COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1192 **Cir. Ct. No. 2013SC2783**

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

SAMANTHA JO PHALIN,

PLAINTIFF-RESPONDENT,

V.

TYLER J. SCHNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Samantha Jo Phalin brought a tort action in small claims court against Tyler Schnell after Phalin's and Schnell's motor

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

vehicles collided. The small claims court commissioner entered a default judgment in favor of Phalin after Schnell failed to appear in small claims court. Phalin was awarded $10,000 in damages. The court commissioner denied Schnell's motion to reopen the default judgment. Rather than request a de novo hearing in the circuit court on his motion to reopen, Schnell filed a trial demand. The court set a date for a trial on the merits. Rather than hold the court trial on that date, the court took up Schnell's motion to reopen the default judgment. The circuit court then denied Schnell's motion to reopen the default judgment, after which Schnell filed a motion for reconsideration. The court denied this motion.

¶2 On appeal, Schnell argues that the court-issued notice of the small claims court trial was defective. He also argues that the court award of $10,000 to Phalin for damages was not supported by the record and that the court erred in denying Schnell's motion to reopen and motion for reconsideration. We disagree and, for the reasons that follow, we affirm the circuit court.

BACKGROUND

¶3 Samantha Phalin filed a summons and complaint in small claims court alleging that Schnell negligently caused their cars to collide, and caused damage to her motor vehicle. Phalin claimed damages in the amount of $10,000, the maximum amount that she could receive in small claims court.

¶4 Schnell failed to appear on the return date in the small claims court and default judgment was entered against him on both liability and damages. The court commissioner awarded Phalin the requested $10,000 in damages. The court commissioner did not take any evidence on Phalin's claimed damages.

¶5 Pursuant to WIS. STAT. § 806.07(1)(a), Schnell filed a timely motion for relief from the default judgment in small claims court, using a court-mandated form, on the ground that his counsel had calendared the hearing on the wrong date. Following a hearing on Schnell's motion to reopen, the court commissioner denied the motion.

¶6 The minutes of the motion hearing before the court commissioner show Schnell was advised of his right to have the denial reviewed de novo in the circuit court. Instead, Schnell filed a small claims demand for a trial de novo in the circuit court, which the court construed as a motion to reopen. A court trial was scheduled for January 28, 2014. Schnell moved for continuance of the court trial date. The court trial was re-scheduled for February 12, 2014.

¶7 On February 12, 2014, the parties appeared in court, ostensibly for a court trial. However, at the beginning of the trial, the trial court stated: "What's before the Court is a de novo review of a decision by the court commissioner made on November 22 of last year which denied Mr. Schnell's motion to reopen." The court then reviewed the procedural history of the case, concluding, "theoretically, there is a court trial scheduled for today, but there will be no trial if I don't grant the motion to reopen." In support of his motion to reopen, Schnell explained to the court that he did not appear at the small claims trial because counsel had miscalendared the trial date. At the conclusion of the hearing, the court denied Schnell's motion to reopen on the ground that Schnell failed to show excusable neglect pursuant to WIS. STAT. § 806.07(1)(a) for failing to appear at the small claims court trial, and that Schnell failed to demonstrate a reasonable prospect of success on the merits.

¶8 Schnell filed a motion for reconsideration, claiming that (1) "Notice in this Matter was defective"; (2) "the Court misstated the Law with regard to the Defendant's personal appearance requirement in a Small Claims Proceeding"; and (3) "the Court foreclosed Counsel's ability to place evidence in the Record regarding the Defendant's meritorious Defense." The court issued a written order denying Schnell's motion for reconsideration. The court rejected two of Schnell's claims on the basis that neither claim had any bearing on the court's denial of Schnell's motion to reopen. Then the court denied the motion because Schnell failed to demonstrate a meritorious defense to Phalin's claim of negligence. Schnell appeals.

DISCUSSION

¶9 Schnell first argues that "the Notice of Hearing, sent out on December 12, 2013, was defective in that, it indicated that the scheduled Hearing was a Trial to the Court, as opposed to, a Motion Hearing." We reject this argument for three reasons.

