COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
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.

Appeal No. 2007AP1038 **Cir. Ct. No. 2004CV679**

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

GEORGE F. HOLLIDAY AND COLLEEN HOLLIDAY,

PLAINTIFFS-RESPONDENTS,

UNITED WISCONSIN INSURANCE COMPANY,

PLAINTIFF,

ADVANCED HEALTHCARE SC GROUP HEALTH PLAN, BERKSHIRE LIFE INSURANCE, UNITED HEARTLAND INSURANCE COMPANY AND SUN LIFE ASSURANCE COMPANY OF CANADA,

INVOLUNTARY-PLAINTIFFS,

V.

ARCH INSURANCE COMPANY,

DEFENDANT-APPELLANT,

PROGRESSIVE HALCYON INSURANCE COMPANY, BRIAN J. HOLST, JOY FARM TRANSPORTATION, INC., GRANITE STATE INSURANCE COMPANY, AIG NATIONAL INSURANCE COMPANY, INC., LULA F. KING, WEST BEND MUTUAL INSURANCE COMPANY AND GENERAL STAR NATIONAL INSURANCE COMPANY,

DEFENDANTS.

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

Before Fine and Kessler, JJ. and Daniel L. LaRocque, Reserve Judge,

¶1 FINE, J. Arch Insurance Company appeals a judgment awarding George F. and Colleen Holliday $1,045,918.94 in damages for injuries George Holliday sustained after a school bus owned by Joy Farm Transportation, Inc., hit his bicycle.[1] The circuit court entered a default judgment against Arch after it failed to timely answer the Hollidays' second amended complaint alleging that Arch was an excess insurer for Joy Farm.[2] Arch claims that: (1) default was not warranted because its failure to timely answer was the result of what it asserts was

[1] The notice of appeal is from a judgment dated March 28, 2007. The judgment was amended on June 4, 2007. The notice of appeal encompasses the amended judgment. *See* WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.").

[2] Arch Insurance Company asserted in a brief before the circuit court that "[t]he proper name of the specific Arch company that issued the policy was 'Arch Excess and Surplus Insurance Company.' Arch has offered to substitute the correct entity via stipulation, but once the default took place this did not happen." Arch Insurance Company does not dispute on appeal that the default made it an excess insurer for Joy Farm. Accordingly, all references to "Arch" on this appeal are to "Arch Insurance Company."

excusable neglect; (2) if Arch did default, the circuit court erred when it precluded Arch from contesting Joy Farm's liability; and (3) there was no evidence to support the circuit court's award of damages for George Holliday's loss of future earning capacity. We affirm.

I.

¶2 George Holliday was injured during a multi-vehicle accident. According to the Hollidays' second amended complaint:

> On or about September 24, 2003, at or near the intersection of North 54th Street and West Chambers Street in the City of Milwaukee, [Brian] Holst and [Lula] King negligently operated their vehicles so as to cause their vehicles to collide which in turn caused the vehicle operated by King, a school bus, to impact with George F. Holliday who was on a bicycle proceeding in a legal manner eastbound on West Chambers Street. At the time of the collision, King was in the course of her employment with Joy Farm operating a school bus and, as such, Joy Farm is vicariously liable for all negligence of King as herein identified.

This case involves Arch's liability for the bus driver's negligence. Joy Farm was insured for $5,000,000 as follows: (1) Granite State Insurance Company for $750,000; (2) General Star National Insurance Company for $250,000; and (3) Arch for $4,000,000.[3]

¶3 Arch was named as an excess insurer for Joy Farm in the Hollidays' second amended summons and complaint, filed on February 3, 2005:

> Upon information and belief, Arch Insurance Company ("Arch") is a foreign insurance corporation whose

[3] Brian Holst had insurance with Progressive Halcyon Insurance Company. Progressive paid its policy limits and was dismissed. Holst was later dismissed from the case as part of a stipulated settlement.

> registered agent is CT Corporation System, 8025 Excelsior Drive, Suite 200, Madison, Wisconsin 53717. Upon further information and belief, at all times relevant, Arch had in full force and effect a policy of excess or umbrella liability insurance covering Joy Farm and, as such, is a proper party herein.

Joy Farm answered. Arch, which was served on February 14, 2005, did not. On April 12, 2005, the Hollidays moved for, and the circuit court granted, a default judgment against Arch.

