COURT OF APPEALS
DECISION
DATED AND RELEASED

September 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0246

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

W. GEORGE BOWRING, and EDWARD J. CALLAN,

Plaintiffs-Respondents,

v.

WISCONSIN DIVISION OF HIGHWAYS & TRANSPORTATION,

Defendant,

WALTER MERTEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

VERGERONT, J.[1] Walter Merten appeals from a judgment in the amount of $2,273 awarded against him for appraisal services provided by W.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

George Bowring and Edward Callan with respect to 1.69 acres of land which the Wisconsin Department of Transportation (DOT) proposed to acquire. He contends that the trial court erred in denying his motion to dismiss on the grounds of lack of capacity to sue and failure to join a necessary party; erred in ruling that his demand for a jury trial was untimely; and erroneously exercised its discretion in denying his motion to enlarge the time to request a jury trial and pay the fees. He also challenges the court's findings and the sufficiency of the evidence to support the judgment against him.[2] We reject each contention and affirm.

[2] The notice of appeal specifically refers to the first three issues. In his brief, Merten also challenges the court's findings and the sufficiency of the evidence to support the judgment as well as the court's later determination that he was in contempt. The respondents apparently are of the view that an appellant's brief is limited to those issues specifically mentioned in the notice of appeal. That is not the case. The failure to specify in the notice of appeal that he is challenging the judgment against him, as well as the three non-final orders specifically referred to, is not a jurisdictional defect. *See* ***Northridge Bank v. Community Eye Care Center***, 94 Wis.2d 201, 203, 287 N.W.2d 810, 811 (1980). Since we are able to determine from the notice of appeal the judgment that Merten is challenging, the notice of appeal is sufficient to give us jurisdiction to review the judgment against him and any prior non-final orders. *See* ***State v. Avery***, 80 Wis.2d 305, 309, 259 N.W.2d 63, 64 (1977). Because we have the record of the trial and because the respondents do discuss the sufficiency of the evidence in the context of addressing other issues, we choose to address Merten's challenges to the judgment.

However, we do not have jurisdiction to review the determination of contempt. That order was entered on April 8, 1996, after the filing of the notice of appeal on January 18, 1996.

BACKGROUND

DOT notified Merten that it proposed to acquire 1.69 acres of his land for the widening of Highway 67 as well as acquiring a temporary limited easement during the year of construction on .08 acres. DOT also notified Merten that he could obtain an appraisal of the property from a qualified appraiser and submit a bill for the reasonable costs of the appraisal to DOT. Merten engaged Bowring and Callan to conduct the appraisal. They submitted their appraisal report to DOT along with a statement for services in the amount of $2,473. DOT sent Merten a check payable to him, Bowring and Callan in that amount. However, Merten refused to negotiate the check to Bowring and Callan because he believed there were deficiencies in their appraisal report and statement for services.

Bowring and Callan filed a small claims action, alleging that payment for their appraisal services was due and owing from Merten.[3] The summons and complaint notified Merten that he had to appear on July 18, 1995, at a certain place and time to dispute the matter "and/or" file a written answer before that time; if neither occurred, a judgment might be granted to the plaintiff. The initial complaint named W. George Bowring Appraisal as the plaintiff. On July 18, 1995, Merten personally appeared and filed a motion to dismiss on the ground that W. George Bowring Appraisal lacked the capacity to sue and that a necessary party had not been joined. Bowring and Callan also personally appeared on that date. The minute sheet states that there was "no resolution to issues." Merten was directed to file a written answer by July 25, 1995, and trial was set for August 3, 1995.

Merten filed a written answer on July 25, 1995. The trial did not take place on August 3. Instead, on that date the court heard Merten's motion to dismiss. Upon learning the W. George Bowring Appraisal was not a legal entity but rather the name under which Bowring and Callan did business, the court permitted Bowring and Callan to amend the complaint to name themselves individually as plaintiffs. They did so on that same day. Another pretrial conference was scheduled, and trial was set for November 16, 1995.

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[3] DOT was also named as a defendant in the initial complaint but was later dropped as a party.

