

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 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. 2005AP3072

Cir. Ct. Nos. 1998CV1312
1999CV919

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 1998CV1312

BACHER COMMUNICATIONS, INC.,

PLAINTIFF-APPELLANT,

DIGICORP, INC., A WISCONSIN CORPORATION,

PLAINTIFF,

CINCINNATI INSURANCE CO.,

INTERVENOR,

V.

DANN KRINSKY,

DEFENDANT,

AMERITECH CORP.,

DEFENDANT-RESPONDENT.

No. 1999CV919

DIGICORP, INC., A WISCONSIN CORPORATION,

PLAINTIFF,

CINCINNATI INSURANCE CO.,

INTERVENING PLAINTIFF,

V.

DANN KRINSKY,

DEFENDANT,

AMERITECH CORPORATION,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

V.

BACHER COMMUNICATIONS, INC.,

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Bacher Communications appeals an order denying its motion for relief under WIS. STAT. § 806.07¹ from a stipulated dismissal of its lawsuit against Ameritech Corporation. Bacher argues it is in the same position as the litigants in *Insurance Company of North America v. Cease Electric, Inc.*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462, and therefore, it should be allowed to reopen a voluntary dismissal. Bacher also argues the circuit court’s denial was inherently inconsistent with its grant of another litigant’s motion to reinstate its judgment, and therefore, Bacher’s judgment should also be reinstated. We disagree, and affirm the circuit court’s denial of Bacher’s motion for relief from its stipulated dismissal.

BACKGROUND

¶2 Dann Krinsky approached Tim and Patti Bacher, the principals of Bacher Communications, looking for work. Krinsky proposed a plan using Bacher’s existing relationship with Digicorp, Inc., to sell Ameritech’s “Valu-Link” service.² On March 25, 1996, Bacher hired Krinsky. On March 28, the Bachers met with Digicorp’s president, Stewart Clark, to present Krinsky’s proposal. Bacher and Digicorp agreed to the deal, and Krinsky began selling Ameritech valu-link calling plans.

¶3 After the deal was entered, Clark contacted an Ameritech manager named Ray Taylor. During their conversation, Clark asked Taylor if he knew

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

² Ameritech was a holding company whose subsidiaries provided telecommunication services throughout the Midwest, including calling plans. Digicorp was an authorized distributor of Ameritech’s valu-link calling plans. Bacher was an agent of Digicorp.

anything about Krinsky. Taylor did not answer Clark's questions regarding Krinsky. On October 8, 1996, after discovering Krinsky forged two contracts, Ameritech terminated its agreement with Digicorp.

¶4 In 1998, Digicorp sued Krinsky and Bacher over the events that led to Ameritech terminating its distributorship agreement. Digicorp then added a claim against Ameritech. Ameritech counterclaimed against Digicorp, cross-claimed against Krinsky, and filed a third-party complaint against Bacher. Bacher counterclaimed against Ameritech. Digicorp and Bacher alleged Ameritech intentionally misrepresented Krinsky's past by failing to report Krinsky had been fired for forging documents while employed by another independent contractor.

¶5 In December 2000, a jury found Ameritech had intentionally misrepresented Krinsky's past and awarded Bacher \$100,000 in damages. On appeal, this court affirmed the judgment. *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶1, 262 Wis. 2d 32, 662 N.W.2d 652. However, the supreme court reversed, holding the fraud in the inducement exception of the economic loss doctrine did not apply. *Id.*, ¶68. The supreme court remanded the case to the circuit court for a new trial limited to contractual remedies. *Id.*, ¶71.

¶6 Back before the circuit court, Bacher argued the supreme court's decision did not end its claims against Ameritech and filed a motion for summary judgment. Ameritech argued the supreme court's decision extinguished Bacher's claims and filed a motion to dismiss.

¶7 On June 10, 2004, the circuit court denied Bacher's motions and granted a conditional motion to dismiss. The next day, Bacher's attorney emailed Ameritech's attorney seeking a stipulation to dismiss on the merits without costs stating "My clients want to put everything to bed and end this litigation now."

The court entered an order consistent with the parties' stipulation to dismiss without costs on June 21, 2004.

