COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1402 **Cir. Ct. No. 1996CV3154**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

WILLIAM J. KEEFE AND
RANDY J. KEEFE,

PLAINTIFFS-RESPONDENTS,

V.

RONALD A. ARTHUR AND
KATHLEEN M. ARTHUR,

DEFENDANTS-APPELLANTS,

ARTHUR & OWENS, LARRY GALEENER,
MARKET STREET INVESTORS, INC.
D/B/A ANTIETAM CORPORATION,
KELLY CAMPION, MARQUETTE COUNTY
AND DONN H. DAHLKE,

DEFENDANTS.

APPEAL from orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Ronald A. and Kathleen M. Arthur appeal from a trial court order entered February 26, 2004, vacating a previous order for judgment that had been entered on May 12, 1997, in the Arthurs' favor.[1] They also challenge the order denying their motion for reconsideration. We conclude that the trial court erroneously exercised its discretion when it reopened the 1997 judgment. Therefore, we reverse the trial court's orders and remand with directions that the trial court reinstate the 1997 judgment.

BACKGROUND

¶2 This is one in a series of cases between the Arthurs and William J. and Randy J. Keefe.[2] A summary of the litigation between the Arthurs and the Keefes is available at ***In re Disciplinary Proceedings against Arthur***, 2005 WI 40, 279 Wis. 2d 583, 694 N.W.2d 910. In short, attorney Ronald Arthur represented Randy Keefe in the early 1990s. In 1994, the two "discussed a possible business arrangement whereby [Ronald] Arthur would purchase parcels of wooded land, and a corporation owned by the Keefes would harvest the marketable timber and pay Arthur a higher price for the timber than other loggers

[1] Ronald A. and Kathleen M. Arthur were attorneys licensed to practice law in Wisconsin. Ronald A. Arthur's license has been revoked. *See* ***In re Disciplinary Proceedings against Arthur***, 2005 WI 40, ¶4, 279 Wis. 2d 583, 694 N.W.2d 910. However, it appears that the license of Kathleen M. Arthur, also known as Mary K. Arthur, is active. In some pleadings the Arthurs identify themselves as attorneys; in others they are listed as "pro se." How they identify themselves does not affect our analysis.

[2] There were originally other parties in this case, as well as in other litigation between the Arthurs and the Keefes. The rights of those other parties are not at issue in this appeal and will not be discussed.

would." ***Id.***, ¶11. The timber proposal ended badly, and numerous lawsuits were initiated.

¶3 Of relevance to this case are two lawsuits, one that took place in Marquette County and the instant case, venued in Milwaukee County. In the Marquette County case, Ronald Arthur sued the Keefes and several other defendants.[3] In the Milwaukee County case, the Keefes sued the Arthurs and other defendants.

¶4 With respect to the Milwaukee County case, in January 1997, the Arthurs filed a "motion for entry of judgment" against the Keefes. The Arthurs urged the trial court to strike the Keefes' pleadings and enter judgment for the Arthurs on the ground that the Keefes had engaged in such egregious conduct that they frustrated and prevented the legitimate administration of justice. In a letter accompanying their motion, the Arthurs asserted:

> Discovery in this matter and companion cases pending in Marquette County has revealed that [the Keefes] have engaged in a wholesale destruction of documentary evidence, thus rendering any trial herein farcical.
>
> I believe that the affidavits and documents enclosed with the subject Motion are conclusive and dispositive regarding the relief requested. However, if the Court desires that the … hearing be conducted as an evidentiary hearing, I would appreciate at least two week's advance notice so that I can make arrangements for witnesses.

[3] It appears that the Marquette County case may have been transferred from another county. Whether it was is not relevant to our analysis and we decline to discuss it in detail.

¶5 On February 18, 1997, the Marquette County trial court heard a motion, also brought by the Arthurs, to strike the pleadings of the Keefes.[4] What precisely happened at that hearing—whether it was an evidentiary hearing, and what the trial court ordered—became an issue at the April 10, 1997, hearing before the trial court in Milwaukee County. No official transcript of the February 18, 1997, hearing was made available to the Milwaukee County trial court (although the Arthurs apparently provided an abridged transcript), and the final findings of fact and conclusions of law had not yet been signed by the Marquette County trial court. The Arthurs asserted that the issues before the Milwaukee County trial court were the same as those that had been decided in Marquette County, and urged the trial court to apply issue preclusion.