¶10 We first note that the allegedly defective notice provided to Schnell is not part of the record. Obviously, we cannot determine whether the notice was defective because Schnell failed to include the notice at issue in the record. The appellant, here Schnell, bears the responsibility to insure that the record includes all documents pertinent to the issues raised on appeal. *See* ***Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.***, 209 Wis. 2d 457, 469, 563 N.W.2d 554 (Ct. App. 1997). Because Schnell failed to include the notice that he claims was defective, we must assume that the missing part of the record, here the notice, would support a ruling by the circuit court that the notice was not defective. ***Id.*** at 470.

¶11 Even assuming that the December 12, 2013 notice stated that it was for a court trial, Schnell's counsel should have known that the court must first address the motion to reopen before the court could proceed to trial. The procedural status on the day of trial was that judgment had been entered against Schnell; the only way by which the court could proceed with the trial was to first reopen the default judgment, a critical point which Schnell fails to acknowledge. Indeed, the minutes of the hearing before the small claims court commissioner on Schnell's motion to reopen indicate that Schnell was informed of his right for a de novo hearing on the motion in the circuit court. If Schnell was "ambushed," as he claims, by the purported change from a trial to a hearing on Schnell's motion to reopen, Schnell should have prepared to argue the motion. In sum, we conclude that the circuit court properly exercised its discretion in denying Schnell's motion to reopen the small claims judgment.

¶12 Schnell next argues that the circuit court erred by awarding $10,000 in damages to Phalin, because "there was no underlying evidentiary foundation in the Record to support an award of that Amount." In support of his argument, Schnell cites WIS. STAT. § 806.02(5), which provides that "*[i]f* proof of any fact is necessary for the court to render judgment, the court shall receive the proof." (Emphasis added.) Schnell then asserts that the court "received no evidence, into the Record, regarding any damages, allegedly, suffered by [Phalin]. The damages amount is not supported by the Record." We reject this argument on at least two grounds.

¶13 First, Schnell's argument is not fully developed. Schnell fails to explain what facts were necessary for the court to consider before entering judgment on damages and why those facts would not support a $10,000 judgment for damages. *See* WIS. STAT. § 806.02(5). We may decline to review issues that

are inadequately briefed. ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998); ***State v. Petti***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶14 Second, it appears that Schnell has forfeited this argument. Our review of the record reveals that Schnell did not make this argument first in the circuit court; in other words, Schnell raises this argument for the first time on appeal. Generally, this court will not review issues that were not first raised to the trial court, and we will not do so here. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶15 As we understand it, Schnell next argues that the circuit court erred by denying Schnell's motion to dismiss on the ground that Schnell failed to demonstrate in his motion that there were "reasonable prospects of success on the merits." On appeal, Schnell argues that the court could not on one hand require Schnell to make this requisite showing, when, on the other hand, the court-mandated form on which Schnell's motion to reopen was written did not require the movant to "include evidence relating to the Movant's reasonable prospects of success on the merits." We do not address this argument.

¶16 We note that this is not the argument Schnell made to the circuit court on the topic of the court-mandated motion to reopen form. In the circuit court, Schnell argued that the form did not provide sufficient space for him to "offer evidence" of a meritorious defense. Schnell complained that the court committed reversible error by first requiring Schnell to demonstrate that he had a meritorious defense, but then not permitting Schnell to provide evidence to that effect because there was not enough space on the form to do so. As indicated above, Schnell makes an entirely different argument. The argument that Schnell

presents on appeal on this topic is demonstrably different than the argument he made in the circuit court. Although both arguments relate to the same topic—the court-mandated motion to reopen small claims judgment form—the arguments are fatally different. We do not consider this argument further because Schnell makes it for the first time on appeal. *See* ***id.***, 210 Wis. 2d at 604.

¶17 Regardless, Schnell ignores the circuit court's first reason for denying Schnell's motion to reopen: Schnell failed to establish excusable neglect for not appearing at the small claims trial before the court commissioner. Schnell does not appeal that part of the court's decision and serves as another basis to reject this appeal.

¶18 Accordingly, we affirm the circuit court's judgment and order denying Schnell's motions to reopen and for reconsideration.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.