

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2002

Cornelia G. Clark
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. 01-1368
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-185

**IN COURT OF APPEALS
DISTRICT III**

**ROBERT A. ARMBRUSTER, PATRICIA A. ARMBRUSTER
AND ARMBRUSTER BUILDERS, INC.,**

PLAINTIFFS-RESPONDENTS,

v.

DOUGLAS FITZGERALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
D. TODD EHLERS, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PER CURIAM. Douglas Fitzgerald appeals from a default judgment in favor of Robert and Patricia Armbruster. Fitzgerald challenges the default judgment and the damages award on numerous grounds. We conclude that

the circuit court did not erroneously exercise its discretion by granting the default judgment. However, we reverse and remand for a new determination of damages because Fitzgerald was not served with notice of the specific amount of damages that the Armbrusters were seeking before the hearing on damages.

STATEMENT OF FACTS

¶2 In December 1999, the Armbrusters filed a complaint against their neighbor, Fitzgerald, alleging that he created a nuisance by placing inoperative motor vehicles, appliances, boats, plumbing fixtures and other “junk” along the road in clear view of the Armbrusters’ property. The Armbrusters alleged that this affected their ability to sell empty lots and a home they constructed because prospective buyers indicated that they did not want to live in view of Fitzgerald’s row of junk. The Armbrusters sought an injunction enjoining Fitzgerald from maintaining his property so as to create a nuisance to the Armbrusters. They also sought compensatory damages for their losses, such as their inability to sell the home.

¶3 The Armbrusters further alleged that Fitzgerald intentionally and maliciously created and maintained the row of junk in order to deter potential buyers of the Armbrusters’ property. They alleged that they contacted Fitzgerald and he refused to remove the junk, even after they told him that it was deterring potential purchasers. The Armbrusters sought punitive damages because of Fitzgerald’s willful, malevolent and oppressive conduct.

¶4 Although it is undisputed that Fitzgerald was served with the complaint, he failed to file an answer or other responsive pleading. The Armbrusters moved for default judgment. Their motion included a supporting affidavit, but did not specify the amount of damages sought.

¶5 On April 18, 2000, Judge John D. Koehn heard the motion for default judgment. Fitzgerald appeared pro se. He did not contest that he had been served and had failed to file a responsive pleading. He also did not seek an extension of time to file a response. Judge Koehn proceeded to hear testimony, which included information concerning the nature of the alleged nuisance and the damages the Armbrusters had suffered.

¶6 The circuit court found Fitzgerald in default and granted the Armbrusters' request for an injunction requiring Fitzgerald to remove the debris.¹ The court declined to determine damages, concluding that was a jury issue. The court ruled that there would be a jury trial in the future for the sole purpose of determining damages.

¶7 Before the jury trial scheduling conference, Judge Koehn retired. The case was assigned to Judge D. Todd Ehlers, who met with the parties at the scheduling conference on September 27. After conferring with the parties off the record, the court summarized the case status.² The court noted that it had reviewed the case file and that Judge Koehn had found Fitzgerald in default. The court stated that although Judge Koehn had planned to hold a jury trial on

¹ Fitzgerald suggests that the circuit court did not find him in default and, instead, determined whether there was a nuisance based on the testimony presented. We disagree. Although the court may not have specifically stated, "I find Fitzgerald in default," the hearing was on the Armbrusters' motion for default judgment and the court concerned itself with receiving evidence relevant to the injunction and damages.

² One issue that Judge Ehlers addressed was whether the Armbrusters wanted him to recuse himself because while he was in private practice, he represented a bank that foreclosed on the Armbrusters' home. Ultimately, the Armbrusters did not seek recusal and the judge remained on the case. On appeal, Fitzgerald argues that Judge Ehlers should have been recused. Because we reverse and remand for a new damages determination and either party may file a request for substitution of judge on remand, *see* WIS. STAT. § 801.58(7), we decline to address this issue.

damages, the court questioned whether that issue could be decided by a jury. The court asked the Armbrusters' counsel to file a letter brief outlining whether a jury could hear the case.

