COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP644 **Cir. Ct. No. 2002SC34794**

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

MARK OLSEN AND RITA OLSEN,

PLAINTIFFS-APPELLANTS,

V.

EDWARD HOFFMANN, DDS, AND HAWTHORNE COLLECTION SERVICES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed and cause remanded with directions*.

¶1 WEDEMEYER, P.J.[1] Mark and Rita Olsen appeal from an order of the trial court denying their motion to reopen, based on fraud, pursuant to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

STAT. § 806.07(1)(c) (2003-04).[2] The Olsens claim the trial court improperly denied the motion, and that the case should be reopened because ***Zehetner v. Chrysler Fin. Co., LLC***, 2004 WI App 80, 272 Wis. 2d 628, 679 N.W.2d 919 requires reopening due to mistake of law, the legislative intent of the Wisconsin Consumer Act supports reopening, ***Mared Indus. v. Mansfield***, 2005 WI 5, 277 Wis. 2d 350, 690 N.W.2d 835 (2005) supports reopening, the original motion to reopen was timely, and because the defendants' numerous fraudulent activities require that the case be reopened. Because the trial court's determinations are amply supported by the record and not clearly erroneous, and because the interest of justice does not demand reopening the case, this court affirms the trial court's order.

BACKGROUND

¶2 A full recitation of the underlying facts of this case as found by the trial court are not relevant to this appeal. A debt for services rendered was owed to Dr. Edward Hoffman in the amount of $591.[3] After numerous failed attempts to collect from the Olsens, which included an offer for the Olsens to propose a payment plan, and an offer to accept periodic payments from the Olsens, Hoffman referred the debt to defendant Hawthorne Collection Services, Inc. Subsequently, in November 2002, the Olsens, through their attorney Douglas Katerinos, sued Dr. Hoffman and Hawthorne for an alleged violation of the Wisconsin Consumer Act.

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

[3] This was reduced to $491 after the Olsens made a payment of $100.

¶3 On September 5, 2003, the trial court granted summary judgment for the defendants, dismissing the Olsens' consumer act claim, the validity of which depended on finding an agreement by Hoffman and the Olsens to accept periodic payments of the outstanding amount of $591. No evidence of an agreement to defer payment was presented to the court.

¶4 By order dated October 7, 2003, the trial court found that the Olsens' consumer act claim was frivolous under WIS. STAT. § 802.05. Additionally, under the authority of WIS. STAT. § 814.025, the court awarded the defendants costs for defending a frivolous suit that Katerinos knew, or should have known, was without any reasonable basis in law or equity and could not be supported by a good faith argument. Attorney Katerinos and the Olsens were ordered to pay attorney's fees in the amount of $5437 and $2347, respectively. The Olsens appealed to this court.

¶5 This court held that the record amply supported the trial court's conclusion that there was no disputed issue of material fact, and upheld the summary judgment. This court also upheld the frivolous finding as it too was amply supported by the record before the trial court. This court then remanded the case back to the trial court to determine the exact amount of attorney fees and costs to be awarded. *See* ***Olsen v. Hoffmann***, No. 03-3500, unpublished slip op. (WI App Nov. 16, 2004).

¶6 On June 28, 2004, the plaintiffs filed a motion to reopen, based on fraud, pursuant to the court's authority under WIS. STAT. § 806.07(1)(c).[4] The

[4] In relevant part, WIS. STAT. § 806.07(1) gives authority to the court, upon proper pleading, to grant relief from judgment for several reasons, including: "(c) Fraud, misrepresentation, or other misconduct of an adverse party."

trial court, while alluding to the great delay in bringing forth the motion and the appearance of improper delay motives on behalf of the plaintiffs, denied this motion on February 21, 2005. The trial court's order denied the motion on two bases: (1) the motion was untimely; and (2) the motion was non-meritorious. The Olsens appeal from that order.

DISCUSSION

¶7 The Olsens predominantly claim the trial court incorrectly relied on mistaken facts and conclusions of law in denying their motion to reopen. Specifically, the plaintiffs accuse the defendants of asserting incorrect conclusions of law that amount to a fraudulent representation to the court that "violate[s] the sanctity of the court." This court affirms the trial court's order.

¶8 The trial court's order denying a motion for relief under WIS. STAT. § 806.07(1)(c) will not be reversed on appeal unless there has been a clearly erroneous exercise of discretion. ***Shuput v. Lauer***, 109 Wis. 2d 164, 177, 325 N.W.2d 321 (1982). An appellate court will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's determination. ***Howard v. Duersten***, 81 Wis. 2d 301, 305, 260 N.W.2d 274 (1977).

¶9 A motion brought under WIS. STAT. § 806.07 "shall be made within a reasonable time, and … not more than one year after the judgment was entered …." Section 806.07(2). "[T]he mere fact that the motion is brought within one year after entry of judgment does not mean that the motion is timely." ***Rhodes v. Terry***, 91 Wis. 2d 165, 171, 280 N.W.2d 248 (1979). To determine whether a motion was brought within a reasonable period of time, the court must consider the particular facts and circumstances of each case. ***Id.*** at 173.

¶10 The trial court's conclusion that the motion was not brought within a reasonable period of time is amply supported by the record. The frivolous ruling order was dated October 7, 2003. The appeal of this order, to reopen judgment, was filed on June 28, 2004, about eight months later. Although it was filed within the suggested statutory one-year period, the court, when considering the particular facts and circumstances of the case, found the delay to be unreasonable. This finding is not clearly erroneous. The delay supports the inference that the Olsens waited until the original trial judge rotated to a different court so that a new trial judge would be assigned to rule on their motion. This provides a reasonable basis for the trial court's ruling, and leads to this court's conclusion that the trial court did not erroneously exercise its discretion when it denied the Olsens' motion to reopen. The trial court also found that there was no merit to the Olsens' claims.