¶4 On April 15, 2005, Arch moved to vacate the default judgment, sought to enlarge the time for filing and serving its answer, and filed an answer to the Hollidays' second amended complaint. Arch claimed, as material, that its failure to timely answer was the result of excusable neglect because a "clerical error misrouted the second amended complaint after it was served on Arch." *See* WIS. STAT. RULES 801.15(2)(a), 806.07(1)(a).[4] The circuit court determined that there was no excusable neglect, held Arch in default for failing to timely answer, and ultimately ordered its answer struck.

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[4] WISCONSIN STAT. RULE 801.15(2)(a) provides:

> When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. The 90 day period under s. 801.02 may not be enlarged. If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect. The order of enlargement shall recite by its terms or by reference to an affidavit in the record the grounds for granting the motion.

WISCONSIN STAT. RULE 806.07(1)(a) provides, as material: "On motion and upon such terms as are just, the court … may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect." "The excusable neglect standard for granting an enlargement of time is substantially equivalent to the excusable neglect standard for vacating a default judgment." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 467 n.2, 326 N.W.2d 727, 730 n.2 (1982).

¶5 Arch sought to contest Joy Farm's liability at a trial. The circuit court denied Arch's motion, concluding that, as a result of the default, Arch was liable for Joy Farm's negligence: "By failing to answer the complaint Arch is deemed to have admitted the negligence of Joy Farm's driver and a degree of negligence sufficient to warrant joint and several liability, and, therefore, there are no issues of fact as to liability that may be contested at trial." The circuit court noted, however, that "because the complaint does not state the dollar amount of the plaintiff's [*sic*] damages, the question of damages remains open and the damage claims may be contested at trial." *See* WIS. STAT. RULE 806.02(2) ("If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02 (1m), the court shall require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment. If proof of any fact is necessary for the court to give judgment, the court shall receive the proof."). As material, WIS. STAT. RULE 802.02(1m) provides: "(a) Relief in the alternative or of several different types may be demanded. With respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount of money the pleader seeks."

¶6 After the circuit court determined that Arch would be liable by default for Joy Farm's damages, the circuit court ordered Joy Farm, Granite State, and General Star dismissed pursuant to their stipulation. The Hollidays agreed to release Granite State and General Star from all liability in exchange for their payments. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 320 N.W.2d 175 (1982). The Hollidays also agreed to release Joy Farm from all liability up to the Granite State and General Star combined policy limits of $1,000,000, and from all liability in excess of the $5,000,000 combined policy limits of Granite State, General Star,

and Arch. The settlement left intact the Hollidays' cause of action against Arch for damages between $1,000,000 and $5,000,000.

¶7 At the hearing on damages, George Holliday testified that at the time of the accident, he was a medical doctor in Milwaukee with Advanced Healthcare. After the accident, he started a new job as a doctor at the St. Mary's Duluth Clinic in Minnesota. Dr. Holliday described his injuries to the court and explained how they affected his ability to work. The Hollidays also presented the videotaped depositions of several medical doctors and the testimony of a Timothy Riley, a vocational consultant, who opined that Dr. Holliday would sustain a future loss of earning capacity between $15,000 and $30,000 per year. Based on this evidence, the circuit court awarded the Hollidays $2,009,689.60 in damages, including, as relevant, $373,700 for George Holliday's loss of future earning capacity. After calculating a credit for settlement payments, costs, and interest, the circuit court entered judgment against Arch for $1,045,918.94.

II.

A. *Default Judgment/Motion to Enlarge.*

¶8 Arch contends that the circuit court erroneously exercised its discretion when it denied Arch's motions to vacate the default judgment and enlarge the time in which to file its answer. Arch's claim implicates two statutes, WIS. STAT. RULES 806.07(1)(a) and 801.15(2)(a).

¶9 A party moving to vacate a default judgment pursuant to WIS. STAT. RULE 806.07(1)(a) must demonstrate: (1) that the judgment against him or her was obtained as a result of mistake, inadvertence, surprise or excusable neglect; and (2) that he or she has a meritorious defense to the action. ***J.L. Phillips &***

Assocs., Inc. v. E & H Plastic Corp., 217 Wis. 2d 348, 358, 577 N.W.2d 13, 17 (1998).

