

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 31, 2010**

A. John Voelker  
Acting 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. 2009AP123**

**Cir. Ct. No. 2007CV2177**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JACK EDWARDS,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL KOTLAREK,**

**DEFENDANT-APPELLANT,**

**BENCHMARK LAND TECHNOLOGY, INC.,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Kenosha County:  
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Kotlarek appeals a default judgment entered in favor of Jack Edwards. Kotlarek argues the circuit court erred by

denying his motions to vacate and reopen the default judgment, and otherwise enlarge the time to answer the complaint based on excusable neglect, extraordinary circumstances and in the interests of justice. We reject these arguments and affirm the judgment.

### **BACKGROUND**

¶2 Edwards was an employee of Benchmark Land Technologies, Inc. from 1985 through August 10, 2006. Kotlarek is both the president and a shareholder of Benchmark. After his termination from employment, Edwards filed a wage claim with the Wisconsin Department of Workforce Development pursuant to WIS. STAT. § 109.09.<sup>1</sup> The department sent notice of the wage claim to Kotlarek and Benchmark, affording them an opportunity to contest the claim. When no response was filed, a final notice was sent. Kotlarek subsequently submitted a response conceding that some of the wages claimed were owed and indicating Benchmark “will pay him as they can.” The department ultimately determined the employer owed Edwards \$2,166.67 in reimbursements and \$11,115.20 in wages, and instructed the employer to pay those amounts. The department’s decision warned that if the employer failed to timely pay, the matter would “be referred to the Kenosha District Attorney for prosecution and 100% penalty wage.” When payment was not made, the matter was referred for prosecution, though it is unclear from the record whether the matter was ultimately prosecuted.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 In any event, Edwards commenced the underlying suit against Kotlarek and Benchmark, seeking damages for unpaid wages and expenses, as well as “liquidated damages” as a penalty pursuant to WIS. STAT. § 109.11(2)(b). It is undisputed that the summons and complaint were served upon both Kotlarek and Benchmark on December 13, 2007. The summons informed the defendants that “within twenty (20) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint.” See WIS. STAT. § 801.09(2)(a)1. Although the answer was due on January 2, 2008, Kotlarek filed an answer on both his and Benchmark’s behalf on January 8, 2008. Despite its actual filing date, the answer was dated January 2, 2008.

¶4 Edwards subsequently moved to strike the answers and for a default judgment. In turn, Kotlarek filed a motion to dismiss. At a subsequent scheduling conference, the court explained to Kotlarek that his answer was untimely and he would have to “demonstrate not just neglect, but excusable neglect.”<sup>2</sup> The court further encouraged Kotlarek to “talk to an attorney” and scheduled the subsequent motion hearing for three months later to enable Kotlarek time to confer with an attorney. Edwards ultimately retained counsel a few days before the scheduled motion hearing.

¶5 On the day of the hearing, defense counsel attempted to file an answer on Benchmark’s behalf, an amended answer on Kotlarek’s behalf and

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<sup>2</sup> The court further notified Kotlarek that because he was not an attorney, he could not represent Benchmark and, therefore, the answer he filed on Benchmark’s behalf was a nullity. See *Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 202, 562 N.W.2d 401 (1997). Although a default judgment was ultimately entered against both Benchmark and Kotlarek, Benchmark is not a party in this appeal.

further moved the court to extend the time for filing the answers. The court heard only the motions that had been scheduled for that day and ultimately struck the answers and granted default judgment in Edwards' favor. Kotlarek subsequently filed a motion to vacate and reopen the default judgment, and again moved to enlarge the time for filing an answer. After a hearing, the court denied Kotlarek's motions and this appeal follows.

### DISCUSSION

¶6 The circuit court's determination whether to grant a default judgment or a concomitant motion for enlargement of time within which to answer is reviewed under an erroneous exercise of discretion standard. *Oostburg State Bank v. United S & L*, 125 Wis. 2d 224, 238, 372 N.W.2d 471 (Ct. App. 1985). 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. See *Ritt v. Dental Care Assocs.*, 199 Wis. 2d 48, 72, 543 N.W.2d 852 (Ct. App. 1995). However, where the circuit court sets forth no reasons or inadequate reasons for its decision, we will independently review the record to determine whether the circuit court properly exercised its discretion and whether the facts provide support for the court's decision. *Connor v. Connor*, 2001 WI 49, ¶38, 243 Wis. 2d 279, 627 N.W.2d 182.

¶7 A defendant is required to respond to a complaint within twenty days of receiving the summons. WIS. STAT. § 801.09(2)(a)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). It is not synonymous with carelessness or inattentiveness. *Id.*

¶8 In his motion, Kotlarek claimed his neglect was excusable based on a number of factors. First, Kotlarek emphasized he is not an attorney and is unfamiliar with the legal system. The summons, however, explicitly informed Kotlarek that his answer was due within twenty days, and further explained that default was a likely outcome of the failure to timely file an answer.

¶9 Second, Kotlarek claimed that when he reviewed the summons and complaint, he “read the date to be December 18, 2007 and calculated the 20 days to expire on January 8, 2008.” Even assuming Kotlarek thought he received the summons on December 18, that would have made his answer due January 7, 2008. Therefore, his answer was late even under his own calculations. As noted above, excusable neglect is not synonymous with carelessness or inattentiveness. *Id.* Moreover, as the court noted, the “backdating of [Kotlarek]’s answer [to January 2, 2008, the date it was actually due] ... has a suspicious aspect to it,” especially in view of Kotlarek’s claim he was on vacation in Florida through January 6, 2008. Although Kotlarek further emphasized he was out of town from just after Christmas through January 6, the summons and complaint were served on December 13, affording him at least twelve days to file his answer or retain counsel to do so.

