COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2005

Cornelia G. Clark
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. 2004AP2596 Cir. Ct. No. 1998CV7745

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

JAMES A. REHRAUER, JAMES D. PRESTIDGE, GLENN W. SCHNEEBERG, ROGER L. O'BRIEN AND GLEN A. DICKAU,

PLAINTIFFS,

ERWIN C. RAASCH, CORNELIUS MIRR, JOSEPH C. KULAKOWSKI, THOMAS L. PIORIER, GEORGE WICKBOLDT, JAMES KARBOUSKI, DONALD C. RODE, ARLENE ZAHARIAS, ROBERT L. SINGER, THADDEUS J. GOLOS, FRANK M. ARNDT, THOMAS F. BRENNAND, ROBERT FILUT, JOHN R. TORPY, THOMAS J. TEMPLIN, WILLIAM VOELTNER, RANDALL B. SCHOPF, KING T. MONAGHAN, PAUL HELMINIAK, NOEL E. NOGALSKI, JOSE R. CABALLERO, CLIFFORD W. BERTLING, LAWRENCE W. LEE, DONALD J. PLUTA, GEORGE REJMAN, JOHN P. MCCLINTOCK, THOMAS A. DAVEY, JR., JAMES H. GREELEY, EDWARD B. JUUL, JAMES H. RADKE, CHARLES L. ZACHARIAS, DARRELL SMERZ, DANIEL D. TETZLAFF, DAVID HOWARD, RICHARD KOLO, LYLE A. LANCE, THOMAS O. KLATT, BONITA BUETOW, PHYLLIS P. PLUSKOTA, MICHAEL R. HORBINSKI, SR., JAMES FRANKEN, GEORGIANNA CZAPLEWSKI, DONALD F. PONIK, GLADYS M. KOLLER, DONALD G. GIGANTE, JOSEPH A. VITUCCI, ERVIN L. PIETERZAK, RICHARD L. SZENTES, RICHARD KRAFT, JAMES G. WERNER AND DWAYNE K. KOLTERMAN,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MILWAUKEE AND MILWAUKEE EMPLOYES' RETIREMENT SYSTEM ANNUITY AND PENSION BOARD,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 LUNDSTEN, P.J. This case involves the circuit court's denial of a motion for relief from a judgment. The appellants are City of Milwaukee firefighters who sued the City over "duty disability benefits." The lawsuit asserted that the City and the Milwaukee Employes' Retirement System Annuity and Pension Board (collectively "the City") had an obligation to pay firefighters lifetime duty disability benefits if the City had promised to do so at some point in a firefighter's tenure. The circuit court dismissed the lawsuit on summary judgment, concluding that the City had no such obligation. Five of the firefighters (the "Rehrauer Five"), who are not appellants here, pursued an appeal of the summary judgment and were successful. As to those five, this court reversed the circuit court in ***Rehrauer v. City of Milwaukee***, 2001 WI App 151, 246 Wis. 2d 863, 631 N.W.2d 644, concluding that the City owed the firefighters lifetime duty disability benefits. The appellants here voluntarily dismissed their original appeals, or did not appeal in the first place, so they could secure other benefits

from the City.[1] More than three and a half years after entry of summary judgment, and after the Rehrauer Five succeeded with their different strategy, the firefighters here moved the circuit court for relief from the summary judgment, pursuant to WIS. STAT. § 806.07 (2001-02).[2] The circuit court, among other reasons, denied the motion because it had not been filed within a reasonable time. We affirm the circuit court.

Background

¶2 The firefighters began employment with the City prior to February 8, 1972. They received duty disability benefits at various times after September 30, 1977. The employment contracts in effect between February 8, 1972, and September 30, 1977, provided for lifetime duty disability benefits if a firefighter became disabled while on duty. The contracts in effect prior to and after those dates, however, provided for limited-term duty disability benefits. Because the hiring dates and the disability dates for the firefighters in this action fell outside of that window, the City concluded that it could and would deny the firefighters lifetime duty disability benefits.

¶3 The firefighters here and the Rehrauer Five filed suit in 1998 challenging the City's failure to pay them lifetime duty disability benefits.[3] The

[1] In this opinion, for the most part, we will refer to the appellant firefighters simply as "the firefighters" and the Rehrauer Five firefighters as the "Rehrauer Five."

[2] All references to the Wisconsin Statutes are to the 2001-2002 version unless otherwise noted.