¶6 The trial court in the Milwaukee County case concluded as follows:

> In another case between the same parties in Marquette County, [the Marquette County trial court] found after an evidentiary hearing that the Keefes had destroyed documents and in other ways refused to comply with the discovery statutes. As a result, he sanctioned the Keefes by dismissing their counterclaims and granting default judgment for the Arthurs. The Arthurs allege that the same documents and discovery abuses that were at issue in the Marquette County case are also at issue in this case and are requesting that the Court dismiss the Keefes' claims as a sanction for the actions they were found to have taken by [the Marquette County trial court] pursuant to the doctrine of issue preclusion.
>
> ….
>
> I have gone over [the factors to be considered]…. I've compared those factors with documents that have been provided to me. I was of the mind this morning to further

[4] The official transcript of the February 18, 1997, hearing before the trial court in Marquette County does not appear to be part of the record in the instant case, although the Arthurs have provided an unofficial "abridged transcript" in their appendix.

> delay this case so that I could obtain a full transcript and the order signed by [the Marquette County trial court]. But based on what I've heard this morning, I don't think that's necessary coupled with the analysis we've already done.
>
> The issue of whether or not the documents are available and if the plaintiffs entered into discovery abuses has been fully litigated by the parties in the Marquette County case. Even though the judge's decision hinged on an unresponded to request for admission, a review of the excerpts of the transcripts, indicates that [the Marquette County trial court] gave the Keefes an opportunity to counter the admissions and present evidence to show that they had not violated discovery statutes. The Keefes were unable to do this to the judge's satisfaction.
>
> The same exact issues will arise if an evidentiary hearing were conducted in this case since such a hearing would involve the exact same subject matter as the Marquette County hearing. Since the parties have already had the ability to litigate the issue in that forum, it would appear that the doctrine of issue preclusion would bar this Court from relitigating the issue again in the form of an evidentiary hearing.
>
> ….
>
> My review of the file indicates that there was no reason to overturn [the Marquette County trial court's] finding as it applies to this case. Therefore, I find that the conduct of the Keefes in conducting pretrial litigation of this case was egregious and in bad faith and a constant decision to improve their position by a flagrant or knowing disregard of the judicial process. And on that basis the [Keefes] are dismissed, all of them with costs.

¶7 On May 12, 1997, the trial court entered Findings of Fact, Conclusions of Law and an Order for Judgment. As relevant to this appeal, the trial court found that: (1) a hearing on a substantially similar matter had taken place in Marquette County; (2) at the Marquette County hearing, the Keefes had been afforded "due process and a full opportunity to present whatever evidence and testimony they believed might be relevant to the motion before the court"; (3) at the Milwaukee County hearing the Keefes had likewise been afforded due

process and a full opportunity to submit to the trial court information, affidavits or documents that would suggest that the Marquette County trial court's determinations were erroneous or improper, and failed to present persuasive evidence; and (4) the Keefes "knowingly, and with a bad faith design, provided false and misleading information, and concealed and/or destroyed documents with the hope and purpose of bettering their position in this litigation" which was egregious. Judgment was entered in 1997 in the Arthurs' favor dismissing the Keefes' complaint.

¶8 The Keefes did not appeal the judgment. Instead, in November 2003, they moved for relief from judgment pursuant to WIS. STAT. § 806.07(1)(c), (1)(h) and (2) (2003-04).[5] The Keefes argued that the Arthurs had engaged in misrepresentation, deceit, fraud and dishonesty while "giving testimony" before the trial court on April 10, 1997. The Keefes also referred to the Office of Lawyer Regulation's complaint against Ronald Arthur, to an affidavit by the Marquette County trial judge who heard the motion hearing on February 18, 1997, and to an alleged false claim for $100,000 that Ronald Arthur filed with the bankruptcy court.

