COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1998

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. 96-3606

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

BCI BURKE COMPANY, INC.,

PLAINTIFF-COUNTER-
DEFENDANT-RESPONDENT,

V.

ALTERED IMAGES, INC.,

DEFENDANT,

R & B GROUP,

DEFENDANT-COUNTER-PLAINTIFF-
THIRD-PARTY PLAINTIFF-APPELLANT,

V.

HANSON DODGE, INC.,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. R&B Group appeals from a default judgment against it and in favor of BCI Burke Company, Inc. The judgment declares that BCI has no obligation to pay any sums demanded by R&B for work that R&B performed in producing BCI's 1996 product catalog. R&B claims that its answer was timely after its petition for leave to appeal was denied by this court, that excusable neglect justifies the late filing, that the circuit court lacked personal jurisdiction over it, and that there was no basis for declaratory relief, the damages award and dismissal of other claims. We affirm the judgment.

BCI manufactures and sells children's playground, park and recreational equipment. It contracted with Altered Images, Inc. for the scanning and digital alteration of photographic and other images necessary to produce its 1996 product catalog. R&B, whose production offices are in Illinois, performed additional lithographic services needed for the catalog. Some of the work was unacceptable and extra costs were incurred to correct the images. R&B billed BCI for the extra costs. BCI commenced this action to recover on theories of breach of contract and conspiracy, and it sought a declaratory judgment that it is entitled to set off any sums due Altered Images and R&B against damages caused it by the poor quality of the catalog.[1]

[1] On May 1, 1996, R&B commenced a collection action against BCI in the United States District Court in the Northern District of Illinois.

Before filing an answer to the complaint, R&B moved to dismiss the complaint for lack of personal jurisdiction due to inadequate contacts with the State of Wisconsin. The circuit court denied the motion at a June 19, 1996 hearing and the written order was entered on June 25, 1996. R&B petitioned this court for leave to appeal the nonfinal order denying its motion to dismiss.[2] *See* RULE 809.50, STATS. The petition for leave to appeal was denied by an order of July 31, 1996. ***BCI Burke Co., Inc. v. Altered Images, Inc.***, No. 96-1986-LV, unpublished order (Wis. Ct. App. July 31, 1996).

On August 2, 1996, BCI moved for default judgment against R&B because R&B had not filed an answer within ten days of notice that the trial court denied its motion for dismissal. *See* § 802.06(1), STATS. The motion was set to be heard on August 9. On August 7, R&B filed a document containing its answer, affirmative defenses, counterclaim, cross-claim and third-party complaint.[3] On August 8, R&B filed a motion to extend the time for filing its answer and an ex parte motion for an order reducing the time for service upon all parties of the motion to extend the time for filing an answer. The circuit court granted the default judgment upon concluding that the time for filing the answer was not tolled by the pending petition for leave to appeal before the court of appeals.

[2] The petition for leave to appeal was timely filed on July 10, 1996, although the filing fee was not paid until July 16, 1996. A response to the petition was filed on July 25, 1996.

[3] R&B counterclaimed against BCI on the theories of breach of a written and oral contract, account stated, and unjust enrichment. It sought damages of $94,322.75 for services rendered. R&B also filed a cross-claim against Altered Images for breach of a written and oral contract for the same damages. A third-party complaint was filed against Hanson Dodge, Inc., which was also involved in production of the catalog, for breach of an oral contract and unjust enrichment.

We first address whether the circuit court had personal jurisdiction over R&B. Whether personal jurisdiction exists is a question of law that we review de novo. *See* ***Marsh v. Farm Bureau Mut. Ins. Co.***, 179 Wis.2d 42, 52, 505 N.W.2d 162, 165 (Ct. App. 1993). A two-step process is employed to determine if there is jurisdiction over a nonresident defendant: first, it must be determined whether the defendant's contacts with Wisconsin subject it to jurisdiction under Wisconsin's long-arm statute, § 801.05, STATS.; second, we must examine whether the exercise of jurisdiction violates due process requirements. *See* ***id.***

Section 801.05(5), STATS., provides that personal jurisdiction exists in any action which :

> (c) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or
>
> ….
>
> (e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

Under § 801.05(5), STATS., sufficient minimum contacts exist if the following three jurisdictional facts are present:

> '(i) a claim arising out of a bargaining arrangement made with the defendant by or on behalf of the plaintiff;
>
> (ii) a promise or other act of the defendant, made or performed anywhere, which evidences the bargaining arrangement sued upon; and

> (iii) a showing that the arrangement itself involves or contemplates some substantial connection with the state.'

