COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP182 **Cir. Ct. No. 2009SC2629**

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

BARBARA M. GODLEWSKI AND GEORGE T. GODLEWSKI,

PLAINTIFFS-RESPONDENTS,

V.

CINDY SCHULTZ A/K/A CYNTHIA SCHULTZ SOCIETY OF ST. FRANCIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 ANDERSON, J.[1] The Society of St. Francis (Society), an animal shelter, appeals from a small claims judgment awarding Barbara and George

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Godlewski $5000 in damages as compensation for Society's role in the loss of their dog. Society did not appear at trial, and the circuit court entered a default judgment awarding damages to the Godlewskis. We affirm the default judgment against Society. However, because the record does not reflect any findings upon which the court could have based the amount awarded, we reverse and remand to the circuit court for a fact-finding hearing to determine the appropriate amount of damages.

¶2 The relevant facts are not in dispute. At the end of April 2009, the Godlewskis' dog escaped from their gated yard. The dog was picked up and brought to Society by a sheriff's deputy. After which, the Godlewskis made multiple attempts to retrieve their dog from Society and each time they were rebuffed. On May 4, 2009, the Godlewskis were told by Society that their dog had escaped from its premises. The Godlewskis were never notified by Society as to whether or not their dog was found and they were never reunited with their dog.

¶3 On July 7, 2009, the Godlewskis filed a complaint in small claims court against Society and individually against Cynthia Schultz, Society's director. The complaint asked for $5000 in damages, the maximum amount allowable under WIS. STAT. § 799.01(1)(d)1. The complaint provided a statement describing the dates and facts relevant to the Godlewskis' multiple attempts to retrieve their dog from Society. It did not provide any information, such as the value of their dog, to support the amount of damages requested.

¶4 On August 26, 2009, the only answer to the Godlewskis' complaint was filed by Schultz.

¶5 A trial on the matter was held on September 30, 2009. Schultz appeared pro se. The Godlewskis' attorney, Stephen M. Clubb, appeared on their

behalf. The court noted that an answer had been filed by Schultz and that Schultz additionally filed a motion to dismiss on the basis that, in suing her, the wrong entity had been sued. Specifically, Shultz's motion asserted that the Godlewskis failed to state a claim because they filed an action against her instead of Society, that Society took possession of the dog, that she never had possession of the dog, and that Society is a corporation and entity entirely separate from her.

¶6 The Godlewskis agreed that Schultz should be dismissed, but explained that her dismissal should be "because we did not effectuate service upon [Schultz] personally, [thus,] service is defective [and] we cannot proceed against her." They further stated that they wished to proceed against Society and were now seeking a default judgment against Society for failing to provide an answer.

¶7 Schultz responded, stating:

> [T]he problem is is that they attempted to serve me three times…. And they didn't do it, and I told the sheriff he could go ahead and give it [to] my sister[, Christine Kiedrowicz]. My sister is not the agent of [Society] …. I'm the registered agent of [Society].

¶8 In response, the Godlewskis informed the court that at the time of the last filings, the Wisconsin Department of Financial Institutions' web page listed the registered agent as Christine Kiedrowicz, not Schultz. They averred that service was properly done to Society, via Kiedrowicz, and that they wished to proceed now only against Society.

¶9 The court agreed that the evidence before it showed that Kiedrowicz was Society's registered agent at the time of service and that, therefore, Society had been properly served via Kiedrowicz. It found that Society did not answer as it was required to do and that no one authorized to appear on behalf of Society was

present. The court dismissed Schultz individually from the complaint based on the fact that Schultz was never properly served. Finally, without noting a basis for its measure of damages, the court granted the Godlewskis' motion for default judgment against Society in the amount of $5000. Specifically it stated:

> So in any event, first, Miss Schultz, you're dismissed because they never got service on you, okay, so you answered, did all the other things but they didn't get service. They did from what's represented get service on Society of St. Francis, Inc.
>
> On that basis, you know, the Court would enter the default judgment…. The claim in the complaint on the monetary damages based on failure to answer is granted.

¶10 On November 4, 2009, Society filed the following motions: motion to reopen, motion to vacate, motion to dismiss and motion for stay of execution. A hearing on the motions was held on December 7, 2009. Schultz appeared on behalf of Society, stating her relationship to the corporate entity was as a director.[2] In support of Society's motions, Schultz stated that she spoke on the phone to the sheriff and "they clearly wanted to serve me." She argued that she was served, not Society, after she told the sheriff to "just give it to" Kiedrowicz. In response, the court explained to Schultz that "[o]f course" an attempt was made to serve her, she was "listed as a defendant before [she was] dismissed out." The court explained, "there is nothing in the file showing service on [Schultz]" and "[t]he only affidavit of service in this file is Society of St. Francis as a corporate entity."

