

**Appeal No. 01-1048**  
**STATE OF WISCONSIN**

**Cir. Ct. No. 99-CV-110**

**IN COURT OF APPEALS**  
**DISTRICT III**

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**NANCY MORALES,**

**PLAINTIFF-RESPONDENT,**

**v.**

**LIBERTY MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT.**

**FILED**

**January 17,**  
**2002**

Cornelia G. Clark  
Clerk of Court of Appeals

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**ERRATA SHEET**

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PLEASE TAKE NOTICE that corrections were made to paragraphs 14 and 17 in the above-captioned opinion that was released on January 15, 2002. A corrected electronic version in its entirety is available on the court's website at [www.courts.state.wi.us](http://www.courts.state.wi.us).

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 15, 2002**

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.

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APPEAL from an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Liberty Mutual Insurance Company appeals an order denying its motions to set aside a default judgment and enlarge the time to answer the complaint, or, in the alternative, to reopen the issue of damages. Liberty argues that the circuit court erred by denying its motions because: (1) the

default judgment was void; and (2) there was excusable neglect. We conclude that the circuit court did not err by denying Liberty's motion to set aside the liability portion of the default judgment and enlarge the time to answer the complaint. However, Liberty received no notice of the specific amount of money claimed prior to the court rendering judgment, pursuant to WIS. STAT. § 806.02(2). Therefore, we reverse the damages portion of the order and remand for further proceedings consistent with this opinion.

### BACKGROUND

¶2 On September 13, 1999, Nancy Morales filed a summons and complaint against Liberty alleging she had been injured in a slip and fall accident and seeking unspecified damages. The accident occurred at Fittante's County Market in Antigo. The complaint also alleged that Liberty issued an insurance policy providing coverage for Fittante's negligence.<sup>1</sup>

¶3 Morales served the summons and complaint on Liberty's registered agent on September 20, 1999. Liberty failed to appear or answer the complaint within forty-five days. *See* WIS. STAT. § 802.06(1). Liberty later speculated that the summons and complaint were misplaced due to the closure of a Liberty office.

¶4 Morales moved the circuit court for a default judgment in the amount of \$50,000 against Liberty. Morales' motion papers, dated November 22, 1999, purported to give notice to Liberty of the motion for default judgment.

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<sup>1</sup> In reality, Liberty had never issued a policy of insurance providing liability coverage to Fittante's.

However, motion papers were never sent to Liberty. At the motion hearing on November 30, the court granted Morales' motion and entered a default judgment.

¶5 On December 26, 2000, after Liberty learned of the default judgment, it moved to set aside the judgment and enlarge the time to answer the complaint. Liberty also moved to reopen the award of damages. The circuit court denied the motions, concluding that the judgment was not void, there was no excusable neglect to justify setting aside the default judgment, and there was no need to reopen the issue of damages because no further notice was required for a default judgment.

#### STANDARD OF REVIEW

¶6 We review a circuit court's decision to enter a default judgment under an erroneous exercise of discretion standard. *Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 650, 360 N.W.2d 554 (Ct. App. 1984). A court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). We will sustain a court's default judgment if there is a reasonable basis for its determination. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991).

#### DISCUSSION

¶7 The procedure for obtaining a default judgment is set forth in WIS. STAT. § 806.02(2).<sup>2</sup> Section 806.02(2) provides that if the amount of money

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<sup>2</sup> WISCONSIN STAT. § 806.02(2) reads as follows:

(continued)

sought is required to be excluded from the demand for judgment under § 802.02(1m)(a),<sup>3</sup> the plaintiff must specify the amount of money claimed and provide that information to the defendant prior to the court granting judgment. *Stein v. Illinois State Assistance Comm'n*, 194 Wis. 2d 775, 782, 535 N.W.2d 101 (Ct. App. 1995).

¶8 WISCONSIN STAT. § 806.07(1)(a) and (d)<sup>4</sup> allows the trial court to grant relief from a default order if, among other things, the judgment is void or a party's failure to appear was the result of excusable neglect.

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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.

<sup>3</sup> WISCONSIN STAT. § 802.02(1m)(a) reads as follows:

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.

<sup>4</sup> WISCONSIN STAT. § 806.07(1) reads as follows:

On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(continued)

## I. VOID JUDGMENT

¶9 Liberty argues that the judgment is void because Morales did not follow the statutory requirements for obtaining a default judgment found in WIS. STAT. § 806.02(2). Liberty bases its argument on *Stein* contending it holds that failure to serve a defendant with notice of the specific amount of money prior to a court entering judgment renders the judgment void.

