COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1396 **Cir. Ct. No. 2007CV2106**

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

SHAWN JOHNSON,

PLAINTIFF-RESPONDENT,

V.

ROMA II - WATERFORD, LLC AND ROMA'S E.T., INC.,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Reversed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 ANDERSON, P.J. Roma II – Waterford, LLC, is appealing the circuit court's order granting default judgment to Shawn Johnson and denying its

motion for reconsideration.[1] Roma II asserts that the default judgment is unfair because its failure to answer three of the four causes of action was the result of a mistake made by its attorney, a lack of attention to detail. We reverse because Roma II did timely file an amended answer that joined all the causes of action. We decline to address its suggestion that today's technology requires us to develop

[1] In reviewing the record, we discovered that a final judgment granting Johnson's motion for default judgment was never signed and filed after the January 28, 2008 motion hearing. The only document purporting to terminate this litigation is entitled "Final Order." It was signed on April 21, *2008*, and bears a clerk of courts' file stamp dated April 21, *2007*. The final order recites:

> (1) the Defendant's Motion for Reconsideration is denied;
>
> (2) the Defendant's Motion to Vacate the Default Judgment is denied.
>
> (3) The proposed Order for Judgment and Judgment filed by Plaintiff on or about January 29, 2008 is hereby stayed pending appeal.
>
> (4) The Clerk of Courts should enter judgment in accordance with the provisions of this Order.

The final order does not expressly grant Johnson a default judgment. Because only final orders and judgments are appealable, WIS. STAT. § 808.03(1) (2007-08), we have examined the order to determine whether the circuit court contemplated the order to be final, and conclude that the court had every intention that the final order would irretrievably remove the litigation from its docket. That is the test of finality required by ***Fredrick v. City of Janesville***, 92 Wis. 2d 685, 687-88, 285 N.W.2d 655 (1979). Even if it is nonfinal, however, we conclude that resolution of the issue on appeal is in the interest of judicial economy and efficiency. Accordingly, we treat the notice of appeal as a petition for leave to appeal and order the petition granted. ***Caldwell v. Percy***, 105 Wis. 2d 354, 357 n.3, 314 N.W.2d 135 (Ct. App. 1981); § 808.03(2).

After September 1, 2007, the Wisconsin Supreme Court requires that a final document contain a statement on its face that it is final for purposes of appeal. ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶¶4, 45, 49, 299 Wis. 2d 723, 728 N.W.2d 670; ***Tyler v. Riverbank***, 2007 WI 33, ¶¶25-26, 299 Wis. 2d 751, 728 N.W.2d 686. The final order dated April 21, 2008, does not contain such a statement. Absent such a statement, we will liberally construe ambiguities to preserve the right to appeal. ***Wambolt***, 299 Wis. 2d 723, ¶¶4, 46; ***Tyler***, 299 Wis. 2d 751, ¶26.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

a definition of "mistake" that takes into consideration "technologically based mistakes," such as computer printing errors.

¶2 On September 13, 2007, Johnson filed a summons and complaint seeking to enforce a Department of Workforce Development final determination that Roma II had violated Wisconsin's minimum wage law and owed Johnson $8155.53 in wages. In forty-seven paragraphs, she set forth four causes of action: (1) "Violation of the Wisconsin Minimum Wage Law," (2) "Failure to Comply with FLSA," (3) "Unjust Enrichment–Reimbursement of Business Expenses," and (4) "Promissory Estoppel–Reimbursement of Business Expenses." The summons and complaint were served on the defendant on October 8, 2007.

¶3 Roma II filed an answer on November 13, 2007. The answer was incomplete. While it responded to Johnson's general allegations and the allegations comprising her first cause of action, it did not respond to the other three causes of action. It was also oddly paragraphed. It started with paragraphs one through eleven and then skipped to paragraphs twenty-three and twenty-four, which denied the first cause of action.

¶4 Johnson responded with a motion for default judgment and supporting affidavit that she filed on December 17, 2007. In that motion, she sought a default judgment on the second, third and fourth causes of action. Roma II reacted by filing an amended answer and counterclaim on December 19, 2007.

