

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1219

Cir. Ct. No. 2006CV223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FRANCES VETTERKIND,

PLAINTIFF-RESPONDENT,

V.

JAMES J. ARMBRUST,

DEFENDANT-APPELLANT,

BIRCHWOOD LUMBER & VENEER COMPANY,

GARNISHEE.

APPEAL from an order of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. James Armbrust appeals an order denying a motion for relief from a default judgment. The issue is whether his attorney's untimely

filing of the answer should be imputed to Armbrust. Under the facts of this case, we conclude Armbrust was blameless and default judgment was inappropriate. We therefore reverse and remand.

¶2 Frances Vetterkind commenced an action alleging Armbrust failed to pay on a promissory note. Armbrust’s attorney filed an answer four days late. Vetterkind filed a motion for default judgment and, at the motion hearing, Armbrust’s attorney stated he misunderstood the effective date of the statutory change from forty-five to twenty days in which to answer a complaint under WIS. STAT. § 802.06(1).¹ The circuit court acknowledged, “there may have been some confusion about when it was going to be effective,” but found no excusable neglect and granted the motion for default judgment. The court subsequently denied Armbrust’s motion for relief from judgment under WIS. STAT. § 806.07(1)(a), (c) and (h). This appeal followed.

¶3 A circuit court’s decision to grant or deny a motion under WIS. STAT. § 806.07 is reviewed subject to an erroneous exercise of discretion standard. *Connor v. Connor*, 2001 WI 49, ¶27, 243 Wis. 2d 279, 627 N.W.2d 182. In the exercise of discretion, the court “must attempt to strike the appropriate balance between the countervailing policy considerations that consistently pull at either end of the default judgment spectrum.” *Id.* (quoting *J.L. Phillips & Assocs. v. E & H Plastic Corp.*, 217 Wis. 2d 348, 359, 577 N.W.2d 13 (1998)). In short, we balance the competing values of finality and fairness in the resolution of such a

¹ References to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

dispute. *Connor*, 243 Wis. 2d 279, ¶27. This statute is to be liberally construed because of its remedial nature. *Id.*, ¶28.

¶4 We turn first to whether the circuit court properly exercised its discretion by denying relief under WIS. STAT. § 806.07(1)(a), which provides that a party may be relieved from a judgment for mistake, inadvertence, surprise or excusable neglect. Cases from our supreme court have discussed excusable neglect in the context of imputing the conduct of an attorney to the client.

¶5 In *Charolais Breeding Ranches, Ltd. v. Wiegel*, 92 Wis. 2d 498, 514, 285 N.W.2d 720 (1979), the court stated that an attorney’s failure “may constitute excusable neglect on the part of the client, when the client has acted as a reasonable and prudent person in engaging a lawyer of good reputation, has relied upon him to protect his rights, and has made a reasonable inquiry concerning the proceedings.” The court concluded that the circuit court’s exercise of discretion “may or may not call for imputation, depending on the facts of each case.” *Id.*

¶6 In *State v. Smythe*, 225 Wis. 2d 456, 469-70 n.11, 592 N.W.2d 628 (1999), the court provided examples of circumstances in which the conduct of an attorney may be imputed to a client, such as complicity or knowledge of the delay. By contrast, the court in *Industrial Roofing Service, Inc. v. Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898, determined that it was “an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney’s conduct to the client, where the client was blameless”.

¶7 Under the facts of the present case, we conclude the untimely answer should not be imputed to Armbrust. First, nothing in the record demonstrates that Armbrust acted imprudently in engaging his attorney or relying upon his attorney

to protect his rights. As a practical matter, a layperson ordinarily cannot be expected to supervise his or her attorney in answering a complaint. This is not a case involving protracted proceedings without inquiry by the client, or conduct by the attorney which should have raised the client's suspicions. See *Charolais Breeding Ranches*, 92 Wis. 2d at 514-15; *Industrial Roofing*, 299 Wis. 2d 81, ¶61. We acknowledge the summons in this case specified that an answer was required within twenty days, and Armbrust had knowledge of the defenses to the allegations in the complaint. However, the answer was filed only four days late and nothing in the record shows Armbrust knew or had reason to know the complaint would not be answered timely.

¶8 Moreover, there is no evidence of Armbrust's complicity. To the contrary, his attorney admitted on the record in open court that, "the only fault is my own." We also note the circuit court's observation that, "there may have been some confusion about when [the statutory change] was going to be effective." Accordingly, we are unable to discern from the facts of this case conduct by the attorney that may be properly imputed to the client.

¶9 In order to obtain relief from a default judgment, the person against whom it has been entered must also show that he or she has a "meritorious defense" to the action. See *J.L. Phillips*, 217 Wis. 2d at 358. In an affidavit attached to his motion for relief, Armbrust alleged several meritorious defenses. First, he alleged the promissory note was a ruse, and was actually a gift from his wife's parents to help his wife while she was undergoing cancer treatment. Armbrust further contends that demands for repayment were made only after his wife died and he began dating a new woman. Armbrust also claims he overpaid the monthly minimum requirement and therefore was not in arrears on the note. In addition, Armbrust alleged the note provided that no interest shall accrue on the

unpaid balance, yet the default judgment necessarily includes an interest component.

¶10 Therefore, we cannot uphold the circuit court's conclusion as a proper exercise of discretion. We reverse specifically as to the issue of imputing the negligence of the attorney to Armbrust. We need not reach the issue of whether additional subsections of WIS. STAT. § 806.07 justified relief from judgment. *See Gross v. Hoffman*, 227 Wis. 296, 299-300, 277 N.W. 663 (1938).

¶11 Our reversal of the default judgment in the case should not be interpreted as an impairment of the court's power to grant default or effectuate other sanctions to facilitate the efficient administration of justice in the appropriate circumstances. *See Smythe*, 225 Wis. 2d at 471. A circuit court considering the facts of a particular case may, as in cases cited herein, conclude the client failed to present sufficient evidence of excusable neglect. However, this case presents circumstances where the court ought not to have imputed the attorney's conduct to Armbrust.

By the Court.—Order reversed and cause remanded.

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

