**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 26, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2329** **Cir. Ct. No. 2008CV17208**

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

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**LAUREN I. PAUSCH,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRISTOPHER S. CORMIER, THEODORE F. VANSINGEL AND TODD J. DIPIERO,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed in part and cause remanded with directions.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Christopher S. Cormier, Theodore F. Vansingel, and Todd J. Dipiero appeal the order requiring them to pay Lauren I. Pausch $1,030,847.59

compensatory and $1.5 million punitive damages, which the circuit court awarded following a default judgment entered on Pausch's intentional-tort complaint against the three men. Cormier, Vansingel, and Dipiero claim: (1) the circuit court erroneously exercised its discretion when it denied their motion to vacate the default judgment; (2) there is insufficient evidence to support the $1 million compensatory damage award (the defendants do not challenge the $30,847.59 part of this award); and (3) the circuit court erred in awarding punitive damages because, they argue: (a) it awarded punitive damages to compensate instead of punish, (b) it awarded too much, and (c) it did not allow evidence of the defendants' wealth. We affirm the circuit court's denial of the defendants' motion to vacate the default judgment, and we affirm its award of compensatory damages. We also hold that the circuit awarded punitive damages for the proper purpose—to punish—and that the punitive damage award was not excessive. We remand, however, for clarification as to whether the punitive award was imposed jointly or individually.

**I.**

¶2 In November of 2008, Pausch sued Cormier, Vansingel, and Dipiero for assault, battery, conversion, and civil conspiracy based on her allegations that in June of 2007, while at a bar, these three men drugged her, took her to a hotel, and repeatedly sexually assaulted her. The defendants did not file an answer or any responsive pleading. In September of 2009, Pausch sought default judgment. In October of 2009, on the date set for the default-judgment hearing, Cormier, Vansigel, and Dipiero came to court *pro se*. The circuit court deferred ruling on the default-judgment motion so the defendants could get a lawyer. In November of 2009, only Dipiero showed up for the scheduled status conference. He told the circuit court that the defendants had not hired a lawyer. The circuit court granted

Pausch's motion for default, and scheduled the "prove-up" damages hearing for February of 2010. *See* WIS. STAT. RULE 806.02(5) ("A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.").

¶3 Forty-five minutes before the start of the February 2010 damages hearing, the defendants hired a lawyer who filed a motion under WIS. STAT. RULE 806.07(1), asking the circuit court to vacate the default judgment, claiming "excusable neglect." *See* WIS. STAT. RULE 801.15(2)(a) ("When an act is required to be done at or within a specified time" the circuit court may not "enlarge" the period after the time has expired unless the moving party proves "excusable neglect.").[1]

[1] WISCONSIN STAT. RULE 806.07(1) provides:

> On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(continued)

¶4 The circuit court denied the motion and set a date for the damage hearing. At the damage hearing, the circuit court ordered the defendants to pay: (1) $30,847.59 as compensatory damages for out-of-pocket expenses; (2) $1 million as additional compensatory damages; and (3) $500,000 in punitive damages against each defendant for a total of $1.5 million in punitive damages.

**II.**

A. *Motion to vacate the default judgment.*

¶5 A party moving to vacate a default judgment under WIS. STAT. RULE 806.07(1)(a) must show: (1) that the judgment "was obtained as a result of mistake, inadvertence, surprise or excusable neglect;" and (2) "that he or she has a meritorious defense." ***J.L. Phillips Assocs., Inc. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13, 17 (1998). A circuit court has wide discretion in determining whether to vacate a default judgment. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865, 867 (1977). We will not reverse a discretionary decision when the record shows that the circuit court made a "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727, 732 (1982).

¶6 The defendants claim the circuit court erroneously exercised its discretion when it found that their neglect in not timely defending Pausch's

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> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

lawsuit was not excusable. Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832, 834 (1969) (quoted source and one set of quotemarks omitted). It "is not synonymous with neglect, carelessness or inattentiveness," ***ibid.***, and "it is not sufficient that the failure to answer in a timely manner be unintentional and in that sense a mistake or inadvertent, since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect," ***Mohns, Inc. v. TCF Nat'l Bank***, 2006 WI App 65, ¶9, 292 Wis. 2d 243, 249, 714 N.W.2d 245, 248 (quoted source and internal quotemarks omitted).

¶7 The defendants argue that their failure to answer was excusable because "they were facing criminal allegations," they were "unsophisticated litigants … not familiar with the judicial system," and from "out-of-state."

