

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2006

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. 2005AP2160

Cir. Ct. No. 2002CV901

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LARRY M. MAIZE,

PLAINTIFF-APPELLANT,

V.

DANIEL W. BLAEDOW AND DORI L. BLAEDOW,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Larry M. Maize has appealed from an order entered in the trial court on August 2, 2005, denying his motion to reopen a judgment entered in 2004 in favor of Daniel and Dori Blaedow. He has also appealed from

a separate order entered on the same date awarding attorney's fees and costs in amount of \$1741.50 to the Blaedows. We affirm both orders.

¶2 Maize and the Blaedows own adjacent pieces of real estate. Maize commenced an action against the Blaedows in October 2002, demanding quiet title to a four-foot strip of land and seeking compensatory and punitive damages for trespass, invasion of privacy, intentional damage to property, loss of personal property, theft and conversion. The Blaedows counterclaimed.

¶3 Maize's claims against the Blaedows were dismissed when neither Maize nor his counsel appeared or filed affidavits in opposition to the Blaedows' motion for summary judgment. On August 6, 2004, after trial on the Blaedows' counterclaims, judgment was entered determining that the Blaedows owned the contested strip of land based upon adverse possession. The judgment awarded the Blaedows compensatory and punitive damages, costs and attorney's fees in the amount of \$38,740.

¶4 Maize filed a timely notice of appeal from the August 2004 judgment. That appeal constituted court of appeals case No. 2004AP2679. It was dismissed on October 27, 2004, for failure to pay the filing fee.

¶5 Maize subsequently moved the trial court to reopen the judgment under WIS. STAT. § 806.07(1)(h) (2003-04).¹ He alleged that the interest of justice compelled relief because he was provided ineffective representation by his attorney in the original trial court proceedings and appeal. In his motion, affidavit and briefs, he detailed alleged deficiencies in counsel's performance. In its

¹ All references to the Wisconsin Statutes are to the 2003-04 version.

August 2, 2005 orders, the trial court denied Maize's motion and awarded attorney's fees and costs to the Blaedows.

¶6 A motion for relief from judgment under WIS. STAT. § 806.07 is addressed to the sound discretion of the trial court. *Brown v. Mosser Lee Co.*, 164 Wis. 2d 612, 616-17, 476 N.W.2d 294 (Ct. App. 1991). We will not reverse the trial court's discretionary determination if the record shows that discretion was in fact exercised and a reasonable basis exists for the trial court's decision. *Id.* at 617.

¶7 WISCONSIN STAT. § 806.07(1)(h) permits a trial court to grant relief under extraordinary circumstances. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 549, 363 N.W.2d 419 (1985). It "should be used only when the circumstances are such that the sanctity of the final judgment is outweighed by 'the incessant command of the court's conscience that justice be done in light of all the facts.'" *Id.* at 550 (quoting *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir)), *cert. denied*, 399 U.S. 927 (1970).

¶8 The trial court reasonably concluded that Maize's allegations of ineffective assistance of counsel are insufficient to justify relief under WIS. STAT. § 806.07(1)(h). When a party in a civil case alleges ineffective assistance by his or her counsel, the remedy is a malpractice suit against counsel. *Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 404, 308 N.W.2d 887 (Ct. App. 1981). A civil litigant whose rights have been adversely affected by the negligence of his or her attorney may hold that attorney liable for monetary losses caused by the negligence. *Id.* at 406.

¶9 The trial court properly applied this rationale in denying Maize's motion without an evidentiary hearing. In reaching this conclusion we

acknowledge that in *Village of Big Bend*, this court discussed the possibility of seeking relief under WIS. STAT. § 806.07 when trial counsel rendered deficient representation in a civil case.² See *Village of Big Bend*, 103 Wis. 2d at 408. However, the rationale behind *Village of Big Bend* is that an innocent party in a civil case generally should not bear the burden of a new trial because the attorney chosen by the other party was ineffective. See *id.* at 406. Nothing alleged by Maize concerning counsel's representation demonstrates the kind of extraordinary or unconscionable circumstances that would justify overriding that policy here.

¶10 For these same reasons, we reject Maize's request that we exercise our discretion to order a new trial under WIS. STAT. § 752.35.³ Maize's remedy, if any, is a malpractice suit against his former counsel, not a new trial in the action against the Blaedows.

¶11 Maize also challenges the trial court's award of \$1741.50 in attorney's fees and costs to the Blaedows. He cites *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984), for the proposition that a trial court's award of attorney's fees is vested in its discretion, and will be sustained on appeal absent an abuse of discretion. Maize contends that the trial court erroneously exercised its discretion by awarding attorney's fees for the purpose of penalizing him. He contends that his motion for relief from judgment

² Similarly, in listing factors relevant to a motion for relief from judgment under WIS. STAT. § 806.07(1)(h), the Wisconsin supreme court included whether the claimant received effective assistance of counsel. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552, 363 N.W.2d 419 (1985).

³ We will assume *arguendo* that we have such authority when, as here, the appeal is taken from an order denying relief from judgment under WIS. STAT. § 806.07, rather than from the judgment itself.

was filed in good faith, and that he was punished sufficiently for the negligence of his former counsel when the trial court awarded attorney's fees in the original judgment.

¶12 We are not persuaded that the trial court erroneously exercised its discretion in awarding \$1741.50 in attorney's fees and costs. The Blaedows incurred additional costs and attorney's fees in defending against Maize's motion for relief under WIS. STAT. § 806.07(1)(h). Moreover, that motion was based on allegations of deficiencies by Maize's own attorney, not misconduct by the Blaedows. Because the trial court could reasonably conclude that the Blaedows were entitled to costs and fees for defending the postjudgment proceedings as well as the prejudgment action, no basis has been established for disturbing its award.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

