

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 13, 2009**

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. 2008AP101**

**Cir. Ct. No. 2006CV911**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**ASSOCIATED BANC-CORP.,**

**PLAINTIFF-COUNTER DEFENDANT-  
RESPONDENT-CROSS-APPELLANT,**

**v.**

**SANDRA RONEY D/B/A RONEY IMAGES,**

**DEFENDANT-COUNTER CLAIMANT-  
APPELLANT-CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Associated Banc-Corp. sued Sandra Roney, doing business as Roney Images, for breach of contract; Roney counter-claimed for negligent misrepresentation. A jury awarded Associated Banc \$3,806 in damages on its contract claim, and Roney \$75,000 in damages on her negligent-misrepresentation claim. Roney appeals the trial-court judgment reducing her damages to \$1313.29. Roney claims that the trial court erred when it: (1) denied her motion at the end of Associated Banc’s case-in-chief to dismiss its breach-of-contract claim against her; and (2) concluded that she did not have the requisite expertise to testify about her lost-business profits, which she claims flowed from Associated Banc’s negligent misrepresentation. We agree, and reverse and remand with directions to the trial court to dismiss Associated Banc’s breach-of-contract claim and hold a new trial on Roney’s damages.<sup>1</sup>

¶2 Associated Banc cross-appeals, contending that: (1) the trial court erred when it reduced its breach-of-contract damages to \$0; (2) Roney’s damages are not supported by credible evidence; and (3) the trial court erred when it excluded a “Deposit Account Information” brochure during Associated Banc’s case-in-chief. Our resolution of Roney’s appeal renders all but the last contention moot. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442

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<sup>1</sup> Roney also counter-claimed for intentional misrepresentation. The jury found against her on this claim and she does not pursue it on appeal. Roney further contends that the trial court erred when it: (1) concluded that her damages of \$75,000 were not supported by credible evidence; (2) permitted Associated Banc to reopen its case to submit exhibits; and (3) extended the time for Associated Banc to file its pre-trial submissions. We either affirm or do not discuss these issues because they are moot. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the “narrowest possible ground”).

N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the “narrowest possible ground”).

## I.

¶3 The underlying facts are undisputed. Roney is a wedding photographer. She had a business checking account with Richmond Bank. Associated Banc bought Richmond Bank’s successor. In the spring of 2006, Roney received an e-mail from a potential customer professing to agree to pay \$3,159 for a wedding-photography package. The customer sent Roney a cashier’s check purporting to be from the Bank of America for \$7,400. The customer then e-mailed Roney, saying that his accountant sent the wrong amount and asked Roney to wire the difference to his travel agent. As we will see, this was a variant on the classic 419-advance-fee scam. *See* [http://en.wikipedia.org/wiki/Advance\\_fee\\_fraud](http://en.wikipedia.org/wiki/Advance_fee_fraud) (named after an “article of the Nigerian Criminal Code” that makes such scams illegal).

¶4 Roney took the cashier’s check to Associated Banc. According to Roney’s trial testimony, she explained the situation and asked the bank whether the check was “good.” The bank told her three times that the check was valid. Associated Banc cashed the check and Roney put \$3,159.72 in her bank account, took the remainder in cash, and wired \$4,045 to the customer’s supposed travel agent. The cashier’s check, contrary to the bank’s assurance, was counterfeit and the Bank of America did not honor it. Associated Banc subtracted the \$7,400 from Roney’s account, which did not have enough to cover the full \$7,400. Associated Banc thus began to bounce her checks, dishonor automatic transfers from the account, and charge her overdraft fees. It ultimately closed Roney’s account with a negative balance.

¶5 Associated Banc sued Roney for the unrecovered part of the cashier's check and overdraft fees, alleging that she had "knowledge of" and breached its "Deposit Account Information Rules." Roney denied that she knew about the rules and, as we have seen, counter-claimed for negligent misrepresentation, seeking, among other things, damages for "[l]oss of business income/loss of profit."

¶6 Associated Banc called three witnesses in its case-in-chief: two of its regional security officers and Roney. During the security officers' testimony, Associated Banc tried to introduce a brochure titled "Deposit Account Information." (Uppercasing omitted.) The trial court ruled that the brochure was inadmissible, concluding, among other things, that it was irrelevant because there was no evidence that Associated Banc sent it to Roney or that Roney had otherwise received it.