¶10 WISCONSIN STAT. RULE 802.06(1) requires a defendant to serve an answer within forty-five days of being served with the complaint. A circuit court may grant relief from this requirement under WIS. STAT. RULE 801.15(2)(a)

> if it finds reasonable grounds for noncompliance with the statutory time period (which the statute and this court refer to as excusable neglect) and if the interests of justice would be served by the enlargement of time, *e.g.*, that the party seeking an enlargement of time has acted in good faith and that the opposing party is not prejudiced by the time delay.

Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461, 468, 326 N.W.2d 727, 731 (1982).

¶11 A circuit court has wide discretion is determining whether to vacate a default judgment or to enlarge the time for answering. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865, 867 (1977) (default judgment); ***Hedtcke***, 109 Wis. 2d at 467, 470–471, 326 N.W.2d at 730, 732 (enlargement of time). We will affirm a discretionary determination if the circuit court has made a "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke***, 109 Wis. 2d at 471, 326 N.W.2d at 732.

¶12 Arch claims that the circuit court erroneously exercised its discretion because: (1) Arch's failure to timely answer was the result of excusable neglect; (2) Arch promptly filed an answer once it learned of the default; (3) the Hollidays were not prejudiced by any delay; (4) Arch's conduct was "neither 'extreme' nor evidence of bad faith"; and (5) Arch had a meritorious defense. The circuit court did not erroneously exercise its discretion in determining that Arch failed to show excusable neglect. Accordingly, we do not address Arch's additional arguments. *See, e.g.*, ***Williams Corner Investors, LLC v. Areawide Cellular, LLC***, 2004 WI

App 27, ¶19, 269 Wis. 2d 682, 692, 676 N.W.2d 168, 173 ("only if the court finds excusable neglect must it also consider the interests of justice"); ***Martin v. Griffin***, 117 Wis. 2d 438, 444, 344 N.W.2d 206, 210 (Ct. App. 1984) ("The existence of a meritorious defense has no bearing on whether the neglect was excusable and is insufficient by itself to entitle a defaulting party to relief from judgment.") (citations omitted).[5]

¶13 Excusable neglect is "'that neglect which might have been the act of a reasonably prudent person under the same circumstances.'" ***Hedtcke***, 109 Wis. 2d at 468, 326 N.W.2d at 731 (quoted source omitted). It is not synonymous with mere neglect, carelessness, or inattentiveness. ***Ibid.*** In determining whether the neglect was excusable, the focus is on whether the conduct was excusable under the circumstances "'since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect.'" ***Martin***, 117 Wis. 2d at 443, 344 N.W.2d at 209 (quoted source omitted).

¶14 Arch claims that it did not answer the second amended complaint because a "clerical person who handles intake misinterpreted Arch's position" and, as a result, Arch did not "discover[]" the complaint until the first week of April of 2005. In support, Arch points to an affidavit from Stephen G. Perrella, an assistant vice president for casualty claims, attached to its motion to enlarge the time for filing its answer. Perrella alleged that Arch was served on February 14,

[5] The circuit court also denied Arch's motion to vacate the default judgment under WIS. STAT. RULE 806.07(1)(h) (the court may relieve a party from a judgment for "[a]ny other reasons justifying relief from the operation of the judgment"). Arch does not develop an argument on this issue. Accordingly, we do not address it. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463, 470 (Ct. App. 1994) ("On appeal, issues raised but not briefed or argued are deemed abandoned.").

2005. On February 28, the vice president for casualty claims sent a letter to Joy Farm "confirming receipt of suit papers and advising that the matter had been assigned to" Perrella. According to Perrella, the "suit papers" were then sent to the scanning department where a "clerical person … missed the fact that there was a complaint":

> The protocol of Arch Group's Casualty Claims Department calls for all suit papers to be duplicated before the file is sent to be scanned so that the responsible claims person is alerted to the existence of the suit immediately. Unfortunately, the clerical person who handled the intake on this matter missed the fact that there was a complaint and sent the entire file to be scanned without notifying me that there was a suit filed.

Perrella claimed that when the matter appeared in his diary on the first week of April, he "reviewed the contents of the file for the first time, saw the Second Amended Complaint[,] and realized that Arch was a named defendant." On April 8, Perrella assigned the case to outside counsel, who contacted the Hollidays' lawyer to ask for an enlargement of time. The Hollidays' lawyer told Arch's lawyer that the Hollidays had obtained a default judgment.

