

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2721

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

SCOTT G. BIESTERVELD AND CINDY M. BIESTERVELD,

PLAINTIFFS-RESPONDENTS,

v.

MARK W. ROOB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Mark Roob appeals from a default judgment in favor of Scott and Cindy Biesterveld. Roob is a professional photographer and photographed the Biestervelds' wedding. Their complaint alleged that he breached a contract for the pictures, violated various provisions of Wisconsin's consumer protection statutes, and used intentional misrepresentations to induce the

contract. When he did not file a timely answer, the trial court granted a default judgment. The issues are whether the trial court's decision to grant the judgment and its decision to deny Roob's motion to vacate the judgment were erroneous exercises of discretion, and whether the court improperly awarded punitive damages to the Biestervelds. We affirm.

BACKGROUND

¶2 After the Biestervelds' wedding the parties could not agree on the amount due for Roob's services. The Biestervelds sued when Roob refused to deliver the photos for the contract price, and served Roob with their summons and complaint on October 15, 1999. Roob filed and served his answer on December 2, 1999, three days after it was due.

¶3 On February 28, 2000, the trial court heard the Biestervelds' motion for default judgment and Roob's motion to dismiss the complaint for failure to state a claim. The court granted default judgment and denied Roob's motion from the bench without hearing oral argument from either side. The court awarded the Biestervelds double the amount they paid Roob for the photos and attorney's fees, as provided in the penalty provisions of the consumer protection statutes Roob allegedly violated. The Biestervelds' claim for punitive damages was set for a hearing.

¶4 Roob subsequently moved to vacate the default judgment. The trial court denied relief based on briefs, again without permitting oral argument. Roob had argued in his brief that the handwritten date of October 18 appeared on the summons he received and that he subsequently treated October 18 as the date of service. This, in his view, provided an excusable reason for his three-day delinquency in serving his answer. Roob's counsel did not file the summons

before the hearing, although the court indicated it had reviewed the document. At the hearing Roob's counsel asked the court for permission to file it, but permission was not received.¹

¶5 The third and final hearing in the matter addressed the Biestervelds' claim for punitive damages. The Biestervelds presented testimony that they paid Roob \$1,980 for eighty five-by-seven inch pictures of their wedding. After the wedding they met with Roob to discuss a design for their wedding album. Over several hours, Roob heavily pressured them to buy more pictures, and ultimately presented them with the choice of paying at least \$2,000 more or receiving nothing for the \$1,980 already paid. Under duress the Biestervelds agreed to pay an additional \$3,200 to Roob, but later stopped payment on their check. In subsequent discussions Roob was abusive and threatened to destroy their negatives if they did not pay him the additional money.

¶6 The Biestervelds also presented evidence that Roob had substantial assets and income, and a long history of civil suits and criminal charges for his business practices. Although Roob presented a substantially different version of events, the trial court accepted the Biestervelds' version and awarded \$15,000 in punitive damages in addition to the double damages and attorney's fees awarded earlier.

¹ A copy of the summons served on Roob appears in the appellate record. It is unclear whether October 15, the actual date of service, or October 18 is handwritten on the document. One could reasonably construe the date as either.

DEFAULT JUDGMENT

¶7 A defendant's answer must be received within forty-five days of service of the complaint. WIS. STAT. § 802.06(1) (1999-2000).² The court may grant a default judgment to the plaintiff if the defendant fails to meet that deadline. WIS. STAT. § 806.02. We review the trial court's decision to grant a default judgment under the erroneous exercise of discretion standard. *Hollingsworth v. American Fin. Corp.*, 86 Wis. 2d 172, 181, 271 N.W.2d 872 (1978). The trial court's decision on a motion to vacate a default judgment is also discretionary. *Baird Contracting, Inc. v. Mid Wisconsin Bank*, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). The trial court properly exercises discretion when it considers the facts of record, applies the proper legal standard, and reasons its way to a rational conclusion. *Id.*

¶8 Roob first contends that the trial court inappropriately excluded oral argument at both hearings on the default judgment, and inappropriately refused Roob permission to file the allegedly misdated summons at the second hearing. Before the first hearing, Roob filed no written response to the motion for default judgment. That being the case, the trial court was under no obligation to hear oral argument from Roob. Milwaukee County Local Rule 365(b) requires that any arguments or papers in support of the opposing party's position must be filed at least five days before a motion hearing. Local Rule 365 is "valid and enforceable." *Community Newspapers, Inc. v. City of West Allis*, 158 Wis. 2d 28, 33, 461 N.W.2d 785 (Ct. App. 1990).