¶8 The circuit court also indicated that Fitzgerald could file written arguments concerning the default and could ask the court to reconsider the default. It also encouraged Fitzgerald to seek assistance from legal counsel. Further, the circuit court said that both parties could file written arguments concerning whether the court would need to hold a hearing to decide the damages issue. Finally, the parties were advised they could file responses to anything submitted by the other party.

¶9 The Armbrusters filed a letter brief in which they argued that defendants are not entitled to a jury trial to determine damages following default. The Armbrusters also urged the court to determine damages based on the Armbrusters' written argument and the evidence submitted at the April 18 hearing. Fitzgerald did not file anything with the court.

¶10 The circuit court issued a written decision concluding that Fitzgerald had no right to a jury trial on the damages issue. Further, it recognized that it was within its discretion to decide whether to hold a hearing or to determine the damages based on the record and the parties' arguments. It observed that the parties had presented evidence at the default judgment hearing before Judge Koehn and that Fitzgerald had participated by cross-examining witnesses and presenting evidence. The court concluded that it would determine damages based

on the evidence and testimony already in the record.³ However, it also stated that the parties could file additional written arguments regarding damages.

¶11 Fitzgerald's written argument in response to the circuit court's decision raised several issues. First, Fitzgerald asserted that it would be unfair to deprive him of a new damages hearing after Judge Koehn promised him a jury trial. Fitzgerald stated that he relied on Judge Koehn's promise when he decided not to appeal the evidentiary rulings made at the hearing. Second, Fitzgerald argued the merits of the damages issue, urging the court to find that the Armbrusters had not suffered any harm due to nuisance alleged in the complaint.

¶12 The Armbrusters also filed a written argument in which they argued the merits of their claim for compensatory and punitive damages. The circuit court's written decision on damages awarded the Armbrusters \$136,400 in compensatory damages. However, the court denied the Armbrusters' claim for damages for intentional infliction of emotional distress.

¶13 The court also found that although the Armbrusters had established grounds for punitive damages, there was nothing in the record indicating whether Fitzgerald had the ability to pay. The court concluded, "Caselaw is clear that [the defendant's ability to pay] must be addressed before this fact-finder can assess and award punitive damages. Consequently at the present time based upon the record in this matter, I am denying the Plaintiffs' request for an award of punitive damages." The final judgment stated, "at this time, the plaintiffs shall not be awarded punitive damages. However, if evidence or testimony is provided in this

³ The court specifically noted that the Armbrusters' letter brief listed the amount of damages requested.

case as to the defendant's ability to pay punitive damages, the plaintiffs may be awarded punitive damages based upon said evidence or testimony.”

¶14 Fitzgerald appeals the default judgment, including the damages award. Represented by counsel on appeal, Fitzgerald raises numerous issues, which he presents as eight main arguments: (1) The court's decision misstates and misapplies private nuisance law; (2) the damages question should have been submitted to a jury; (3) the court applied the wrong standards concerning damages on default; (4) the court applied the wrong legal standards concerning nuisance damages; (5) the court's damage calculations were clearly erroneous; (6) the court exceeded its authority by holding the issue of punitive damages open; (7) the injunction should be overturned as improper and moot; and (8) Judge Ehlers' refusal to disqualify himself violated the recusal statute and due process.

DISCUSSION

¶15 After reviewing the parties' briefs and the record, we conclude that the most logical way to address the issues raised on appeal is by examining the case chronologically. We begin with the Armbrusters' complaint, which specifically asked for \$500,000 in compensatory and \$250,000 in punitive damages. Because the Armbrusters' action was grounded in tort, they should not have specified the amount of damages sought. *See* WIS. STAT. § 802.02(1m)(a).⁴ This error does not void the complaint. *See Apex Elecs. Corp. v. Gee*, 217 Wis.2d 378, 385, 577 N.W.2d 23 (1998) (where tort complaint erroneously specified the amount of damages sought, the amount must be viewed as a nullity,

⁴ All statutory references are to the 1999-2000 version.

and the complaint must be read as if no dollar amount had been demanded for punitive damages). However, it does affect what the Armbrusters were required to do before damages could be awarded in a default judgment.