¶15 The circuit court rejected this explanation, finding that Arch's failure to timely answer was not excusable:

> Attorneys and insurance company claims employees are regularly involved with lawsuits and trained to recognize the importance of timely responding to legal documents.
>
> So, what this strikes me as is the classic case of inattentiveness. Arch took its eye off the ball. Arch was not attentive to the deadline for answering, and no explanation has been given which would demonstrate to me that Arch's failure to be attentive was at the same time the act of a reasonably prudent person. And as we all know inattentiveness does not qualify as excusable neglect.
>
> ….

> In this case, … it seems that the responsibility for determining whether there was a summons to begin with is something that deserved a timely response was assigned to, quote, a clerical person who handled the intake on this matter. I was quoting from … Mr. Perrella's affidavit.
>
> The, quote, clerical person, close quote, had been assigned the blame by Arch for, quote, missing the fact that there was a complaint and for not, quote, notifying Mr. Perrella that there was a suit filed, close quote. I infer from Mr. Perrella's affidavit that one of two things is true about Arch. Either, one, that a clerical person was someone trained to look through the files and find summonses and complaints, in which case the clerical person in this case truly does bear responsibility for this problem and bears responsibility akin to a lawyer's responsibility for having to make a judgment, and in this case didn't make a judgment because he or she took his or her eye off the ball.
>
> The other possibility is that the clerical person was not so trained, in which case Arch as an entity, as an enterprise bears the responsibility for leaving a weak link in the chain that must be forged between receiving service of the summons and serving a timely answer.

¶16 The circuit court properly exercised its discretion. As the circuit court recognized, Arch is a sophisticated insurance company with, according to its affidavit, an established "protocol" for processing "suit papers." *See* ***Baird Contracting, Inc. v. Mid Wisconsin Bank of Medford***, 189 Wis. 2d 321, 326, 525 N.W.2d 276, 278 (Ct. App. 1994) ("attorneys and insurance company claims employees are regularly involved with lawsuits and trained to recognize the importance of timely responding to legal documents"). The summons and second amended complaint clearly named "Arch Insurance Company" as a defendant; indicated that a "lawsuit or other legal action" had been filed; informed Arch that it had forty-five days to "respond with a written answer"; and explained that if Arch did not answer, "the court may grant judgment against you for the award of money or other legal action requested in the second amended complaint." Arch does not explain why under these circumstances its "clerical person," who, as the

circuit court found, was or should have been trained to recognize a summons and complaint, failed to do so. Accordingly, Arch has not demonstrated that its delay in responding to the second amended complaint was the result of "excusable neglect," and the circuit court properly denied Arch's motions to vacate the default judgment and enlarge the time in which to file its answer.

B. *Effect of the Default Judgment.*

¶17 On appeal, Arch "concedes that if default was proper, and the Court of Appeals believes that there was no excusable neglect, that Arch's failure to answer renders it the de facto excess carrier for Joy Farm." Arch claims that the circuit court erred because, under ***Estate of Otto v. Physicians Insurance Co. of Wisconsin, Inc.***, 2007 WI App 192, 305 Wis. 2d 198, 738 N.W.2d 599, the default did not establish Arch's liability for its insured's negligence.[6] We disagree.

¶18 Arch cites to the court of appeals decision in ***Estate of Otto***. That decision was affirmed by the supreme court after the appellate briefs in this case were submitted. *See* ***Estate of Otto v. Physicians Insurance Co. of Wisconsin, Inc.***, 2008 WI 78, ¶13, ___ Wis. 2d ___, ___, 751 N.W.2d 805, 809. Both the Hollidays and Arch address the supreme-court decision in letter-briefs to this court. We thus rely on the supreme-court decision.