Capitol Fixture v. Woodma Distribs., 147 Wis.2d 157, 161-62, 432 N.W.2d 647, 650 (Ct. App. 1988) (quoted source omitted).

Here, there was an arrangement between BCI and R&B for the delivery of items of value within the State of Wisconsin. R&B performed lithographic services and delivered the result within the State. Additionally, a R&B employee traveled to Wisconsin to meet with people involved in production of the catalog. R&B knew that the catalog was being produced within the State and that its work product would be used in that production. The three jurisdictional factors are satisfied, and thus, there is a presumption of compliance with the due process standards. *See* ***id.*** at 162, 432 N.W.2d at 650.

The quality and nature of R&B's contacts with Wisconsin must be examined to determine if the presumption of compliance is overcome. *See* ***id.***

> The Wisconsin Supreme Court has outlined a five-factor test that determines whether a nonresident's due process has been violated. The factors are: (1) quantity of contacts; (2) nature and quality of contacts; (3) source of cause of action; (4) interest in Wisconsin in the action; and (5) convenience; however, all need not be present in substantial degree before jurisdiction exists.

Id.

The circuit court found that Scot Miller, a R&B employee, came into Wisconsin to deliver materials for production of the catalog and that he was present at the Wisconsin printing plant when the first pages of the catalog were being printed. Miller's affidavit establishes that on at least three occasions he delivered work product to Wisconsin. In addition, Miller attended an 8:30 a.m. meeting at BCI's Fond du Lac office as the final catalog pages were being

reviewed. This demonstrates R&B's attempt to prove its commitment to BCI as a new client. Thus, the nature of R&B's direct contacts with Wisconsin was to perform the contract by delivery of proofs and obtaining approval of work product. Even though these contacts may be characterized as just delivery of work product, they can be considered substantial. *See* ***id.*** at 163, 432 N.W.2d at 650.

Moreover, the cause of action involves a catalog being produced in Wisconsin. Two other Wisconsin businesses, Altered Images and Hanson Dodge, were involved in that production. Wisconsin has an interest in providing a forum for resolution of the parties' interests. *See* ***id.*** It is also a convenient forum for potential witnesses. *See* ***id.*** at 164, 432 N.W.2d at 651.

While R&B contends that its significant contact was only through Dale Miller, Scot Miller's father and principal in Altered Images, it ignores that Altered Images was engaged in performing the contract in Wisconsin. R&B sent the contract bid to Altered Images in Wisconsin. The possibility that R&B was engaged in a joint venture with Altered Images for the purpose of producing the catalog in Wisconsin also supports the conclusion that sufficient and substantial contacts with Wisconsin exist. We conclude that due process is not offended by subjecting R&B to Wisconsin jurisdiction and that the circuit court had personal jurisdiction over R&B.

The default judgment was granted because R&B failed to file an answer within ten days of the hearing at which its motion to dismiss the complaint was denied. R&B contends that the time in which to file its answer was tolled by the filing of the petition for leave to appeal, and therefore, it had ten days after its petition for leave to appeal was denied in which to file an answer. It suggests that because the entry of default judgment is not specified in § 808.075, STATS., as

something the circuit court is authorized to undertake while an appeal is pending, it was not obligated to file an answer.

The faulty premise in R&B's claim is that no appeal was commenced and § 808.075, STATS., was never activated. A petition for leave to appeal a nonfinal order under RULE 809.50, STATS., is simply a request for permission to commence an appeal. Only if the petition is granted is a notice of appeal deemed filed, *see* RULE 809.50(3), and the circuit court restricted to act under § 808.075. Only if a party requests and is granted a temporary stay of proceedings while the petition for leave to appeal is pending is any obligation to proceed in the circuit court tolled. *See* RULE 809.52, STATS. *Cf.* § 808.07(1), STATS. ("[a]n appeal does not stay the execution or enforcement of the judgment"). Thus, R&B's obligation to timely answer the complaint still existed. Moreover, the time in which to file the answer expired before the petition for leave to appeal was even filed and there was no time left to toll.[4] *See* ***Riggs Marine Serv., Inc. v. McCann***, 160 Wis.2d 846, 852, 467 N.W.2d 155, 158 (Ct. App. 1991).

