COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 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. 96-0509

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

KEVIN KIRSCH,

Plaintiff-Appellant,

v.

PAT SIEDSCHLAG, NURSE BUCHHOLZ, VIOYA DASGUPTA, KYLE DAVIDSON, WARDEN JEFFREY ENDICOTT, DOCTOR GALIOTO, NURSE HALGERSON, LIEUTENANT JACOB, NURSE KLOOSTRA, CAPTAIN PRIEVE, BETH RATACZAK, WILL ROGERS, STEVE SCHNEIDER, SAM SCHNIETER, CAPTAIN TRATTLES, SERGEANT WARNEKE, AND BARBARA WHITMORE,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Kevin Kirsch appeals from an order dismissing his motion to reopen an order of dismissal. Kirsch brought the motion under § 806.07(1)(h), STATS., which permits a court to set aside a judgment or an order for "any other reasons justifying relief from the operation of the judgement." Kirsch contends the trial court erroneously exercised its discretion in denying his motion. We conclude the trial court did not erroneously exercise its discretion and affirm.

Kirsch, proceeding pro se, filed a complaint in April 1992 alleging that he was an inmate confined at Columbia Correctional Institution and that on several occasions the defendant prison officials denied him the use of a wheelchair, which he needed because of an injured foot, and this caused further injury to his foot. Kirsch requested the appointment of counsel because he was unable to obtain counsel on his own, and that request was denied. The defendants answered the complaint and filed a motion for summary judgment, accompanied by numerous factual submissions, a brief in support, and proposed findings of fact and conclusions of law. The defendants contended that the factual submissions showed that they relied in good faith on the fact that a physician had not ordered a wheelchair; Kirsch was observed able to walk; and he had demonstrated propensities toward destruction of property which made disallowance of the use of a wheelchair reasonable. Therefore, the defendants argued in their brief, they had not been deliberately indifferent to a serious medical need of Kirsch's, the standard for an Eighth Amendment violation for deprivation of medical care.

Kirsch requested a continuance of nine months to conduct discovery in response to the motion. The court granted Kirsch forty-five days in which to submit an affidavit in compliance with § 802.08(4), STATS., stating the reasons why he could not present by affidavit facts essential to his opposition to the motion. Kirsch did submit an affidavit within forty-five days. However, the court did not rule on the request for a continuance. It decided that the motion for summary judgment was moot because Kirsch had amended his complaint to add eleven defendants and the defendants had answered the amended complaint. Approximately four months later on June 29, 1993, Kirsch and the defendants entered into a stipulation to dismiss the action with prejudice and without costs to any party. The court dismissed the action on those terms.

On May 26, 1994, Kirsch, again proceeding pro se, filed a motion to set aside the order of dismissal under § 806.07(1)(h), STATS. In his affidavit in support of the motion, Kirsch avers the following. He underwent intense psychological therapy at WCI to deal with the "rage and torment" he felt over the events that were the subject of the lawsuit. The process of litigating the lawsuit caused him to relive those events, which, in turn, caused him to experience rage and a desire to seek "violent vengeance." Those feelings prevented him from making progress in his psychotherapy. He discussed this dilemma with his psychiatrist and he and his psychiatrist agreed that he had to put aside the litigation in order to make progress in his psychotherapy. He wrote to defendants' counsel indicating that he was psychologically unable to proceed with the litigation and attempted to reach a settlement, but the defendants rejected all of his proposals. He then wrote to defendants' counsel and said he would stipulate to a dismissal because he was psychologically unable to continue. He continued his therapy and eventually came to terms with the events giving rise to the lawsuit. He is now psychologically capable of continuing the case and he needs to vindicate his rights through the court system for the wrongs he suffered and to receive just compensation.

The trial court denied the motion on the grounds that because the order of dismissal was with prejudice, it was "res judicata." Kirsch appealed the denial of his motion. We reversed on the ground that res judicata does not bar a motion for relief from a prior order under § 806.07, STATS. We remanded to the trial court for a determination of whether, under § 806.07(1)(h), extraordinary circumstances existed which justify relief in the interest of justice.

The trial court, upon remand, denied the motion to vacate. The court concluded that "in view of all relevant facts, no extraordinary circumstances exist which would justify granting plaintiff's motion, on the entire record of this case and in conformance with § 806.07(1)(h), STATS." Kirsch now appeals from that denial, contending that the trial court erroneously exercised its discretion in concluding that extraordinary circumstances did not exist.

Orders and judgments may be vacated under § 806.07(1), STATS., if extraordinary circumstances justify such relief. ***M.L.B v. D.G.H.***, 122 Wis.2d 536, 549, 363 N.W.2d 419, 425 (1985). The burden is on the party seeking relief to establish the requisite grounds for such relief. *See* ***Martin v. Griffin***, 117

Wis.2d 438, 443, 344 N.W.2d 206, 209 (Ct. App. 1984). A motion under § 806.07(1)(h), STATS., is addressed to the discretion of the trial court. ***M.L.B.***, 122 Wis.2d at 541, 363 N.W.2d at 422.

Section 806.07, STATS., attempts to achieve a balance between the competing values of finality and fairness in the resolution of a dispute. ***Id.*** at 542, 363 N.W.2d at 422. In exercising its discretion under § 806.07(1)(h), a trial court should consider factors relevant to these competing interests, including the following: (1) whether the judgment was the result of a conscientious, deliberate and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether relief is sought from the judgment in which there has been no judicial consideration of the merits, and the interests of deciding a particular case on the merits outweighs the finality of judgment; (4) whether there is a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief. ***Id.*** at 552-53, 363 N.W.2d at 427.

