

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1742

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EUGENE GLINSKI AND EVELYN GLINSKI,

PLAINTIFFS-RESPONDENTS,

V.

THE POOL PEOPLE OF CENTRAL WISCONSIN, INC.,

DEFENDANT-APPELLANT,

**HAYWARD POOL PRODUCTS, INC., GRECK'S POOL &
SPAS, L.L.C. AND KEITH GRECK,**

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Forest County: GLENN H. HARTLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. The Pool People of Central Wisconsin, Inc. (PPCW) appeals from a default judgment awarding Eugene and Evelyn Glinski \$37,824 for claims arising from a dispute over the installation of the Glinskis' swimming pool. PPCW also appeals an order denying its motion for relief from a default judgment. PPCW argues the circuit court erred by concluding that: (1) the Glinskis' service of process on PPCW was proper; and (2) PPCW's allegation that the Glinskis had failed to join an indispensable party was an insufficient basis to reopen the default judgment. PPCW also asks this court to reduce the damage award, even though PPCW did not raise the damage issue at the circuit court. We reject PPCW's arguments and affirm the judgment and order.

FACTS

¶2 PPCW, a Wisconsin business corporation, incorporated in 1988 and dissolved in July 1999. Its business was selling pool products and its principal offices were located in Schofield, Wisconsin. PPCW's 1998 annual report lists its president as Joseph Slowikowski.

¶3 The Glinskis purchased a swimming pool from PPCW in 1998. The Glinskis claimed the pool was defective and in October 1999 filed suit against PPCW and others who installed or repaired the pool. On October 20, 1999, the Glinskis attempted to serve PPCW through personal service on its corporate officer, Slowikowski.

¶4 Although numerous witnesses offered conflicting accounts of what occurred on October 20, some facts are undisputed. Law enforcement officer David Rudie went to what he believed to be PPCW's primary place of business to serve Slowikowski with the summons and complaint. He spoke with Slowikowski and then left the building.

¶5 Rudie returned a short time later and spoke with Bill Greenwood, the owner of The Pool People USA, the company that had purchased PPCW's assets, was operating at the same address, and now employed Slowikowski.¹ Rudie left the papers on a pool table² and filed a certificate of service with the court. Whether this service was valid is the first issue on appeal.

¶6 PPCW did not file an answer, and the Glinskis moved for default judgment. On January 6, 2000, Slowikowski was personally served with notice of the motion for default judgment. PPCW did not attend the February 4 hearing and the circuit court granted the default judgment against PPCW, awarding the Glinskis \$37,824 in damages.

¶7 On March 22, PPCW moved for relief from judgment on grounds that service of the summons and complaint on PPCW was fundamentally defective and that the Glinskis had failed to name Slowikowski as a necessary and indispensable party. The circuit court denied the motion. This appeal followed.

¶8 PPCW appeals both the default judgment and the order denying its motion to reopen the default judgment, arguing that service was fundamentally defective and that the Glinskis failed to name a necessary and indispensable party. We reject PPCW's arguments and affirm the judgment and order. We decline to address PPCW's argument that the circuit court improperly measured damages against PPCW because it is raised for the first time on appeal.

¹ Slowikowski sold Greenwood the business and agreed to become Greenwood's employee for two years as Greenwood learned the business.

² The business sells both swimming pools and pool tables.

DISCUSSION

A. Service of process

¶9 The Glinskis attempted to serve Slowikowski as PPCW's corporate officer. Pursuant to WIS. STAT. § 801.11(5)(a), a plaintiff can properly serve a domestic corporation

[b]y personally serving the summons upon an officer, director or managing agent of the corporation or limited liability company either within or without this state. In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

¶10 After an evidentiary hearing, the circuit court made findings of fact and concluded that PPCW had been properly served. Whether PPCW was properly served presents a mixed question of fact and law. The circuit court's findings with respect to the October 20 events will be upheld unless they are clearly erroneous. *See* WIS. STAT. § 805.17. The interpretation and application of WIS. STAT. § 801.11(5)(a) to those facts presents a question of law we review de novo. *See Bar Code Resources v. Ameritech, Inc.*, 229 Wis. 2d 287, 291, 599 N.W.2d 872 (Ct. App. 1999).

¶11 Although PPCW in its statement of facts notes that the witnesses offered conflicting testimony, on appeal it does not challenge the circuit court's factual findings as clearly erroneous. We have reviewed the transcript and see no basis to set aside the circuit court's findings. Therefore, we will apply the circuit court's findings of fact to WIS. STAT. § 801.11(5)(a).

