

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1667

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WALTER L. MERTEN,

PLAINTIFF-APPELLANT,

V.

DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Walter Merten appeals from an order denying relief from an order that dismissed his appeal of a condemnation award. The issue is whether the trial court properly exercised its discretion in denying relief based

on the facts Merten presented in his WIS. STAT. § 806.07 (1997-98)¹ motion. We affirm.

¶2 In 1996, the Department of Transportation (DOT) condemned 47,000 square feet of land Merten owned. In May 1998, Merten commenced this action to appeal the DOT's award for the condemned land. The trial court's first scheduling order required Merten to name his expert appraisal witnesses by October 1, 1998.² Merten did not meet that deadline. On October 30, Merten's counsel requested a new deadline and a postponement of the February 1999 trial date because Merten had retained an appraisal expert, but he was physically unable to participate in the trial.

¶3 Counsel subsequently withdrew and an amended scheduling order provided a March 1 deadline for naming Merten's witnesses. Again, Merten failed to meet the deadline and substitute counsel appeared on May 3, 1999. A month later, counsel moved to again extend the witness deadline and postpone the July trial date. A second amended scheduling order set November 15, 1999, as Merten's new deadline for naming witnesses, with trial scheduled for March 2000.

¶4 Once again, Merten failed to name his witnesses on time, and instead asks for yet another extension. The trial court pronounced itself "sick and tired of Mr. Merten's excuses and delays," but "reluctantly" extended the November 15 deadline until December 15, 1999.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² The order pertained to all witnesses, expert and lay, but the only witnesses Merten needed or sought were real estate appraisers.

¶5 On December 15, Merten, by his third attorney, requested his fourth extension of time under the scheduling order, citing a recent two-month illness and his belated hiring of new counsel. The court responded with an order for dismissal as sanction for Merten's repeated delinquencies. The court noted that Merten only needed to name an appraisal witness, that obtaining one was neither a time consuming nor burdensome task, and that Merten or one his attorneys had plenty of opportunities to accomplish it.

¶6 Approximately three months after entry of the dismissal order, Merten filed a WIS. STAT. § 806.07 motion to vacate it. His affidavit pointed out that he did, in fact, submit an appraiser's name and report to DOT's counsel on November 13, 1998. He added that counsel requested the first extension and trial adjournment without his consent or knowledge. The second delinquency he attributed to replacement counsel's negligence, and the third to his illness and his second attorney's delay in returning his file. The affidavit did not address why he failed to meet the final December 15, 1999 deadline.

¶7 The trial court denied relief. The court applied the "extraordinary circumstances" test and concluded that Merten failed to show any. The court noted that the information provided in Merten's submissions was already before the court when it dismissed the case. The court again noted the simplicity of arranging for an appraisal witness. Finally, the court found no basis to attribute all of the delinquencies to Merten's various attorneys.

¶8 WISCONSIN STAT. § 806.07 sets forth various grounds upon which a trial court may vacate a judgment. The specific subsection Merten relies on is the catchall provision in subsec. (1)(h), allowing relief for any other justifiable reasons. To obtain relief under this subsection, the moving party must show

extraordinary circumstances. *Johns v. County of Oneida*, 201 Wis. 2d 600, 607, 549 N.W.2d 269 (Ct. App. 1996). In applying this test the trial court should consider:

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.

Id. at 608. The trial court's decision on a § 806.07 motion is discretionary. *Id.* at 607. We do not reverse a trial court's discretionary act if the record reflects a reasonable basis for the court's determination. *State v. C.W.*, 142 Wis. 2d 763, 766-67, 419 N.W.2d 327 (Ct. App. 1987).

¶9 The trial court acted reasonably when it denied Merten's motion to vacate the dismissal order. The trial court considered Merten's health problems, and troubles with his various attorneys, and concluded that neither factor excused a delinquency extending over fifteen months. As the trial court noted, the only witness necessary to Merten's case was an expert property appraiser, and the effort and time needed to procure one was minimal. The record indicates that Merten, a retired lawyer himself, was actively involved in the case, frequently communicated with his attorneys, and contacted the court as well. This fact further supports the reasonableness of the trial court's decision.

¶10 Additionally, the appraiser's name and report provided to DOT's counsel in November 1998 did not resolve the delinquency as Merten contends. That report was admittedly outdated and therefore of little relevance. Merten fails

to explain why, if the named appraiser was to be his only witness, he continued to request extensions to find an appraiser for the next thirteen months. The only reasonable reading of the record is that Merten did not intend to rely on that appraiser as a witness at trial.

By the Court.—Order affirmed.

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