¶10 Liberty misreads *Stein*. There, the plaintiff commenced an action against the defendant for destroying his creditworthiness. The complaint stated that the plaintiff was seeking compensatory damages, but did not specify a dollar amount. When the defendant failed to file a responsive pleading, the plaintiff moved for default judgment and filed an affidavit seeking \$10,000 in compensatory damages. The plaintiff did not serve the affidavit on the defendant.

¶11 We deemed WIS. STAT. § 806.02(2) clear and held that the plaintiff was obligated to inform the defendant of the specific sum of damages before the court could enter default judgment. *Stein*, 194 Wis. 2d at 782. We concluded that

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- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
  - (d) The judgment is void;
  - (e) The judgment has been satisfied, released or discharged;
  - (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
  - (g) It is no longer equitable that the judgment should have prospective application; or
  - (h) Any other reasons justifying relief from the operation of the judgment.

a different interpretation would effectively eliminate from the statute the language “shall require the plaintiff to ... provide that information ... to the other parties prior to the court rendering judgment.” *Id.* (citation omitted).

¶12 Contrary to Liberty’s assertion, we did not hold that failing to give the defendant notice of the specific amount of money being sought voided the entire judgment. Rather, this portion of our decision in *Stein* stands for the proposition that failure to give the defendant notice of the specific amount of money being sought voids only the damage portion of the judgment, not the liability portion. *See id.*

¶13 In *Stein*, we voided the default judgment because, “in the context of this particular case, where the opposing party and its attorney were known, the affidavit of [the plaintiff] became an assertion for the first time of a claim for specific relief and constituted an additional part of the complaint.” *Id.* at 783. As part of the complaint, the affidavit should have been served on the defendant pursuant to WIS. STAT. §§ 801.11 and 801.14. *Id.* Because those requirements were not followed, we held the judgment was void. *Id.*

¶14 Here, Morales did not provide Liberty with notice of the specific amount claimed before the circuit court granted the motion for a default judgment. While this is a violation of the requirements in WIS. STAT. § 806.02(2), it does not follow that the entire judgment is void. Therefore, we reject Liberty’s argument and conclude that the court did not err by denying Liberty’s motion to set aside the judgment.



## II. EXCUSABLE NEGLIGENCE

¶15 Liberty argues that the circuit court erred by not enlarging the time to answer the complaint because of excusable neglect. According to Liberty, it heard nothing from Morales from September 20, 1999 until December 16, 2000, when Morales faxed a copy of the default judgment. Liberty contends that had Morales given Liberty notice of the specific amount of damages in the default judgment, it would have realized its mistake much sooner and would have been able to determine how the summons and complaint were misplaced. Now, because so much time has gone by, Liberty is unable to determine why it did not file an answer. Therefore, Liberty concludes that it was prejudiced by Morales' failure to follow the procedures in WIS. STAT. § 806.02(2).

¶16 A defendant is required to respond to a complaint within forty-five days of receiving the summons. WIS. STAT. § 801.095(1). The court may grant a default judgment to the plaintiff if the defendant fails to meet that deadline. WIS. STAT. § 806.02; *Hollingsworth v. American Fin. Corp.*, 86 Wis. 2d 172, 181, 271 N.W.2d 872 (1978). The time for filing an answer may be enlarged after the deadline has already passed if the delinquency was the result of excusable neglect. WIS. STAT. § 801.15(2)(a). Excusable neglect is "neglect which might have been the act of a reasonably prudent person under the same circumstances." *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted). It is not synonymous with carelessness or inattentiveness. *Id.* (quotation omitted).

¶17 The trial court reasonably concluded that Liberty acted in a nonprudent manner. Liberty did not answer the summons and complaint. It did not file its motion until December 26, 2000. Liberty speculates that the reason for not answering the complaint was that there was confusion in the closing of a

Liberty claims office at the time. Because excusable neglect is not synonymous with carelessness or inattentiveness, it was reasonable for the court to find no excusable neglect. Therefore, we conclude that the circuit court did not err by denying Liberty's motion to enlarge the time to answer the complaint.

### III. DAMAGES

¶18 Last, we conclude that the circuit court had no reasonable basis to refuse to reopen the damage portion of the default judgment. As indicated, a complaint in tort is not permitted to set out a sum certain for damages. WIS. STAT. § 802.02(1m). However, plaintiffs must give notice of that sum certain to defendants before trial courts may award damages in a default judgment. *Stein*, 194 Wis. 2d at 781-83. Because Morales' complaint contained no specific amount for damages, under the holding in *Stein*, she had a duty to provide Liberty with a specific amount of money claimed before the court awarded damages.

¶19 We conclude that the circuit court erred by not reopening the issue of damages. Therefore, we reverse the damages portion of the order and remand. Upon remand, the court shall provide Liberty an opportunity to be heard, in a manner the court deems appropriate, before awarding damages.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded for further proceedings consistent with this opinion. Costs denied to both parties.

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