¶7 At the end of Associated Banc's case-in-chief, Roney moved to dismiss Associated Banc's breach-of-contract claim, arguing that the bank had not shown there was any agreement or contract allowing the bank to setoff the cashier's check or assess fees. The trial court denied the motion, and Roney then testified in her case-in-chief on her counter-claim.

¶8 The jury returned its verdict on August 22, 2007. On Associated Banc's breach-of-contract claim, it found that Associated Banc was entitled to assess fees and costs "subject to the terms and conditions of the Deposit Account Information," and awarded damages of \$3,806. (As we discuss below, the trial court later received the "Deposit Account Information" brochure into evidence.) On Roney's negligent-misrepresentation counter-claim, the jury found that

Associated Banc was ninety percent negligent, that Roney was ten percent negligent, and awarded \$75,000 in damages to her.

¶9 On post-verdict motions, Roney sought judgment on the verdict and Associated Banc requested a new trial, claiming that the verdict was excessive. In the alternative, the bank asked the trial court to reduce Roney's damages. The trial court's clerk told the parties that three dates were available for a hearing: September 28, October 12, and October 24, 2007. Roney's lawyer said that he would be available on October 24. Neither party disputes that October 24 was more than sixty days after the verdicts. *See* WIS. STAT. RULE 805.16(2) ("arguments on motions after verdict shall be not less than 10 nor more than 60 days after the verdict is rendered").

¶10 On October 24, the trial court orally ruled on the parties' motions. It determined that Associated Banc's damages were "negated" by the jury's finding that it was ninety percent negligent, and reduced them to \$0. The trial court also determined that Roney's damages were not supported by the evidence, and reduced them by an amount that it said it would determine later.

¶11 The trial court memorialized its findings in a December 7, 2007, order for judgment. Based on the parties' submissions, it reduced Roney's damages to \$1313.29 plus costs, for a total judgment of \$1,985.29. Neither party disputes that the order for judgment was filed more than ninety days after the verdicts. *See* WIS. STAT. RULE 805.16(3) (motions after verdict not decided "on the record" within ninety days of verdict considered denied).

## II.

## A.

¶12 Roney claims that the trial court lost competency to decide Associated Banc’s post-verdict motion to reduce her damages because it did not hear the motion within sixty days of the verdicts or enter the order for judgment within ninety days of the verdicts. *See Jos. P. Jansen Co. v. Milwaukee Area Dist. Bd. of Vocational, Technical & Adult Educ.*, 105 Wis.2d 1, 10, 312 N.W.2d 813, 817 (1981) (trial court loses competency to decide post-verdict motions when it does not comply with the time limits in WIS. STAT. RULE 805.16). We disagree.

¶13 WISCONSIN STAT. RULE 805.16 provides, as material:

(2) The time for hearing arguments on motions after verdict shall be not less than 10 nor more than 60 days after the verdict is rendered, *unless enlarged pursuant to motion under s. 801.15 (2) (a)*.<sup>2</sup>

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<sup>2</sup> 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.

Under RULE 801.15(2)(a), a trial court’s power to enlarge the time for filing motions is “highly discretionary.” *See Heditcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 467, 326 N.W.2d 727, 730 (1982).

(3) If within 90 days after the verdict is rendered the court does not decide a motion after verdict *on the record* or the judge, or the clerk at the judge's written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

(Emphases and footnote added.)

¶14 The trial court did not lose competency to decide the post-verdict motions. It implicitly enlarged the time for hearing arguments when it gave the parties a hearing date beyond the sixty-day time limit and neither party objected. See *Hefty v. Strickhouser*, 2008 WI 96, ¶53, \_\_\_ Wis. 2d \_\_\_, \_\_\_, 752 N.W.2d 820, 833 (“In the absence of some specific dispute ... we see no need for the court to explain scheduling decisions on the record. There is surely a presumption that a court is acting rationally and impartially in constructing a scheduling order.”); *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727, 732 (1982) (when trial court does not give reason for enlarging time, reviewing court may examine Record to determine whether trial court exercised discretion). Moreover, the trial court decided the motions on the Record within the ninety-day time limit when it orally decided the motions at the October 24 hearing. See *Graf v. Gerber*, 26 Wis. 2d 72, 74, 131 N.W.2d 863, 865 (1965) (“if the trial court’s decision[] on motions after verdict is given verbally [*sic*] from the bench in open court within the allotted period, it is timely even though not transcribed and filed until after this period has expired”) (applying predecessor statute).<sup>3</sup> As we will see, however, this issue is moot in connection with Roney’s appeal because Roney is entitled to a

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<sup>3</sup> Although the word “verbally” is commonly used to mean “orally,” “verbal” refers to communication by words, whether written or oral, and “orally” is the preferred usage when the communication is spoken rather than written. See *State v. Ebersold*, 2007 WI App 232, ¶¶9–13, 306 Wis. 2d 371, 377–380, 742 N.W.2d 876, 878–880.

new trial on damages. *See Gross*, 227 Wis. at 300, 277 N.W. at 665; *Blalock*, 150 Wis. 2d at 703, 442 N.W.2d at 520.