¶5 A hearing on Johnson's motion was held on January 28, 2008. Johnson asked the court to ignore Roma II's amended answer because it was filed after Johnson had moved for default judgment and to grant her a default judgment

on her second, third and fourth causes of action. Roma II's attorney, Patrick J. Hudec, explained to the court[2] that the first answer was a draft that a new secretary had printed from a computer file and he had signed and filed it by mistake. He complained that counsel for Johnson did not make a courtesy call to point out the incomplete answer rather than file a motion for a default judgment.[3] Johnson's counsel replied that when counsel signs a pleading, he is certifying that he has read the pleading, and Hudec cannot be heard to claim excusable neglect.

¶6 The trial court granted Johnson a default judgment after first acknowledging that the original answer was "clearly a mistake," but going on to hold that "there has to be some good justification or reason for the mistake." The court commented that the signer of the pleading is certifying that the contents are correct and that implies "that the signer of the document had reviewed the document for its correctness."[4] The court concluded that the mistake did not rise

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[2] Attorney Hudec's lack of attention to detail reared up in the motion hearing when he claimed to have filed an affidavit with the court but had to retract that claim when counsel for Johnson and the court stated that Hudec had not filed an affidavit. He then made the astonishing statement, "And my testimony for this Court, your Honor, can be presumed to be under oath." It is astonishing because he was making a legal argument and had not been called as a witness and sworn in as a witness.

[3] While our supreme court has promulgated "Standards of Courtesy and Decorum for the Courts of Wisconsin," SCR 62 (2008), courtesy calls to opposing counsel before filing a legitimate motion are not included, although, we think it is a better practice. We note that the trial court apparently agrees.

[4] WISCONSIN STAT. § 802.05, provides, in part:

> **Signing of pleadings, motions, and other papers; representations to court; sanctions. (1)** SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and state bar number, if any. Except when otherwise specifically provided by rule or statute, pleadings need

(continued)

to the level of "excusable mistake or excusable neglect or whatever the terms are used in the cases." The court failed to discuss the amended answer that had been filed in response to the motion for a default judgment.

¶7 Two months later, Roma II filed a "Motion for Reconsideration; Motion to Vacate Default Judgment," accompanied by an affidavit from Hudec. At the motion hearing, Hudec again explained that the original answer was a mistake and asserted the mistake did not rise to the level of being so egregious as to justify a default judgment. He went on to argue:

> not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> **(2)** REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

> And Judge, based upon all those matters, and I would add one more point. The answer was timely filed. The factual issues were timely joined. A party does have, as a matter of right, the ability to file amended pleadings without leave of the Court within six months. Amended pleadings, the appropriate pleadings were immediately filed. They have not been challenged. There has been no motion to strike, and, Judge, under all these circumstances and the law which obviously promotes substantial justice, wants to avoid technical victories over a person's day in court, the court cases speak of default judgments being a harsh and drastic remedy that are highly disfavored under the law, and that when there are a simple mistake, there couldn't have been a more honest mistake than this one….

¶8 Johnson retorted that the mistake did not rise to the level of excusable neglect. She told the court that there is a high burden on attorneys to do their job correctly. She reminded the court that her attorney was under no obligation to insure that Hudec was doing his job correctly. Johnson acknowledged that default judgment could be considered a Draconian remedy, but it was one that was authorized to be employed when a party does not live up to its obligations. Finally, she asserted that Hudec's carelessness and inattentiveness should not be characterized as excusable.

¶9 The court refused to grant any relief to Roma II:

> Now I recognize that this was a mistake, but the statute requiring attorneys to sign the documents is to serve the purpose of making sure they read and know what it is they are signing. If Mr. Hudec had done that, he would have immediately noted that [in]advertently several pages of the answer were left off when it was printed out. He nonetheless signed it. It was an incomplete answer, and the motion was made by the plaintiff for default judgment on all those paragraphs for which no answer was provided.
>
> Although common practice is attorneys would under those circumstances make a courtesy call and say hey, is there some mistake here, the last 27 paragraphs are not

> answered, Miss Piefer, for whatever reason, did not do that. The fact remains cases like the Dugenske[5] and Charolais Breeding[6] case tell us that a mistake like this does not rise to the level of getting relief from the judgment. There was an improper answer filed. The plaintiff jumped on it. (Footnotes added.)

¶10 Roma II promptly filed this appeal.[7]

¶11 Before addressing the merits, we are obliged to explain that Hudec's "mistake" in signing and filing an incomplete answer appears not to be an isolated incident but a pattern of gross and inexcusable inattention to details. We have already explained that at the hearing on Johnson's motion for a default judgment on January 28, 2007, Hudec made a representation to the court that he had filed an affidavit in opposition to the motion. He had to retract that representation when both Johnson's attorney and the court remarked that they had not received his affidavit.