Having determined that R&B failed to timely file an answer, we consider its claim that its failure was due to excusable neglect. It argues that because excusable neglect exists, the circuit court erroneously exercised its discretion in denying its motion to extend the time for filing an answer. *See* § 801.15(2)(a), STATS. (circuit court may enlarge a specified time period, but

[4] R&B was present, through counsel, at the June 19, 1996 hearing when the circuit court denied its motion to dismiss. That constituted notice of the court's action and required the responsive pleading to be served within ten days. *See* § 802.06(1), STATS. The ten days expired on July 3, 1996. *See* § 801.15(1)(b), STATS. (in determining a period of eleven days or less, the day of the act from which the period runs and Saturdays and Sundays are excluded). The petition for leave to appeal was filed on July 10, 1996.

when the motion is made after the expiration of the time, an extension may be granted only upon a finding that the failure to act was the result of excusable neglect). R&B claims that counsel's error in interpreting the statutes and rules of appellate procedure constitutes excusable neglect.

The determination as to whether excusable neglect exists for the purpose of enlarging the time for filing an answer is discretionary. *See* ***Gerth v. American Star Ins. Co.***, 166 Wis.2d 1000, 1006, 480 N.W.2d 836, 839 (Ct. App. 1992). Although R&B argues that the circuit court failed to even exercise discretion in this respect because it did not make a specific finding on the issue, the issue was litigated and implicit in the granting of the default judgment is the determination that excusable neglect did not exist. We may engage in an examination of the record and determine whether the record supports the circuit court's discretionary decision. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982).

"'Excusable neglect' for noncompliance with the statutory time period for performing an act is not synonymous with neglect, carelessness or inattentiveness. Rather, excusable neglect is that which might have been the act of a reasonably prudent person under the same or similar circumstances." ***Gerth***, 166 Wis.2d at 1007, 480 N.W.2d at 839 (citation omitted). A party's misapprehension of the law is not excusable neglect. *See* ***id.*** at 1008, 480 N.W.2d at 840; ***Martin v. Griffin***, 117 Wis.2d 438, 443-44, 344 N.W.2d 206, 209-10 (Ct. App. 1984).

R&B argues that the mistake of its attorney should not be imputed to it. While the circuit court need not impute the negligence of the attorney to the client, it has the discretionary power to do so. *See* ***Wagner v. Springaire Corp.***, 50 Wis.2d 212, 221, 184 N.W.2d 88, 93 (1971). The circuit court should attempt to do

substantial justice between the parties based on the facts of the case. *See* ***id.*** Relevant considerations include whether the client has acted as a reasonable and prudent person in engaging an attorney of good reputation, whether the client has relied upon the attorney to protect its rights, and whether the client has made reasonable inquiry concerning the proceedings. *See* ***id.*** Because R& B bears the burden of establishing excusable neglect, *see* ***Martin***, 117 Wis.2d at 443, 344 N.W.2d at 209, it also bears the burden of establishing facts which mitigate against imputing the attorney's mistake to R&B.

R&B did not offer one evidentiary fact on the relevant considerations. Specifically, there is no showing that any R&B personnel made reasonable inquiry about the need to answer the complaint. *Cf.* ***Charolais Breeding Ranches v. Wiegel,*** 92 Wis.2d 498, 514, 285 N.W.2d 720, 728 (1979). The record here suggests that rather than relying on counsel to protect its interests in this lawsuit, R&B was attempting to delay the progression of the suit. R&B chose dual representation by Illinois and Wisconsin counsel.[5] It filed its motion to dismiss for lack of personal jurisdiction on the last day for filing an answer to the complaint. It directed that a federal lawsuit be filed and that happened thirty days after this action was commenced. It did not timely respond to BCI's discovery requests made while the petition for leave to appeal was pending. Although R&B represented that it had intended to file an answer after the petition for leave to appeal was denied, it was not prompted to action until given notice of BCI's motion for default judgment. Given the situation, we are not persuaded that it was an erroneous exercise of discretion to impute counsel's mistake to R&B. R&B's claim of excusable neglect fails.