[3] A comparison of the complaint filed in 1998 and the motion for relief filed in 2004 indicates that there are nine firefighters who moved for relief in 2004 who do not appear to have been a part of the action before it was dismissed on summary judgment. We find no place where the firefighters explain why these nine are properly parties to this appeal. However, because we affirm the circuit court's denial of the motion, there is no reason to discuss these nine separately.

circuit court determined that the City did not owe any of these firefighters lifetime benefits and granted summary judgment in favor of the City. The Rehrauer Five pursued an appeal. The firefighters here either did not appeal or voluntarily dismissed their appeals.[4]

¶4 The firefighters' decision not to pursue an appeal was required by their acceptance of an offer made by the City. This offer was related to the "Global Settlement" litigation, a different lawsuit initiated by the City. According to the firefighters, the Global Settlement agreement provided them with limited-term, rather than lifetime, duty disability payments, but also gave them lump-sum payments in amounts varying from $35,000 to $42,000. Firefighters, including the Rehrauer Five, who did not enter into Global Settlement agreements did not, at least at that time, secure the lump-sum payments. The agreements took the form of a "Global Settlement Consent Form" and a "Release," which had the combined effect of requiring firefighters to drop all legal claims against the City regarding disability benefits.

¶5 The Rehrauer Five's appeal was successful. In our 2001 ***Rehrauer*** decision, we concluded that the firefighters were entitled to lifetime duty disability benefits because they "gained vested rights in the highest level of duty disability benefits that came to be contractually established during their years of active duty." ***Rehrauer***, 246 Wis. 2d 863, ¶20. After this victory, the Rehrauer Five filed suit seeking the lump-sum payments that the firefighters before this court

[4] The distinction between the firefighters who did not appeal and those who dismissed their appeals does not matter because "[a]n appellant who voluntarily dismisses an appeal is returned to the position occupied prior to appeal and is bound by the order or judgment appealed from." ***State v. Lee***, 197 Wis. 2d 959, 968, 542 N.W.2d 143 (1996).

now had received as a result of the earlier Global Settlement agreements. A Milwaukee County circuit court agreed with the Rehrauer Five that they were entitled to the benefits of the Global Settlement agreements. Thus, unlike the firefighters before us, the Rehrauer Five obtained the benefit of both the Global Settlement agreement and lifetime duty disability benefits. The Rehrauer Five also filed an action to recover attorneys' fees for prior litigation. That effort was unsuccessful.

¶6 On January 29, 2004, more than three and a half years after entry of the summary judgment, and after all of the litigation described above was resolved, the firefighters filed a motion for relief from judgment under WIS. STAT. § 806.07(1)(f), (g), and (h). Section 806.07 provides, in pertinent part:

> **806.07 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:
>
> ….
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (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.

¶7 The circuit court denied the motion on two alternative grounds: first, if the firefighters were seeking relief from the Global Settlement agreements, the court did not have the authority to grant that relief, and, second, the motion was untimely, having been filed more than three and a half years after entry of the summary judgment.[5] The firefighters appeal.

Discussion

A. The Relevant Delay Begins With Entry of the Summary Judgment

¶8 According to the circuit court, it had no authority to grant relief from the Global Settlement agreements, and the relevant judgment for purposes of granting relief under WIS. STAT. § 806.07 is the summary judgment. Thus, the relevant delay in filing the motion for relief is the more than three and a half year period between June 20, 2000, when summary judgment was entered, and January 29, 2004, when the firefighters' motion for relief was filed. The firefighters persist in arguing that their motion for relief may properly be viewed two alternative ways: first, as a motion seeking relief from the summary judgment or, second, as a motion seeking relief from their subsequent Global Settlement agreements. As to the second alternative, § 806.07 provides that a court "may relieve a party or legal representative from a judgment, order or *stipulation*" (emphasis added), and the firefighters argue that "stipulation" should be liberally construed to encompass the Global Settlement agreements. But the firefighters'

[5] The circuit court also concluded that the motion was "statutorily precluded" because it was not made within the time limits prescribed by WIS. STAT. § 805.16. Both parties agree, however, that a movant must only comply with the time limits in § 805.16 if the motion is brought under WIS. STAT. § 806.07(1)(b). *See* § 806.07(2). The firefighters' motion was not brought under sub. (1)(b). Because this issue is not disputed on appeal, and because it does not affect what we conclude is a proper basis for the circuit court's decision, we address the matter no further.

"alternatives" argument is off the mark. Regardless whether their motion for relief may be viewed as seeking relief from the Global Settlement agreements, and regardless whether the circuit court had authority to vacate or modify those agreements, the circuit court properly viewed the firefighters' motion as seeking relief from the summary judgment and the court correctly measured the period of delay as starting the date that judgment was entered.