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[5] ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 257 N.W.2d 865 (1977).

[6] ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis. 2d 498, 285 N.W.2d 720 (1979).

[7] Roma II's brief violates some basic rules of appellate practice and procedure. Included in the statement of facts are facts focusing on an intimate relationship between Johnson and the owner of Roma II; facts explaining their conduct; and, in the appendix, an administrative determination, postdating the decision being appealed. None of these facts are germane to the issues on appeal. In the brief, Hudec attempts to explain the inclusion of this material is to illustrate that Roma II has always "aggressively defended" against legal actions commenced by Johnson. We reject his explanation. The material is salacious and could only have been included to prejudice Johnson. No matter the reason Hudec included this material in the brief, it was improper because an appellate court will not consider materials outside the record. ***Parr v. Milwaukee Bldg. & Constr. Trades***, 177 Wis. 2d 140, 145 n.4, 501 N.W.2d 858 (Ct. App. 1993). Because Hudec readily admits that the intentional inclusion of this material is in violation of the rules of appellate practice and procedure, we impose a $500.00 penalty payable to the clerk of the court of appeals within thirty days of the date of release of this opinion. *See* WIS. STAT. RULE 809.83(2).

¶12 But Hudec's egregious conduct did not end in the circuit court. It continues here with his failure to insure a proper final order or judgment was in the record when he filed his notice of appeal. *See* ***State ex rel. Hernandez v. McConahey***, 42 Wis. 2d 468, 471, 167 N.W.2d 412 (1969) ("The duty rests upon counsel to obtain a sufficient order or judgment upon which to predicate an appeal.") We also struck his reply brief, filed on behalf of Roma II, because it was not timely filed, WIS. STAT. RULE 809.19(4), and he failed to serve a copy of it on Johnson, RULE 809.19(8).

¶13 Hudec's problems in this court do not stop with his ignoring the rules of appellate practice. In the table of contents of his principal brief, he states the first issue is:

> Did the trial court err in granting a default Judgment where a timely answer was filed but mistakenly in an early draft form that did Respond to all causes of action?

Skipping to the statement on oral argument and publication, Hudec writes:

> In this case, the attorney dictate final changes over the should of a secretary who then printed off an earlier draft and that mistake was not caught prior to signing the document.

We will not detail other errors. We are left shaking our heads! Frankly, we are at a loss to understand what is clearly Hudec's intentional disregard of the rules and the details, including his failure to proofread.[8]

[8] Tips for proofreading can be found online at The University of Wisconsin—Madison's "The Writing Center." *See* http://writing.wisc.edu/Handbook/Proofreading.html (last visited Mar. 13, 2009).

¶14 Roma II incorrectly maintains our standard of review is de novo because it contends we are to apply several statutes—WIS. STAT. §§ 802.05 and 806.07(1)—to undisputed facts. Roma II first challenges the circuit court's granting default judgment to Johnson; the correct standard of review requires us to review a court's decision to enter a default judgment for the erroneous exercise of discretion. ***Midwest Developers v. Goma Corp.***, 121 Wis. 2d 632, 650, 360 N.W.2d 554 (Ct. App. 1984). Roma II also challenges the court's refusal to vacate the default judgment; the correct standard of review is whether the court exercised sound discretion in refusing to reopen a default judgment. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). When we review a circuit court's exercise of discretion, we examine the record to determine whether the court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. ***Crawford County v. Masel***, 2000 WI App 172, ¶5, 238 Wis. 2d 380, 617 N.W.2d 188. We give close scrutiny to default judgments. ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶64, 253 Wis. 2d 238, 646 N.W.2d 19.

¶15 We reject Roma II's assertion that the court erred in basing the default judgment on a violation of WIS. STAT. § 802.05. The court's reference to that statute is benign; it is meant only as an observation that if Hudec had actually read the original answer before he signed it, "he would have immediately noted that [in]advertently several pages of the answer were left off when it was printed out."

¶16 The court granted default judgment solely because Roma II did not join all of the issues. WISCONSIN STAT. § 806.02(1) provides, in part, "A default judgment *may* be rendered … if no issue of law or fact has been joined and if the

time for joining issue has expired." (Emphasis added.) It is elementary that a court should carefully exercise its discretion because default judgments are regarded with disfavor in the eyes of the law since the general policy of the law favors giving litigants their day in court with an opportunity to try the issues. ***J. L. Phillips & Assocs. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 359, 577 N.W.2d 13 (1998).

