

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 2010

David R. Schanker
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. 2008AP2870

Cir. Ct. No. 2007SC3239

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SCOTT D. MILLER, D/B/A SCOTT'S BOAT RENTAL,

PLAINTIFF-APPELLANT,

V.

JEFF BAUDRY AND HEIDI BAUDRY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Fond du Lac County:
RICHARD J. NUSS, Judge. *Dismissed.*

¶1 SNYDER, J.¹ Scott D. Miller, d/b/a Scott's Boat Rental, appeals from an order denying his motion for reconsideration of a summary judgment in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

favor of Jeff and Heidi Baudry. Miller contends that the circuit court improperly denied his motion for reconsideration and was required to hear, in their entirety, his arguments on the merits of his case. Because Miller's motion for reconsideration did not present any new issues, however, his appeal is untimely. We dismiss for lack of jurisdiction.

BACKGROUND

¶2 On December 6, 2007, Miller filed a complaint against the Baudrys, claiming they damaged a rented personal watercraft resulting in total repair costs of \$3705.22, as well as lost revenue to Miller's rental business. Mediation was unsuccessful, and a trial date was set. On July 14, 2008, and prior to trial, the Baudrys filed an affidavit and a motion for summary judgment. The circuit court held a motion hearing on July 30, and granted the summary judgment motion, resolving the case in its entirety. The court entered judgment the following day, July 31, 2008.

¶3 On August 4, the Baudrys sent a notice of entry of judgment to Miller and filed a copy of the notice on August 5. Under WIS. STAT. § 808.04(1),

[a]n appeal to the court of appeals must be initiated within 45 days of entry of a final judgment or order appealed from if written notice of the entry of a final judgment or order is given within 21 days of the final judgment ... or within 90 days of entry if notice is not given.

¶4 On September 3, Miller filed a motion for reconsideration. On October 7, he filed a motion for recusal of the judge. A motion hearing took place on October 9, where the court denied both motions. The court filed the order on October 16. Miller filed a notice of appeal on November 14, more than forty-five days from the entry of judgment on July 31, 2008.

DISCUSSION

¶5 On appeal, Miller seeks redress for what he perceives to be an unjust ruling by the circuit court. He asks this court to not only set aside the order denying his motion for reconsideration, but also hear the original issues and decide the case on the merits. Further, he asks us to overturn the summary judgment and rule in his favor for the entire amount of damages sought.

¶6 The circuit court denied Miller’s motion for reconsideration pursuant to WIS. STAT. § 805.17(3), which provides that a motion must be “made not later than 20 days after entry of judgment.” In addition, the court issued a collateral decision² addressing the issues presented in the motion. The court determined that no new issues were presented for the court to consider and that summary judgment had been proper. The court therefore reaffirmed the July 30 judgment.

¶7 The Baudrys contend that we do not have jurisdiction to hear this appeal because both Miller’s motion for reconsideration and his notice of appeal were untimely. In fact, Miller missed every statutory postjudgment deadline. He filed his motion for reconsideration on September 3, more than twenty days after the July 31 entry of judgment. He received notice of the entry of judgment, limiting his time for appeal from that judgment to forty-five days after entry;

² At the motion hearing, the circuit court dismissed the motion for reconsideration because it was untimely. The court went further, however, to state that

if for whatever reason any court of higher jurisdiction would challenge [the ruling] and say ... we should have given him his day in court ... then this Court is going to make the collateral finding that there is no basis for your Motion for Reconsideration ... and ... that I have not overlooked any controlling legal precedent

however, he filed his notice of appeal on November 14, more than ninety days after entry. Because Miller's appeal from the summary judgment is untimely, the only remaining issue is whether Miller's appeal from the order is properly before us. We must decide, therefore, whether Miller, in his motion for reconsideration, presented any issues other than those already determined by the summary judgment of the circuit court.

¶8 In order for this court to have jurisdiction over an appeal from the denial of a motion for reconsideration, "a party must present issues other than those determined by the original final order or judgment." *Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 45, 310 N.W.2d 615 (1981). Stated another way, an "order is not appealable where ... the only issues raised by the motion were disposed of by the original judgment or order." *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972).

¶9 Whether a party's motion for reconsideration raised a new issue "presents a question of law that this court reviews de novo." *State v. Edwards*, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136. When reviewing a decision de novo, "this court must decide questions of law without deference to the trial court's decision." *Cobb State Bank v. Nelson*, 141 Wis. 2d 1, 5, 413 N.W.2d 644 (Ct. App. 1987).