¶9 The problem with the firefighters' "alternatives" argument is that their motion for relief from judgment is plainly directed at the summary judgment. To obtain their goal of receiving lifetime duty disability benefits, the firefighters need that judgment vacated because it is the judgment that permits the City to deny them lifetime benefits. Thus, regardless whether the circuit court has the authority to relieve the firefighters of their obligations under their Global Settlement agreements, the issue remains whether the firefighters' delay in seeking relief from the summary judgment, pursuant to WIS. STAT. § 806.07, is reasonable. On this topic, the Global Settlement agreements are merely one of the circumstances to be taken into account when assessing the reasonableness of the delay. Because we conclude that the delay as to the summary judgment was not reasonable, we need not address the circuit court's authority to grant relief from the Global Settlement agreements.[6]

[6] If we were to address the circuit court's authority to grant relief from the Global Settlement agreements, we would have the same question as the circuit court: Why would the circuit court have authority over agreements executed after final judgment and without approval or participation of any kind by the circuit court? The firefighters' briefs do not adequately answer this question. The case they primarily rely on in this regard, ***In re Estate of Persha***, 2002 WI App 113, 255 Wis. 2d 767, 649 N.W.2d 661, is easily distinguished.

¶10 In addition, we observe that for most of the firefighters the difference in timing between the summary judgment and the Global Settlement agreements is insignificant in the context of a more than three and a half year delay. For most of the firefighters, the execution of the agreements relating to the Global Settlement litigation occurred within four months of the entry of summary judgment. We conclude that there is no rational reason why this difference in timing would have affected the circuit court's assessment of the delay under WIS. STAT. § 806.07.

B. The Circuit Court Properly Exercised Its Discretion in Denying the Firefighters' Motion for Relief

¶11 The firefighters argue the circuit court erred in concluding that their motion had not been made within a reasonable time. They assert that the circuit court did not "indicate that it considered the amount of time elapsed between the 6/20/00 entry of the summary judgment and the 1/29/04 filing of the Motion for Relief to be unreasonably lengthy when measured in light of the particular circumstances of this case." The firefighters assert that the circuit court "failed to make any factual inquiry regarding the circumstances surrounding the timing of the filing of Plaintiffs-Appellants' Motion for Relief."

¶12 While it is true that the circuit court's relatively short order denying the firefighters' motion for relief does not provide an extended explanation of its decision, our review of the hearing persuades us that the court did consider the relevant circumstances. Moreover, regardless of the extent to which the court

articulated its reasoning, the record supports the court's conclusion that the delay was not reasonable.[7]

¶13 A circuit court's order denying a motion for relief under WIS. STAT. § 806.07 as untimely will not be reversed on appeal unless there has been an erroneous exercise of discretion. *See* ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 629-30, 511 N.W.2d 868 (1994). "Discretionary acts are sustained if the trial court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 848, 593 N.W.2d 103 (Ct. App. 1999) (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982)). "We will generally look for reasons to sustain a trial court's discretionary decision." ***Murray v. Murray***, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999). "Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling." ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).

¶14 As the firefighters point out, there are no bright-line rules for what constitutes a reasonable time under WIS. STAT. § 806.07(2). Determining whether a delay is reasonable "requires a case by case analysis of all relevant factors." ***Cynthia M.S.***, 181 Wis. 2d at 627. Those factors include the reasons for the delay and the prejudice caused the other party. ***Id.*** Our analysis is "guided by the fact

[7] As mentioned earlier in this decision, the firefighters sought relief under three subsections of WIS. STAT. § 806.07(1), that is, (f), (g), and (h). Motions made under all three subsections must be made "within a reasonable time." WIS. STAT. § 806.07(2). Therefore, it is unnecessary to address the three subsections individually.

that while respect for the finality of judgments is an important concern, the purpose of sec. 806.07(1)(h) is to allow courts to do substantial justice when the circumstances so warrant." ***Id.*** Of particular note here, when the "reasonable time" language in WIS. STAT. § 806.07(2) was adopted, the intent "was to shorten the time period for filing a motion to vacate rather than allowing these motions to be filed up to a year after entry of the judgment as permitted by the former statute, [WIS. STAT. § 269.46 (1973)]." ***Rhodes v. Terry***, 91 Wis. 2d 165, 173, 280 N.W.2d 248 (1979). Thus, even a one-year delay is a substantial delay. Still, even delays longer than one year may be reasonable when viewed in light of particular circumstances. Here, our independent review reveals a reasonable basis for the circuit court's conclusion that the more than three and a half year delay was not reasonable.