¶11 The scope of this appeal is essentially to reconsider the trial court's order denying the Olsens' request to reopen the judgment. This court concludes that the trial court considered the facts, applied the pertinent law, and reached a reasonable conclusion. Accordingly, this court cannot conclude that the trial court's decision was erroneous.

¶12 For clarity and finality purposes, this court believes it is important to briefly address the other arguments set forth in the plaintiffs' briefs. The Olsens assert that their motion to reopen is proper because the defendants have relied upon, and continually misrepresented to the courts, the holding of ***Zehetner***. The Olsens also repeatedly accused the defendants of fraudulent activities that support reopening under WIS. STAT. § 806.07(1)(c). The time to litigate the issue presented in ***Zehetner*** has passed. The time to argue that issue was during the initial trial court proceedings in this matter. The trial court found that this case did

not present any consumer protection act violation. The trial court's decision in that regard was affirmed by this court in the first appeal.

¶13 The Olsens' reference to ***Zehetner*** is an attempt to relitigate an issue that they have already lost. This is something this court is not willing to do. The plaintiffs further allege that the defendants are perpetuating a fraud upon the court by not conceding the plaintiffs' interpretation of the case. Conceding the Olsens' interpretation of the law is by no means an obligation for which the defendants must engage simply upon the Olsens' request, especially after the court has already found in favor of the defendants.

¶14 The Olsens also boldly assert that the judgment entered against them was based upon the defendants' fraudulent activities. This court agrees with the trial court's conclusions made on the record that there is

> nothing here to suggest that this judgment resulted from fraud perpetrated on the Court, by any of the lawyers, by any of the defendants, by any representatives of the defendants, et cetera.
>
> Some of this stuff that is cited in support of the proposition that the judgment resulted from fraud is simply silly.

The Olsens obviously believe the trial court's decision was incorrect. This court, nonetheless, is bound by the law. There is no basis upon this record and the appellate standard of review to reverse the order of the trial court.

¶15 Accordingly, this court declines to address any other peripheral arguments made by the Olsens in their briefs. They have either already been litigated in previous matters before the court, are wholly not proper for the purposes of this appeal, or are skeletal arguments that simply rehash findings of fact adverse to the Olsens. It is time for this litigation to come to an end. Justice

is best served by adhering to the principles of finality in litigation and discouraging litigants from pursuing multiple lawsuits or consuming the resources of the legal system without regard to the decisions made by the courts.

¶16 In that regard, once again, this court has received three motions for sanctions—one each from the Olsens, Hoffmann and Hawthorne. The Olsens request that this court sanction Hoffmann and his attorney by "summary reversal, striking the Hoffmann Response, and awarding the Olsens costs, fees, and punitive monetary penalties" based on the "deliberate presentations to this Court of numerous prior false statements made in bad faith, additionally and independently constituting a[n] expanding pattern of repeated egregious misconduct, fraudulent behavior, and a flagrant and knowing disregard of the judicial process." It is clear from the Olsens' briefs that they have very strong feelings in this regard. This court does caution all parties that the integrity of the justice system is dependent upon all participants being forthright with a dedicated adherence to the rules. Sometimes, however, emotions can cloud objectivity. This court has reviewed the materials submitted by the Olsens in support of their motion and cannot conclude that the relief they request is warranted. The Olsens' motion for sanctions is denied.

¶17 Hoffmann and Hawthorne each filed a motion seeking reimbursement of actual out-of-pocket costs and attorney fees incurred in responding to this appeal on the basis that the appeal was frivolous. Hawthorne attaches a detailed accounting of time spent in responding to this appeal. Before

this court can grant these requests, it must first determine whether the appeal is frivolous.[5]

¶18 In reviewing whether an appeal is frivolous, this court decides the question as a matter of law. *See* ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. In order to make an award of frivolous costs and fees, this court must find that the entire appeal was frivolous. ***Id.*** This court will impose sanctions for a frivolous appeal if the "'party or party's attorney knew, or should have known, that the appeal … [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.'" ***Id.*** (citation omitted; brackets in original); *see also* WIS. STAT. § 809.25(3)(c)2.

¶19 This court finds that the Olsens' appeal is frivolous. The Olsens or their attorney should have known that there was no arguable merit to this appeal. There was no reasonable basis in law or equity to challenge the trial court's ruling denying the motion to reopen. A reasonable person would have known that any further appeal would be frivolous. The issues raised in this appeal simply attempted to re-litigate those issues, which had previously been decided both at the trial court level and the appellate court level. Accordingly, this court grants Hoffmann's and Hawthorne's motions for fees and costs. Hawthorne has included a detailed accounting of the amount expended in defending this appeal. This court finds the $1147.50 incurred to be reasonable and therefore orders the trial court to

[5] This court notes that all parties have had an opportunity to be heard with respect to these motions. Hoffmann and Hawthorne each filed separate motions with this court and the Olsens filed responses to both. Accordingly, the issue of whether this appeal is frivolous can properly be addressed. *See* ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621.

enter judgment against the Olsens in that amount.[6] Hoffmann does not submit a detailed accounting of costs incurred in defending this appeal. Accordingly, on remand, the trial court is directed to determine what amount of attorney's fees and costs should be awarded.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[6] The trial court may adjust this amount should any evidence be presented to demonstrate that such adjustment is necessary. *See* ***Lucareli v. Vilas County***, 2000 WI App 157, ¶¶8-12, 238 Wis. 2d 84, 616 N.W.2d 153.