¶8 The circuit court disagreed:

> The question is what constitutes, quote, unquote, "excusable neglect." The point is, your clients were advised by this court repeatedly that they needed to get a lawyer so that we could move this matter forward.
>
> … [O]nly one came back [to court.] Again I advised them [to get] a lawyer. And, quite frankly, counsel, they hired you 45 minutes before the prove-up date.
>
> That -- I categorically reject the idea that your clients are unsophisticated. I find them remarkably sophisticated even though they were pro se litigants. Their delay in getting representation … disregarding my imploring them to do so on the repeated occasion is really an example of bad faith in my mind.
>
> I, quite frankly, take a different view of your clients. I think they're gaming the system and they were delaying as far as they could, and they are not unsophisticated. And, therefore, I am denying the motion [to vacate the default

> judgment] based upon my view of the totality of the circumstances, the bad faith of your client bringing you on 45 minutes before the prove-up date.

¶9 The circuit court did not erroneously exercise its discretion in refusing to set aside the default. Significantly, the summons and complaint served on the defendants specifically warned them that they had to respond in writing to Pausch's complaint "within forty-five (45) days" and that if they did not so respond "the Court may grant judgment against you." *See* WIS. STAT. RULES 801.095 & 801.09. Letting things slide until the prove-up hearing is not something that a reasonably prudent person would do. We affirm the circuit court's refusal to vacate the default judgment.

B. *Compensatory damages.*

¶10 A claimant has the burden to prove damages to a reasonable degree of certainty, but mathematical precision is not required. ***Plywood Oshkosh, Inc. v. Van's Realty Constr. of Appleton, Inc.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847, 849 (1977). A claimant's conclusory assertions are not sufficient to support a damage claim; rather, damages must "be proven by statements of facts." ***Id.***, 80 Wis. 2d at 31, 257 N.W.2d at 849. Compensatory damages may include damages for mental pain and suffering. *See* ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 269, 580 N.W.2d 233, 241 (1998). The circuit court's findings on damages will not be reversed unless clearly erroneous. *See* WIS. STAT. RULE 805.17(2) ("Findings of

fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

¶11 The defendants challenge the $1 million compensatory damage award, arguing that: (1) because Pausch did not plead intentional infliction of emotional distress in the complaint, she should not be compensated for it; and (2) there is insufficient evidence to support the $1 million award. We disagree.

¶12 As the circuit court explained in determining the award for compensatory damages, "compensatory damages over and above the specials" are appropriate because "even if she was intoxicated, that does not give license for three individuals to sexually assault and sodomize" her. The circuit court referenced the three affidavits from Pausch's therapists, which documented the anguish, pain, and suffering suffered by Pausch as a result of the assaults, and that she will continue to suffer. One therapist described Pausch's symptoms: "intense fear and helplessness," "flashbacks about the traumatic event," "nightmares and recurring dreams about the trauma," "recurrent distress," "shortness of breath, racing thoughts, panic feelings, sweating," "sense [of] foreshortened future," "restricted range of affect," "detachment," "decreased interest and participation in activities," "avoid[ance]," "amnesia," "decreased concentration," and "hypervigilance." These symptoms are "moderate to severe [in] range resulting in a significant decrease in overall functioning." Another therapist said she was "suffering from long-term effects of P[ost] T[raumatic] S[tress] D[isorder]."

1. *Alleged failure to plead intentional infliction of emotional distress*.[2]

¶13 As seen from footnote 2, the defendants argue for the first time on this appeal that Pausch did not adequately plead intentional infliction of emotional distress. Pausch, however, did plead that the defendants "subjected" "Pausch … to an hours long physical and sexual assault by the defendants" which "seriously injured" Pausch and caused "physical and psychological damages [that Pausch] will continue to so suffer in the future." These allegations are more than sufficient to support a default-judgment award for emotional damages Pausch suffered as a result of what she claimed the defendants did to her. *See* ***Strid v. Converse***, 111 Wis. 2d 418, 422–423, 331 N.W.2d 350, 353 (1983) (a complaint's operative facts govern, not its legal theory).

2. *Sufficiency of the evidence*.

¶14 The defendants argue that there is insufficient evidence to support the $1 million compensatory-damage award because Pausch did not testify and because the circuit court did not read the therapists' affidavits into the Record. This argument is wholly without merit.

[2] Defendants' lawyer on this appeal makes the "failure to plead intentional infliction of emotional distress" claim in his appellate brief by relying on Pausch's complaint and affidavits. Despite this, he did not include any of these documents in his appendix, as required by WIS. STAT. RULE 809.19(2)(a) and as he attested to in his certification. The lawyer also does not reveal that the argument he makes here was not made in the circuit court. This is significant because "[g]enerally, arguments raised for the first time on appeal are deemed waived." ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶23, 303 Wis. 2d 258, 275, 735 N.W.2d 93, 102. We see no reason to excuse the defendants from this general rule. Nevertheless, we briefly address the argument in the main body of this opinion. Further, in light of their failure to disclose on appeal that they were making the intentional-infliction-of-emotional-distress argument for the first time on appeal, we admonish the defendants' appellate lawyer for both not complying with RULE 809.19(2)(a), and for not being fully forthright, as required by SCR 20:3.3 ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal.").