¶9 The Arthurs moved to "quash" the motion. The trial court held a hearing on the Keefes' motion. In its written findings, the trial court noted that the Marquette County judge had testified in Ronald Arthur's disciplinary hearing that he had never conducted a full evidentiary hearing on the discovery issues "as Attorney Arthur had so advised" the Milwaukee County trial court at the April 10,

[5] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

1997, hearing. The trial court concluded that the preclusion argument advanced by Ronald Arthur before Milwaukee County trial judge Frank T. Crivello on April 10, 1997,

> was predicated on the failure of the Keefes to respond to Request[s] for Admissions in the pending Marquette County matter and an alleged full hearing thereon conducted before [the Marquette County trial court]. This was inaccurate. [The Marquette County trial court] never conducted a full hearing thereon per his own sworn statements, and that in any event, an admission in a pending case is not admissible as an admission for any other purpose or against a party in any other proceeding pursuant to [WIS. STAT. §] 804.11(2).

The trial court further concluded that Ronald Arthur had committed a fraud on the court by representing that the issues before the Marquette County trial court had been "fully heard by evidentiary hearing."

¶10 The trial court concluded that the May 1997 judgment was based on "fraud, misrepresentation or other misconduct of an adverse party" and that the Keefes were entitled to relief from judgment under WIS. STAT. § 806.07(1)(c). The trial court also indicated that the judgment was void because it was obtained by way of a fraud on the court, and that the judgment could therefore be set aside without regard to the reasonable time standard set forth in § 806.07(2). In doing so, it appears that the trial court may have granted relief based on § 806.07(1)(d) or (h).

¶11 The Arthurs moved the trial court to reconsider its decision. The trial court denied the motion. This appeal followed.

DISCUSSION

¶12 At issue is the trial court's decision to grant the Keefes relief from judgment under WIS. STAT. § 806.07, which provides in relevant part:

> **Relief from judgment or order. (1)** 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:
>
> ….
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> **(2)** The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

¶13 On appeal, we review a trial court's order granting or denying a motion for relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion. *See* ***Lenticular Europe, LLC v. Cunnally***, 2005 WI App 33, ¶9, 279 Wis. 2d 385, 693 N.W.2d 302. "We affirm a discretionary decision if the circuit court examined the relevant facts, applied the correct law, and using a rational process reaches a reasonable result." ***Id.***

A. Timeliness of the motion for relief from judgment

¶14 The Arthurs argue that the Keefes' motion for relief from judgment is time-barred, because WIS. STAT. § 806.07(2) provides that motions for relief based on § 806.07(1)(c) are barred if not made within a year of entry of judgment. For purposes of this appeal, we will assume that the trial court orders granting the Keefes relief from judgment are not time-barred because they are based on § 806.07(1)(d) and (h).

B. Whether the trial court properly granted relief from judgment

¶15 The trial court's decision to grant the Keefes relief from judgment was based on its review of the April 10, 1997, hearing transcript before a different judge, as well as documentary evidence of subsequent proceedings. In this court's opinion, the evidence of Ronald Arthur's conduct in other cases, including before a bankruptcy court, is not relevant to the crucial issue on appeal: did Ronald Arthur mislead the trial court on April 10, 1997, such that the Keefes should be entitled to relief from judgment over six years later? The only document needed to answer that question is the transcript of the April 10, 1997, hearing; the contents of that transcript are not in dispute.

¶16 The basis for the trial court's decision to grant the Keefes relief from judgment was its finding that Ronald Arthur had falsely represented to the trial court on April 10, 1997, that a full evidentiary hearing had taken place in Marquette County. This finding is clearly erroneous. Although Ronald Arthur did make such a representation, he later acknowledged, when the Keefes objected to the characterization, that the hearing in Marquette County had not been an evidentiary hearing. Given this acknowledgment, we conclude that Ronald Arthur did not mislead the trial court sufficiently to justify relief from judgment. An

examination of the relevant discussion is helpful to explain our conclusion. Arthur argued the following:

