COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2014

Diane M. Fremgen
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. 2013AP2753 **Cir. Ct. No. 2013CV47**

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

WISCONSIN STATE PRISON EMPLOYEES WAUPUN LOCAL 18, AFSCME, AFL-CIO, TAYCHEEDAH CORRECTIONAL CENTER AND DRUG ABUSE CORRECTIONAL CENTER EMPLOYEES LOCAL 126, AFSCME, AFL-CIO, DODGE CORRECTIONAL INSTITUTION WAUPUN EMPLOYEES LOCAL 178, AFSCME, AFL-CIO, REDGRANITE CORRECTIONAL INSTITUTION EMPLOYEES REDGRANITE LOCAL 281, AFSCME, AFL-CIO, FOX LAKE CORRECTIONAL INSTITUTION EMPLOYEES FOX LAKE LOCAL 1005, AFSCME, AFL-CIO, COLUMBIA CORRECTIONAL INSTITUTION EMPLOYEES LOCAL 3394, AFSCME, AFL-CIO AND DEBRA GARCIA, AS ADMINISTRATOR OF AND ON BEHALF OF AFSCME LOCAL UNIONS 18, 126, 178, 281, 1005 AND 3394, AFSCME 24,

PLAINTIFFS-RESPONDENTS,

V.

DANIEL MEEHAN, CHARLES YORK, BRIAN CUNNINGHAM, KENNETH A. TILLEMAN, KEITH E. LOEST, PHILLIP B. BRISKI, STEPHAN E. KUEHN, LONNY BENBO, CRAIG L. HULL, DONALD CUPERY, CHRISTOPHER DAVIS, JON K. PATZLSBERGER, TRISTA PITZEN, WISCONSIN ASSOCIATION OF CORRECTIONAL LAW ENFORCEMENT, WCL WAUPUN, WCL TAYCHEEDAH, WCL DODGE, WCL REDGRANITE, WCL FOX LAKE AND WCL COLUMBIA,

DEFENDANTS-APPELLANTS,

LEONARD WRIGHT,

DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. This appeal is from a judgment encompassing two default judgments entered for the failure to timely answer the complaint, *see* WIS. STAT. § 801.09(2)(a)3.b., without a showing of excusable neglect or extraordinary circumstances necessary to justify relief under WIS. STAT. § 806.07(1)(h) (2011-12).[1] We affirm.

¶2 The Wisconsin Association for Correctional Law Enforcement (WACLE) is a labor organization whose membership formerly belonged to local unions affiliated with the American Federation of State, County, & Municipal Employees (AFSCME). AFSCME and its local unions (AFSCME Locals) filed suit against twenty-one defendants: WACLE; WACLE officers, who formerly were officers in AFSCME Locals; and WACLE local unions. The complaint alleged that, while still officers in AFSCME Locals, WACLE officers diverted funds from AFSCME Locals' treasuries then used the diverted monies to establish

[1] Appellants do not seek relief from the judgments under WIS. STAT. § 806.07(1)(a), (b), (d), or (g), as they did below. We deem those arguments abandoned. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

and fund WACLE. The complaint alleged breach of contract, tortious interference with contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conversion, and unjust enrichment. The plaintiffs sought an injunction ordering the transfer of funds they did not yet possess and declaratory relief for those they did.

¶3 By January 22, 2013, the plaintiffs effected service on fourteen of the twenty-one defendants, the "Group of 14."[2] The Group of 14 defendants all failed to answer or otherwise respond to the complaint. Ten days beyond the forty-five-day deadline,[3] the plaintiffs moved for default judgment against the Group of 14. *See* WIS. STAT. § 806.02(1). The Group of 14 moved to deny the motion for default judgment, for change of venue from Winnebago county, and to dismiss the claims against defendants Wright and Benbo for failure to state a claim. The latter motion was timely only as to Wright.

¶4 At a hearing on June 6, 2013, the circuit court granted the plaintiffs' motion for default judgment against the Group of 14, finding that it did not demonstrate the requisite excusable neglect in failing to respond to the complaint. It denied all three of the Group of 14's motions.

[2] The Group of 14 consists of defendants Meehan, Tilleman, Loest, Kuehn, Benbo, Hull, Cupery, Davis, Patzlsberger, Pitzen, and four WACLE Locals, WCL Waupun, WCL Taycheedah, WCL Fox Lake, and WCL Columbia.

[3] The summons erroneously instructed defendants to file an answer within twenty days instead of forty-five, *see* WIS. STAT. § 801.09(1), (2)(a)3.b., but plaintiffs allowed the full statutory time to play out before moving for default.

¶5 By the time of the June 6 hearing, six of the remaining seven defendants (the Group of 6) had not responded to the complaint.[4] On June 7, the Group of 6 moved for permission to file a late answer, followed a week later by an answer filed on behalf of all defendants, including those already defaulted. The plaintiffs moved for default judgment against the Group of 6 and to strike its late answer except as to Wright. The Group of 14 moved for relief from the default judgment against them pursuant to WIS. STAT. § 806.07(1).

¶6 The circuit court granted the plaintiffs' motion for default judgment against the Group of 6, denied the defendants' motion to file a late answer, ordered the answer stricken except as to Wright, denied the Group of 14's motion for relief from default judgment, and declared that the funds in question "belong[] solely to [the AFSCME Locals] and to no other person or entity." The defendants except for Wright appeal.

