

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2011

A. John Voelker
Acting 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 Nos. 2010AP2332, 2011AP147

Cir. Ct. No. 2010CV7777

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

APPEAL NO. 2010AP2332

ALLEN SILVERSTEIN,

PLAINTIFF-RESPONDENT,

v.

BRADFORD AMIDZICH,

DEFENDANT-APPELLANT,

PERLICK CORPORATION,

GARNISHEE-DEFENDANT,

WEISS BERZOWSKI BRADY LLP,

CO-APPELLANT.

APPEAL NO. 2011AP147

ALLEN SILVERSTEIN,

PLAINTIFF-RESPONDENT,

V.

BRADFORD AMIDZICH,
DEFENDANT-APPELLANT,
PERLICK CORPORATION,
GARNISHEE-DEFENDANT.

APPEAL from orders of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Bradford Amidzich appeals from the circuit court's order denying his motion for summary judgment and permitting Allen Silverstein to proceed with his garnishment action against Amidzich and Perlick Corporation, and from the circuit court's order denying Amidzich's motion for relief from the circuit court's prior final order based upon newly discovered evidence.¹ Amidzich argues that the circuit court erred in permitting Silverstein to proceed with the

¹ Amidzich first filed a notice of appeal from the circuit court's August 19, 2010 order, which denied Amidzich's motion for summary judgment and permitted Silverstein to proceed with the garnishment action; we assigned the appeal Case No. 2010AP2332. Thereafter, Amidzich filed with the circuit court a motion for relief from the court's prior final order based upon newly discovered evidence, which the circuit court denied on December 20, 2010. Amidzich filed a notice of appeal from the court's December 20, 2010 order, and we assigned the appeal Case No. 2011AP147. Upon Amidzich's motion, we then consolidated Case Nos. 2010AP2332 and 2011AP147 because the issues to be decided and applicable facts were the same in both appeals and consolidation was in the interest of justice and judicial efficiency. *See* WIS. STAT. § 809.10(3) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

garnishment action he filed against Amidzich and Perlick because it was undisputed that Perlick, the garnishee, was not indebted to Amidzich. We agree, reverse the circuit court's order, and remand the case back to the circuit court with directions to grant Amidzich's motion for summary judgment and to dismiss the garnishment action.

BACKGROUND

¶2 In May 2010, Silverstein filed a garnishment summons and complaint alleging that Amidzich owed him \$47,907.28 following the entry of judgment in Milwaukee County Circuit Court Case No. 2004CV8072.² Silverstein sought garnishment against Perlick, on the belief that Perlick was indebted to or had in its possession or under its control property belonging to Amidzich.

¶3 Amidzich answered the complaint, admitting the existence of the judgment in Milwaukee County Circuit Court Case No. 2004CV8072 but denying that Perlick was indebted to or held any of Amidzich's property. Instead, Amidzich asserted that Perlick had royalty obligations payable to Ameramid, Inc.,

² In their respective briefs, Silverstein and Amidzich both include numerous facts from Milwaukee County Circuit Court Case No. 2004CV8072. However, very few of those facts are in the record for the garnishment action before us, as is evident from the parties' failure to provide any record cites for those particular facts. *See* WIS. STAT. § 809.19(1)(d) (requiring "a statement of facts relevant to the issues presented for review, with appropriate references to the record"). Consequently, we do not consider those facts when rendering our decision in the present case. *See Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (Assertions of fact not found in the record are prohibited and will not be considered by the court.).

In the summons and complaint, Silverstein wrote that judgment was entered in Milwaukee County Case Nos. "2004CV8072/2267." As best we can tell, that is the only reference to Case No. 2004CV2267 in the record and our review of the docket in that case did not reveal any connection to Silverstein's garnishment action. As such, we presume that the reference to Case No. 2004CV2267 is merely a scrivener's error.

a non-party, based upon patents assigned to Ameramid that were licensed to Perlick.

¶4 Perlick, as the garnishee, also answered the complaint, at first asserting that it was indebted to Amidzich by virtue of a license agreement. However, Perlick later filed an amended answer, stating that it was not indebted to Amidzich, but was instead indebted to Ameramid.

¶5 Silverstein did not name Ameramid as a party in the complaint, move to amend the complaint to include Ameramid as a party, or assert that he held a judgment against Ameramid. Nor did Silverstein file a reply to either Amidzich's answer or Perlick's amended answer.

¶6 Amidzich filed a motion for summary judgment asserting that there were no genuine issues of material fact because it was undisputed that Perlick was not indebted to Amidzich, thereby barring a garnishment action against Amidzich and Perlick. In response, Silverstein argued that Perlick was indebted to Amidzich by virtue of the fact that Ameramid was allegedly wholly owned by Amidzich; however, Silverstein filed no evidence in support of that assertion.