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶9 Local Rule 365(b) also permitted the court to refuse the summons for filing on the day of the second hearing. In any event, the issue was fully briefed before that hearing, the court reviewed a copy of the summons, and one is in the appellate record. Therefore, Roob cannot reasonably argue that he suffered prejudice. Nor has he shown prejudice from the absence of oral argument at the second hearing, in view of his opportunity to fully brief his motion to vacate.

¶10 Roob next contends that the court's decision on both the motion for default and the motion to vacate were erroneous exercises of its discretion. The dispositive issue is whether Roob's failure to file an answer until three days after his deadline was excusable neglect. *See* WIS. STAT. § 801.15(2)(a). Excusable neglect is the conduct of a reasonably prudent person under the same circumstances. *Giese v. Giese*, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969). Those circumstances here included Roob's considerable experience representing himself in civil litigation. In that context, the trial court reasonably concluded that, had Roob been reasonably prudent, he would have noted and remembered that he was actually served on October 15, notwithstanding his assertion that he construed the handwritten date on the summons as October 18.

¶11 Roob also contends that the complaint was defective and could not support a default judgment. Two of the Biestervelds' six causes of action, Roob asserts, failed to sufficiently state a claim because judgment on similar claims by his dissatisfied customers were reversed in *Reusch v. Roob*, 234 Wis. 2d 270, 610 N.W.2d 168 (Ct. App. 2000). However, the Biestervelds' complaint presented four other claims that did state claims for relief.

PUNITIVE DAMAGES

¶12 Punitive damages are awarded for outrageous conduct that is malicious or in willful or reckless disregard of the plaintiff's rights. *Gianoli v. Pfleiderer*, 209 Wis. 2d 509, 527, 563 N.W.2d 562 (Ct. App. 1997). The purpose is to punish and deter such conduct. *Fahrenberg v. Tengel*, 96 Wis. 2d 211, 234, 291 N.W.2d 516 (1980). An award is excessive if it is more than is necessary to punish and deter, or inflicts a penalty or burden on the defendant disproportionate to the wrongdoing. *Id.* Factors considered in awarding punitive damages include the grievousness of the acts, the degree of malicious intent, the actual and potential damage, and the defendant's ability to pay. *Id.* We will affirm a punitive damages award if there is any credible evidence in the record to support it. *Gianoli*, 209 Wis. 2d at 527.

¶13 Roob contends that the Biestervelds waived their claim to punitive damages by accepting statutory double damages for Roob's violation of several consumer protection statutes. However, the Biestervelds recovered punitive damages under their intentional misrepresentation claim. Roob cites no authority for the proposition that statutory damages on consumer protection claims bar punitive damages on a common law claim, even if all claims pertain to the same series of events.

¶14 The award of \$15,000 is not excessive. The Biestervelds essentially described an attempted extortion. They were subject to heavy duress and threats to withhold items of extraordinary importance to them. They were lied to. They presented evidence that Roob has a long history of unscrupulous business practices, and has been criminally convicted for them. He has substantial assets and income. Having accepted the Biestervelds' version of events, the trial court

reasonably concluded that \$15,000 was an appropriate means of deterring outrageous conduct and not unduly burdensome to Roob.

¶15 Finally, Roob contends that because the Biestervelds eventually received their pictures, their actual damages were nominal, and punitive damages are not available in cases of nominal damage. A nominal damage award may support a substantial punitive damages award “where egregious acts result in injuries that are hard to detect or noneconomic harm that is difficult to measure.” *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 629-30, 563 N.W.2d 154 (1997). Such is the case here, where the Biestervelds were deprived of their wedding pictures for two years while being subjected to outrageous acts of extortion.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