B.

¶15 The trial court refused to let Roney testify about the business she lost as a result of Associated Banc having misled her about the validity of the scammer's cashier's check because it concluded that she lacked the requisite expertise. Roney made the following offer of proof outside of the jury's presence (*see* WIS. STAT. RULE 901.03(1)(b) & (3)):

- she had been a wedding photographer since 1998;
- she maintained her own books and records, which gave her “knowledge of what the costs are for [] running [her] business”;
- she did an analysis of the “costs, expense[s], and profits” for the wedding photography she did in 2006;
- her gross income for 2006 was \$38,496.45, her costs for that year were \$14,615.54, and her sales tax for that year was \$1,639.37, and after she subtracted her costs and sales tax from her gross income, she had a gross profit of \$22,241.54, or a fifty-eight percent profit margin for 2006.

As part of her offer-of-proof, Roney submitted a list of bookings, showing for each one: her cost, the price she charged, and the tax. According to Roney, the 2006 “volume of work” was “typical from years past.”

¶16 Roney also testified during her offer-of-proof that to August of 2007 she had a gross income of \$14,280. With a fifty-eight percent profit margin, she expected to earn some \$8,000 in profits. As she did for 2006, Roney submitted a

list of her bookings for 2007, showing for each one: her cost, the price she charged, and the tax. Roney told the trial court that while it was possible there “may be some ... late or short-notice type wedding situations” for the remainder of 2007, the “bulk of [her] work is for large weddings planned a long time in advance.”

¶17 Roney attributed her “falloff in business” in 2007 to her inability to pay for her webpage, her internet yellow-pages advertisement, and her chamber-of-commerce listing after Associated Banc “took action” against her account. She anticipated that “had that not occurred, [her] 2007 bookings would have been approximately in the same level as 2006.” Roney could not, however, testify how much of her business came from the webpage or chamber-of-commerce listing. When asked on cross-examination during her offer-of-proof whether the number of photographers in the area affected her 2007 income, Roney replied that she was “only speculating, but [didn’t] think so.” She told the trial court that she was only aware of one new wedding photographer in the area within the preceding year.

¶18 The trial court found that Roney did “not have the expertise to give an opinion as to her lost profits”:

Respectfully to this witness, the only thing she can testify to is her income was such-and-such an amount in 2006. Perhaps she can also say what it was in 2005 and 2004. From that, she extrapolates that her income should be the same. That’s all she can say.

She cannot give the underlying economic factors that are occurring; she can’t say how many of her orders came through the website and how many did not, even -- not that it particularly would matter, but it might help.

She can’t -- she can basically say she’s only aware of one new photographer in the area. Doesn’t mean she’s done a study to see if there are five or six more. She’s only aware of one.

Roney contends that the trial court applied the wrong standard because she was qualified to testify as to the business she claimed to have lost as a result of what Associated Banc did. We agree.

¶19 “The decision whether a witness is competent to testify on a particular matter is within the trial court’s discretion.” *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶25, 265 Wis. 2d 703, 722, 666 N.W.2d 38, 48.

Damages for lost profits need not be proven with absolute certainty, but the claimant must produce sufficient evidence ... on which to base a reasonable inference as to a damage amount. To establish lost profits, the claimant must produce evidence of the business’s revenue as well as its expenses. Assertions as to the amount of lost profits have no evidentiary value unless supported by figures showing profits and losses.

