

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 8, 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. 97-2821-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**WILLIAM CAMPBELL D/B/A C.C. DECOR,**

**PETITIONERS-APPELLANTS,**

**V.**

**DARIEN LUMBER COMPANY, INC. ALSO D/B/A MERRILL  
HILLS LUMBER COMPANY,**

**RESPONDENTS-RESPONDENTS,**

**ABC INSURANCE COMPANY, FICTITIOUS INSURANCE  
COMPANY,**

**RESPONDENT.**

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APPEAL from an order of the circuit court for Walworth County:  
JAMES L. CARLSON, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

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

PER CURIAM. William Campbell appeals from an order denying his motion under § 806.07, STATS., to reopen a default judgment in favor of Darien Lumber Company, Inc. We conclude that the circuit court properly exercised its discretion in determining that Campbell's failure to appear at a pretrial conference was not due to excusable neglect. However, the award of punitive damages was erroneous. We affirm in part and reverse in part the order of the circuit court and remand to the circuit court with directions to enter an amended judgment vacating the award of punitive damages.

Campbell commenced this action against Darien Lumber to recover losses he suffered due to allegedly defective decking lumber sold to him by Darien Lumber. Darien Lumber filed a counterclaim to recover \$41,890.12, alleged to be the unpaid balance of Campbell's credit account. Darien Lumber sought punitive damages as well alleging that Campbell's failure to pay was an illegal conversion of monies received from the homeowners whose property was improved by the decking lumber.

An October 9, 1996 scheduling order set a pretrial hearing for March 24, 1997.<sup>1</sup> When the pretrial hearing was convened, Campbell, who was no longer represented by counsel, failed to appear. The circuit court entered a default judgment dismissing Campbell's complaint and granting Darien Lumber judgment on its counterclaim for \$11,119.01 plus interest. The circuit court also determined that Darien Lumber was entitled to punitive damages and directed that if Campbell

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<sup>1</sup> The scheduling order is not in the record transmitted to this court. We are not able to ascertain whether the order gave Campbell notice that his failure to appear could result in a default judgment. However, § 805.03, STATS., gives notice that such a sanction is possible.

did not pay the judgment within thirty days, Darien Lumber would be awarded punitive damages in the amount of \$11,119.01.<sup>2</sup>

On July 14, 1997, Campbell's new attorney filed a motion to reopen the default judgment on the grounds that Campbell's failure to appear at the pretrial hearing was due to excusable neglect. The motion argued that Campbell had been involved in a car accident in May 1996 which had severely limited his memory and that Campbell's former attorney had not advised Campbell of the pretrial hearing. Campbell also filed a motion to amend the default judgment to vacate the award of punitive damages as entered contrary to law. Campbell's motions were denied and he appeals. Pursuant to a presubmission conference and this court's order of October 20, 1997, the parties submitted memorandum briefs.

Campbell first argues that the default judgment was improper because the circuit court did not make requisite findings that he had acted egregiously or in bad faith in failing to appear at the pretrial conference. *See Schneider v. Ruch*, 146 Wis.2d 701, 705, 431 N.W.2d 756, 758 (Ct. App. 1988). Campbell did not timely appeal the default judgment. Our review is limited to whether the circuit court erroneously exercised its discretion in denying Campbell's motion for relief under § 806.07, STATS. Campbell must show one of the threshold factors under § 806.07 to collaterally attack the judgment because the judgment was not timely appealed. *See O'Neill v. Buchanan*, 186 Wis.2d 229, 234, 519 N.W.2d 750, 752 (Ct. App. 1994).

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<sup>2</sup> The March 27, 1997 judgment provided that if Campbell failed to pay within thirty days, the judgment awarding punitive damages could be entered on the affidavit of Darien Lumber's attorney and without further notice to Campbell. On May 15, 1997, an amended judgment was entered to include the award of punitive damages.

An order denying a motion for relief under § 806.07, STATS., will not be reversed unless the circuit court erroneously exercised its discretion. *See State ex rel. M.L.B. v. D.G.H.*, 122 Wis.2d 536, 541, 363 N.W.2d 419, 422 (1985). We will not find an erroneous exercise of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for its decision. *See id.* at 542, 363 N.W.2d at 422.

