line to avoid additional costs; (6) that he "intentionally and maliciously used his and his wife's position and knowledge as attorneys in an all out effort to intimidate Doyle into not pursuing her claims, intimidate her legal counsel into ceasing to represent her ... and to make her legal fees so exorbitant that she could not afford to fight him"; and (7) that he "embarked on a path of lying to the court and trying to frustrate the discovery process, all to the injury of Doyle." Those findings, unchallenged by Arthur, are more than adequate to justify an award of punitive damages.

As to the amount of the award, Arthur argues that because Doyle's actual damage was "*de minimis*," in light of the expert testimony that his actions did not significantly diminish the market value of her property, "the $75,000 punitive damage award is certainly disproportionate to the inconsequential damage done to [the] property." In ***Jacque v. Steenberg Homes, Inc.***, 209 Wis.2d 605, 609, 563 N.W.2d 154, 156 (1997), however, the supreme court held that, in a trespass-to-land case, even an award of "nominal damages"—in that case one dollar—can sustain an award of punitive damages. And, in ***Jacque***, the court upheld an award of $100,000 in punitive damages, despite the one-dollar compensatory-damage award, where the defendant had damaged the plaintiff's land by moving a house trailer across it, and where the court characterized the defendant's actions as a "brazen, intentional trespass" undertaken with

"indifference and a reckless disregard for the law, and for the rights of others." ***Id.*** at 628, 563 N.W.2d at 164. Using ***Jacque*** as a guide, Arthur has not persuaded us—given the trial court's findings with respect to his conduct—that the $75,000 award was excessive.

Arthur next argues that the trial court erred in awarding compensatory damages of $34,720—which he characterizes as "replacement cost" damages—based on the testimony of Doyle's experts that that sum of money would be required to restore Doyle's land to its former condition. He claims first that a default judgment may not be entered for more than the amount demanded in the complaint, which he says was $4,000. And while, as Arthur points out, there are cases stating generally that "[i]n the case of a default judgment, relief is limited to that which is demanded in the plaintiff's complaint," ***Klaus v. Vander Heyden***, 106 Wis.2d 353, 359, 316 N.W.2d 664, 668 (1982), we note that the *ad damnum* clause of Doyle's complaint sought damages in "the amount of $4,000, *plus* such additional amount that will fully compensate Plaintiff for her loss and damages" (emphasis added). And many other cases have held that, "[u]pon entry of a default judgment, the circuit court may hold a hearing … to determine damages." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 478-79 n.5, 326 N.W.2d 727, 736 (1982); *see also* ***Apex Elecs. Corp. v. Gee***, 217 Wis.2d 378, 387, 577 N.W.2d 23, 27 (1998) (circuit court may require "additional proof beyond the complaint" when assessing unliquidated damages on a default judgment); ***Martin v. Griffin***, 117 Wis.2d 438, 445, 344 N.W.2d 206, 210 (Ct. App. 1984) (trial court granting default judgment has option of holding a hearing for proof of any fact necessary to render judgment). The trial court followed accepted procedures in holding the hearing on damages in this case—a hearing that provided Arthur with

notice of the amount being sought, and one in which he participated fully. We see no error.

Arthur also argues that, because the trees which were destroyed or removed were "timber and [were] not shade trees," it was error to assess damage based on their replacement or restoration cost. First, Doyle's damage claim was not limited to the loss of the trees, but, as we have emphasized above, also encompassed claims for considerable additional damage to her property caused by the digging of the logging road. Second, as we noted in ***Threlfall v. Town of Muscoda***, 190 Wis.2d 121, 133, 527 N.W.2d 367, 371-72 (Ct. App. 1994), "[b]ecause recovery in trespass is based on a wrongful invasion of a plaintiff's rights, the rule of damages adopted should more carefully guard against failure to compensate the injured party than against possible overcharge to the wrongdoer." We went on to hold in ***Threlfall*** that a plaintiff, whose "ornamental" shrubs and trees were destroyed by the defendant's trespass, could recover damages based on their replacement cost—even though they "had no fair market value and their cutting increased the market value of the plaintiff's land." ***Id.*** at 133, 527 N.W.2d at 372.

The record in this case indicates that Doyle not only suffered the loss of the trees, but the improper cutting of the logging road through her property caused ecological damage, erosion problems and changes to the watershed, and there was testimony that at least $34,720 would be needed to return the property to its original condition. We see no error in the trial court's award of compensatory damages.

Finally, Arthur raises a series of "due process" arguments. First, he claims that the trial court failed to explain its reasons for denying his motion to

dismiss Doyle's complaint, and "denied [him] the opportunity for hearing on the motion." In particular, he objects to the fact that the order denying his motion simply recites that it was being entered "for the reasons stated by the court at the hearing held on November 30, 1995." At the November 30 hearing, the court indicated that it was denying Arthur's motion to dismiss—which was based in large part on the pendency of the lawsuit Arthur had started in Dodge County—on grounds that both the property at issue and the "principal" party to the dispute, Doyle, were located in Juneau County, and Doyle's counsel was directed to prepare the order. And we agree with the trial court that, because Arthur never objected to the order as drafted and entered,[2] any portions of his motion not specifically addressed by the court at the hearing were effectively abandoned. Finally, Arthur's assertion that the court never "provided him the opportunity to respond" to a letter from Doyle to the court asking for a ruling on his motion to dismiss after more than six months had passed since the hearing, is wholly unavailing. His motion and supporting arguments were fully heard by the court at the November 30 hearing.

Arthur's argument that he was "denied the assistance of counsel" on the second day of the three-day hearing on damages, in violation of his due-process rights, is equally meritless. Arthur was ostensibly represented by his wife, also an attorney, on the first day of the hearing, and the trial court declined to adjourn the proceedings when his wife indicated, without elaboration, that she would be unable to attend on the second day, leaving Arthur to represent himself. Arthur, an experienced attorney, had acted as his own counsel throughout the

[2] Arthur's first "objection" to the order was not made until more than three months after its entry—after Doyle filed her motion for default judgment.

proceedings, as well as in many of the other related lawsuits he commenced in other counties. And there is, as Arthur should know, no right to the assistance of counsel in civil actions. He had a full hearing on damages, and he participated fully and actively in that hearing. We see nothing unconstitutional, illegal, or even unfair about the trial court's failure to adjourn the proceedings.

Finally, Arthur argues that the trial court never acted on his motion to implead a non-party and "refused [him] the opportunity to offer evidence in defense of liability" at the hearing on damages. As to the first, his impleader motion was filed on November 20, 1996—more than fourteen months after the filing of the summons and complaint—and, contrary to Arthur's assertion that his motion was never acted on, the court specifically noted in its March 26, 1997, memorandum decision that, "[b]ecause Arthur has been found to be in default and a default judgment [has been] authorized in this case there is no reason to consider [his] motion … for leave to implead third parties." The court's observation, with which we agree, compels rejection of Arthur's "evidence in defense of liability" argument as well. As a defaulting defendant, he had long ago lost the right to contest liability.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.