COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 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. 99-0708

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

ELIZABETH ARONSON AND RACHAEL VANCE, BY HER GUARDIAN AD LITEM, ANN W. JOHNSON,

PLAINTIFFS-RESPONDENTS,

V.

KIMBERLY ANN HJEMVICK AND MUTUAL SERVICE CASUALTY INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

LUMBERMENS MUTUAL CASUALTY COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kimberly Hjemvick and Mutual Service Casualty Insurance Company (hereafter collectively "MSI") appeal a trial court order that denied MSI's motion to reopen a default judgment on the basis of excusable neglect. Elizabeth Aronson served MSI with the summons and complaint on February 2, 1998. Jacklyn Anderson, an employee of MSI, held settlement talks with Aronson's counsel and extended an offer to settle the dispute. On February 13, 1998, Aronson's counsel told Anderson that he would let her know if his client accepted the offer. Anderson then placed the summons and complaint in the file without forwarding it to MSI's outside counsel. Aronson contacted MSI no further, and MSI never answered Aronson's complaint. On June 8, 1998, Aronson moved the trial court for a default judgment without notice to MSI. On July 24, 1998, the trial court granted Aronson a default judgment.

¶2 On September 22, 1998, Anderson reviewed MSI's files and noticed that Aronson's summons and complaint had gone unanswered. She forwarded the summons and complaint to defense counsel. On November 4, 1998, MSI moved to reopen the default judgment, citing excusable neglect. The trial court denied the motion.

¶3 MSI makes three arguments on appeal: (1) MSI failed to answer the summons and complaint through excusable neglect, relying on Aronson's counsel's promise to let Anderson know if Aronson accepted MSI's settlement offer; (2) Aronson never gave MSI a valid, sum certain notice of her damage request, in violation of §§ 801.11, 801.14, and 806.02(2), STATS.; and (3) the trial court wrongly accepted Aronson's damage request without having a clear evidentiary basis. We conclude that the trial court correctly refused to reopen liability but should have reopened the damage award. We therefore affirm the order in part, reverse it in part, and remand the matter for further proceedings.

¶4 We first uphold the trial court's refusal to reopen the liability portion of the default judgment. The trial court made a discretionary decision. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 470, 326 N.W.2d 727, 732 (1982). Such decisions must have a reasonable basis. *See* ***Littmann v. Littmann***, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973). Excusable neglect takes place if someone fails to act in a reasonably prudent manner. *See* ***Hedtcke***, 109 Wis.2d at 468, 326 N.W.2d at 731. Here, the trial court reasonably concluded that Anderson acted in a nonprudent manner for MSI. She took no action on the Aronson lawsuit after Aronson's counsel promised to inform her if Aronson accepted MSI's settlement offer. This was an injudicious response to Aronson's counsel's promise. Aronson's counsel did not promise Anderson that Aronson would drop the lawsuit in the immediate future. He did not promise that he would waive his right to pursue all available remedies. He simply promised to keep Anderson informed if Aronson accepted the settlement offer. Such a promise did not permit MSI to sit on its rights. MSI had a duty to use due diligence, and Anderson chose no action at MSI's peril.

¶5 We also conclude, however, that the trial court had no reasonable basis to refuse to reopen the damage portion of the default judgment. Plaintiffs' complaints are not permitted to set out a sum certain for damages. However, plaintiffs must give notice of that sum certain to defendants before trial courts may grant a valid default judgment. *See* ***Stein v. Illinois Assistance Comm.***, 194 Wis.2d 775, 781-83, 535 N.W.2d 101, 103-04 (Ct. App. 1995) (applying §§ 801.11, 801.14, and 802.06(2)). Here, Aronson's complaint contained no sum certain for damages, and she therefore under the holding in ***Stein*** had a duty to furnish MSI notice setting out a sum certain. We reject Aronson's claim that her January 14, 1998 demand letter acted as that notice. She furnished MSI the letter

almost three weeks before service of the complaint and filed a copy in court as part of her motion for a default judgment. The letter fell short of a ***Stein*** notice. It was outside the pleadings, and Aronson never gave MSI notice that she was relying on it for a default judgment. On remand, the trial court should reopen the damage award and hold additional proceedings designed to arrive at a fair and equitable damage award. As a result of the remand, we need not address MSI's third argument that the trial court had no clear evidentiary basis for its damage award.

By the Court.—Order affirmed in part and reversed in part; cause remanded for proceedings consistent with this opinion; no costs to either party.

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