[2] The Society of St. Francis, Inc., is a registered corporation. Generally, a registered corporation must appear by attorney; however, there is an exception. *See* ***Jadair Inc. v. U.S. Fire Ins. Co.***, 209 Wis. 2d 187, 213, 562 N.W.2d 401 (1997). For an appeal in a small claims action, a nonlawyer may appear on behalf of a corporation if the nonlawyer is a full-time authorized employee of the entity on whose behalf the nonlawyer acts. *See* ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 603-04, 589 N.W.2d 633 (Ct. App. 1998); *see also* WIS. STAT. § 799.06(2).

Consequently, it concluded, there was "no basis" for the motions. Society appeals the judgment and denial of its motions to reopen and vacate.

¶11 On appeal, Society makes several arguments. First, Society argues that service of process on Society was insufficient and, therefore, the circuit court lacked personal jurisdiction over Society. Whether service of a summons is sufficient to obtain personal jurisdiction over a defendant is reviewed as a question of law. *See* ***Useni v. Boudron*** 2003 WI App 98, ¶8, 264 Wis. 2d 783, 662 N.W.2d 672. For support, Society cites WIS. STAT. § 801.02(1), which mandates that an authenticated copy of the summons and complaint be served on each named defendant in an action. *See* ***Useni***, 264 Wis. 2d 783, ¶8. It then relies on ***Useni*** as its basis to argue that it was not properly served.

¶12 ***Useni*** sets forth the requirements for service of process of an individual being sued in a dual capacity. *See* ***id.***, ¶¶8-11. The case at bar has nothing to do with service in a dual capacity and, thus, Society's reliance on ***Useni*** is pointless. In ***Useni***, a summons and complaint was filed naming Steven M. Boudron and Fairview Family Restaurant, Inc., as separate defendants. ***Id.***, ¶3. The affidavit of the process server indicated that he served the business of "Fairview Family Restaurant, Inc.," by serving "Steven M. Boudron owner/agent" at the business. ***Id.*** The manner of service indicated that it was corporate service and only one copy of the authenticated summons and complaint was served. ***Id.*** On appeal, we held that the circuit court did not obtain personal jurisdiction over Boudron because the plaintiff failed to properly serve Boudron by failing to serve him individually with an authenticated copy of the summons and complaint. *See* ***id***, ¶14. We held that none of the relevant statutes allow a defendant who is being sued in a dual capacity (personally or officially) to be served in only one of those capacities; in fact, the plain language of the statutes mandate that each defendant,

Boudron and Fairview, be individually served. ***Id.***, ¶11. We concluded that it was clear from the affidavit of the process server that only Fairview was served, not Boudron. ***Id.*** Thus, Boudron was never properly served. ***Id.***

¶13 Unlike Boudron in ***Useni***, who was Fairview's agent at the time of service, the record here establishes that Schultz was not Society's agent at the time of service. It further establishes that Society's registered agent, Kiedrowicz, was indeed served with an authenticated summons and complaint at Society's business address, effectuating proper service on Society. Furthermore, it establishes that Schultz was not personally served and, therefore, Schultz in her individual capacity is not a party to this case. *See* WIS. STAT. § 801.02(1) (each named defendant in an action must be served with an authenticated copy of the summons and complaint). The circuit court correctly determined that service of process on Society was sufficient. Given that ***Useni*** addresses proper service when trying to serve in a dual capacity and that this case has nothing to do with service in a dual capacity, ***Useni*** does not advance Society's position that it was not properly served. The issue of dual capacity is not before us and Society's reliance on ***Useni*** is misplaced.

¶14 Society next argues that Schultz's answer was sufficient as an answer for Society. Society is incorrect. The caption of Schultz's answer makes it quite clear that it was filed solely on her own behalf. Schultz was *not* a named or joined defendant given that she was never properly served. WIS. STAT. § 801.14(1) (every paper required for proper service must be served on each defendant). Simply put, Schultz was not a party to the case; she was dismissed from the case and, therefore, her answer could not possibly suffice as an answer for Society.

