

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2010

David R. Schanker
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.

Appeal No. 2008AP1954

Cir. Ct. No. 2007SC1982

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RICHARD WOLFF,

PLAINTIFF-RESPONDENT,

V.

**SECOND WIND BOAT WORKS, LLC P/K/A SECOND WIND BOAT WORKS,
GREG GRISWOLD AND LAURA WIERZBICKI,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Reversed and cause remanded for further proceedings.*

¶1 HIGGINBOTHAM, J.¹ Second Wind Boat Works, LLC appeals pro se a circuit court order denying its motion to reopen a default judgment entered against it for failure to appear at a scheduling conference in Richard Wolff's small claims action against Second Wind.² After finding that Second Wind showed that its failure to appear was the result of excusable neglect, and that default judgment was too harsh a sanction in this case, it nonetheless entered an order denying the motion to reopen after Second Wind failed to comply with certain sanctions imposed by the court.³ In effect, the default judgment in this case resulted not from Second Wind's failure to appear, but from its failure to comply with certain sanctions.

¶2 On appeal, Second Wind appears to argue that the circuit court erroneously exercised its discretion in denying its motion to reopen the default judgment because the court lacked the authority to impose the particular sanctions specified by the court.⁴ We conclude that the trial court erroneously exercised its discretion by failing to explain why the ultimate sanction of dismissal was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Richard Wolff chose not to file a response brief in this appeal. Accordingly, we decide this appeal solely on Second Wind's brief and the record transmitted to this court.

³ The question of whether the court had the authority to condition the reopening of a default judgment on the fulfillment of sanctions has not been briefed to us, and is beyond the scope of this opinion.

⁴ Second Wind makes two additional arguments. First, it argues that Wolff's complaint should have been dismissed upon summary judgment for failure to state a cognizable claim. Second, it argues that the circuit court's May 15, 2008 order warning each party to abide by the court's rulings or face the possibility of sanctions, including dismissal, was an abuse of the court's discretion. Because Second Wind has failed to adequately develop these arguments, we do not address them. See *Kristi L.M. v. Dennis E.M.*, 2007 WI 85, ¶20 n. 7, 302 Wis. 2d 185, 734 N.W.2d 375 (appellate court is not required to address undeveloped arguments).

appropriate under the facts of this case. Further, we agree with Second Wind that, with regard to three of the ordered sanctions, the court lacked the authority to impose these sanctions or the sanctions were unsupported by the record. Accordingly, we vacate the order denying the motion to reopen the default judgment, and direct the court to enter an order to reopen consistent with its finding of excusable neglect. On remand, the court may, within the proper exercise of its discretion, order Second Wind to pay costs for mileage, docketing fees and postage for failure to appear at the scheduling conference.

BACKGROUND

¶3 Richard Wolff purchased a boat from Second Wind after reading an advertisement in a publication which represented that the boat had a new engine. Wolff discovered that the boat's engine was not working properly the first time he took the boat on the water. The vice-president of Second Wind Boat Works, Greg Griswold, tried to fix the engine to no avail. Wolff then took the boat to Skipper Buds, a boat repair shop in Madison. Wolff paid Skipper Buds over \$6000 to replace the engine.

¶4 Wolff filed a complaint pro se in small claims court alleging Second Wind fraudulently misrepresented that the boat engine was new and therefore violated WIS. STAT. § 100.18(1).⁵ Wolff sought \$5000 to recover some of the costs he incurred in replacing the engine.

⁵ WISCONSIN STAT. § 100.18(1) reads as follows:

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything

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¶5 Second Wind filed an answer and counterclaim stating that Wolff's claim was frivolous.⁶ Second Wind also filed a motion to dismiss Wolff's complaint for failure to state a claim. The court converted the motion into a motion for summary judgment and granted partial summary judgment to Second Wind. The court then set a date for a scheduling conference to determine the trial date.