¶16 The Armbrusters properly moved for default judgment, but they neglected to serve Fitzgerald with notice of the specific amount of money they sought before the default judgment hearing. *See Stein v. Illinois State Assist. Comm'n*, 194 Wis. 2d 775, 785, 535 N.W.2d 101 (Ct. App. 1995) (plaintiff must provide specific damages information to the defendant prior to judgment). Although Fitzgerald ultimately received notice of the amounts sought when the Armbrusters filed their letter brief with Judge Ehlers, Fitzgerald did not have proper notice of the damages sought at the April 18 hearing before Judge Koehn.

¶17 We next consider Judge Koehn's decision to find Fitzgerald in default. "A default judgment may be rendered ... if no issue of law or fact has been joined and if the time for joining issue has expired." WISCONSIN STAT. § 806.02(1). The granting of a default judgment is not a matter of right, but rather is within the trial court's discretion. *Hansher v. Kaishian*, 79 Wis. 2d 374, 387-88, 255 N.W.2d 564 (1977).

¶18 At the April 18 hearing, Fitzgerald did not contest that he had received the complaint and failed to answer within forty-five days. He did suggest to the court that as a layperson, he was not sure how to respond. However, he did

not ask the court for an extension of time to answer.⁵ Instead, Fitzgerald focused his energies on cross-examining witnesses and presenting evidence.

¶19 On appeal, Fitzgerald challenges the circuit court's exercise of discretion on grounds that the facts alleged in the complaint do not state a claim for nuisance. Fitzgerald is correct that the mere fact that a party may be in default does not confer a right to judgment upon a claim that is not recognized by law or is insufficient as a matter of law. *See Johnson v. Grzadzielewski*, 159 Wis. 2d 601, 612, 465 N.W.2d 503 (Ct. App. 1990) (In a default motion, the complainant must show that the complaint was timely served and filed and that the complaint contains allegations sufficient in law to state a claim for relief against the defendant). Thus, we must consider whether the complaint states a claim for private nuisance. This presents a question of law that we review de novo. *See Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999).

¶20 A nuisance is an unreasonable activity or use of property that interferes substantially with the comfortable enjoyment of life, health or safety of

⁵ Indeed, Fitzgerald has never filed an answer or moved to reopen the default judgment, even though Judge Ehlers advised him to consult a lawyer and invited him to file a written argument concerning the default. On appeal, Fitzgerald alleges that Judge Koehn refused to let him file an answer. The transcript does not support his assertion. Near the end of the April 18 hearing, Fitzgerald stated, "Excuse me. There [are] some things that I have written here in response to the papers he's talking about. Would you be interested in reading them?" The court started to tell Fitzgerald that he needed to have filed any response earlier, but then apparently proceeded to review the papers. The court then told Fitzgerald that his response should have been filed within 45 days of having been served with the summons and complaint. Fitzgerald did not seek the court's permission to file a late answer, and we have located no reference in the record to any subsequent attempt to file an answer. Furthermore, we have no way of knowing whether the papers discussed at the hearing could have qualified as an answer to the complaint. We remain unconvinced that Fitzgerald was precluded from filing a late answer or seeking to reopen the judgment.

another or others. *State v. Quality Egg Farm, Inc.*, 104 Wis. 2d 506, 517, 311 N.W.2d 650 (1981). The Armbrusters' complaint alleged that Fitzgerald had placed junk on his property to deter future buyers of their property. It further alleged that buyers had been deterred. Taking these allegations as true, we conclude that the complaint states a claim for private nuisance.