¶15 The firefighters assert that their delay is justified by four reasons, either individually or in combination: *first*, they could not have been expected to seek relief until the Rehrauer Five were successful on appeal, an event that did not occur until June 2001; *second*, their motion for relief would not have been sensible until after the Rehrauer Five also obtained the right to the Global Settlement lump-sum payments, which occurred in April 2002; *third*, it was proper for the firefighters to await a decision on the Rehrauer Five's action seeking attorney fees, a question resolved against the Rehrauer Five in July 2003; and, *fourth*, the firefighters were acting under economic duress when they gave up their right to appeal the summary judgment. We address each topic below.

1. The Rehrauer Five's Successful Appeal

¶16 The Rehrauer Five declined to take the certainty of the Global Settlement lump-sum payout and instead pursued an appeal from the summary

judgment. The firefighters here opted for certain benefits over an uncertain outcome of the appeal. They now argue it would not have made sense for them to seek relief until the Rehrauer Five were successful on appeal. In response, the City cites ***Ackermann v. United States***, 340 U.S. 193 (1950), for the proposition that, where a litigant does not appeal, the success of co-litigants on appeal does not provide a basis for vacating the original judgment under the federal rule counterpart to WIS. STAT. § 806.07, Rule 60(b) of the Federal Rules of Civil Procedure. We find ***Ackermann*** persuasive.[8]

¶17 In ***Ackermann***, complaints were filed by the federal government against three defendants seeking to cancel their citizenship by naturalization on the grounds of fraud. ***Ackermann***, 340 U.S. at 195. All three parties lost at a consolidated trial, and their citizenship status was revoked. ***Id.*** Only one of the three appealed. That party was successful on appeal, and the judgment was reversed. ***Id.*** One of the two who did not appeal later filed a motion to vacate the judgment against them under Rule 60(b). ***Ackermann***, 340 U.S. at 194. The ***Ackermann*** Court concluded, despite arguments to the contrary, that the defendant seeking relief had made a "free choice" not to appeal. ***Id.*** at 197-202. Despite the different results among the similarly situated defendants, because the choice was "free," the success of the defendant who did appeal was not a circumstance warranting relief under Rule 60(b). ***Ackermann***, 340 U.S. at 197-202.

[8] WISCONSIN STAT. § 806.07 is based on Rule 60(b) of the Federal Rules of Civil Procedure. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 542, 363 N.W.2d 419 (1985). Federal case law interpreting and applying Rule 60(b) is, therefore, persuasive authority when we interpret and apply § 806.07. *See* ***Schauer v. DeNeveu Homeowner's Ass'n***, 194 Wis. 2d 62, 73, 533 N.W.2d 470 (1995).

¶18 Apart from asserting that their decisions to forgo their appellate rights were not freely relinquished, a topic we address below, the firefighters present no reason why we should not apply the reasoning of ***Ackermann*** here. Consistent with ***Ackermann***, we conclude that success by the Rehrauer Five does not provide a reasonable basis for the delayed filing of the firefighters' motion for relief under WIS. STAT. § 806.07.

2. The Rehrauer Five and the Global Settlement Lump-Sum Payments

¶19 ***Ackermann*** applies equally to the firefighters' contention that there was good reason not to file their motion for relief until after the Rehrauer Five were also successful in obtaining the Global Settlement lump-sum payments. The firefighters contend that, until that point, they assumed that they could obtain the global settlement litigation money or the lifetime duty disability payments, but not both. This argument again assumes that the different *result* of a different party's litigation strategy provides a basis for vacating a judgment under WIS. STAT. § 806.07. Again we disagree.

3. The Rehrauer Five's Attorneys' Fees

¶20 The firefighters argue that they reasonably waited to file their motion for relief until the Rehrauer Five litigated the issue of whether they could recover attorneys' fees. But the firefighters fail to explain why this fees litigation should matter. The firefighters' best effort at an explanation occurred during the following exchange with the circuit court:

> ATTORNEY FRAKER: … [T]he [firefighters] waited until after the attorney fee questions for the five who had appealed all the way had been decided in July of '03, and the time for the appeal of that decision had expired in October of '03.

> THE COURT: What was the relevance of waiting for that?
>
> ATTORNEY FRAKER: The relevance was the potential conflict of arguing that the rest of the potential appellants should bear their fees, and the appellants bringing an action for their fees, the conflict that I had explained to them while we were holding off filing until that issue was decided.