¶12 The circuit court found that Rudie went to the business premises formerly occupied by PPCW and currently occupied by The Pool People USA in order to serve PPCW with the Glinskis' complaint. The court in its written decision also found:

[Rudie] spoke with Mr. Slowikowski and informed him that [he] was there to serve a legal paper upon Mr. Slowikowski as registered agent of The Pool People of Central Wisconsin, Inc. Officer Rudie identified the documents as "legal papers" and during their discussion, Mr. Slowikowski refused to accept the papers. Officer Rudie at that point left the building with the papers, probably somewhat concerned as to how to handle the situation. He then returned into the building at which time he observed Mr. Slowikowski going back into a restricted area of the building. I believe it is inferable at this point that if Officer Rudie can see Mr. Slowikowski, Mr. Slowikowski could see Officer Rudie and was going to the restricted part of the building for purposes of evading service. Officer Rudie spoke to a fellow employee of Mr. Slowikowski who went back to speak with Mr. Slowikowski, came back to Officer Rudie and indicated that Mr. Slowikowski would not come out. At that point Mr. Greenwood, the current operator of The Pool People USA, and employer of Mr. Slowikowski, came to speak to Officer Rudie and indicated that he did not want a scene. He told Officer Rudie that he would make sure Mr. Slowikowski got the legal documents. Officer Rudie then left the legal papers in the area where he had met with Mr. Slowikowski, on top of a demonstration pool table, and in plain view for Mr. Slowikowski when he would return from the restricted area. Mr. Greenwood did tell Mr. Slowikowski that legal papers had been left for him at the front of the store on the pool table.

¶13 The Glinskis argue that although Slowikowski did not physically accept the papers directly from Rudie, Slowikowski was nonetheless served as required by WIS. STAT. § 801.11(5)(a). Their argument is based on *Borden v. Borden*, 63 Wis. 374, 23 N.W. 573 (1885). In *Borden*, our supreme court

concluded that service may be proper even if a party refuses to physically receive the proffered legal papers. See *id.* at 377.

¶14 The process server in *Borden* went to Borden's home and informed him that he had a summons to serve and held it so that Borden could see it. Borden refused to accept the papers and pushed the server partly out the door. The server told Borden he would leave a copy of the summons for him and did so by attaching it securely to the handle of the door latch, informing Borden that he had done so. *Id.* at 376. The court concluded that there had been proper service and went on to explain:

It is of course impossible, without the use of violence, to compel a party to receive and retain papers offered him with a view of making a service. Any act of violence to accomplish that end is not to be tolerated. And when a party refused to accept a copy of a summons which is offered him in a civil and proper manner, after being informed what the paper is, there is no other way to make service but deposit the process in some appropriate place, in the presence of the party, if possible, or where it will be most likely to come to his possession. If, then, the party to be served does not get a copy of the summons it will be entirely owing to his own fault.

Id. at 377. We conclude that *Borden's* reasoning is equally applicable here.

¶15 The circuit court found that Rudie informed Slowikowski that he had legal papers to serve on him as registered agent for PPCW. Furthermore, Slowikowski refused to accept the papers and went to a restricted area of the store to avoid further contact with Rudie. Another employee told Rudie that Slowikowski refused to come out. Rudie left the papers on a pool table, in plain sight, where Slowikowski and Rudie had spoken earlier. Finally, Greenwood told Rudie that he would tell Slowikowski that the papers had been left for him.

¶16 Just like Borden, Slowikowski was aware that the process server had papers to serve, physically removed himself from the area to avoid service, and had access to the papers after the process server left. If Slowikowski did not receive the papers, it was entirely his own doing. *See id.*

¶17 PPCW argues the facts in this case can be distinguished from *Borden*. First, Rudie did not specifically say the papers contained a summons. Instead, he stated that he had “legal papers” for Slowikowski. Second, Rudie left the papers on a pool table while Slowikowski was in a different area of the building. These differences, PPCW contends, are sufficiently different to make *Borden* inapplicable. We are unconvinced.

¶18 Slowikowski’s own testimony reveals that he spoke with Rudie for several minutes about PPCW, the fact that he used to own it, and that he could not accept service of process for PPCW now that it had dissolved.³ Slowikowski testified:

Well, first when he came in, he was talking to an employee called Jason, and Jason said to me that he has some papers to serve on the [PPCW] at which time I came over.