¶8 During the pendency of this action, the supreme court affirmed this court's decision in *Insurance Company of North America v. Cease Electric, Inc.*, 2004 WI App 15, 269 Wis. 2d 286, 674 N.W.2d 886,³ that the economic loss doctrine does not apply to service contracts. See *Insurance Co. of N. Am. v. Cease Elec., Inc.*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462. Based on *Cease Electric's* holding, Digicorp moved to reinstate the prior judgment. On May 18, 2005, the court granted Digicorp's motion treating the motion as one for summary judgment. Digicorp and Ameritech subsequently settled their litigation.

¶9 On May 19, 2005, Bacher filed a motion for relief from the stipulated dismissal under WIS. STAT. § 806.07(1). On September 20, 2005, the court denied Bacher's motion and entered the order denying Bacher's motion on October 12, 2005. Bacher appeals.

DISCUSSION

¶10 The decision to grant a motion for relief from a judgment or order is a discretionary decision of the circuit court. See *Sukala v. Hertiage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. "A circuit court's discretionary decision will not be reversed unless the court erroneously exercised that discretion." *Id.* "We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." *Brown v. Mosser Lee Co.*, 164

³ The opinion was filed on December 17, 2003.

Wis. 2d 612, 617, 476 N.W.2d 294 (Ct. App. 1991) (quoted source omitted). When reviewing the record, we generally look for reasons to affirm the circuit court rather than reverse because this discretion is essential to the circuit court's function. *Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 149, 519 N.W.2d 723 (Ct. App. 1994).

¶11 Bacher argues the circuit court's denial of its motion for relief from its stipulated dismissal was an erroneous exercise of discretion. Bacher contends the *Cease Electric* decision changed the law and the circuit court's denial is inconsistent with its grant of Digicorp's motion to reinstate its judgment. We disagree.

¶12 *Cease Electric* did not create a change of law that would require relief from the stipulation Bacher entered into with Ameritech. Bacher entered into its stipulation after this court decided *Cease Electric*. Therefore, the law in Wisconsin at the time of dismissal was that the economic loss doctrine did not apply to service contracts.

¶13 The circuit court's denial of Bacher's motion was not inherently inconsistent with the treatment of Digicorp's motion. Bacher entered into a stipulation to dismiss on the merits with Ameritech. Digicorp had not entered into a stipulated dismissal. Therefore, Bacher and Digicorp are not in the same position, and the circuit court's differing treatment is not inherently inconsistent.

¶14 WISCONSIN STAT. § 806.07⁴ governs motions for relief from judgments and orders. The supreme court has explained courts should consider

⁴ WISCONSIN STAT. § 806.07 reads in relevant part:

(continued)

the following factors under § 806.07 when determining whether to grant a motion for relief from a judgment or order:

whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

State ex rel. M.L.B. v. D.G.H., 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985).

However, these considerations are not exclusive. *State v. Sprosty*, 2001 WI App 231, ¶¶19-20, 248 Wis. 2d 480, 636 N.W. 2d 213.

(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:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(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.

¶15 The record reveals the circuit court also appropriately considered relevant factors before denying Bacher's motion. First, the court considered the importance of finality in providing predictability to litigants, so they know when the litigation is over. Similarly, the court noted finality preserves the limited resources of the courts. Second, the court considered that Bacher initiated the dismissal with Ameritech and benefited from the stipulated dismissal because it was without costs. Third, the court considered Bacher's six-month wait after *Cease Electric* to file a motion as indicating *Cease Electric* was not the reason for Bacher's motion; rather, the court's reinstatement of Digicorp's judgment was more than likely the reason Bacher moved for reinstatement. The circuit court also observed Bacher was aware this court's decision in *Cease Electric* would be favorable to Bacher, and yet it still moved for dismissal of its claim. Finally, the court noted the supreme court had an opportunity to provide Bacher with a remedy but declined to do so. These considerations are consistent with WIS. STAT. § 806.07.

¶16 Because the circuit court's denial of Bacher's motion for relief was a reasonable exercise of discretion, the order is affirmed.

By the Court.—Order affirmed.

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