The trial court did not explain in its decision what facts it considered and the reasoning process by which it concluded that extraordinary circumstances did not exist. However, we generally look for reasons to sustain a trial court's discretionary determination. ***Schauer v. DeNeveu Homeowners Ass'n***, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1994). We may sustain a trial court's decision to deny relief under § 806.07, STATS., even though the circuit court's reasoning may be inadequately expressed. ***Id.*** In such cases, we may independently examine the record to determine if it provided a basis for the trial court's decision. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Kirsch's argument is that his "psychological trauma or mental incapacity to pursue his pro se litigation" constitutes extraordinary circumstances. He relies on ***United States v. Cirami***, 563 F.2d 26 (2nd Cir. 1977), decided under the federal rule counterpart to § 806.07(1)(h), STATS. The taxpayers in ***Cirami*** sought relief from a tax judgment against them, explaining that they did not oppose the government's motion for summary judgment because they did not know about it. ***Id.*** at 30. Their attorney knew of the motion but did not oppose it because he was suffering from a mental disorder manifesting itself in a failure to complete work for clients and was seeing a psychiatrist. The taxpayers submitted affidavits to this effect from the attorney

and from a psychologist confirming treatment of the attorney. Other evidentiary material submitted by the taxpayers supported their own sworn statements that they had been unable to reach their attorney and also showed that the government knew the presiding judge could not reach the attorney before the government brought the motion for summary judgment. ***Id.***

The court held that if these facts were established at an evidentiary hearing, they constituted extraordinary circumstances. ***Id.*** at 34-35. The court also considered the merits of the taxpayers' defense and concluded that their submissions on the merits, if established at trial, could well result in a substantial reduction of the taxes and interest awarded against them. The court remanded for an evidentiary hearing on the motion. ***Id.***

Because ***Cirami*** dealt with the mental disorder of an attorney that caused him to default, where the clients had no knowledge of the disorder or of the pending motion requiring a response, it is not particularly helpful in reviewing the trial court's decision in this case. The issue here is whether Kirsch's emotional reactions to the defendants' conduct and to the litigation constitute extraordinary circumstances. In the absence of any submissions indicating that Kirsch was suffering from a psychological disorder or illness that impaired his ability to make decisions, a reasonable judge could conclude that his averments, accepting them as true,[1] do not establish that his decision to voluntarily dismiss the litigation was not the result of a conscientious, deliberate and well-informed choice. Undoubtedly many litigants experience anxiety, anger and frustration as the result of litigation in which they are involved. A reasonable judge could conclude that such feelings do not constitute extraordinary circumstances and do not justify permitting a litigant to change his or her mind about pursuing the litigation because those feelings have subsided.

[1] In determining whether a party is entitled to relief under § 806.07(1)(b), STATS., the court should examine the assertions in the petition with the assumption that they are true. ***M.L.B. v. D.G.H.***, 122 Wis.2d 536, 557, 363 N.W.2d 419, 429 (1985). If those assertions constitute extraordinary circumstances justifying relief under § 806.07(1)(h), the court is to determine the truth of those assertions at a hearing and to determine other factors bearing on the equities of the case. ***Id.***

We also consider the other ***M.L.B.*** factors. Kirsch was not represented by counsel at the time he decided to enter into a voluntary dismissal and he is not now represented by counsel. This is not a situation where obtaining counsel, or new counsel, has brought to the litigant's attention information affecting a prior decision the litigant made. Kirsch's affidavit may be read to suggest that his inability to obtain counsel increased the emotional strain on him, thus leading to his decision to stipulate to a dismissal. However, a reasonable judge could conclude that this does not make the circumstances Kirsch describes extraordinary.

There was no judicial consideration of the merits. This favors vacating the stipulation if, as the third and fourth ***M.L.B.*** factors indicate, there is merit to Kirsch's claims or questionable merit to the defenses.[2] The merit of the claim the moving party wishes to pursue after vacating a judgment or order under § 806.07(1)(h), STATS., is a critical factor. *See, e.g.*, ***Cirami***, 563 F.2d at 35; ***M.L.B.***, 122 Wis.2d at 555, 363 N.W.2d at 428 (court considered as factor in granting motion that subsequent to unrepresented eighteen-year-old's stipulation to paternity, blood test results showed he could not be father). Kirsch has presented no argument or submissions indicating why deciding this particular case on the merits outweighs the policy of finality of judgments, or why his claims are meritorious in view of the defenses asserted and the detailed materials submitted in support of defendants' motion for summary judgment. With only Kirsch's amended complaint, we are unable to determine the likelihood of his success against the legal defenses and factual materials submitted by the defendants. Since it is Kirsch's burden to show he is entitled to the relief he seeks, a reasonable judge could conclude that Kirsch has not demonstrated that the strength of the merits of his case, or the lack of merit to the defenses, favors granting his motion.

The fifth factor--whether there are intervening circumstances making it inequitable to grant relief--favors Kirsch, in that the State has presented no reason why it would be inequitable to grant relief or why they would be prejudiced if the dismissal order were now vacated.

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[2] The defenses asserted in the amended answer include: qualified immunity, the Eleventh Amendment, lack of requisite personal involvement of certain of the defendants to be held liable under 42 U.S.C. 1983, official immunity, and that Kirsch has sustained no injury or damage by reason of the conduct of the defendants and any injury or damage he has incurred are the result of his own acts and/or negligence.

We acknowledge that a reasonable judge could consider that the reasons Kirsch presents for entering into the stipulation, coupled with his unrepresented status, the lack of a decision on the merits, and the lack of prejudice to the defendants justify relief under § 806.07(1)(h), STATS. However, that does not mean the trial court's decision here is unreasonable, and we cannot say that it is. We conclude that, applying the proper legal standard to the record, a reasonable judge could reach the conclusion that this trial court did.

By the Court.—Order affirmed.

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