¶19 In ***Estate of Otto***, the plaintiffs filed an amended complaint alleging medical negligence directly against, as material, two doctors, the clinic that

[6] The circuit court also held that Arch could not put into play the comparative negligence between the bus driver, Arch's insured, and the driver of the car, Holst. *See* WIS. STAT. § 895.045(1) (comparative negligence). Arch does not develop this issue on appeal. Accordingly, we do not address it. *See* ***Johnson***, 184 Wis. 2d at 344, 516 N.W.2d at 470.

employed the doctors, and the doctors' and the clinic's insurance company, Physicians Insurance Company of Wisconsin, Inc. ***Id.***, 2008 WI 78, ¶¶16–17, ___ Wis. 2d at ___, 751 N.W.2d at 810. The amended complaint alleged that Physicians Insurance's "codefendant insureds were negligent causing damages to the plaintiff" and that Physicians Insurance was "'directly liable to Plaintiffs in an amount to be proven at trial.'" ***Id.***, 2008 WI 78, ¶18, ___ Wis. 2d at ___, 751 N.W.2d at 810. The doctors and the clinic answered the amended complaint, denying that the doctors were negligent and that Physicians Insurance was liable for any damages. ***Id.***, 2008 WI 78, ¶19, ___ Wis. 2d at ___, 751 N.W.2d at 810. Physicians Insurance did not timely answer. ***Id.***, 2008 WI 78, ¶22, ___ Wis. 2d at ___, 751 N.W.2d at 810. On a motion by the plaintiffs, the circuit court struck Physicians Insurance's late answer and entered a default judgment against it. ***Id.***, 2008 WI 78, ¶23, ___ Wis. 2d at ___, 751 N.W.2d at 811. Physicians Insurance argued that, while the default estopped it from asserting its policy defenses, the default did not preclude it from litigating the doctors' negligence. ***Id.***, 2008 WI 78, ¶24, ___ Wis. 2d at ___, 751 N.W.2d at 811. The circuit court rejected this argument, determining that Physicians Insurance's default rendered it liable for the plaintiffs' damages. ***Id.***, 2008 WI 78, ¶25, ___ Wis. 2d at ___, 751 N.W.2d at 811.

¶20 The supreme court affirmed, concluding as a matter of law that the doctors' and the clinic's answer did not inure to Physicians Insurance's benefit. *See* ***id.***, 2008 WI 78, ¶¶10–11, 29, ___ Wis. 2d at ___, ___, 751 N.W.2d at 809, 812; *see also* ***Rao v. WMA Sec., Inc.***, 2008 WI 73, ¶62, ___ Wis. 2d ___, ___, 752 N.W.2d 220, 236 (effect of default is an issue of law). ***Estate of Otto*** began its analysis of this issue with WIS. STAT. § 632.24, Wisconsin's direct action statute.

Estate of Otto, 2008 WI 78, ¶31, ___ Wis. 2d at ___, 751 N.W.2d at 812. Section 632.24 provides:

> Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, *irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.*

(Emphasis added.) ***Estate of Otto*** rejected Physicians Insurance's argument that its liability was "'completely dependant on [its insureds'] liability,'" because under § 632.24 and the case law interpreting it, while "'[t]he responsibility of an insurance company to an injured party is derivative of the insured's conduct, … it is not derivative of the status of the insured's personal liability to a plaintiff.'" ***Estate of Otto***, 2008 WI 78, ¶¶34, 36, ___ Wis. 2d at ___, ___, 751 N.W.2d at 812, 813 (brackets in original; quoted sources omitted). ***Estate of Otto*** recognized that this did not end the analysis, however, because "[t]he direct action statute does not speak to the question whether the timely answer of an insured denying liability may inure to the benefit of a defaulting insurance company so as to preclude a judgment by default against it for the plaintiff's damages." ***Id.***, 2008 WI 78, ¶43, ___ Wis. 2d at ___, 751 N.W.2d at 814. It thus turned to the law in Wisconsin on default judgments.

¶21 WISCONSIN STAT. RULE 806.02, Wisconsin's default-judgment provision, reads, as material:

> **(1)** A default judgment may be rendered as provided in subs. (1) to (4) *if no issue of law or fact has been joined and if the time for joining issue has expired*. Any defendant appearing in an action shall be entitled to notice of motion for judgment.

> **(2)** After filing the complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue, *the plaintiff may move for judgment according to the demand of the complaint*. If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02 (1m), the court shall require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment. If proof of any fact is necessary for the court to give judgment, the court shall receive the proof.

(Emphasis added.) The supreme court determined that these subsections were inconsistent with Physicians Insurance's position that it could rely on the doctors' and the clinic's answer because: (1) Physicians Insurance conceded that it failed to join an issue of law or fact and the time for doing so had expired; (2) "the text of [] subsection [(1)] does not suggest that there may be circumstances in which one defendant may join issue of fact or law on behalf of another"; and (3) "[n]othing in the text of subsection (2) suggests that the plaintiff's right to move for judgment against a defendant in default may be conditional upon the content of an answer served timely by a codefendant not in default." ***Estate of Otto***, 2008 WI 78, ¶¶47–49, ___ Wis. 2d at ___, 751 N.W.2d at 815.