Like the circuit court, we discern nothing that explains why the attorney fees litigation by the Rehrauer Five provides justification for any part of the firefighters' delay in moving for relief from judgment.

4. Economic Duress

¶21 Finally, we address the topic of economic duress. Before the circuit court, the firefighters asserted that they dismissed their appeals, or declined to appeal in the first place, because of economic duress. The firefighters argued that they were improperly forced to choose between a "large" unrelated benefit, the lump-sum cash payout relating to the Global Settlement litigation, and pursuing an appeal. For the following reasons, economic duress does not provide a basis for reversing the circuit court's determination that the delay was not reasonable.

¶22 First, the topic of economic duress is not properly presented on appeal. In their brief-in-chief, the firefighters fail to present developed argument on the issue. There is scant reference to it in their "Argument" section and, in their "Statement of the Case," the firefighters simply provide a summary of the duress argument they made before the circuit court. Only in their reply brief do the firefighters present significant legal argument on the topic. Thus, we need not address the issue. *See* ***Sauk County v. Gumz***, 2003 WI App 165, ¶32 n.13, 266 Wis. 2d 758, 669 N.W.2d 509.

¶23 Second, it is not apparent why an allegation of economic duress should have affected the circuit court's assessment of the reasonableness of the more than three and a half year delay. As further explained below, a party alleging economic duress must make a showing satisfying four elements. Our review of the record indicates that any evidence that might show economic duress was available shortly after entry of the summary judgment. Thus, even if valid, the firefighters' economic duress argument does not explain the delay. If the firefighters are contending that the existence of economic duress did not become apparent until some later date, they have failed to develop that argument, either before the circuit court or before us.

¶24 Third, our review of the briefing and argument before the circuit court persuades us that, even had the circuit court addressed economic duress, it would have been required to conclude that the firefighters were not subjected to duress.

¶25 A party alleging economic duress has a difficult burden. "[M]erely driving a hard bargain or taking advantage of another's financial difficulty is not duress." ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 110, 293 N.W.2d 155 (1980). Proving economic duress requires proof of four elements: first, the party alleging duress must show that he or she was the victim of a wrongful or unlawful act or threat; second, the act or threat must be such that it deprives the victim of his or her unfettered will; third, the threatened party must be compelled to make a disproportionate exchange or to give up something for nothing; and, fourth, the threatened party must have no adequate legal remedy. ***Id.*** at 109-10.

¶26 We find no place where the firefighters offered to show that the City, when threatening to withhold the Global Settlement payout, acted wrongfully or

unlawfully within the meaning of ***Wurtz***. We also locate no place in the record where the firefighters offered to show that they were effectively forced to give up something for nothing, or to make a disproportionate exchange. Rather, the firefighters assert that they had to choose between a "large" unrelated benefit, the Global Settlement lump-sum cash payment, and pursuing an appeal of the summary judgment, a trade-off that on its face does not present a disproportionate exchange. Further, the firefighters did not offer to present evidence that their financial situations were so precarious that they were deprived of their unfettered will.

¶27 The firefighters assert on appeal that there is a factual dispute as to whether their decision not to pursue an appeal of the summary judgment was the result of "improper coercion." But they do not tell us what facts are in dispute, and the record shows they did not suggest to the circuit court that a hearing was needed to resolve factual disputes. Indeed, the circuit court held a hearing, but at no time—not before, not during, and not after the hearing—did the firefighters indicate that an evidentiary hearing was needed to resolve disputed facts. Rather, the firefighters hoped the circuit court would adopt their economic duress argument based on general assertions of duress contained in their affidavits and in the arguments of their counsel.[9] They pursue this same strategy on appeal, and we find it no more persuasive than did the circuit court.

[9] For example, the firefighters' counsel asserted generally that "the economic pressure was just too great to withstand," and that "these [firefighters] were more susceptible to the City's threat, for whatever financial and/or other reasons."

¶28 Finally, it is clear that the firefighters had an adequate legal remedy. This fact is amply demonstrated by the successful litigation pursued by the Rehrauer Five.

¶29 Therefore, the firefighters' assertion of economic duress provides no basis to reverse the circuit court's determination that the delay was not reasonable.

Conclusion

¶30 We agree with the circuit court that, under WIS. STAT. § 806.07(2), the more than three and a half year delay was not reasonable, and we affirm the denial of the firefighters' motion for relief from judgment.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.