¶21 Fitzgerald argues that as a matter of law, the appearance of nearby property cannot constitute a nuisance. Fitzgerald has provided us with no controlling authority for this proposition. Our supreme court has characterized a nuisance as a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Vogel v. Grant-Lafayette Elec. Co-op*, 201 Wis. 2d 416, 422, 548 N.W.2d 829 (1996). *Vogel* stated that the "interest in the private use and enjoyment of land" is broadly defined to include "any disturbance of the enjoyment of property." *Id.* at 423. In the absence of controlling authority supporting Fitzgerald's position and given *Vogel's* broad definition of nuisance, we conclude that the complaint states a claim for private nuisance.

¶22 Next, we consider whether Fitzgerald is entitled to a jury trial on damages. Fitzgerald does not contend that defendants are allowed a jury trial in default cases. *See* WIS. STAT. § 806.02(2); *see also Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 478 n.5, 326 N.W.2d 727 (1982) (upon entry of a default judgment, the circuit court may hold a hearing or inquiry to determine damages). Rather, he argues, without citation to authority, that he is entitled to a jury trial because Judge Koehn promised him one. We disagree. We will not order a jury trial where the law does not provide for it. Instead, we conclude that Fitzgerald should be given another opportunity to provide the court with evidence concerning damages.

¶23 We conclude that the complaint states a claim for private nuisance and that there is no basis to overturn the circuit court's discretionary decision to find Fitzgerald in default. However, we conclude that there should be a new determination of damages. As discussed earlier, Fitzgerald was not given proper notice of the amount of damages sought prior to the hearing before Judge Koehn. *See Stein*, 194 Wis. 2d at 785. Also, Fitzgerald was informed that he would have another opportunity to present information on the damages issue.⁶ These reasons justify a new damages determination.

¶24 Conversely, we do not agree with Fitzgerald that on remand the Armbrusters should be precluded from pursuing their claim for punitive damages and damages for intentional infliction of emotional distress. Fitzgerald has argued that Judge Ehlers should have recused himself and that there should be a new damages hearing. At the same time, he implicitly asks this court to affirm all parts of the damages decision that were to Fitzgerald's benefit. Given the strong argument that Fitzgerald failed to preserve several issues that we are using to justify a new hearing, we conclude that in the interest of justice, the best course of action is to completely reverse the court's damages determination and remand for a new determination of all damages. *See WIS. STAT. § 752.35.*

¶25 Based on the foregoing, we affirm that portion of the judgment finding Fitzgerald in default. We reverse the damages portion of the judgment and remand. On remand, the circuit court is instructed to: (1) provide a reasonable

⁶ Although we conclude that Fitzgerald is not entitled to a jury trial and we cannot guarantee that the circuit court will provide him with a hearing, we are confident that allowing Fitzgerald to submit additional information and argument concerning damages will provide him with the requisite due process.

amount of time for the Armbrusters to provide Fitzgerald with specific notice of the damages they seek; and (2) if the notice requirement is satisfied, proceed to determine damages.⁷ We stress that it remains within the court's discretion to hold an evidentiary hearing or to ask the parties to submit affidavits in support of their damages arguments. *See Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 651, 360 N.W.2d 554 (Ct. App. 1984) (proof of damages in default judgment need not be presented in an evidentiary hearing; it can be submitted in affidavit form).

¶26 Because we reverse the damages determination, we need not consider Fitzgerald's arguments concerning the circuit court's damages determination. But we do observe that it was improper to hold the punitive damages determination open. We direct the circuit court to make a final determination on damages on remand.

¶27 Finally, we decline to overturn the injunction. Fitzgerald argues that the injunction should not have been issued and is now moot because the Armbrusters have sold all of the property in question. The Armbrusters agree that the injunction is now moot as to them. However, they assert that the new property owners should be able to enforce the injunction against Fitzgerald. We decline to address these arguments because this issue is raised for the first time on appeal and because the parties agree that the issue is moot as to the Armbrusters. If and when the Armbrusters' successors attempt to enforce the injunction against Fitzgerald, the circuit court will address the injunction's potential application.

⁷ We have affirmed the circuit court's discretionary determination that Fitzgerald was in default. That may not be relitigated on appeal; rather, the sole issue will be damages.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

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