¶15 Thirdly, Society contends that the circuit court erred by not applying the proper standard when denying Society's motion to reopen and other posttrial motions. The record demonstrates otherwise. While we agree with Society that the proper standard when considering a motion to reopen is the good cause standard,[3] we are satisfied that this standard was applied. Society points to the circuit court's use of the phrase "excusable neglect" as proof that the circuit court did not apply the good cause standard. Despite the court's use of this phrase, Society does not show that the court applied the wrong standard.

¶16 When reviewing a discretionary[4] decision of the circuit court, we are to determine whether the court reviewed the relevant facts; applied the proper standard of law; and using a rational process, reached a reasonable conclusion. *See* ***State v. Payano***, 2009 WI 86, ¶¶40-41, 320 Wis. 2d 348, 768 N.W.2d 832. If, for whatever reasons, the circuit court failed to delineate the factors that influenced its decision, then it erroneously exercised its discretion. ***Id.*** However, regardless of the extent of the circuit court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the court's decision had it fully exercised its discretion. ***Id.*** In this case, the record demonstrates that, despite its use of the term "excusable neglect," the circuit court applied the good cause standard when it denied Society's motion:

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[3] WISCONSIN STAT. § 799.29 provides: "**(1)** MOTION TO REOPEN. (a) There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and *good cause shown*." (Emphasis added.)

[4] Under the plain language of WIS. STAT. § 799.29(1)(a), the circuit court's decision whether to reopen a default judgment is entirely discretionary: "[T]he trial court *may*, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown." (Emphasis added.)

> So there is no basis on the motion that I can see to reopen. The corporation was properly served. The corporation never answered. The corporation never appeared….
>
> So consequently the motion to reopen will be denied for the reasons set forth on the record.

Thus, because the circuit court properly considered the facts of the record, applied the correct standard and reached a decision that a reasonable judge could reach, we will not reverse the circuit court's decision not to reopen its default judgment. *See* ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

¶17 Lastly, Society argues that the circuit court erred by awarding $5000 in damages to the Godlewskis. The determination of the appropriate measure of damages is a question of law which we review independently. *See* ***Magestro v. North Star Envtl. Constr.***, 2002 WI App 182, ¶10, 256 Wis. 2d 744, 649 N.W.2d 722. Under WIS. STAT. § 806.02, upon the entry of a default judgment, the circuit court may hold a hearing or inquiry to determine damages. ***Smith v. Golde***, 224 Wis. 2d 518, 530, 592 N.W.2d 287 (Ct. App. 1999) (citing ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 478-79 n.5, 326 N.W.2d 727 (1982)). However, the circuit court need not hold a hearing if the amount of damages is alleged in the complaint and the defendant fails to contest the amount. *See* ***Smith***, 224 Wis. 2d at 530. If additional proof is necessary, however, the court may hold a hearing, and the defendant has the right to participate and present evidence on his or her behalf. ***Id.***

¶18 In this case, the circuit court did not have any bases upon which it could rely for a determination that $5000 is the appropriate damage award. The Godlewskis' complaint does not contain any supportive facts or offer of proof for the amount of damages requested. The trial transcript shows that nothing regarding the reasoning for the amount awarded was addressed, and our

independent review of the record does not reveal any facts to support the amount awarded. Society disputes the damage award. Consequently, a damage hearing is necessary in order to present evidence on the value of the Godlewskis' lost property[5] and allow the court to make a determination based on the proof presented. It may well be that $5000 is a valid damage award; a hearing will shed light on this.

¶19 By way of guidance to the circuit court, we do not consider the instant case as one that calls for a literal application of the usually applied rule of certainty, e.g., market value before and after. *See* ***Town of Fifield v. State Farm Mut. Auto. Ins. Co.***, 119 Wis. 2d 220, 230, 349 N.W.2d 684 (1984). The fact of damage is certain, and the responsibility for the loss of property devolves totally on the wrongdoer. *See* ***id.*** Society can hardly complain that the value is not exactly ascertainable when it is Society's wrong that deprived the Godlewskis of their dog. *See* ***id.*** Thus, the circuit court should keep in mind that while damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate. *See* ***id.***

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

[5] The law categorizes the dog as personal property despite the long relationship between dogs and humans. ***Rabideau v. City of Racine***, 2001 WI 57, ¶5, 243 Wis. 2d 486, 627 N.W.2d 795. Dogs are so much a part of the human experience: "[D]ogs work in law enforcement, assist the blind and disabled, perform traditional jobs such as herding animals and providing security, and, of course, dogs continue to provide humans with devoted friendship." ***Id.***, ¶4. To the extent, this opinion uses the term "property" in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case. *See* ***id.***, ¶5.

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