

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP152

Cir. Ct. No. 2005CV877

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN JUSTINGER,

PLAINTIFF-APPELLANT,

V.

DIANE BOGENSCHUETZ,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. John Justinger appeals from the judgment of the circuit court that dismissed his complaint against Diane Bogenschuetz. Justinger argues that the circuit court erred when it considered documents Bogenschuetz filed with the court after the deadline for filing responses to a summary judgment

motion had expired, and when it granted Bogenschuetz's motion for reconsideration and dismissed Justinger's complaint on a ground that had not been addressed by either party. We conclude that the circuit court properly exercised its discretion when it did not exclude the late filed responses, but that it erred when it dismissed the complaint on a basis that had not been argued by either party. Consequently, we reverse the matter and remand for a new trial on this issue.

¶2 In 1999, Nathan Bogenschuetz signed a promissory note agreeing to pay \$19,376 to his uncle, John Justinger.¹ Nathan's mother, Diane Bogenschuetz, also signed the note. The note was secured by a motorcycle. In 2004, Nathan and Diane defaulted on the note. Justinger then sued them. Diane answered the complaint, but Nathan filed for bankruptcy and was dismissed from the action.

¶3 On June 6, 2006, Justinger filed a motion for summary judgment. On July 5, 2006, the day the trial to the court was scheduled to begin, the court held the hearing on Justinger's summary judgment motion. On the morning of the hearing, Diane's attorney faxed a letter to the court and to Justinger's attorney that opposed the motion and included copies of previously filed discovery responses.² At the hearing, Justinger argued that the court should not consider the documents filed by Diane because they were not timely under WIS. STAT. § 802.08(2) (2003-04). The court, however, considered the documents and denied the summary judgment motion. The trial to the court was held the same day. At the end of the trial, the court ruled for Justinger.

¹ The parties do not explain what the note was for.

² The court stated that the documents had been filed thirty minutes prior to the start of the hearing.

¶4 Diane subsequently moved the court to reconsider and dismiss Justinger’s claims. In November 2006, the court granted Diane’s motion. The court stated that it granted the motion because Justinger had testified at trial that he had released a lien on the motorcycle without informing Diane that he had done so. The court concluded that because he had acted “in a manner contrary to the interest of Ms. Bogenschuetz as a guarantor,” that he should not have a judgment against her for the outstanding amounts on the note. Neither party had previously raised this issue or briefed this issue.

¶5 Justinger argues to this court that the circuit court erred when it considered the documents Diane filed because the documents were not filed by the statutory deadline. WISCONSIN STAT. § 802.08(2) (2005-06) states that opposing affidavits in a summary judgment proceeding shall be served “at least 5 days before the time fixed for the hearing.”³ Sheboygan County Local Rule 602 provides in relevant part that if the respondent does not file a brief or other supporting documents within five days, “it shall be deemed a waiver of that right.” The circuit court here considered the discovery responses to be an affidavit in opposition to the summary judgment motion. The parties do not dispute that Diane’s attorney did not file the documents by the deadline. Diane’s attorney argued that he had served opposing counsel before the deadline expired.

¶6 A circuit court has the discretion to extend deadlines to file responsive documents. *See* WIS. STAT. § 801.15(2) and *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 470, 326 N.W.2d 727 (1982). On review, therefore, the

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

issue for this court is whether the circuit court properly exercised its discretion. *Id.* Justinger argues only that the deadline was mandatory and the circuit court did not have the authority to extend it. The circuit court did have such discretion under § 801.15(2). What this court must determine, then, is whether the record reflects “the reasoned application of the appropriate legal standard to the relevant facts in the case.” *Id.* at 471.

When the circuit court sets forth the reasons for its decision under sec. 801.15(2)(a), this court will focus on the facts of record to determine whether they support the court’s reasons. When the circuit court sets forth no reason or inadequate reasons for its decision, this court may engage in its own examination of the record and determine whether the circuit court exercised its discretion and whether the facts provide support for the circuit court’s decision. If the record indicates that the circuit court failed to exercise its discretion, if the facts of record fail to support the circuit court’s decision, or if this court’s review of the record indicates that the circuit court applied the wrong legal standard, this court will reverse the circuit court’s decision as an abuse of discretion.

Id. at 471-72 (citations omitted).

¶7 Our review of the record establishes that the circuit court properly exercised its discretion when it allowed the responses to the discovery requests to serve as a response to the summary judgment motion. The record shows that the court was frustrated with both parties for their handling of discovery issues. Further, the court noted that the attorney who apparently had been representing Diane had health problems and had had his license to practice suspended. Another member of that attorney’s firm represented Diane at the hearing and had only recently become involved in the case. Based on these facts, we conclude that the record supports the circuit court’s decision to extend the deadline for filing the response.

¶8 The next issue is whether the circuit court erred when it decided Diane’s motion for reconsideration on a ground that had not been pled, briefed, or argued by either party. We conclude that it did. After the court granted judgment to Justinger, Diane moved for reconsideration. In this motion, she argued a failure of consideration. Justinger addressed this issue in his response. When the circuit court decided the motion, it ruled against Diane on the failure of consideration issue. The court then stated that “there was other evidence presented at the trial, which was not raised by counsel in argument following the presentation of evidence, that leads the court to grant the motion for reconsideration.” The court went on to say that Justinger testified at trial that he had a lien on the motorcycle that had been used to secure the promissory note, but that he released the lien without contacting Diane. The court concluded that under these circumstances, Justinger should not have a judgment against Diane.

¶9 Without deciding the merits of the issue itself, we conclude that it was error for the court to decide on the basis of an issue that had not been pled, briefed, or argued by the parties. Justinger argues that the circuit court’s act should be construed as an amendment to the pleadings and that the circuit court did not comply with the statutory requirements. *See* WIS. STAT. § 802.09(2). Diane responds that when the testimony was elicited from Justinger at trial about releasing the lien, his counsel should have objected because the purpose of the testimony was “self-evident.”

¶10 We conclude that the circuit court’s action in this case did not constitute an amendment to the pleadings. The court simply decided the case on an issue without any notice to the parties, without the parties’ consent, and without any opportunity for the parties to present evidence on the issue. The interests of justice demand that the parties be given the opportunity to present evidence and

argue the issue. *See* WIS. STAT. § 752.35. Consequently, we reverse the judgment of the circuit court and remand the matter for trial on this issue.

By the Court.—Judgment reversed and cause remanded.

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