> The actual status of the situation in Marquette County is as follows: There was a hearing conducted, *full evidence hearing* conducted before [the trial court] on the issue of document destruction. A full transcript of that hearing is available, and I could make it available to the Court but because it was lengthy, I did submit excerpts of that which give a true and accurate representation of the substance of those proceedings.
>
> At the conclusion of that hearing, the definitive factual finding was made that the Keefes were liable on the allegations of the complaint and that their pleadings were being stricken as a discovery sanction….
>
> ….
>
> The fact is there has been a full adjudication of the question of … the facts relating to the document production. *And the Keefes had an opportunity to present whatever evidence and testimony they wanted to present in that form.*
>
> As indicated in the transcript submitted to this Court, [the trial court] found that [the Keefes] had absolutely nothing to submit of relevance. And that's the actual state of affairs in Marquette County and, also, the reason why collateral estoppel is appropriate in this case. And it is inappropriate to conduct *another evidentiary hearing* on the same matters which are already resolved [under the trial court judge].

(Emphasis added.)

¶17 William Keefe was given an opportunity to respond.

> [Keefe]: [T]his Court scheduled an evidentiary hearing. Now, *the hearing in Marquette County was not an evidentiary hearing. That was a motion hearing…. There was not an opportunity to su[b]peona witnesses…. There was never an evidentiary hearing scheduled in Marquette County, so that hearing was simply a motion hearing.* So as far as—

> [Trial court]: I don't understand. How was [the judge] able to make findings of fact without an evidentiary hearing?
>
> [Arthur]: *This was not an evidentiary hearing. That was a motion hearing, the same thing that's in this court*.
>
> [Trial court]: Just a minute, counsel.
>
> [Arthur]: Your Honor … the excerpts of the transcript which are submitted have some very express language on that point.

(Emphasis added.) Arthur then quoted from the transcript, noting that the Marquette County trial court explicitly told Keefe it would give him an opportunity to respond to the allegations regarding the document production. Arthur stated:

> At that point Mr. Keefe began to present what was purported evidence and testimony. And the Court kept saying, but Mr. Keefe, you're not saying anything which is in response to this particular matter. Do you have anything to say in response to the issues before the Court? …. And, again, there was nothing.
>
> Repeatedly [the Marquette County trial court] asked if there was anything that the Keefes had to offer … which had any relevance to the issues that were before that Court and the issues that are before this Court on this same motion. And the Keefes didn't say I could say something else if I had an opportunity to present a witness. They simply had nothing of relevance to say, and [the Marquette County trial court] was extremely patient in going through the process and affording the Keefes every opportunity to present anything that they had which might be regarded as relevant.
>
> After that, [the Marquette County trial court] made the conclusion that they had absolutely nothing to say.

When Arthur finished speaking, the trial court made its ruling that issue preclusion applied and justified judgment against the Keefes.

¶18 There is no denying that Arthur originally indicated that there had been an evidentiary hearing. But when Keefe objected, Arthur clarified that it had been a motion hearing. He also indicated that the Keefes had been given the opportunity to present evidence but were unable to identify any evidence that the Marquette County trial court found relevant to the issue presented. Based on the transcript, we cannot conclude that Arthur committed a fraud on the trial court. Arthur clarified that it was not a full-blown evidentiary hearing, and explained that the Marquette County trial court based its decision on the lack of any evidence to refute the Arthurs' allegations.

¶19 We conclude that there was nothing in Arthur's conduct at the April 10, 1997, motion hearing to justify granting relief from the judgment under WIS. STAT. § 806.07(1)(d) or (h).[6] Accordingly, we reverse the trial court's orders, and remand with directions that the trial court reinstate the 1997 judgment.[7]

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[6] Because we reverse on the ground that the trial court erroneously exercised its discretion when it granted the Keefes' motion for relief from judgment, we do not consider the Arthurs' additional argument that the Keefes were erroneously trying to relitigate an issue decided against them by the court of appeals in another case between the parties.

[7] Although we allow the 1997 judgment to stand, we have not considered the merits of any arguments against that ruling. There may have been legitimate factual and legal challenges to the order—such as whether the trial court correctly found that the Keefes had been given an opportunity to fully litigate their position and whether a sanction in one county can be the basis for issue preclusion in another county—but the Keefes chose not to appeal. Thus, the only issue before this court is the propriety of reopening the judgment over six years later. We conclude there is an insufficient basis to do so.