¶22 In addition to the default-judgment provision, ***Estate of Otto*** also looked to WIS. STAT. RULE 802.02, which governs pleadings. As material here, it provides:

> **(4)** EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the fact, nature and extent of injury and damage, are admitted when not denied in the responsive pleading, except that a party whose prior pleadings set forth all denials and defenses to be relied upon in defending a claim for contribution need not respond to such claim. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Estate of Otto determined that this subsection "establishes that averments in a plaintiff's complaint are deemed to be admitted when not denied in a defendant's responsive pleading." ***Id.***, 2008 WI 78, ¶54, ___ Wis. 2d at ___, 751 N.W.2d at 816; *see also* ***id.***, 2008 WI 78, ¶42, ___ Wis. 2d at ___, 751 N.W.2d at 814 ("when a defendant is determined to be in default, the factual allegations against the defendant, except those relating to the amount of damages, ordinarily are deemed true"). It pointed out that there are no exceptions suggesting that this general rule "cannot apply when the averment is denied in the separate responsive pleading of a codefendant." ***Id.***, 2008 WI 78, ¶54, ___ Wis. 2d at ___, 751 N.W.2d at 816. ***Estate of Otto*** thus concluded that under RULE 802.02(4), Physicians Insurance's default rendered it liable for the plaintiffs' damages:

> In support of causes of action pled directly against [Physicians Insurance], the plaintiff alleged that [Physicians Insurance]'s insureds were negligent causing damages to the plaintiff and that [Physicians Insurance] is "directly liable" to the plaintiff for these damages. [Physicians Insurance], in failing to deny this allegation of its liability in a timely answer, admitted it. With the issue of liability resolved by virtue of [Physicians Insurance]'s default, only the amount of damages was left to be determined before entry of judgment against [Physicians Insurance].

Estate of Otto, 2008 WI 78, ¶55, ___ Wis. 2d at ___, 751 N.W.2d at 816.

¶23 Under ***Estate of Otto***, Arch's default made it liable for the negligence of its insured's bus driver. Like Physicians Insurance, Arch cannot rely on its insured's answer to contest liability. Arch contends, however, that the second amended complaint here, unlike that in ***Estate of Otto***, did not allege that Arch is directly liable for the bus driver's negligence. Rather, Arch argues that the only "demand" in the second amended complaint is that Arch is an excess insurer

for Joy Farm. This argument ignores the second amended complaint's allegation that Arch's insured was causally negligent:

> On or about September 24, 2003, at or near the intersection of North 54th Street and West Chambers Street in the City of Milwaukee, Holst and King negligently operated their vehicles so as to cause their vehicles to collide which in turn caused the vehicle operated by King, a school bus, to impact with George F. Holliday who was on a bicycle proceeding in a legal manner eastbound on West Chambers Street. At the time of the collision, King was in the course of her employment with Joy Farm operating a school bus and, as such, Joy Farm is vicariously liable for all negligence of King as herein identified.

Arch's default admitted these allegations. *See* WIS. STAT. RULE 802.02(4); ***Estate of Otto***, 2008 WI 78, ¶42, ___ Wis. 2d at ___, 751 N.W.2d at 814 (party who defaults admits the factual allegations in the complaint). Accordingly, the circuit court properly determined that the default established Arch's liability for the bus driver/Joy Farm's negligence.

C. *Future Loss of Earning Capacity.*

¶24 Arch claims that there is no evidence to support the circuit court's award for Dr. Holliday's future loss of earning capacity. To prove a loss-of-future-earnings claim, a plaintiff must show: "'(1) the determination of the extent to which such capacity has been diminished, and (2) the fixing of the amount of money which will compensate for the determined extent of impairment.'" ***Ianni v. Grain Dealers Mut. Ins. Co.***, 42 Wis. 2d 354, 364, 166 N.W.2d 148, 153 (1969) (quoted source omitted). Medical evidence of disability, in combination with other evidence regarding a claimant's employment history, education, aptitude, and ability, may support an award for loss of future earning capacity. *See* ***Hoeft v. Milwaukee & Suburban Transp. Corp.***, 42 Wis. 2d 699, 715, 168 N.W.2d 134, 142 (1969).