¶10 To the extent Kotlarek emphasizes Edwards' failure to attach referenced exhibits to the summons and complaint, Kotlarek failed to establish how any confusion created by the absence of the exhibits caused his untimely answer. Kotlarek also contends he was confused at the scheduling conference by the circuit court's urging him to seek the advice of counsel and explanation of the legal standard. This confusion, however, does not provide the court with grounds to find excusable neglect for Kotlarek's failure to timely file an answer over two months earlier.

¶11 Ultimately, the court noted Kotlarek's conduct was "curious," recounting the backdating of the answer coupled with Kotlarek's claim that he could not afford an attorney while simultaneously vacationing in Florida. In considering both Kotlarek's failure to respond to the department's initial notice of Edwards' wage claim, and failure to timely file an answer, the court noted its belief that "it wasn't important enough to Mr. Kotlarek to respond," suggesting he "has a bias against responding about this matter." The court concluded Kotlarek's conduct "leaves me with the impression that his failure to act within the time allowed by law was a product of something other than excusable neglect." The court also noted that although it was not a "fan" of default judgment, the history of the case did not "[cry] out to heaven for mercy." Based on the record, we conclude the circuit court reasonably determined that Kotlarek's neglect was inexcusable.

¶12 Kotlarek also contends the circuit court erroneously exercised its discretion by failing to balance the interests of justice before granting the default judgment. The interests of justice require the court to consider the sometimes contradictory interests in affording litigants a day in court and in ensuring prompt adjudication. *Hedtcke*, 109 Wis. 2d at 469. In making this assessment, the court

should look to such factors as “whether the dilatory party has been acting in good faith, and whether the opposing party has been prejudiced.” *Id.* at 477. A court should also consider the existence of prompt remedial action as “a material factor” in assessing both the reasonableness of the delay and the interests of justice. *Id.*

¶13 As noted, the court acknowledged it was not a fan of default judgments but nevertheless concluded the history of this case did not “[cry] out to heaven for mercy.” That the court may not have specifically articulated its consideration of the interests of justice policy factors does not mean that it was not cognizant of these factors before granting the motion for default judgment. *See Connor*, 243 Wis. 2d 279, ¶25. Moreover, the record supports the circuit court’s decision. It appears Kotlarek was not acting in good faith when he backdated the answer. Further, Edwards was prejudiced by his inability to recover wages earned in 2006. Finally, although Kotlarek arguably may have acted promptly in answering the complaint six days late, prompt action is not “a substitute for determining whether the party’s initial failure to meet the statutory deadline was the result of excusable neglect.” *Hedtcke*, 109 Wis. 2d at 477.

¶14 Kotlarek alternatively argues the court erroneously exercised its discretion by failing to consider whether extraordinary circumstances existed to warrant vacating the default judgment under WIS. STAT. § 806.07(1)(h).<sup>3</sup> Under this subsection, the court must determine whether, in view of all the facts, “extraordinary circumstances” exist which justify relief. *State ex rel. Cynthia*

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<sup>3</sup> WISCONSIN STAT. § 806.07(1)(h) provides: “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: ... (h) Any other reasons justifying relief from the operation of the judgment.”

*M.S. v. Michael F.C.*, 181 Wis. 2d 618, 625-26, 511 N.W.2d 868 (1994). The circuit court considers the following factors in determining whether extraordinary circumstances exist:

whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

*Connor*, 243 Wis. 2d 279, ¶41. A circuit court, in determining whether extraordinary circumstances exist for purposes of subsec. (h), has sufficient equitable latitude to consider only those of the five factors it considers relevant. *See Sprayer Supply, Inc. v. Feider*, 133 Wis. 2d 397, 407-09, 395 N.W.2d 624 (Ct. App. 1986).

¶15 Edwards contends that where, as here, the court finds no excusable neglect, it is not required to analyze whether extraordinary circumstances justified setting aside the default judgment. Our supreme court has held, however, that a finding of excusable neglect is not required under the extraordinary circumstances test to obtain relief from a default judgment under WIS. STAT. § 806.07(1)(h). *See Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶41, \_\_ Wis. 2d \_\_. We nevertheless reject Kotlarek’s argument.

¶16 In the brief supporting Kotlarek’s motion to vacate the default judgment, Kotlarek argued: “Considering all of the circumstances, defendants are entitled to preemptive relief pursuant to WIS. STAT. § 806.07(1)(h).” At the hearing on Kotlarek’s motion, however, defense counsel argued “the crux of the



motion essentially is the excusable neglect standard, and that's the neglect in which Mr. Kotlarek attempts to show in his affidavit that he was justified in filing the answer late." After hearing the parties' arguments and denying Kotlarek's motion to vacate the default judgment on grounds of excusable neglect, the court asked, "Anything else?" Defense counsel answered, "Nothing from the defendants." To the extent Kotlarek contends the circuit court erroneously exercised its discretion by failing to consider the § 806.07(1)(h) factors, Kotlarek failed to bring this alleged omission to the circuit court's attention, thereby waiving any claimed error. *See, e.g., State v. Brunette*, 220 Wis. 2d 431, 455, 583 N.W.2d 174 (Ct. App. 1998). Even on the merits, considering the § 806.07(1)(h) factors in light of the overall purpose of determining whether Kotlarek's untimely answer was due to extraordinary circumstances, we conclude there is nothing extraordinary about the circumstances leading to his default.

*By the Court.*—Judgment affirmed.

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

