

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0349

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GRANDE CHEESE COMPANY,

PLAINTIFF-RESPONDENT,

v.

**MANAGEMENT SYSTEM TECHNOLOGY, INC. D/B/A
DATA COLLECTION PRODUCTS COMPANY,**

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. Defendant, Management System Technology, Inc., d/b/a Data Collection Products Company (MST), appeals from a default judgment. MST contends the circuit court erroneously exercised its discretion when it denied MST's motion to enlarge the time to file its answer and granted Grande Cheese

Company's motion for default judgment. We conclude that the trial court properly exercised its discretion and affirm.

¶2 Grande Cheese Company and MST contracted for the sale, maintenance and warranty of certain hand-held computer units and accessories. Ultimately, Grande Cheese sued MST seeking damages for breach of contract and breach of warranty. The summons and complaint were served on MST on August 21, 1998. The forty-five day deadline for MST's answer expired on October 6, 1998. During this period of time, MST's out-of-state counsel attempted to determine whether either the product manufacturer or MST's insurer would answer and defend. On October 6, 1998, MST's counsel contacted Grande Cheese's counsel and obtained a courtesy extension to answer until October 26, 1998. MST's counsel confirmed the extension in an October 7, 1998, letter, stating:

This letter will document our phone conversation of October 6, 1998. During that conversation I informed you that my client was in the process of retaining Wisconsin counsel to provide a defense. Based on that fact you agreed to extend my client's time for filing an answer or other pleading for an additional twenty days through October 26, 1998. I will contact you as soon as I have identified the counsel who will be handling this matter. If you have any questions in the interim please call.

¶3 On October 23, 1998, MST's insurer informed counsel that it would refuse to tender a defense. On October 26, 1998, the product manufacturer informed counsel that it would not defend the action. Consequently, MST's counsel forwarded its file to Wisconsin counsel, along with a letter indicating that it was his understanding that Grande Cheese would agree to a further short extension so long as MST was diligently and in good faith preparing a defense. Local counsel received the materials on October 27, 1998, and on October 30,

1998, filed a notice of appearance and a motion to enlarge the time to answer the complaint until November 6, 1998, serving a fax copy upon Grande Cheese. That afternoon, Grande Cheese's counsel informed MST's counsel that Grande Cheese would not agree to a further extension of time and that it considered MST in default for failure to serve a responsive pleading by October 26, 1998. MST subsequently filed an answer. Grande Cheese moved to strike the answer and for default judgment. After a hearing, the circuit court held that MST's failure to timely respond to the complaint was not the result of excusable neglect and denied MST's motion to enlarge the time for filing an answer. The circuit court granted Grande Cheese's motions to strike and for default judgment. This appeal followed.

¶4 A party who fails to act within a specified time may petition the court for an extension of time to act. *See* § 801.15(2)(a), STATS. Whether to grant such a motion is a discretionary determination. *See Lambert v. Hein*, 218 Wis.2d 712, 721, 582 N.W.2d 84, 88 (Ct. App. 1998). We do not disturb the circuit court's discretionary determination as long as the record shows that the court logically interpreted the facts and applied a proper legal standard. *Id.* A circuit court may grant relief under § 801.15(2)(a) if it finds that: (1) the noncompliance was due to excusable neglect; and (2) an enlargement of time would serve the interests of justice, that is, whether the party seeking relief acted in good faith and whether the opposing party would be prejudiced by the time delay. *Id.* Excusable neglect is defined as "that neglect which might have been the act of a reasonably prudent person under the same circumstances." *See Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 468, 326 N.W.2d 727, 731 (1982).

¶5 In this case, the circuit court first applied the *Hedtcke* excusable neglect standard to the facts and concluded that failing to comply with the

courtesy agreement was not caused by excusable neglect. Although recognizing that MST moved for an extension within a reasonable time after the courtesy extension deadline had expired, the court also considered the following factors to be relevant: (1) no answer was filed for sixty-five days after service of the summons and complaint, which included the initial courtesy extension period; (2) the written courtesy agreement, drafted by MST's counsel, unambiguously identified a specific date for filing the answer and did not indicate an understanding that further extensions might be granted; and (3) on or before the October 26 deadline, MST's counsel did not attempt to contact Grande Cheese to request additional time to answer. The circuit court acknowledged counsel's argument that, in his experience as an Illinois attorney, such extensions are automatically extended, but it concluded that misunderstanding the law without reasonable inquiry did not constitute excusable neglect. Finally, the court concluded that when a courtesy agreement is memorialized in writing, the parties must be able to rely upon the writing, and that a reasonable and prudent person under the circumstances would not have allowed the courtesy deadline to pass without further contacting opposing counsel or filing an answer.

¶6 The circuit court then proceeded to consider whether an enlargement of time would serve the interests of justice. Although noting that there was no claimed prejudice to Grande Cheese and that there was no undue delay in MST's filing after October 26, the court re-emphasized its concern that parties and the court must be able to rely upon unambiguously written courtesy agreements, knowing that they will be complied with and not unilaterally modified. Consequently, the interests of justice did not require relieving MST from the deadline identified in the courtesy agreement.

¶7 We conclude that the circuit court examined the relevant facts, identified and applied the correct legal principles and reached a conclusion that a reasonable judge could reach. See *Krebs v. Krebs*, 148 Wis.2d 51, 55, 435 N.W.2d 240, 242 (1989). We are satisfied the circuit court properly exercised its discretion, and therefore affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