> The determination of damages is within the discretion of the trial court. Whether the trial court applied a proper legal standard in determining damages is a question of law which we review *de novo.* Findings of fact made by the trial court with regard to damages will not be upset by us unless clearly erroneous.

Three & One Co. v. Geilfuss, 178 Wis. 2d 400, 410, 504 N.W.2d 393, 398 (Ct. App. 1993) (citations omitted).

¶25 The circuit court determined that Dr. Holliday was entitled to $373,700 for his future loss of earning capacity:

> I believe Dr. Holliday when he says he has shifted from 15 minute increments to 20 minute increments to compensate for the physical and mental fatigue he suffers as a result mainly of the condition of his hip, but, secondarily, the daily reminders of his accident and the various tolls it has taken…. That shift from 15 minute segments to 20 minute segments would imply a 33% loss of earning capacity.
>
> But I haven't seen a wage loss on that scale; at least Dr. Holliday did not provide me with the data to demonstrate a 33% reduction in salary or even potential salary.
>
> I do believe it is possible to reconcile the evidence on this point -- that the doctor has in fact increased the increments of his patient visits but in fact without a loss of income to the same degree. The way I reconcile these pieces of evidence is that I believe Dr. Holliday was not booked to truly full capacity before the accident. For example, he testified in his deposition that on some days he was seeing as few as ten patients.
>
> But I judge Dr. Holliday to be a hard worker who is motivated to support his family. He's a double board certified physician who went against doctors' orders to return to work sooner than recommended, and he testified sincerely about his concerns about bringing in enough income to meet all of his obligations.
>
> Therefore, I believe that the reason that he has not suffered a 33% loss of production is that he has done a better job in Duluth, even with an increased patient increment, of filling his entire plate so that he can

> maximize his time with patients and maximize his income as well.
>
> ….
>
> [T]he preponderance of the evidence also persuades me that despite his strong willingness to work he is not able to work as much as he could before the accident. I am persuaded by his testimony that he lacks stamina at the end of the day and that there are certain maneuvers in the examining room that he cannot confidently perform. I think some of these weaknesses may grow worse as the arthritis in his hip is likely to intensify. These observations lead me to concur with Mr. Riley that in fact Dr. Holliday has suffered some not insignificant loss of earning capacity.

The circuit court then quantified this loss by comparing Dr. Holliday's first-year guaranteed salary at the Duluth Clinic with his subsequent production-based salary. It noted that Dr. Holliday's guaranteed salary was larger than his production-based salary, "impl[ying] … that he has not reached the production level than an uninjured doctor in his circumstances might produce." By comparing these two figures, the circuit court determined that Dr. Holliday's income would be ten-percent less per year and, based on a yearly guaranteed salary of $140,000 until Dr. Holliday was sixty-seven years old, awarded damages of $360,000. The circuit court also awarded Dr. Holliday $13,700 "for the lost earning capacity he will suffer about ten years from now when his hip is replaced and he is unable to work … for about eight weeks."

¶26 On appeal, Arch acknowledges that Dr. Holliday "was involved in a significant accident that impacted his life in a significant way," but contends that the circuit court erred because there is no medical evidence showing that any permanent injuries Dr. Holliday may have sustained will affect his ability to work at any point in the future. *See* ***Schulz v. St. Mary's Hosp.***, 81 Wis. 2d 638, 657, 260 N.W.2d 783, 790 (1978) ("mere proof of a permanent injury is not conclusive

evidence of impairment of future earning capacity") (internal quotation marks and quoted source omitted). This argument appears to focus on the first aspect of the test for future earning capacity—the extent to which Dr. Holliday's earning capacity has been diminished. The evidence at the damages hearing supports the circuit court's conclusion that Dr. Holliday's injuries caused a loss in his earning capacity.

¶27 Dr. Holliday was thirty-eight years old at the time of the accident. He testified that he was practicing internal medicine and pediatrics in Milwaukee at Advanced Healthcare. Dr. Holliday told the court that at Advanced Healthcare his salary was "production based," or based on the number of patients he took care of. According to Dr. Holliday, he saw patients approximately every fifteen minutes.