¶17 This would be a simple case but for Roma II filing an amended answer, joining all of the issues only two days after Johnson moved for a default judgment. The filing of an amended answer joined all of Johnson's causes of action because Roma II was at liberty, under WIS. STAT. § 802.09(1),[9] to file an amended answer within six months of the filing of Johnson's summons and complaint. Johnson filed her summons and complaint on September 13, 2007; she filed her motion for default judgment on December 17, 2007; and Roma II filed its amended answer on December 19, 2007.

[9] WISCONSIN STAT. § 802.09(1) states:

> **Amended and supplemental pleadings. (1)** AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 20 days after service of the amended pleading unless: a) the court otherwise orders; or b) no responsive pleading is required or permitted under s. 802.01(1). If a defendant in the action is an insurance company, if any cause of action raised in the original pleading, cross-claim, or counterclaim is founded in tort, or if the party pleading in response is the state or an officer, agent, employee, or agency of the state, the 20-day time period under this subsection is increased to 45 days.

¶18 A plaintiff is entitled to a default judgment "if no issue of law or fact has been joined" in a timely manner. WIS. STAT. § 806.02(1). An issue is joined when "the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact [or a legal proposition] to be so, and the other denies it." BLACK'S LAW DICTIONARY 836 (6th ed. 1990). *See* ***Snowberry v. Zellmer***, 22 Wis. 2d 356, 358, 126 N.W.2d 26 (1964) (issue was joined upon service of the answer). Here, Roma II joined the first cause of action when it filed the original answer and it joined the remaining three causes of action when it timely filed its amended answer.

¶19 In ***Split Rock***, 253 Wis. 2d 238, ¶37, Justice Prosser wrote:

> A party may move for default judgment in a variety of situations under various statutes. When a motion is made under WIS. STAT. § 806.02(1)-(4), the movant must show that no issue of law or fact has been joined. Thus, when an answer has been served late or filed late, a motion to strike the late answer is a prerequisite to a default judgment.

¶20 Under this working principle, Johnson had to file a motion to strike the amended answer that Roma II filed as a matter of right. Her motion for default judgment did not serve to block or cancel out Roma II's amended answer. Johnson was not entitled to a default judgment since Roma II had timely joined all issues of law and fact before the motion hearing.

¶21 Given that Johnson had been served with the answer and amended answer and both documents had been timely filed, she was also required to establish that she would be prejudiced by the court's not striking Roma II's answers and granting her a default judgment. *See* ***Split Rock***, 253 Wis. 2d 238, ¶5. She did not establish prejudice and the court did not discuss prejudice and make a

finding that Johnson or the court would be prejudiced by permitting Roma II's answers to stand.

¶22 We reject Roma II's request that we review "what type of mistakes, in this 'new electronic age,' should call into play equitable and remedial relief." Whether counsel prepares pleadings with a quill pen and foolscap, a typewriter and bond paper, or a computer and pdf file there is an obligation to pay attention to details. We see no reason to construct different rules for computer-based errors; the novelty of an error inherent in a method of preparation does not justify different rules and relief. Rather than construct a new rule, we believe, as the supreme court did in ***Split Rock***, 253 Wis. 2d 238, ¶54, that errors brought about by the use of technology can be handled by the aggrieved party seeking a "'just' order under WIS. STAT. § 805.03. This rule authorizes the circuit court to issue a full range of orders in response to a party's failure 'to comply with the statutes governing procedure in civil actions.'"[10]

¶23 In conclusion, Roma II's answer and amended answer were timely and joined all of the issues of law and fact. The court erred in granting default

[10] WISCONSIN STAT. § 805.03 states:

> **Failure to prosecute or comply with procedure statutes.** For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

judgment because Johnson failed to (1) move to strike the amended answer before moving for a default judgment and (2) establish that either she or the court would be prejudiced if default judgment was not granted. We reverse the default judgment and order denying reconsideration in order to give Roma II its day in court.[11]

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[11] We will forward a copy of this opinion to the Office of Lawyer Regulation pursuant to the requirement of SCR 60.04(3)(b) (2008).

> A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the rules of professional conduct for attorneys should take appropriate action. A judge having personal knowledge that a lawyer has committed a violation of the rules of professional conduct for attorneys that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.