*Lindevig v. Dairy Equip. Co.*, 150 Wis. 2d 731, 740, 442 N.W.2d 504, 508 (Ct. App. 1989) (citations omitted); *see also T & HW Enters. v. Kenosha Assocs.*, 206 Wis. 2d 591, 605 n.5, 557 N.W.2d 480, 485 n.5 (Ct. App. 1996) (lost-profit damages recoverable where claimant can present business history and experience sufficient to allow fact-finder to reasonably ascertain future lost profits). As a business owner, however, Roney was competent to testify about her lost business-profits. *See Teff*, 2003 WI App 115, ¶¶27–28, 265 Wis. 2d at 723–724, 666 N.W.2d at 48–49 (business owner competent to testify on lost payments). Her testimony on lost profits was based on her experience as a wedding photographer and detailed records of her income and costs kept in the course of her business. This is all that is required. *See id.*, 2003 WI App 115, ¶28, 265 Wis. 2d at 724, 666 N.W.2d at 49. Accordingly, we reverse and remand for a new trial on Roney’s damages.

## C.

¶20 As we have seen, at the close of Associated Banc’s case-in-chief, Roney moved to dismiss Associated Banc’s breach-of-contract claim.<sup>4</sup> Specifically, Roney pointed out that there was no evidence that she had received the bank’s deposit-account-information rules or that those rules applied to her account.

¶21 Associated Banc did not reference any evidence that Roney had received the deposit-account-information rules. Instead, it asked the trial court to take judicial notice of 12 U.S.C. §§ 4303 and 4305, which provide, as material:<sup>5</sup>

**§ 4303. Account schedule**

**(a) In general**

Each depository institution shall maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by the depository institution, in accordance with the requirements of this section and regulations which the Board [of Governors of the Federal Reserve System] shall prescribe. The Board shall specify, in regulations, which fees, charges, penalties, terms, conditions, and account restrictions must be included in a schedule required under this subsection. A depository institution need not include in such schedule any information not specified in such regulation.

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<sup>4</sup> Roney moved for a “directed verdict.” Technically, a “directed verdict” is appropriate only at the close of all the evidence. *See* WIS. STAT. RULE 805.14(4). The proper motion at the end of the plaintiff’s case-in-chief is a motion for “dismissal.” *See* RULE 805.14(3).

<sup>5</sup> Roney also asked the trial court to take judicial notice of 12 C.F.R. § 229 (availability of funds and collection of checks) or “Regulation CC.” At the trial, one of the security officers testified that Roney had a business account, and that “Reg CC does not apply to business account deposits.” Associated Banc does not claim otherwise on this appeal. Accordingly, we do not address 12 C.F.R. § 229.

**§ 4305. Distribution of schedules**

**(a) In general**

A schedule required under section 4303 of this title for an appropriate account shall be—

(1) made available to any person upon request;

(2) provided to any potential customer before an account is opened or a service is rendered; and

(3) provided to the depositor, in the case of any time deposit which has a maturity of more than 30 days is renewable at maturity without notice from the depositor, at least 30 days before the date of maturity.

(Footnote omitted.) *See also* WIS. STAT. § 404.103(2) (“Federal reserve regulations and operating circulars, clearinghouse rules, and the like, have the effect of agreements ... whether or not specifically assented to by all parties interested in items handled.”).

¶22 The trial court appeared to take judicial notice of the statutes, *see* WIS. STAT. RULE 902.01 (judicial notice), and denied Roney’s motion, concluding that under 12 U.S.C. § 4305(a) Associated Banc was not required to provide Roney with the rules:

[The statute] says that she’s charged with assenting. She could have asked for it. She did not. It does not in any way require the bank to, every single time there’s a change of bank ownership, that they have to send her a new one, and/or even at the -- had to send the one originally. But even if they didn’t send it originally -- and maybe Richmond Bank screwed up, doesn’t matter, because she could ask for it, and she is bound by it. Whether she assented to it or not. That’s what the statute says.

Roney contends that the trial court erred because under “basic contract requirement[s]” Roney was required to have notice of the rules. We agree.

¶23 “We review a trial court’s decision to grant a defendant’s motion to dismiss for insufficient evidence at the close of plaintiff’s case on a de novo basis.” *Kain v. Bluemound E. Indus. Park, Inc.*, 2001 WI App 230, ¶21, 248 Wis. 2d 172, 184, 635 N.W.2d 640, 645–646.

The trial court may grant a motion to dismiss for insufficient evidence at the close of plaintiff’s case only if “the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party.” When ruling on a motion to dismiss, the trial court should consider only the proof that the plaintiff has offered before resting its case. Our review on appeal is the same as that conducted by the trial court.

*Id.*, 2001 WI App 230, ¶21, 248 Wis. 2d at 184, 635 N.W.2d at 646 (citations and quoted source omitted).

