

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 97-0779

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DUANE S. JOHNSON,

PLAINTIFF-APPELLANT,

v.

**JMT-SUB CORP., F/K/A MYERS TRUCK AND CASTING
COMPANY, AND NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ

PER CURIAM. Duane Johnson appeals from a judgment dismissing his claim against JMT-SUB Corp. and its insurer, Nationwide Mutual Fire Insurance Company. The issue is whether the circuit court properly denied Johnson's motion for a default judgment, and instead deemed the respondents'

answer timely. We conclude that the circuit court properly exercised its discretion in the matter, and therefore affirm.

Johnson commenced this personal injury action on March 20, 1995. On April 5th, a Nationwide claims representative asked for and received consent from Johnson's counsel, Ward Richter, to file the answer by April 25th. The parties acknowledged their agreement to this deadline in writing. Nationwide retained Attorney Tim Yanacheck on April 6th. Yanacheck later recalled that Richter told him that day to "take as much time as I needed to file the Answer." On April 7th, Yanacheck wrote Richter the following letter:

This letter will confirm our telephone conversation yesterday. Thank you for your kind extension of time in which I may file an Answer on behalf of the defendant. Hopefully, I will be able to obtain sufficient information for a meaningful Answer before April 25, 1995. If not, I will contact you again to ask for additional time.

Yanacheck did not file an answer nor contact Richter by April 25th. He and Richter next spoke on May 22nd when, according to the circuit court's finding,

Richter reminded Yanacheck that an answer had not been filed and that he was concerned about the timing of this lawsuit in relationship to the recent change in the law. Richter indicated to Yanacheck that he wouldn't accept any answer that might adversely affect his client's interests in relation to the recent change in the law on joint and several liability.

Two days later, the attorneys met by chance and again briefly discussed the matter. At that time, Yanacheck was still waiting for a report on the case from Nationwide. The conversation with Richter prompted him to ask for an immediate report. A contemporaneous memorandum prepared by Yanacheck's

secretary indicated that Yanacheck believed at this time that Richter had provided him an open-ended extension of the answer deadline.

On June 1st Richter wrote Yanacheck concerning the overdue answer. He stated that Johnson would not assert a default if Yanacheck agreed to waive

any defenses to the effect that there is any defect in the identification of the defendant, service on the defendant, or any other defect that would force the plaintiff to re-file or re-plead the claims. You can deny that your client was negligent and you can raise contributory negligence as defenses, but I would have to review any other defenses that you raise before agreeing to relieve the defendant from the default.

Richter also offered settlement, and asked for a response to the letter by June 8th. The next day Richter retracted the letter after meeting with his client. Yanacheck then filed his answer within an hour of receiving Richter's letter.

Johnson subsequently moved for default judgment, and JMT-SUB Corp. and Nationwide responded with a motion to allow the answer as timely. Based on the circumstances described above, the circuit court found that after April 7th the "course of dealings between counsel reasonably allowed Yanacheck to conclude that he had obtained a reasonable but indefinite period of time to answer plaintiff's complaint." The court premised this conclusion on the following circumstances: that plaintiff had explained that the lawsuit was filed at an early stage to avoid an upcoming change in the law of joint and several liability; that Richter did not indicate that time was of the essence in answering the complaint; that he did not say or do anything at odds with Yanacheck's belief that he had an indefinite extension; that the interaction between counsel on May 22nd suggested that plaintiff's primary concern was that he not lose the tactical

advantage of having filed the lawsuit before the law changed; that the May 24th discussion allowed Yanacheck to infer an ongoing understanding with Richter for an indefinite extension; and that Richter's letter of June 1st may have limited but did not contradict Yanacheck's understanding of their arrangement. The court further referred to Richter's willingness to accept an answer that did not implicate the new law, and Johnson's failure to show any prejudice from the delay in answering his complaint.

Section 801.15(2), STATS., provides that a motion to extend the deadline for a specified act, made after the deadline has passed, "shall not be granted unless the court finds that the failure to act was the result of excusable neglect." Neglect is excusable if it is that "which might have been the act of a reasonably prudent person under the same circumstances. It is 'not synonymous with neglect, carelessness or inattentiveness.'" *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 468, 326 N.W.2d 727, 731 (1982) (citation omitted). The determination on this issue is a matter for the circuit court's discretion. *Id.* at 470, 326 N.W.2d at 732. The circuit court properly exercises its discretion if it examines the relevant facts, applies the appropriate law and demonstrates a rational process in reaching a reasonable conclusion. *Krebs v. Krebs*, 148 Wis.2d 51, 55, 435 N.W.2d 240, 242 (1989). When exercising its discretion, the circuit court must view default judgments with disfavor and prefer, whenever reasonably possible, to afford litigants a day in court and a trial. *Hedtcke*, 109 Wis.2d at 469, 326 N.W.2d at 731.

The circuit court reasonably excused the respondents' neglect. The initial written communications among the attorneys and Nationwide's claims representative plainly established an answer deadline of April 25, 1995. The problem arose because the attorneys had contemporaneous oral communications

which led Yanacheck to believe that Richter had given him an indefinite extension. Although Richter disputed Yanacheck's interpretation, the circuit court concluded that the subsequent communications between counsel demonstrated that Yanacheck's interpretation of his understanding with Richter was reasonable. The circuit court's conclusion is, in turn, itself, reasonable. After April 25th and until June 2nd, Richter continued to discuss and negotiate with Yanacheck as if an answer would be forthcoming. Regardless of Richter's reasons for doing so, it is the reasonableness of Yanacheck's understanding of the matter that is at issue. Given these facts and the policy against default judgments, the circuit court reasonably accepted Yanacheck's version of his and Richter's understanding.

According to Richter, however, Yanacheck's interpretation of their communications is irrelevant. He contends that under the parol evidence rule, the circuit court could only consider the unambiguous written communications establishing the April 25th deadline. We disagree. Attorneys' courtesy agreements are not formal contracts, and courts do not necessarily apply rules of contract construction to them. *Oostburg State Bank v. United Sav. & Loan Ass'n*, 125 Wis.2d 224, 235, 372 N.W.2d 471, 476 (Ct. App. 1985). As noted, the test is whether Yanacheck's neglect was that of a reasonably prudent person under the same circumstances. All evidence bearing on his understanding at the time of the agreement is therefore relevant and properly considered, including oral communications.

Next, Johnson contends that the circuit court erred by considering Yanacheck's conduct rather than Nationwide's. As he notes, Yanacheck attributed the late answer to Nationwide's delay in providing him information on the case. Once retained, however, the ultimate responsibility for filing the answer was

Yanacheck's, and the responsibility for failing to file it must also rest with Yanacheck. Johnson cannot reasonably contend otherwise.

Finally, Johnson contends that the circuit court erred by failing to consider the fact that after Yanacheck filed the answer on June 2nd, replacement counsel waited until July 21st to move to allow the answer as timely. Under the circumstances, that delay has no significance. Johnson had already brought the matter before the court on his motion for default judgment filed on June 7th, with a scheduled hearing date of July 28th. The filing of the respondent's complementary motion caused no further delay in the proceeding.

By the Court.—Judgment affirmed.

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