[5] R&B's Illinois attorney was admitted to practice in the circuit court *pro hac vice*. *See* SCR 10.03(4) (West 1998).

Therefore, it was not a misuse of discretion to deny R&B's motion to extend the time for filing its answer.

R&B believes that by entering the default judgment the circuit court extinguished not only the answer but the counterclaim, cross-claim and third-party complaint against Altered Images and Hanson Dodge. It argues that it was error for the circuit court to dismiss the pending claims against other defendants who did not move for default judgment.

We first note that the default judgment does not speak to the claims R&B filed against Altered Images and Hanson Dodge.[6] As to the counterclaim against BCI, because the circuit court denied an extension of time in which to file the answer, which included the counterclaim, the answer document has no legal effect and it constituted a "fugitive document."[7] *Cf.* ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 849, 434 N.W.2d 773, 776 (1989) (report not introduced into evidence was a fugitive document); ***Hansen v. Firemen's Ins.***, 21 Wis.2d 137, 142, 124 N.W.2d 81, 84 (1963) (third amended complaint not a fugitive document when there is a tacit assent to the filing of the late document); ***Marathon Finance Corp. v. Rice Lake Auto Co.***, 239 Wis. 201, 207, 1 N.W.2d 81, 83-84 (1941) (fugitive documents are not part of the record). Because no

[6] R&B suggests that our order of March 28, 1997, confirming that the judgment was final and appealable as of right, means that its cross-claim and third-party complaint were no longer pending because there could not be finality with those claims still pending. However, our order merely determined that all litigation between R&B and BCI was concluded, and finality exists for that reason. Altered Images and Hanson Dodge are not parties to this appeal. We need not resolve whether the claims against Altered Images and Hanson Dodge survived the default judgment, were timely filed or can be pursued in a separate action.

[7] For this reason we summarily reject R&B's contention that the circuit court was first required to strike its answer before granting default judgment. ***Homa v. East Towne Ford, Inc.***, 125 Wis.2d 73, 78, 370 N.W.2d 592, 595 (Ct. App. 1985), which R&B cites, has no application because there the late answer was filed before the motion for default judgment was filed.

counterclaim was ever filed against BCI, we need not decide whether the counterclaim was permissive, compulsory or subject to a time limit for filing. *See* §§ 802.06 and 802.07, STATS. Additionally, we note that the counterclaim was necessarily disposed of by the declaratory judgment that BCI has no obligation to pay any amount to R&B.

R&B contends that the circuit court exceeded its discretion in granting the default judgment without taking additional proof regarding the existence of a contract between the parties, whether the contract had been modified, whether the catalog was of poor quality, and whether such poor quality would and did cause BCI a loss of profit. It further contends that there is no basis for the damages award or, in this case, a no damages award by virtue of the declaratory judgment.[8]

The circuit court is only required to take additional proof when necessary to render a judgment and not in every case. *See* § 806.02(2), STATS. (in rendering a default judgment if "proof of any fact is necessary for the court to give judgment, the court shall receive the proof"). Whether the circuit court properly determined that no additional proof was necessary is a question of law which we may determine de novo. *See* ***Midwest Developers v. Goma Corp.***, 121 Wis.2d 632, 651, 360 N.W.2d 554, 564 (Ct. App. 1984).

The allegations of the complaint are deemed admitted by R&B's failure to timely file an answer. We deem the allegations sufficient to permit the

[8] The circuit court declared that BCI "has no obligation to pay any part of sums demanded by defendant R&B Group, Inc. in connection with BCI Burke Company, Inc.'s 1996 product catalog." R&B suggests that in effect BCI's alleged damages have been offset against the amount R&B billed for work performed.

entry of judgment without additional proof. Ultimately, BCI did not seek money damages. The complaint set forth the declaratory relief sought and the reasons why it was entitled to that relief. Nothing made it necessary for the court to take further evidence. The circuit court properly exercised its discretion in granting the default judgment.

By the Court.—Judgment affirmed.

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