¶6 Second Wind failed to appear at the scheduling conference. As a result, the court entered a default judgment in favor of Wolff. Second Wind moved to reopen the default judgment on the ground that it inadvertently misplaced the notice sent by the court informing it of the date for the scheduling conference. At the conclusion of the hearing on Second Wind's motion, the court found that Second Wind showed that its failure to appear at the scheduling

offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

⁶ Second Wind does not appeal the court's dismissal of its counterclaim.

conference was the result of excusable neglect under WIS. STAT. § 806.07(1)(a), and that imposition of default judgment for its failure to appear was too harsh a sanction in this case. Nonetheless, the court imposed several sanctions on Second Wind and ordered that it would deny the motion to reopen unless Second Wind complied with these sanctions within ten days. The sanctions included forfeiture of a right to a jury trial; forfeiture of jury fees; payment of attorney's fees, costs, and expenses in the amount of \$864.92; and payment of a surety of \$2500 to be held by the court until the entry of judgment.

¶7 Second Wind failed to meet the conditions. Accordingly, the court entered an order denying Second Wind's motion to reopen the default judgment. Second Wind appeals.

DISCUSSION

¶8 As a preliminary matter, Second Wind argues that the circuit court erred in applying to the motion to reopen the excusable neglect standard under WIS. STAT. § 806.07⁷ provided in the general rules of civil procedure instead of the good cause standard under WIS. STAT. § 799.29⁸ found in the small claims chapter. Whether the circuit court has applied the correct legal standard is a question of law subject to our independent review. See *Landwehr v. Landwehr*, 2006 WI 64, ¶8, 291 Wis. 2d 49, 715 N.W.2d 180.

⁷ As pertinent, WIS. STAT. § 806.07(1)(a) provides that, “[o]n motion and upon such terms as are just, the court ... may relieve a party or legal representative from a judgment, order or stipulation for ... [m]istake, inadvertence, surprise, or excusable neglect.”

⁸ WISCONSIN STAT. § 799.29(1)(a) provides as follows: “There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.”

¶9 We agree with Second Wind that the court should have applied the good cause standard set forth in WIS. STAT. § 799.29(1) to the motion to reopen. Where the legislature has prescribed a different procedure within the small claims chapter, the general rules of civil procedure do not apply. See WIS. STAT. §§ 799.01(1) (procedure in ch. 799 is the exclusive procedure for use in small claims actions); 799.04(1) (general rules of practice and procedure apply to small claims actions except as otherwise provided in ch. 799); 801.01(2) (general rules of civil procedure do not apply where a different procedure is prescribed by statute or rule). Because § 799.29(1) provides a different procedure for reopening a default judgment than WIS. STAT. § 806.07(1)(a), the procedure set forth in § 799.29(1) provides the exclusive method to reopen a small claims judgment. See *King v. Moore*, 95 Wis. 2d 686, 690, 291 N.W. 2d 304 (Ct. App. 1980).

¶10 However, Second Wind makes no attempt to explain how it was harmed by the court's failure to apply the good cause standard, and it is difficult to see how the court's error could have adversely affected Second Wind. In fact, the court found Second Wind had demonstrated its failure to appear was the result of excusable neglect, a more rigorous standard for reopening than good cause.

The Court's Denial of Motion to Reopen after Second Wind Failed to Comply with Sanctions

¶11 Second Wind argues that the circuit court misused its discretion when it denied Second Wind's motion to reopen the default judgment after Second Wind failed to comply with certain sanctions. We review a circuit court's imposition of a sanction for an erroneous exercise of discretion. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W. 2d 859 (1991) (overruled on other grounds by *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898). A court properly exercises its discretion when

it applies the proper law to the facts of record, and reaches a reasonable result. *See id.*

¶12 WISCONSIN STAT. § 802.10(7) provides that a court may impose a sanction for a violation of a scheduling or pretrial order. The court may make orders “as are just” against a party that violates a scheduling or pretrial order. *See* WIS. STAT. § 805.03.⁹ “[D]efault judgment is the ultimate sanction. The law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues.” *Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.*, 2002 WI 66, ¶64, 253 Wis. 2d 238, 646 N.W.2d 19. Dismissal is appropriate only when the non-complying party has acted egregiously or in bad faith. *Industrial Roofing Servs., Inc.*, 299 Wis. 2d 81, ¶43, “Where the circuit court finds that failures to respond to discovery and follow court orders are extreme, substantial, and persistent it may dismiss the action with prejudice on the grounds that the conduct is egregious.” *Id.* (citations omitted). Failure of a circuit court “to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion.” *Anderson v. Circuit Court for Milwaukee County*, 219 Wis. 2d 1, 11, 578 N.W. 2d 633 (1998).

