

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 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. 95-1163

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RANDY D. SCHWARTZ,

Plaintiff-Respondent,

v.

NORTH FARM COOPERATIVE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
GEORGE NORTHRUP, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. North Farm Cooperative (NFC) appeals from a default judgment on Randy Schwartz's breach of contract claim. The issues are whether the trial court properly held NFC in default, and whether the court properly determined Schwartz's damages at a subsequent hearing. We affirm the trial court's rulings.

Schwartz was NFC's general manager until the board of directors fired him in August 1993. One month later he challenged his termination under the grievance procedures in NFC's personnel manual. NFC's board did not believe that its termination decision was subject to the grievance procedures and took no action.

Schwartz subsequently brought this action to recover the wages he lost until he was reemployed elsewhere in June 1994. His complaint alleged that the board's failure to address his grievance entitled him to lost wages and that the failure to grant him that remedy constituted a breach of his employment contract.

Schwartz filed this action on June 30, 1994. On the same day, his attorney, Richard Bolton, sent NFC's counsel, Scott Herrick, a copy of the summons and complaint and a letter asking if Herrick could accept service. He also stated in his letter that "I further would be willing to extend the response date to the Complaint if any meaningful progress toward resolving this dispute can be made." On July 12, Herrick wrote back that he accepted service on NFC's behalf. He also stated that "I will advise you if I receive any instruction regarding further discussion."

Over the next three weeks there was no further communication between the attorneys. On August 4, twenty-three days after service of the complaint, Herrick filed and served NFC's answer.

On August 11, Schwartz moved for default judgment because the answer was three days late under § 802.06(1), STATS. NFC opposed the motion and moved for an enlargement of the time to answer. Herrick contended at the default hearing that he reasonably construed his exchange of letters with Bolton as a courtesy agreement allowing him additional time to file the answer.

Upon review of the letters, the trial court concluded that the answer was untimely and Herrick's neglect in filing an untimely answer was not excusable because the letters could not reasonably be construed as a courtesy agreement. The court therefore granted default judgment and scheduled a hearing to allow Schwartz to prove his damages.

At that hearing, Schwartz introduced into evidence that part of the personnel manual explaining that a grievance that the board does not timely decide is automatically decided in favor of the grievant, and the remedy sought by the grievant will be granted. Schwartz also introduced evidence of \$38,000 in lost wages and reemployment expenses, an amount that was not disputed by NFC. For its part, NFC introduced into evidence another part of the personnel manual indicating that Schwartz was an at-will employee and was subject to termination "at any time for any lawful reason by any party." NFC also brought out that Schwartz was on probation when he was fired. The trial court awarded damages, concluding that the grievance procedure applied despite the evidence of Schwartz's at-will and probationary status.

Whether to grant a default judgment is discretionary. *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis.2d 4, 11, 386 N.W.2d 53, 57 (1986). We will reverse a discretionary decision if the trial court fails to exercise discretion, if the facts do not support the decision or if the wrong legal standard is applied. *Id.* at 11-12, 386 N.W.2d at 57.

The trial court reasonably concluded under the facts that the attorneys' exchange of letters did not constitute a courtesy agreement. Bolton's letter refers only to something he would be willing to do under certain conditions. It extends no firm offer or promise of an extension. Herrick's response indicates only that he would contact Bolton "if I receive any instruction regarding further discussion." No reasonable interpretation of this exchange allows an inference that the parties had reached an agreement. Without such an agreement, the time for NFC to answer remained twenty days, and expired on August 1.

Herrick's misinterpretation of his communications with Bolton did not constitute excusable neglect. Such neglect is that which might have been the act of a reasonably prudent person under the same circumstances; it is not synonymous with neglect, carelessness or inattentiveness. *Martin v. Griffin*, 117 Wis.2d 438, 443, 344 N.W.2d 206, 209 (Ct. App. 1984). The trial court concluded that no reasonable attorney could have construed the exchange of letters as a firm courtesy agreement. We agree. As noted, Bolton only offered to extend the answer deadline on a contingent basis. Herrick then failed to address that contingency in the manner necessary to obtain a binding

agreement. No other interpretation of the attorneys' communication is reasonably available.

The trial court properly awarded Schwartz his claimed damages. NFC contends that the trial court erred by excluding evidence of Schwartz's at-will and probationary employment status, but that contention misstates the court's ruling. The trial court considered that evidence and concluded that the grievance procedures remained available to contest Schwartz's discharge. In any event, NFC cannot prevail on its argument because the evidence of Schwartz's status pertained to NFC's liability, not the amount of damages Schwartz sustained. The former issue was resolved by the default judgment, and NFC could not relitigate it. Only the damages issue remained for determination, and was resolved without dispute.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.