Campbell argues that he established excusable neglect for his failure to appear at the pretrial conference. “Excusable neglect allowing relief from judgment is that neglect which might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness.” *Price v. Hart*, 166 Wis.2d 182, 194-95, 480 N.W.2d 249, 254 (Ct. App. 1991). To determine whether the reasonably prudent person standard has been met, the circuit court “should consider whether the person has acted promptly to remedy his situation and whether vacation of the judgment is necessary to prevent a miscarriage of justice.” *Charolais Breeding Ranches, Ltd. v. Wiegel*, 92 Wis.2d 498, 512, 285 N.W.2d 720, 727 (1979).

Campbell’s only support for his claim that he suffered mental deficiencies which impaired his ability to recall and appear at the pretrial conference was a copy of a psychological evaluation completed for a personal injury suit Campbell was pursuing. The circuit court noted that the evaluation did not address whether Campbell had the capacity to understand a notice to appear and that the evaluation suggested that Campbell’s claimed deficiencies were due to symptom magnification. It is apparent from the circuit court’s decision that it disbelieved Campbell’s claim that his memory failed him as to the necessity to appear at the hearing. A circuit court’s credibility determination may not be

disturbed on appeal. *See Plesko v. Figgie Int'l*, 190 Wis.2d 764, 775-76, 528 N.W.2d 446, 450 (Ct. App. 1994).

Campbell suggests that he has been harshly dealt with for a singular failure. However, in advance of the pretrial date, Darien Lumber had moved to strike Campbell's complaint for his failure to provide discovery and file trial materials, including witness lists and specification of damages. In considering Campbell's motion to reopen, the circuit court explained how Campbell had failed to meet his obligations throughout the case. Campbell's pro se status did not give him license to ignore civil practice procedures or ignore orders of the court. *See Waushara County v. Graf*, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20 (1992).

The circuit court also found that Campbell was notified about what occurred with respect to entry of the default judgment and yet never came forward with any proof of unfairness or dispute as to the validity of the stated account. Although Campbell did write a short letter to the court which was received on April 1, 1997, he did not request that the judgment be reopened.<sup>3</sup> He took no corrective action until faced with execution of the judgment. Consideration was given to whether Campbell acted promptly to remedy his situation and whether the judgment was a miscarriage of justice. We conclude that the circuit court properly exercised its discretion in concluding that there was not excusable neglect.

Despite the absence of excusable neglect which might support vacating the default judgment and Campbell's failure to appeal the judgment, we will consider whether the circuit court properly awarded punitive damages as part

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<sup>3</sup> The letter suggested that the parties had reached a settlement prior to the pretrial conference. In his § 806.07, STATS., motion, Campbell did not rely on the letter's contention as grounds for his nonappearance.

of the default judgment. We do so because a punitive damages award entered contrary to law would be an erroneous judgment which the circuit court may set aside under § 806.07(1)(h), STATS. See *Sprayer Supply, Inc. v. Feider*, 133 Wis.2d 397, 402, 395 N.W.2d 624, 626 (Ct. App. 1986). Although Campbell did not explicitly make a § 806.07(1)(h) claim, he moved to vacate the punitive damages as entered contrary to law.<sup>4</sup> If he is correct, we need not go through the guise of suggesting to the circuit court that relief should be afforded under § 806.07(1)(h) should a new motion be filed; we may direct entry of the proper judgment on the grounds that justice has miscarried. See *Gamroth v. Village of Jackson*, 215 Wis.2d 250, 263, 571 N.W.2d 917, 921 (Ct. App. 1997).

Campbell argues that Darien Lumber failed to establish a prima facie case for granting punitive damages. We agree.

Darien Lumber sought damages for Campbell's breach of the terms of his open credit account by nonpayment. Punitive damages are unavailable in a breach of contract action. See *Loehrke v. Wanta Builders, Inc.*, 151 Wis.2d 695, 701, 445 N.W.2d 717, 720 (Ct. App. 1989). However, if the breaching party has a fiduciary duty to the other party, a tort action in which punitive damages may be recovered will coincide with the contract action. See *id.* at 701-02, 445 N.W.2d at 720. Section 779.02(5), STATS., creates a fiduciary duty between a prime contractor and a subcontractor by imposing a trust upon all moneys paid to a prime contractor by a homeowner for improvements. See *Loehrke*, 151 Wis.2d at 702-703, 703 n.2, 445 N.W.2d at 720.

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<sup>4</sup> By the separate motion to vacate, the issue is preserved for appellate review because it was first presented to the circuit court. We do not consider whether the circuit court's failure to make a finding that Campbell's failure to appear was egregious or in bad faith resulted in an erroneous judgment because it was not raised in the circuit court.