¶13 The court conditioned the reopening of the default judgment on Second Wind’s fulfillment of the following sanctions: (1) payment of Wolff’s

⁹ WISCONSIN STAT. § 805.03 states as follows:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).

attorney fees to write the brief in opposition to Second Wind's motion to reopen; (2) payment of Wolff's reasonable costs resulting from Second Wind's failure to appear at the scheduling conference; (3) forfeit of the right to a jury trial and the jury fees paid by Second Wind; and (4) payment of a \$2500 surety to the court.

¶14 We conclude that the circuit court erred in two fundamental respects. First, it erroneously exercised its discretion by failing to adequately explain why the harsh sanction of dismissal was appropriate in this case.¹⁰ As noted, the court found that Second Wind had demonstrated that its failure to appear at the scheduling conference was the product of excusable neglect, a higher standard than the good cause standard applicable in small claims cases. Given the court's finding that Second Wind had more-than good cause for failing to appear at the scheduling conference, we must conclude that the default judgment was ultimately the result of Second Wind's failure to comply with the imposed sanctions. The court failed to explain why Second Wind's failure to comply with any or all of these sanctions warranted the harsh sanction of dismissal. Accordingly, we conclude that the court misused its discretion in denying the motion to reopen, which was, in effect, an order to dismiss for failure to comply with the ordered sanctions.

¶15 Second, with regard to three of the particular sanctions imposed—payment of attorney fees, forfeit of the right to a jury trial (along with the forfeiture of paid jury fees) and payment of a \$2500 surety—we conclude that the

¹⁰ Because we conclude that the court erroneously exercised its discretion for failing to adequately explain why dismissal was appropriate in this case, we need not address whether the court had the authority to require the fulfillment of a sanction as a condition for reopening a default judgment. As explained, this question has not been briefed and is beyond the scope of this opinion.

court lacked the authority to impose these sanctions or the record failed to support their imposition. We address each of these sanctions in turn. Finally, we consider the court's order of costs at the conclusion of this section.

1. Attorney Fees

¶16 Wolff represented to the court that he paid \$755.75 for an attorney to prepare a brief in opposition to Second Wind's motion to reopen the default judgment. The court ordered Second Wind to pay these fees as one of the sanctions and conditions for reopening the default judgment. Second Wind argues, as it did in the circuit court, that the court improperly exercised its discretion in awarding these fees because no attorney was on record as representing Wolff at the time. We agree.

¶17 A court may require a party who violates a scheduling order to pay attorney fees caused by the failure without a finding of egregious conduct by the failing party. *Modica v. Verhulst*, 195 Wis. 2d 633, 651, 536 N.W. 2d 466 (Ct. App. 1995). However, in small claims court, attorney fees may not be awarded on behalf of a party "unless the party appears by an attorney other than himself or herself." WIS. STAT. § 799.25(10)(d).¹¹

¶18 The record in this case indicates that no attorney was on record as representing Wolff at any time between the scheduling conference and the hearing on Second Wind's motion to reopen.¹² We note that Wolff submitted the brief

¹¹ WIS. STAT. § 799.25(10)(d) states that "No attorney fees may be taxed in behalf of any party unless the party appears by an attorney other than himself or herself."

¹² We observe that Wolff's documentation consisted of a list of costs he incurred as a result of Second Wind's failure to appear at the scheduling conference and to challenge Second Wind's motion to reopen the default judgment. Wolff did not submit an invoice from the

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under his own signature on May 27, 2008. If Wolff was represented by an attorney, the attorney did not file a Notice of Retainer with the court until July 11, 2008, more than one month after the hearing was held on Second Wind's motion to reopen the default judgment. Because there is no evidence that the attorney Wolff asserts drafted the brief submitted in opposition to Second Wind's motion to reopen was Wolff's attorney of record at that time, Wolff was not entitled to attorney fees. Accordingly, we conclude that the court erroneously exercised its discretion in ordering Second Wind to pay Wolff's attorney fees.