Merten filed a demand for a jury trial along with a check for $36; both were received by the court on August 10, 1995.

On August 30, 1995, the court entered an order directing return of the fee on the grounds that the request for a jury trial was not timely because it was not filed within twenty days of July 18, 1995, as required by § 799.21(3), STATS.,[4] and was not accompanied by the fee required by the statute.

Merten received the order on September 5, 1995. On September 25, he filed a motion to extend the deadline for filing the jury demand and fee under § 801.15(2)(a), STATS., alleging excusable neglect.[5] After a hearing, the court denied the motion concluding that the demand was untimely, was not accompanied by the requisite fee, and that the interest of justice did not require an enlargement of the deadline.

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[4] Section 799.21(3)(a), STATS., provides:

> (a) Any party may, upon payment of the fees prescribed in ss. 814.61(4) and 814.62(3)(e), file a written demand for trial by jury. If no party demands a trial by jury, the right to trial by jury is waived forever. In eviction actions, the demand shall be filed at or before the time of joinder of issue; in all other actions within 20 days thereafter.

[5] Section 801.15(2)(a), STATS., 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 60 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.

Merten's motion actually requested that the August 30, 1995 order be vacated and that an order be entered extending time to supplement the fee. We interpret this as a request for enlargement both of the time to file the demand and to submit the fee, since both must be done within twenty days of joinder.

After a trial to the court, the court determined that reasonable compensation for the services provided by Bowring and Callan was $2,273. It ordered that Merten satisfy the judgment by negotiating the DOT check, paying $2,273 to Bowring and Callan and refunding $200 to DOT.

DISCUSSION

We first address Merten's argument regarding his motion to dismiss due to lack of capacity to sue and failure to join a necessary party. It is not clear to us whether Merten is arguing that the court erred in denying the motion or erred in ordering a written answer before deciding the motion. The latter argument appears to be related to Merten's argument regarding the timeliness of the jury demand, and we address that below. The former argument is without merit. The court may, on its own initiative, permit an amendment to a complaint to add or drop parties at any time during the proceeding on such terms as are just. Section 803.06(1), STATS. The court properly exercised its discretion when it permitted Bowring and Callan to amend the complaint to add their names as individuals in place of W. George Bowring Appraisal, rather than dismissing the complaint as Merten requested.

We next address Merten's argument that his jury demand was timely filed because joinder occurred on July 25, 1995, the date his answer was filed, rather than on July 18, 1995, the return date. We note that Merten appears to concede that the fee he filed with the demand was insufficient.[6] We are at this point, then, concerned only with the proper interpretation of the requirement in § 799.21(3), STATS., that the demand and fee be filed within twenty days of the date of joinder. This presents a question of law, which we review de novo. *See* ***Torke/Wirth/Pujara v. Lakeshore Towers***, 192 Wis.2d 481, 501, 531 N.W.2d 419, 426 (Ct. App. 1995).

All pleadings in small claims actions, except the complaint, may be oral, unless the circuit court by rule requires written pleadings or a judge or commissioner requires written pleadings in a particular case. Section 799.06(1),

[6] In addition to $6 per juror, *see* § 814.61(4), STATS., Merten should have paid $53--the difference between the fee of $75 required under § 814.61(1)(a)2 and the fee of $22 required under § 814.62(3)(a)2, STATS. Section 814.62(3)(e).

STATS. "Joinder" is not defined in the statute. However, the function and proceedings of the return date are prescribed in detail. Section 799.20(4), STATS., provides:

> **Inquiry of defendant who appears on return date.** If the defendant appears on the return date of the summons or any adjourned date thereof, the court or court commissioner shall make sufficient inquiry of the defendant to determine whether the defendant claims a defense to the action. If it appears to the court or court commissioner that the defendant claims a defense to the action, the court or court commissioner shall schedule a trial of all the issues involved in the action, unless the parties stipulate otherwise or the action is subject to immediate dismissal.

The record shows that this is what happened on July 18, 1995. Merten appeared; the issues were discussed; Merten communicated that he contested the complaint and wished to present defenses; and the matter was scheduled for trial.