¶10 In his motion for reconsideration, Miller attempted to repeat his trial arguments under the theory that the circuit court's final judgment was improper and unjust. Miller makes the following nine arguments: (1) the circuit court had an obligation to hear and consider the case in its entirety; (2) the use of summary judgment is only appropriate where both parties agreed to stipulate facts; (3) the court did not allow testimony from the plaintiff; (4) summary judgment was not

appropriate as there was a genuine issue of material fact and the moving party was not entitled to judgment as a matter of law; (5) the court did not examine the evidence in a light most favorable to the nonmoving party; (6) the court did not consider evidence of the definition of “deposit”; (7) the court did not follow procedure pursuant to WIS. STAT. § 799.215; (8) the court did not award Miller costs pursuant to WIS. STAT. § 799.25; and (9) the court did not hold an open trial with evidence presented in support of the plaintiff, contrary to WIS. STAT. § 799.28(2).

¶11 None of Miller’s arguments presented a new issue before the circuit court. Rather, they reveal a litigant hoping the court would rehear old arguments. As the circuit court noted, “[i]n essence you want me, quite frankly, to rehash this whole case.” Further, Miller, in his motion for reconsideration, asked the court to, inter alia, “[r]econsider the case as originally filed, but admitting into trial, testimony and evidence as prescribed by law.” This demonstrates Miller did not have any new issue for the circuit court to consider. Instead, Miller intended for the reconsideration motion hearing to operate as a new trial.

¶12 Miller also claims that, although the court officially denied his motion for reconsideration, the motion hearing did, in fact, operate as a rehearing of the entire case and therefore the timeline for appeal should run from the final order entered October 16, 2008. In support of his argument, Miller directs us to the transcript of the motion hearing. He contends that this court should see that “the text of the lengthy transcript, 17 pages worth, clearly shows this was a rehearing to ... reconsider the basis of [o]rder of July 31st.” According to Miller, “This fact makes the new judgment of October [16], 2008 the final judgment.”

¶13 Although the collateral ruling and discourse between Miller and the court may have created a “lengthy transcript,” the substance of the transcript is telling. The circuit court indicates it was extending him a courtesy by issuing a collateral finding on the motion without respect to timeliness of filing. Furthermore, Miller’s own statements show he was aware of the purpose of the hearing. Upon realizing that he could not argue the merits of his case, Miller states, “If I can’t have my case heard, I got nothing else to say.” In sum, the hearing did not discuss the merits of the case and, since Miller did not present any issues the court did not previously consider, the circuit court denied the motion for reconsideration.

¶14 We are aware that in *Silverton Enterprises, Inc. v. General Casualty Co.*, 143 Wis. 2d 661, 422 N.W.2d 154 (Ct. App. 1988), this court granted an appeal from an order denying a motion for reconsideration; however, that case is distinguishable. There, the issue of estoppel was presented to the court for the first time on reconsideration. *Id.* at 666. Additionally, the *Silverton* court vacated its original judgment in order to hear what effect the estoppel defense would have on the original judgment. *Id.* at 666 n.1. By vacating the judgment, the court “deprived the judgment of finality and rendered it nonappealable as of right.” *Id.* at 667. An appeal from that postjudgment order was therefore appropriate. Conversely, Miller’s motion for reconsideration did not present any new issues for the court to consider, and the court did not vacate the original judgment.

¶15 In addition to preserving the finality of judgments, the *Marsh* and *Ver Hagen* courts were concerned that providing a right of appeal from a motion for reconsideration where the issues had been disposed of at trial and no new issue is presented would artificially increase the timeline during which a party may

appeal a final judgment. See *Ver Hagen*, 55 Wis. 2d at 26; *Marsh*, 104 Wis. 2d at 48. As a practical matter, “if an appeal were allowed ... the statute limiting the time for appeal would be wholly nullified.” *Ver Hagen*, 55 Wis. 2d at 26 (citing *Erin Prairie v. Wells*, 158 Wis. 140, 141, 142, 147 N.W. 374, 148 N.W. 1095 (1914)).

CONCLUSION

¶16 Nothing in the record or in Miller’s arguments persuades us that we have jurisdiction to hear this case. Although Miller fervently attempts to persuade us to hear the merits of his arguments, we conclude that Miller did not present any new issues in his motion for reconsideration, failing the “new issue” test outlined by *Marsh* and *Ver Hagen*. Therefore, Miller is foreclosed from appealing from the order dismissing his motion for reconsideration. His appeal should have been taken from the summary judgment, but his statutory time for appeal is long past. For the foregoing reasons, we dismiss for lack of jurisdiction.

By the Court.—Appeal dismissed.

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