2. Forfeiture of the Right to a Jury Trial and Jury Fees

¶19 Second Wind argues that once it complied with the statutory requirements for filing a written demand for a jury trial, the court lacked the discretion to deny it the right to a jury trial as a condition for reopening the default judgment. We agree.

¶20 The right to a jury trial in civil cases is guaranteed by WIS. CONST. Article 1, Section 5 of the Wisconsin Constitution.¹³ WISCONSIN STAT. § 799.21(3)¹⁴ provides that any party in a small claims action may, within a certain

attorney he asserted authored the brief or evidence in any other form that the attorney prepared the brief in behalf of Wolff.

¹³ WISCONSIN CONST. art. 1, § 5 reads as follows:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

¹⁴ WISCONSIN STAT. § 799.21(3) reads as follows:

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period of time, demand a jury trial upon payment of a fee prescribed by statute. Failure to pay the required fee or to make the demand within the time limit results in waiver of the right. Sec. 799.21(3). A court lacks the discretion to deny a jury trial unless a defendant has waived the constitutional right. See *Rao v. WMA Sec., Inc.*, 2008 WI 73, ¶¶17, 27, 310 Wis. 2d 623, 752 N.W. 2d 220; see also WIS. STAT. RULE 805.01(1) (stating that the right of trial by jury set forth in WIS. CONST. art. 1, § 5 and § 799.21 “shall be preserved to the parties inviolate”) and (3).

¶21 The record here shows that Second Wind did not waive its right to a jury trial in writing or orally, and that it paid the required fee and filed the jury demand within the required time. Although a court has broad discretion in imposing sanctions, we are not aware of any authority that confers discretion on a

TRIAL BY JURY. (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.

(b) In counties in which a circuit court commissioner is assigned to assist in small claims matters, except in eviction actions which shall be governed by par. (a), demand for trial by jury shall be made at the time a demand for trial is filed. If the party requesting a trial does not request a jury trial, any other party may request a jury trial by filing the request with the court and mailing copies to all other parties within 15 days from the date of mailing of the demand for trial or the date on which personal notice of demand is given, whichever is applicable. If no party demands a trial by jury, the right to trial by jury is waived forever. The fees prescribed in ss. 814.61 (4) and 814.62 (3) (e) shall be paid when the demand for a trial by jury is filed.

court to deny a party's right to a jury trial as a sanction for failing to appear at a scheduling conference. *See* WIS. STAT. RULE 805.01(1).¹⁵

¶22 We are sympathetic with the circuit court's concern that, at least at the time the sanction order was entered, both parties were appearing *pro se* and that their performance throughout the proceedings raised justifiable concerns about their ability to try the case to a jury. However, a court may not deny a party the right to a jury trial under Wisconsin's constitution as long as the party does not waive the right under Wisconsin law. Accordingly, we conclude that the circuit court erroneously exercised its discretion in imposing a sanction that denied Second Wind's right to a jury trial and required the forfeiture of the jury fees paid by Second Wind as a condition of reopening the default judgment.

3. Surety of \$2500

¶23 Finally, Second Wind argues that the circuit court erroneously exercised its discretion in conditioning the reopening of the default judgment on Second Wind's payment of \$2500 as a surety on a future judgment against it. Second Wind asserts that the sanction is unreasonable. We agree.

¶24 We assume for purposes of this discussion that the circuit court has the authority to impose such a sanction.¹⁶ We nonetheless conclude that the circuit

¹⁵ WISCONSIN STAT. RULE 805.01(1) reads as follows:

RIGHT PRESERVED. The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

¹⁶ We need not address whether the court had the authority to impose a sanction requiring a party to deposit a surety with the court pending resolution of the case because we conclude on other grounds that the court misused its discretion in imposing this sanction.

court erroneously exercised its discretion in imposing the sanction of requiring a \$2500 surety because the court failed to delineate the factors that influenced its decision. *See Anderson*, 219 Wis. 2d at 11.