The statute also provides that if the defendant does not appear personally on the return date then upon due proof, a default judgment in plaintiff's favor may be entered. *See* § 799.22(2), STATS. In the event a county permits the filing of a written answer by the return date in lieu of a personal appearance, as is the case here, an answer properly filed is considered an appearance for purposes of avoiding the entry of a default judgment on the return date. Section 799.22(4). The language used in this section is particularly pertinent for our purposes because it uses the term "join issue" in providing alternatives to a personal appearance on the return date.[7]

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[7] Section 799.22(4)(am), STATS., provides:

> If the defendant is a nonresident of this state, the circuit court shall adopt a rule to permit the defendant to *join issue* in any of the actions specified in s. 799.01 without appearing on the return date by answering by mail, in such manner as the

We conclude that joinder occurred on July 18, 1995, when Merten personally appeared and contested the complaint. The written answer he later filed at the court's direction did not function as an alternative to personal appearance: it was not necessary to avoid a default and it was not necessary to join the issues. Rather, in this context it was a discretionary determination made by the court, *see* § 799.06(1), STATS., and functioned to clarify and organize the many objections Merten had to the appraisal report. The trial court correctly ruled that Merten's demand for a jury trial, filed twenty-three days after joinder, was untimely.

The right to a jury trial is waived in civil proceedings if the statutory procedures for asserting the right are not followed. ***State ex rel. Prentice v. County Court***, 70 Wis.2d 230, 239-40, 234 N.W.2d 283, 288 (1975). However, a court may, under § 801.15(2)(a), STATS., grant a motion made after the expiration of the specified time for demanding a jury trial upon a finding of excusable neglect. *See* ***Chitwood v. A.O. Smith Harvestore***, 170 Wis.2d 622, 628, 489 N.W.2d 697, 701 (Ct. App. 1992). The court must first determine if there is excusable neglect and, if there is, whether relief should be granted in the interest of justice. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 475-77, 326 N.W.2d 727, 734-35 (1982). "Excusable neglect" is that neglect which might have been the act of a reasonably prudent person under the same circumstances. ***Id.*** at 468, 326 N.W.2d at 731. How promptly the party acts in seeking the enlargement is a factor that may be relevant in determining the plausibility to the justification for the neglect, and it is relevant to determining whether relief is in the interest of justice. ***Id.*** at 477, 326 N.W.2d at 735.

We do not reverse a circuit court's determination under § 805.15(2)(a), STATS., unless an erroneous exercise of discretion is clearly shown. ***Id.*** at 470, 326 N.W.2d at 732. Where the trial court does not set forth adequate reasons to explain its decision, we may review the record to determine whether it supports the trial court's decision. ***Id.*** at 471, 326 N.W.2d at 732. Generally, we look for reasons to sustain a trial court's discretionary decision.

(..continued)

> rule permits, and if the court adopts a rule under par. (a) to permit the defendant to join issue without appearing on the return date by answering by telephone, then the defendant shall also be permitted to join issue by answering by telephone, in such manner as the rule permits. (Emphasis added.)

Schauer v. DeNeveu Homeowners Ass'n, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995).

The trial court determined that Merten's jury demand was untimely and not accompanied by the required fee. It did not expressly determine whether this was the result of excusable neglect. It did decide that the interests of justice did not require granting the motion for enlargement.

Merten avers in his affidavit that at the pretrial on August 3, 1995, he stated he wanted a jury trial and "the Court courteously checked the statute book and said that the time for the demand was close (20 days after joinder) and that the fee was $6.00 per juror." At the hearing on the motion, the court stated: "I do recall the discussion of the fee of $6 at the pretrial conference but I don't recall any representation as to what was the time of joinder." Although it is not clear whether the court is recalling that it told Merten that the fee of $6 per juror was the entire fee, we will interpret the court's comments most favorably to Merten--as the court's acknowledgment that it did mislead or misinform Merten as to the amount of the fee. We will assume without deciding that Merten's reliance on the court's statement and failure to check further on the amount of the fee required was excusable neglect. However, the record provides no basis for a finding of excusable neglect with respect to the untimeliness of the demand.