¶24 “The relationship between a bank and its depositor is grounded in contract.” *Schaller v. Marine Nat’l Bank of Neenah*, 131 Wis. 2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). The essential elements of a contract are an offer, an acceptance, and consideration. *Gustafson v. Physicians Ins. Co. of Wisconsin, Inc.*, 223 Wis. 2d 164, 173, 588 N.W.2d 363, 367 (Ct. App. 1998). “An offer and acceptance exist when mutual expressions of assent are present.” *Ibid.*; see also *Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 246, 525 N.W.2d 314, 318 (Ct. App. 1994) (“A contract is based on a mutual meeting of the minds as to terms, manifested by mutual assent.”).

¶25 The trial court erred when it denied Roney’s motion to dismiss for two reasons. First, as we have seen, under basic contract law, Associated Banc was required to show that Roney received and assented, either expressly or tacitly, to the rules. Associated Banc did not produce *any* evidence in its case-in-chief

that either it or Richmond Bank gave to Roney the deposit-account-information rules. Second, and this is consistent with the basic contract law we have discussed, 12 U.S.C. § 4305(a) requires that a customer have notice of a bank's terms and conditions. See *ibid.* (“A schedule required under section 4303 of this title for an appropriate account shall be—(1) made available to any person upon request; (2) *provided to* any potential customer before an account is opened or a service is rendered.”) (emphasis added). Accordingly, the trial court did not err in not initially receiving the brochure, see *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (we may affirm for a reason not relied on by the trial court), and we reverse and remand with directions to the trial court to dismiss Associated Banc's breach-of-contract claim.

D.

¶26 Roney claims that the trial court erroneously exercised its discretion when it reopened the evidence to allow Associated Banc to submit its exhibits, and points to two instances. According to Roney, the first was when, at the close of Roney's defense and counter-claim, Associated Banc moved to admit its exhibits, including the cashier's check, Roney's account information, and a wire-transfer receipt. Roney made a general objection, arguing that Associated Banc should have moved to admit these exhibits at the end of its case-in-chief: “We brought our motion for a directed verdict, and then we proceeded with our defense and counterclaim. [The exhibits] should have been provided at the end of [its] case.” The trial court permitted Associated Banc to offer the exhibits: “I'll admit it if it's relevant, even if it wasn't offered timely, and I'd do the same for both sides.” Roney contends that this was an erroneous exercise of discretion. We disagree.

¶27 The decision to reopen a case for additional evidence is in the trial court’s discretion. See *Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530, 536 (1984); see also *State v. Vodnik*, 35 Wis. 2d 741, 746, 151 N.W.2d 721, 723–724 (1967) (“[T]he discretion of the trial court [to reopen a case] ... rest[s] upon general principles of equity and justice including whether the opposing party is prejudiced in the trial or proof of his contentions.”). Roney has not shown prejudice. As we have seen, the trial court explained that it would allow the belated admission of relevant exhibits for both parties. Roney has not shown that the trial court erroneously exercised its discretion.

¶28 Roney contends that the second instance was when the trial court erroneously allowed Associated Banc to buttress its case after the evidence on that aspect of the trial was closed. Roney made a specific objection at the close of her defense and counter-claim to the Associated Banc’s sought-for admission of the “Deposit Account Information” brochure. Roney argued that the brochure was inadmissible because Associated Banc had not provided any evidence that the brochure was in effect when Roney cashed the fraudulent cashier’s check. The trial court, based on its earlier ruling that the federal statutes do not require assent, reopened the evidence so that Associated Banc could lay the proper foundation for the admission of the brochure.

¶29 Associated Banc recalled as a witness one of the security officers. The security officer testified that the brochure contained the bank’s “rules for having an account.” She told the jury that the rules applied to all of the bank’s customers and that the last revision was in February of 2006. The trial court admitted the brochure into evidence. The officer did not, however, connect the brochure and its contents to Roney—as with the situation in its case-in-chief, the bank again did not present any evidence that Roney had agreed either expressly or

tacitly to the rules. Further, given our conclusion that the trial court should have dismissed Associated Banc's breach-of-contract claim at the end of its case-in-chief, this matter is now moot. *See Gross*, 227 Wis. at 300, 277 N.W. at 665; *Blalock*, 150 Wis. 2d at 703, 442 N.W.2d at 520.

E.

¶30 The trial court issued a pre-trial scheduling order requiring the parties to appear at the final pre-trial conference with counsel. It also required Associated Banc to file before the final pre-trial conference proposed verdict forms, jury instructions, and an itemization of damages.