¶7 The circuit court held a hearing on the motion and, following the parties' arguments, denied Amidzich's motion for summary judgment and permitted Silverstein to proceed with his garnishment action. The circuit court concluded, based upon its reading of *Wiebke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 265 N.W.2d 571 (1978), that Ameramid was the alter ego of Amidzich, and therefore any royalties Perlick owed to Ameramid were payable to

Silverstein.³ Amidzich filed a motion for reconsideration, which the circuit court also denied. Amidzich appeals.

DISCUSSION

¶8 Amidzich argues that the circuit court erred in denying his motion for summary judgment, thereby permitting Silverstein to proceed with his garnishment against Amidzich and Perlick, because in doing so the circuit court: (1) improperly disregarded the statutory requirements for garnishment actions set forth in WIS. STAT. ch. 812; (2) improperly disregarded the statutory requirements for summary judgment set forth in WIS. STAT. § 802.08; and (3) denied Amidzich his right to due process. Because we agree with Amidzich that the circuit court’s order fails to take into account the statutory requirements of ch. 812, we need not address the other issues Amidzich raises. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“cases should be decided on the narrowest possible ground”).

¶9 This court reviews orders granting summary judgment *de novo*, applying the same standard as the circuit court. *Racine Cnty. v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶24, 323 Wis. 2d 682, 781 N.W.2d 88. Summary judgment is appropriate only “when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Jackson Cnty.*

³ The circuit court addressed issues regarding the alter ego doctrine and *Wiebke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 265 N.W.2d 571 (1978), *sua sponte*, even though they were neither raised nor briefed by the parties. Because Silverstein does no more in his brief than quote the circuit court’s holding, that is, he does not argue that the alter ego doctrine is applicable by providing analysis and relevant case citations, and because our review of the circuit court’s grant of summary judgment is *de novo*, we decline to address the applicability of the alter ego doctrine.

v. *DNR*, 2006 WI 96, ¶11, 293 Wis. 2d 497, 717 N.W.2d 713 (citation omitted); see WIS. STAT. § 802.08(2).

¶10 WISCONSIN STAT. § 812.01(1) permits any creditor to commence a garnishment action “against any person who is indebted to or has any property in his or her possession or under his or her control belonging to such creditor’s debtor.” Here, it is undisputed that Amidzich was indebted to Silverstein for a judgment in a previous action. Consequently, § 812.01(1) permits Silverstein, as the creditor, to commence a garnishment action against “any person who is indebted to or has any property in his or her possession or under his or her control belonging to” Amidzich, Silverstein’s debtor. However, due to Silverstein’s failure to reply to Perlick’s amended answer, the undisputed evidence presented to the circuit court on summary judgment conclusively established that Perlick was not indebted to Amidzich, prohibiting a garnishment action against it.

¶11 WISCONSIN STAT. § 812.14 states that “[t]he answer of the garnishee shall be taken as true unless the plaintiff, within 20 days after the receipt of the answer of the garnishee, serves a reply upon the garnishee.” (Emphasis added.) Perlick stated in its amended answer that Perlick was not indebted to Amidzich, but was instead indebted to Ameramid. Silverstein did not serve Perlick with a reply. As such, we must accept as true Perlick’s assertion that it was not indebted to Amidzich. See *id.* (a garnishee’s answer left unreplied “shall be taken as true”) (emphasis added); see also *State v. Koopmans*, 210 Wis. 2d 670, 677, 563 N.W.2d 528 (1997) (“The word ‘shall,’ when used in a statute, is presumed to be mandatory.”). Because Perlick was not indebted to Amidzich, Silverstein may not file a garnishment action against Perlick for collection of his judgment against

Amidzich. *See* WIS. STAT. § 812.01(1). The circuit court erred in concluding otherwise.

¶12 As such, we remand this case back to the circuit court with directions to grant Amidzich’s motion for summary judgment and to dismiss the garnishment action.⁴

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

⁴ Co-appellant Weiss Berzowski Brady LLP also filed a notice of appeal from the circuit court’s August 19, 2010 order, which denied Weiss’s motion to intervene.

Weiss represented Amidzich in Milwaukee County Circuit Court Case No. 2004CV8072, in which the circuit court set forth the \$47,907.28 judgment against Amidzich upon which this garnishment action is based. As part of that representation, Weiss entered into a patent security agreement with Ameramid. Weiss moved to intervene in the present case, arguing that it had an interest in the royalties Perlick owed to Ameramid by virtue of its security agreement with Ameramid. The circuit court denied Weiss’s motion to intervene and concluded that any security interests Weiss had in Ameramid’s patents were subordinate to Silverstein’s judgment against Amidzich. Weiss appeals.

We need not address the substance of Weiss’s appeal because our decision to remand this case back to the circuit court for dismissal of the garnishment action against Amidzich and Perlick leaves Weiss’s alleged interests unencumbered, thereby rendering its claims on appeal moot. *See State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (“An issue is moot when its resolution will have no practical effect on the underlying controversy.... Generally, moot issues will not be considered by an appellate court.”).