¶15 Pausch filed an affidavit attesting to the damages caused by the defendants' actions. The circuit court relied on her affidavit. Pausch did not need to formally testify in order for the circuit court to do so. *See* WIS. STAT. RULE 806.02(5); ***Rao v. WMA Securities, Inc.***, 2008 WI 73, ¶¶37–39, 310 Wis. 2d 623, 641–643, 752 N.W.2d 220, 229–230. Moreover, the circuit court also had affidavits submitted by three of Pausch's therapists discussing the significant harm Pausch suffered as a result of the sexual assaults. The therapists' affidavits did not have to be read out loud to the court reporter for the circuit court to rely on them.

C. *Punitive damages.*

¶16 The defendants make three claims regarding punitive damages: (1) the circuit court awarded punitive damages to compensate Pausch, not to punish them; (2) the punitive damage award was excessive; and (3) the circuit court erred by not holding a hearing on the defendants' wealth.

1. *Purpose of the punitive award; excessiveness.*

¶17 The purpose of punitive damages is to "'punish'" the defendant and "'to deter others from like conduct.'" ***Kink v. Combs***, 28 Wis. 2d 65, 81–82, 135 N.W.2d 789, 798–799 (1965) (quoted source omitted). The circuit court's findings on damages will not be reversed unless clearly erroneous. *See* WIS. STAT. RULE 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

¶18 The circuit court's finding of $1.5 million in punitive damages was not clearly erroneous. Although this award was substantial (as justified by what the defendants did to Pausch), it was not excessive. As we have seen, the

complaint, which the defendants never denied, related that the defendants "subjected" "Pausch … to an hours long physical and sexual assault by the defendants" which "seriously injured" Pausch and caused "physical and psychological damages [that Pausch] will continue to so suffer in the future." Simply put, the defendants gang-raped Pausch. Additionally, the defendants videotaped the hours-long rape and made a DVD of it and even, according to a police report in the Record, took pictures with Pausch's cell-phone during the ordeal and sent a picture of "her face with a penis in her mouth … to everyone on the contact list in her cell phone." There is more than enough evidence supporting the circuit court's award of punitive damages. As ***Kink*** recognizes, "[p]unitive damages are particularly appropriate where the defendant sexually assaults his victim." ***Id.***, 28 Wis. 2d at 79, 135 N.W.2d at 797.[3]

[3] The defendants claim that the circuit court awarded punitive damages to merely compensate Pausch (rather than punish them) because of what her lawyer told the circuit court:

> I believe punitive damages are appropriate in this case, and *one* of the reasons that I would like the punitive and the compensatories split is that in theory the defendants could go bankrupt and discharge the compensatory damage obligation to my client. A punitive damage award is not dischargeable in bankruptcy, to my understanding, and so for that reason, I would like a punitive damage award.

(Emphasis added.) Before the circuit court began its punitive-damages determination, it noted that "the argument as to punitive discharged in bankruptcy is appropriate." Further, the circuit court fully and carefully considered all of the appropriate punitive-damages factors: "The factors to be considered" are "the maliciousness of the alleged activities, the intentional disregard for the plaintiff's rights, [and] the allegations of drugging." It also observed that the case was "particularly egregious when it's a three-on-one situation." Significantly, making a punitive-damage award non-dischargeable in bankruptcy ensures that the award will actually "punish" and not be a mere wisp of paper that a defendant could effectively ignore.

2. *Wealth of the defendants.*

¶19 In cases where punitive damages are awarded, the wealth of the defendants can be considered only when the defendants are individually responsible for the punitive damages. *See* ***Franz v. Brennan***, 146 Wis. 2d 541, 548–549, 431 N.W.2d 711, 714–715 (Ct. App. 1988), *aff'd* 150 Wis. 2d 1, 440 N.W.2d 562 (1989). When the defendants are jointly and severally liable for the punitive damages, information as to the wealth of the defendants must be excluded. ***Ibid.***

¶20 Here, the circuit court cited ***Franz***, observing that "the issue of wealth of the defendants is inadmissible … for the purposes of this proceeding … based upon the case of ***Franz v. Brennan*** … [which] gave us a joint and several liability." The circuit court's statement is correct—when defendants are jointly and severally liable for a punitive damage award, the wealth of the defendants is inadmissible.

¶21 Later on in the hearing, however, the circuit court imposed "$500,000 punitive damages on each independent -- each individual defendant individually." Thus, the circuit court's ruling is unclear as to whether the punitive award was joint and several *or* individual. We remand on this issue with directions to the circuit court to clarify its ruling. On remand, the circuit court shall either: (1) make the defendants jointly and severally liable for the $1.5 million punitive damage award; *or* (2) make the defendants individually liable for the punitive damage award. If the circuit court chooses the second option, it is obligated by ***Franz*** to hold a hearing on the respective wealth of the three defendants.

*By the Court*.—Order affirmed in part and cause remanded with directions.

Publication in the official reports is not recommended.