Darien Lumber's counterclaim alleges that each pickup or delivery of decking material was for a specific property to be improved, that Campbell had been paid in full by the owners of property on which the lumber was used, that pursuant to § 779.02(5), STATS., money paid to Campbell by various owners of improved properties constituted a trust fund for payment for materials, and that Campbell had committed theft by contractor. The allegations in the counterclaim are not definite enough to establish that Campbell was a prime contractor as defined in § 779.01(2)(d), STATS., and that Darien Lumber was a subcontractor. There is no allegation that Campbell entered into contracts with owners who were not themselves the prime contractor with respect to improvements to the land. *See* § 779.01(2)(d)1. The bare allegations in the counterclaim were insufficient to establish that a fiduciary relationship existed between Campbell and Darien Lumber with respect to the charges for lumber.

Even if the parties were in a prime contractor-subcontractor relationship, it is not sufficient to allege that certain trust monies had not been paid over. Punitive damages require proof that the prime contractor has acted with a reckless indifference to the subcontractor's rights or in an outrageous manner. *See Loehrke*, 151 Wis.2d at 705, 445 N.W.2d at 721. *See also Mid-Continent Refrigerator Co. v. Straka*, 47 Wis.2d 739, 747, 178 N.W.2d 28, 32-33 (1970) (something must be shown over and above the mere breach of duty for which compensatory damages can be given). As Campbell argues, § 895.85(3), STATS.,<sup>5</sup> addresses the need for proof that a party has acted maliciously or in the intentional disregard of the rights of the other party.

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<sup>5</sup> Section 895.85(3), STATS., provides: "The plaintiff may recover punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

Darien Lumber did not offer any proof in support of its claim for punitive damages. The allegations in the counterclaim, in light of Campbell's denial, cannot alone establish that Campbell acted maliciously. Moreover, a trust fund is not imposed for monies which are the subject of a bona fide dispute. *See* § 779.02(5), STATS. Campbell's answer to the counterclaim indicated that a dispute existed as to sums Darien Lumber claimed to be due.<sup>6</sup> The circuit court did not issue a special verdict and did not make the requisite findings that Campbell's behavior was malicious or in an intentional disregard of Darien Lumber's rights.<sup>7</sup> Punitive damages are not permitted in these circumstances.<sup>8</sup>

The award of punitive damages must be vacated for an additional reason. A default judgment must be limited to that which is demanded in the complaint. *See Stein v. Illinois State Assistance Comm'n*, 194 Wis.2d 775, 784, 535 N.W.2d 101, 104 (Ct. App. 1995). Darien Lumber's counterclaim did not specify an amount of punitive damages. Therefore, it was required under § 806.02(2), STATS., to serve Campbell with notice of the specific amount of

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<sup>6</sup> Campbell's answer to the counterclaim was not stricken.

<sup>7</sup> The requirement in § 895.85(4)(b), STATS., that the trial court issue a special verdict as to punitive damages "if the case is tried to the court" suggests that punitive damages cannot be awarded as part of a default judgment without further proof. Currently pending before the Wisconsin Supreme Court in *Apex Electronics Corp. v. Gee*, No. 97-0353-FT, is whether punitive damages may be awarded solely on the allegations in the complaint when the defendant has defaulted by his failure to timely answer. Neither party has asked that this appeal be placed on hold pending a decision by the supreme court.

<sup>8</sup> We questioned, *sua sponte*, whether by providing that the punitive damages would be imposed only if Campbell failed to pay the judgment within thirty days, the circuit court was punishing Campbell for postjudgment conduct and not on the basis of his allegedly willful failure to pay the sums due in accordance with § 779.02(5), STATS. The conditional nature of the punitive damages award is not grounds for reversal. *See Gianoli v. Pfleiderer*, 209 Wis.2d 509, 533, 563 N.W.2d 562, 571 (Ct. App. 1997) ("if a trial court properly determines that punitive damages should be imposed, no factual or legal objection exists to the effort to ameliorate their effects by providing a means of avoiding them").



money it was seeking prior to judgment. *See Stein*, 194 Wis.2d at 785, 535 N.W.2d at 105. The itemization of damages filed on March 14, 1997, did not specify the amount of punitive damages sought. Only at the pretrial/default hearing did Darien Lumber ask for punitive damages equal to the account balance. The requirement of § 806.02(2) was not satisfied and the punitive damages judgment is void and must be set aside. *See Stein*, 194 Wis.2d at 785, 535 N.W.2d at 105. On remand, the circuit court shall enter an amended judgment vacating the award of punitive damages.

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

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