¶28 Dr. Holliday told the court that, in December of 2004, he and his family moved to Duluth, Minnesota, where he joined the St. Mary's Duluth Clinic. His first-year salary at the Duluth Clinic was $140,000; after that, it was based on the number of patients he took care of. Dr. Holliday testified that he saw fewer patients at the Duluth Clinic as a result of his injuries, which included: lacerations on his head and face; broken bones in his face; missing teeth; a fractured elbow, wrist, and fingers; and a fractured hip. He told the court that, as a result of his eye and facial injuries, he has double vision which, in conjunction with the wrist and finger injuries, affect his ability to enter his work notes and to perform digital rectal examinations. According to Dr. Holliday, his hip injury causes continued pain, affects his balance, and limits his ability to sit or stand for extended periods. He told the circuit court that both sitting and standing are part of his job: "Both sitting and standing are part of it. As far as requirement, the sitting portion happens as we're getting information as a ground work, as a history, and then a

standing portion is during the physical exam portion." Dr. Holliday testified that due to the overall decrease in his mental sharpness and physical stamina, he sees patients at the Duluth Clinic in twenty- instead of fifteen-minute increments.

¶29 Gregory Schmeling, M.D., an orthopedic trauma surgeon, testified at his deposition that he performed surgery on Dr. Holliday to fix a left T/posterior wall acetabular fracture, or a t-shaped fracture to Dr. Holliday's left hip socket. According to Dr. Schmeling, Dr. Holliday's injury was:

> one of the more complex that I've seen in 15 years, but more importantly, in his case he had severe destruction of the soft tissue, the other tissues around the bone such that once we actually had reconstructed his hip socket, the hip was still unstable. And I have never experienced that in 15 years, other than with Dr. Holliday. And by unstable, I mean I could actually pull the hip, the femoral head, out of the hip socket just by grabbing onto the upper part of the femur. It would go in and out of the hip socket.

Dr. Schmeling testified that, based on his post-surgical examinations of Dr. Holliday, it was his opinion to a reasonable degree of medical probability that Dr. Holliday would have persistent pain, decreased motion, and weakness in his hip, and would not be able to "do his work and his activities to the same level he did them before." Dr. Schmeling testified that Dr. Holliday's need to decrease his patient load was consistent with his injury, specifying that Dr. Holliday has:

> substantial muscle atrophy in his hip musculature, which is going to make it very difficult for him to maintain prolonged periods of standing because that's what your hip muscles sort of do. And it also -- have difficulty with, you know, prolonged walking. So I think at the end of the day, I think he's going to fatigue…. [T]he amount of damage to the muscles has created irrecoverable or unrecoverable strength and endurance.

According to Dr. Schmeling, Dr. Holliday will also need at least one hip-replacement surgery in the future as a result of his injury.

¶30 Steven Grindel, M.D., an orthopedic surgeon, testified at his deposition that as a result of accident, he treated Dr. Holliday for fractures to his right wrist, right index finger, and left little finger. Dr. Grindel opined to a reasonable degree of medical probability that as a result of these injuries, Dr. Holliday would have permanent pain; deficits in range of motion, strength, and function; and an increased risk of arthritic changes. Dr. Grindel testified that Dr. Holliday's difficultly with entering his work notes and in performing digital rectal examinations was consistent with these injuries.

¶31 Sang Hong, M.D., an ophthalmologist, treated Dr. Holliday for fractures to his eye sockets, nose, cheek bone, and jaw; eye lacerations; and eye hemorrhaging. Dr. Hong opined to a reasonable degree of medical probability that Dr. Holliday would suffer permanent double-vision. Finally, Steven Sewall, D.D.S., an oral and maxillofacial surgeon, testified that he treated Dr. Holliday for severe dental and facial injuries. According to Dr. Sewall, these injuries will cause continued facial pain, swelling, and nasal congestion.

¶32 This evidence is sufficient to support the circuit court's award of damages for future loss of earning capacity. As we have seen, the circuit court found credible Dr. Holliday's testimony that his injuries affected his ability to perform some of his job requirements, including keyboarding and digital rectal examinations. The circuit court also found credible the testimony of the medical doctors, who explained that Dr. Holliday's injures would permanently affect his ability to perform some of his specific job requirements as well as his general ability to work on the same level as he did before. From this evidence, the circuit court reasonably concluded that Dr. Holliday's injuries caused a loss in his future earning capacity.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.