¶31 Associated Banc's lawyer appeared at the pre-trial conference without a bank representative. It also did not file any of the required submissions. Associated Banc's lawyer explained that the bank had changed law firms and there was what she claimed was a miscommunication as to which lawyer was going to file the documents. The trial court gave Associated Banc more time to file the required submissions. Associated Banc filed its proposed special verdict questions, jury instructions, and itemization of damages four days later.

¶32 Roney claims that the trial court erred because the bank did not move to enlarge the time for filing its submissions or show excusable neglect. *See* WIS. STAT. RULE 801.15(2)(a) ("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."). We disagree.

¶33 Pre-trial calendar orders are governed by WIS. STAT. RULE 802.10. As material, RULE 802.10(3) provides that “the circuit court may enter a scheduling order on the court’s own motion or on the motion of a party.”<sup>6</sup> Under

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<sup>6</sup> WISCONSIN STAT. RULE 802.10(3) provides in full:

SCHEDULING AND PLANNING. Except in categories of actions and special proceedings exempted under sub. (1), the circuit court may enter a scheduling order on the court’s own motion or on the motion of a party. The order shall be entered after the court consults with the attorneys for the parties and any unrepresented party. The scheduling order may address any of the following:

- (a) The time to join other parties.
- (b) The time to amend the pleadings.
- (c) The time to file motions.
- (d) The time to complete discovery.
- (e) The time, not more than 30 days after entry of the order, to determine the mode of trial, including a demand for a jury trial and payment of fees under s. 814.61 (4).
- (f) The limitation, control and scheduling of depositions and discovery, including the identification and disclosures of expert witnesses, the limitation of the number of expert witnesses and the exchange of the names of expert witnesses.
- (g) The dates for conferences before trial, for a final pretrial conference and for trial.
- (h) The appropriateness and timing of summary judgment adjudication under s. 802.08.
- (i) The advisability of ordering the parties to attempt settlement under s. 802.12.
- (j) The need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems.

(continued)

RULE 802.10(3), the decision to modify a scheduling order is within the trial court's discretion. See *Hefty*, 2008 WI 96, ¶31, \_\_\_ Wis. 2d at \_\_\_, 752 N.W.2d at 828 (trial courts have both inherent and statutory discretion to control their dockets); *Teff*, 2003 WI App 115, ¶29, 265 Wis. 2d at 724, 666 N.W.2d at 49 (“trial court has broad discretion in deciding how to respond to untimely motions to amend scheduling orders”).

¶34 The trial court's decision to extend Associated Banc's deadline for pre-trial submissions was well within its discretion. As we have seen, Associated Banc provided the trial court with a reason for the delay and filed its proposed special verdict questions, jury instructions, and itemization of damages four days after the initial deadline. Roney does not claim that Associated Banc's late filings in any way interfered with her ability to fully present her case. See *Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 310, 470 N.W.2d 873, 878 (1991) (“primary concern of the circuit court when addressing an untimely motion to amend a scheduling order is on accommodating the conflicting interests in permitting parties to fully present their case, in preventing prejudice to the opposing party, and in deterring litigants from flaunting court orders and interfering with the orderly administration of justice”).

### III.

¶35 Associated Banc cross-appeals, claiming that the trial court erred when it reduced its damages to \$0, and that Roney's damages of \$1,313.29 are not supported by credible evidence. As we have seen, however, we are remanding for

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(k) Any other matters appropriate to the circumstances of the case, including the matters under sub. (5) (a) to (h).

a new trial on Roney’s damages and for the dismissal of Associated Banc’s breach-of-contract claim. Accordingly, these matters are now moot. *See Gross*, 227 Wis. at 300, 277 N.W. at 665; *Blalock*, 150 Wis. 2d at 703, 442 N.W.2d at 520.<sup>7</sup> Associated Banc also claims in its cross-appeal that the trial court erred when it excluded the “Deposit Account Information” brochure during Associated Banc’s case-in-chief. As we have also seen, however, the bank did not, either in its case-in-chief or when the trial court permitted it to reopen, lay a proper foundation for the brochure’s receipt into evidence.

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

Publication in the official reports is not recommended.

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<sup>7</sup> Associated Banc also contends that Roney’s lawyer should be sanctioned for filing frivolous pre-trial motions. Associated Banc does not, however, provide Record citations or adequately develop its arguments on this issue. Accordingly, we decline to address it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can “decline to review issues inadequately briefed”); *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990) (court of appeals not required to scour Record to review arguments unaccompanied by adequate citations to Record).