The record shows that the court did not tell Merten that joinder did not occur until he filed a written answer. There is no evidence that Merten made an inquiry as to when the twenty days for requesting a jury demand began to run. On July 18, 1995, Merten appeared and contested the complaint. A trial was then scheduled for August 3, 1995. On July 25, 1995, the date on which Merten filed his answer, a notice was sent to Merten notifying him that "[t]he court has changed this court trial to a motion hearing/pretrial conference" at the same time and place. Merten was thus on notice that up to that time, the court was proceeding as if trial would be to the court. At the August 3 motion hearing/pretrial, the court, according to Merten, told him that the time for requesting a jury trial was "close." Under these circumstances, a reasonably prudent person who wants a jury trial, as Merten states he did, would immediately seek further information as to the exact deadline for requesting a jury trial. A reasonably prudent person would not take it upon himself to determine that "joinder" means the date the written answer was filed rather than the earlier return date and, without any confirmation of this interpretation

and knowing that the deadline is "close," make a jury demand based on this interpretation.

Both parties refer in their briefs to the fact that Merten was a retired trial attorney. We cannot tell from the record whether the trial court knew this at the time it denied the motion for enlargement. However, it is obvious from the motions and pleadings filed by Merten, which the trial court has read, that Merten knew how to find, read and argue the applicable statutes. This is an additional basis in the record indicating that Merten's conduct was not that of a reasonably prudent person under similar circumstances.

We conclude that the record supports the court's implicit finding that Merten's untimely demand was not the result of excusable neglect. Denial of his motion on that basis is therefore not an erroneous exercise of discretion. Since the "interests of justice" component enters in only if there is excusable neglect, we need not consider that point.

Finally, we address Merten's challenge to the judgment against him. There is no dispute that Merten engaged Bowring and Callan to perform an appraisal. The issues the court had to decide were whether they substantially performed the contract and, if they did, the reasonable value of their services. We do not reverse findings of fact made by a trial court sitting as the trier of fact unless they are clearly erroneous. Section 805.17(2), STATS. The trial court gave a very detailed and thoughtful decision from the bench on the day following the close of evidence, stating each of its findings and the evidence that supported those findings and the legal standards it applied. We conclude that the court applied the correct legal standards and that all of its findings were supported by the record.

There was ample evidence to support the court's determination that Bowring and Callan substantially performed the contract. Two experienced real estate appraisers testified that the report Bowring and Callan prepared conformed to the uniform appraisers' guidelines and the DOT guidelines for appraisers. A DOT employee, formerly a real estate appraiser, testified that the appraisal complied with the DOT appraisal guidelines. The court addressed the deficiencies that Merten's expert mentioned in his testimony. The court agreed that the evidence showed that the report failed to address the underground sprinkler system and the large timbers and that there

were certain other defects in the report, such as failing to label the pictures properly and inaccurately describing the size of the parcel before the taking. However, the court determined that these were minor and unimportant deviations from the obligations of the appraisers. This determination is supported by the record.

With respect to the reasonable value of the services, the court did not consider itself bound by DOT's determination that the amount charged was reasonable but instead made its own evaluation. Bowring and Callan's witnesses testified that the statement for services complied with DOT guidelines for such statements, that the amount charged was reasonable, and that the hourly rate--$50--was at the low end of the range of charges for such work in the area. They also testified that it was customary to use materials submitted by clients in preparing an appraisal report, as Bowring and Callan had done. Merten's expert did not present testimony on the reasonableness of the charges.

The court determined that there was an error in the computation of hours on one date, overstating the hours by one hour. The court also found that, in view of the information Merten gave Bowring and Callan, Bowring's testimony that it took nine hours to do certain evaluations was not credible. The court therefore reduced this time to six hours. After making these reductions, the court concluded that Merten owed Bowring and Callan the resulting amount of $2,273. The court's findings of fact are supported by the record and it made no errors of law.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.