I said, the [PPCW] is no longer in business, the corporation was dissolved June 30, and this is the Pool People USA LLC.

As the Pool People LLC, we can’t accept anything for the [PPCW] at which point we had a brief discussion, and the officer left.

³ Slowikowski testified that this was his understanding of the law at the time. However, neither party on appeal disputes that service on Slowikowski as a corporate officer was appropriate. *See Wisconsin Fin. Corp. v. Garlock*, 140 Wis. 2d 506, 516, 410 N.W.2d 649 (Ct. App. 1987) (the dissolution of a corporation does not affect the corporation’s existence for the purpose of lawsuits).

... I did mention to him, in the process of a conversation, that I used to own [PPCW] and the corporation is no longer in business.

This testimony supports the circuit court's implicit finding that Slowikowski knew Rudie was trying to serve him and that he refused to accept the papers. Regardless whether Rudie used the word "summons," Slowikowski was sufficiently on notice of the importance of the legal papers for *Borden* to apply.

¶19 Finally, we conclude that *Borden*'s principles also apply even though Slowikowski was not in the room when Rudie left the papers on the pool table. Slowikowski had voluntarily removed himself from the room and refused to come out to see Rudie. Additionally, the circuit court found that Greenwood told Slowikowski where the papers were located. We conclude that service was proper and that the circuit court did not err when it denied PPCW's motion for relief from default judgment on improper service grounds.

B. Necessary and indispensable party

¶20 PPCW argues that the default judgment should be reopened because the Glinskis failed to name Slowikowski as a necessary and indispensable party. PPCW argues that Slowikowski is a necessary and indispensable party under WIS. STAT. § 803.03(1) because PPCW was dissolved and Slowikowski acquired the corporation's assets. Pursuant to WIS. STAT. § 180.1408, claims against a dissolved corporation can be enforced against any shareholder's assets that were distributed during liquidation. Accordingly, PPCW argues, the Glinskis will have to seek payment from Slowikowski, and that makes him an indispensable party.

¶21 We agree with PPCW that the determination whether a party is necessary and indispensable under WIS. STAT. § 803.03(1) is within the circuit

court's discretion. See *Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis. 2d 31, 44, 465 N.W.2d 266 (Ct. App. 1990). However, PPCW argues that “the default judgment should not have been rendered, because all necessary parties were not before the court.” PPCW ignores the well-settled proposition that a circuit court cannot be said to have erroneously exercised its discretion by making a ruling when it was never asked to exercise that discretion in the first place. See *State v. Franklin*, 228 Wis. 2d 408, 418-19, 596 N.W.2d 855 (Ct. App. 1999). We have already concluded that PPCW was properly served and that Slowikowski himself was the agent for service. The Glinskis, PPCW or Slowikowski could have moved to add Slowikowski as a party. We conclude that their failure to do so before default judgment was entered against PPCW is not a basis to conclude that the circuit court erroneously entered the default judgment.

¶22 PPCW also argues that the circuit court erroneously exercised its discretion when it refused to reopen the default judgment and add Slowikowski as a party. It explains: “[T]he Glinskis cannot obtain any relief, much less complete relief, unless Joseph Slowikowski is made a defending party, since all the assets of the corporation were distributed to him.” PPCW also expresses its concern that Slowikowski's interests will be impaired and impeded if the default judgment is not reopened.

¶23 These arguments confuse the issues. PPCW cannot attempt to relieve itself from default judgment by arguing that reopening the judgment will be best for the Glinskis and Slowikowski. Whether Slowikowski will be bound by the default judgment against PPCW is not an issue before this court. In short, the circuit court's willingness to add Slowikowski as a party is irrelevant to the issue whether PPCW is entitled to relief from judgment under WIS. STAT. § 806.07. Accordingly, we reject this argument.

C. Damage calculation

¶24 PPCW argues that this court should review how the circuit court measured damages. For example, PPCW argues the circuit court erred as a matter of law when it concluded that it could award damages for the Glinskis' loss of use of the pool. PPCW acknowledges that it never raised this issue in the circuit court, but urges this court to nonetheless consider the issue under the authority of *Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998). In *Apex*, our supreme court held that even if an issue is not raised in the circuit court, an appellate court may choose to review questions of law that have been briefed by the parties when the question is of sufficient public interest to merit a decision. *See id.* We are unconvinced this case is of sufficient public interest to merit review. Accordingly, we decline to address the damage issue.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