¶7 A circuit court's decision to grant or deny a motion for enlargement of time is a discretionary one, ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982), as is the decision to grant or vacate a default judgment, ***Oostburg State Bank v. United Savings & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). We review such determinations under the erroneous exercise of discretion standard. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We will not reverse a discretionary determination if the record shows that discretion was in fact exercised and we can perceive a

[4] The Group of 6 consists of defendants York, Cunningham, Briski, WACLE, and two WACLE Locals, WCL Dodge and WCL Redgranite. Defendant Wright timely responded to the complaint by filing a motion to dismiss.

reasonable basis for the court's decision. ***Id.***, ¶30. We generally look for reasons to sustain a discretionary determination. ***Id.***

¶8 Defendants have an "unequivocal duty" to timely answer a complaint. ***Estate of Otto v. Physicians Ins. Co. of Wis., Inc.***, 2008 WI 78, ¶56, 311 Wis. 2d 84, 751 N.W.2d 805. The circuit court may enlarge the time for serving an answer "on motion for cause shown and upon just terms." WIS. STAT. § 801.15(2)(a). But the court's power is limited: "If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect." ***Id.***

¶9 Excusable neglect is the neglect that "'might have been the act of a reasonably prudent person under the same circumstances.'" ***Hedtcke***, 109 Wis. 2d at 468. "It is 'not synonymous with neglect, carelessness or inattentiveness.'" ***Id.*** The burden of establishing excusable neglect is on the party seeking an enlargement of time for filing an answer or relief from a default judgment. ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶50, 253 Wis. 2d 238, 646 N.W.2d 19 (enlargement of time); ***Carmain v. Affiliated Capital Corp.***, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265 (relief from judgment).

¶10 Appellants failed to carry—almost, even, to pick up—their burden. Their motion for leave to file a late answer offered a single reason for their inaction. They asserted that, as their motions to dismiss Benbo and Wright and for change of venue "had the possibility of impacting their status, they were reasonable in awaiting a resolution prior to expend[ing] time answering the complaint." "'[Excusable neglect] does not include neglect which consists in a

total sleeping on one's rights.'" ***Padek v. Thornton***, 3 Wis. 2d 334, 338, 88 N.W.2d 316 (1958).

¶11 The circuit court deemed insufficient their explanation at the motion hearing that they were faced with "just too many lawsuits against too many defendants … served at different time periods." It found that each defendant had an independent obligation to respond to the complaint and that a reasonable, prudent person would not ignore a summons.

¶12 The court also rejected their possible-confusion hypothesis. Appellants had conjectured that, as the summons erroneously named too short an answer period, some defendants might have believed they were in default before they actually were, implying that any untimely answer or remedial action was pointless. The court concluded that theoretical reliance on a technical defect in the summons did not establish excusable neglect because it was unaccompanied by any claim or showing that the error *actually* misled them. *See* ***Hedtcke***, 109 Wis. 2d at 473 (excusable neglect should be "predicated … on specific incidents and a persuasive explanation" justifying the attorney's entire period of neglect). We agree there was an utter failure to establish excusable neglect. The court properly exercised its discretion in denying the motion to file a late answer.

¶13 Appellants argue, however, that "a finding of excusable neglect is not required for a court to grant relief under WIS. STAT. § 806.07(1)(h)." ***Miller***, 326 Wis. 2d 640, ¶45. But relief under § 806.07(1)(h) requires "extraordinary circumstances" that "justify[] relief in the interest of justice." ***Miller***, 326 Wis. 2d 640, ¶35. To make that determination, the circuit court should "'consider a wide range of factors.'" ***Id.***, ¶36. They include:

> [W]hether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id. (citation omitted).

¶14 Extraordinary circumstances exist only in "extreme and limited cases." ***Connor v. Connor***, 2001 WI 49, ¶43, 243 Wis. 2d 279, 627 N.W.2d 182. This case is not one of them. It was appellants' deliberate choice to respond only as to two of the twenty-one defendants served. Their complaint of "piecemeal" personal service without notice to their counsel did not deprive them of the effective assistance of counsel; service was properly accomplished and they could have notified counsel themselves. They contend the interest of deciding the real issue—who the true owners of the treasury funds are—outweighs the finality of judgments. Many defaulted parties make a similar claim.

¶15 They also insist there is a meritorious defense to the judgment declaration that the disputed funds belong solely to the AFSCME Locals. They assert that the ruling is contrary to Wisconsin public policy under ***Wells v. Waukesha County Marine Bank***, 135 Wis. 2d 519, 401 N.W.2d 18 (Ct. App. 1986). We disagree. In ***Wells***, the entire AFSCME Local membership exercised its statutory right to disaffiliate from the international union. ***Id.*** at 526-28. This

court held that a clause in the international union's constitution requiring permanent forfeiture of the Locals' treasuries to the international union, when it had no other claim to those monies, violated public policy. ***Id.*** at 526-27, 532. Here, by contrast, AFSCME Locals continue to operate and represent employees in several bargaining units such that dues money collected by the AFSCME Locals still belongs to the Locals and is "used for a purpose" for which it originally was intended. A "contract[] should be held unenforceable on public policy grounds only in cases free from doubt." ***Id.*** at 534. This one is not.

¶16 Finally, appellants argue that WACLE's victory in the July 2013 representation election is an intervening circumstance, as it changed the ownership of union funds AFSCME and its Locals were claiming. Appellants argue it would be inequitable to let the defaults stand given the court's ruling that the funds "belong solely to [the AFSCME Locals]." If anything, this argument goes to damages, not the merits.

¶17 This case does not present extraordinary circumstances justifying relief in the interest of justice. The denial of the motion for relief from the judgments reflects a proper exercise of discretion. With the defaults affirmed, the venue issue is irrelevant. We need not address it. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment affirmed.

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