¶25 The full extent of the circuit court’s explanation for requiring the deposit was as follows: “And then I believe it’s appropriate to have the defendant file with the Court \$2500, which is one half of the claim, to be held by the Court pending resolution of the matter.” We conclude that this explanation is inadequate, especially in light of the severity of the sanction. The court’s explanation in this case was arguably less adequate than the explanation the supreme court concluded was inadequate in *Anderson*. There, a circuit court imposed a \$50 fine on an attorney for appearing late at a scheduling conference. The circuit court informed the attorney that he was late, the court had two cases to try and it was important for the trial to start on time. *Id.* Here, the court did not explain why requiring a \$2500 deposit—an unusual and costly sanction for forgetting to appear at a scheduling conference—was a just sanction under the circumstances of this case. It did not state, for example, that Second Wind had shown itself to be a particular risk not to pay a damage award or showed that it was not likely to prevail on the merits. Indeed, the court declared that, based on its understanding of the case, each party had an equal chance of prevailing, which would argue against the imposition of a surety. Consequently, we are unable to determine whether this sanction was just. Accordingly, we conclude that the circuit court erroneously exercised its discretion in requiring Second Wind to deposit \$2500 with the court as a condition for reopening the default judgment.

4. Costs Resulting from the Missed Scheduling Conference

¶26 The court ordered Second Wind to pay Wolff's mileage, postage and docketing fees totaling \$109.17 as a sanction for missing the scheduling conference. Second Wind argues that Wolff is not entitled to the docketing fees because Second Wind's principals, Greg Griswold and Laura Wierzbicki, had already been dismissed from the case and therefore there was no need to docket the judgment in two counties against them. It also argues that the court misused its discretion in ordering Second Wind to pay mileage for Wolff's trips to the Jefferson County Courthouse to file paperwork because these costs were unreasonable and not supported by the record.

¶27 In addition to ordering the payment of attorney fees, the court may order a party who failed to obey a scheduling order to pay reasonable costs caused by the failure. *Modica*, 195 Wis. 2d at 651. Like the sanction of attorney fees, this type of sanction does not require a finding of egregious conduct. *Id.* Because it is within the court's discretion to order the payment of reasonable costs, we will sustain the sanction unless the court erroneously exercised its discretion. *Id.* at 650.

¶28 While we vacate the order denying the motion to reopen, including the imposition of these costs, we conclude that the court may, within the proper exercise of its discretion, require Second Wind on remand to pay Wolff's postage, docketing fees and mileage, i.e. those costs that represent Wolff's actual expenses for Second Wind's mistake. Second Wind does not challenge the court's authority to order it to pay Wolff's postage. With respect to the docketing fees, Second Wind does not fully develop its argument, and we therefore do not consider it. *See Kristi L.M. v. Dennis E.M.*, 2007 WI 85, ¶20 n. 7, 302 Wis. 2d 185, 734 N.W.2d

375 (appellate court is not required to address undeveloped arguments). As for the mileage costs, Second Wind fails to explain why the court acted unreasonably in awarding Wolff this expense. Second Wind simply argues that it was unreasonable for Wolff to drive thirty-four miles to hand deliver a private e-mail to the court. Second Wind fails to persuade us that the court erroneously exercised its discretion in ordering Second Wind to pay Wolff his mileage costs as a sanction for failing to appear at the scheduling conference. Accordingly, we conclude that the court may require Second Wind to pay these costs on remand.

CONCLUSION

¶29 In sum, we conclude that the trial court erroneously exercised its discretion by failing to explain why the ultimate sanction of dismissal was appropriate for Second Wind's failure to comply with the ordered sanctions. Further, we conclude, with regard to three of the ordered sanctions, the court lacked the authority to impose these sanctions or the sanctions were unsupported by the record. Accordingly, we vacate the order denying the motion to reopen the default judgment, and direct the court to enter an order to reopen consistent with its finding of excusable neglect. On remand, the court may, within the proper exercise of its discretion, order Second Wind to pay costs for mileage, docketing fees and postage for failure to appear at the scheduling conference.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

