COURT OF APPEALS DECISION DATED AND FILED

December 12, 2002

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. 02-1250

Cir. Ct. No. 96-FA-446J

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

IN RE THE MARRIAGE OF:

JOYCE JUDITH SYPHARD,

PETITIONER-RESPONDENT,

V.

RONALD JAMES SYPHARD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Ronald Syphard appeals from an order denying his motion to vacate the judgment divorcing him from Joyce Syphard. The trial court granted a default judgment of divorce to Joyce when Ronald failed to appear for

trial. Several months later Ronald sought relief from the judgment under WIS. STAT. § 806.07 (1999-2000).[1] The issue is whether the order denying postjudgment relief was a proper exercise of the trial court's discretion. We conclude that it was, and therefore affirm.

¶2 Joyce petitioned for divorce in September 1996. Numerous issues were, in Ronald's words, "hotly contested," and remained unresolved over the next four years. At a pretrial conference on February 14, 2000, the trial court announced a trial date of November 27, 2000. Ronald, appearing pro se, attended that conference. On February 21, 2000, the trial court mailed the parties a pretrial order that also gave notice of the November 27, 2000 trial date.

¶3 On the day of trial, Ronald was incarcerated on a probation hold. He did not appear at the trial, request a continuance or otherwise communicate with the court. Upon noting the fact that notice of the trial had been provided at the pretrial conference and in the subsequent order, the trial court allowed the trial to proceed. In the resulting judgment, Joyce received custody of the children, child support and permanent maintenance. Additionally, on evidence of abusive treatment of Joyce and the children, the court denied him physical placement privileges.

¶4 In March 2001, Ronald wrote the court to inquire about the status of the divorce proceeding. In December 2001, Ronald moved to reopen the judgment. His accompanying affidavit asserted the following:

> I was not aware of the November 27, 2000 divorce trial.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> I was not served with a notice of appearance pursuant to sec. 767.125, Stats., for the November 27, 2000 divorce trial. I did not receive any written notice of the November 27, 2000 divorce trial.
>
> I was incarcerated for several weeks prior to the November 27, 2000 trial. I had family members check my mail at my home address and I did not receive from them any mail informing me about the trial.
>
> The transcript of the November 27, 2000 divorce trial indicates that I received oral notice at a February 14, 2000 pretrial conference. Transcript of November 27, 2000 Divorce Trial at 4-5.
>
> I do not recall receiving oral notice of the November 27, 2000 divorce trial at the February 14, 2000 pretrial conference or at any other time. I have a hearing problem and I may not have heard a reference to a trial date during the pretrial conference.
>
> If I would have known of the November 27, 2000 divorce trial, I would have tried to appear in person (or, if necessary, by telephone) to defend the allegations against me and to state my proposal for child custody and placement, child support, maintenance, and property division. These issues were all decided without providing me an opportunity to be heard.
>
> I did not find out that the November 27, 2000 divorce trial had taken place or that a Judgment was entered until March 2001, after I wrote letter to the Court on February 27, 2001, asking about the status of the divorce.

¶5 The trial court denied Ronald's motion to reopen, finding it "beyond a reasonable doubt" that Ronald knew of the hearing. The court noted that Ronald had repeatedly avoided and delayed matters in this proceeding, and had demonstrated manipulative conduct on several occasions. The court also noted that at a September 2000 pretrial hearing Ronald showed familiarity with the terms of the February 21 pretrial order. The trial court inferred that if Ronald had full knowledge of the other terms of the order, he must also have had knowledge of the trial date. Finally, the trial court indicated that it simply did not believe Ronald's

assertion that his hearing problems were a factor in his non-appearance. On appeal Ronald contends that his lack of notice compels a different result, as does the fact that the trial court allowed Joyce to present hearsay and false testimony at the trial.

¶6 WISCONSIN STAT. § 806.07 authorizes the trial court to relieve a party from a judgment for various reasons including surprise or excusable neglect. Relief under this section is discretionary. ***Johnson v. Johnson***, 157 Wis. 2d 490, 497, 460 N.W.2d 166 (Ct. App. 1990). We will reverse an exercise of discretion only if the record demonstrates that the trial court failed to exercise its discretion or applied the wrong legal standard, or that the facts of record fail to support the decision. ***Finley v. Culligan***, 201 Wis. 2d 611, 626-27, 548 N.W.2d 854 (Ct. App. 1996).

¶7 Ronald argues that the trial court had no authority to treat the assertions in his affidavit as anything other than true facts. In so arguing he relies on ***Bernfeld v. Bernfeld***, 41 Wis. 2d 358, 164 N.W.2d 259 (1969). In ***Bernfeld*** the court stated that on a motion to vacate a judgment of divorce "an affidavit of a party should be accepted as proof of the statements contained therein for purposes of determining whether there is sufficient cause to vacate a *default* judgment." ***Id.*** at 366.

¶8 We conclude, however, that this quoted statement is not binding authority in this case and did not compel the trial court to accept Ronald's assertions as true. At the time ***Bernfeld*** was decided, motions to reopen default divorce judgments were decided under a statute, since repealed, that required a "lesser showing" than WIS. STAT. § 806.07 imposes in order to obtain relief from a divorce judgment. ***Bernfeld***, 41 Wis. 2d at 367. Additionally, the affidavit in

Bernfeld concerned matters outside the record of the proceeding that the court had no means to assess. Here, in contrast, Ronald's assertions were contradicted by evidence of record and by the trial court's personal observation of the proceedings. The ***Bernfeld*** holding is rendered absurd if it requires the trial court to treat as "fact" that which it knows beyond a reasonable doubt, from evidence of record and its own credibility determinations, to be false.

¶9 Ronald's argument to set aside the default judgment on due process grounds therefore fails, because it depends on the truth of his claim to no actual notice of the trial. As noted, the trial court simply did not believe that claim, as is its prerogative. *See* WIS. STAT. § 805.17(3).

¶10 Ronald's next argues that Joyce's use of inadmissible hearsay at the trial compelled an order vacating the resulting judgment. In the postjudgment proceeding, the trial court agreed that much of Joyce's evidence was subject to exclusion. However, the trial court also made it clear that it did not rely on this evidence to make its decision on the various matters at issue. We will not look beyond that explanation in order to review the trial court's thought processes. *See* ***State v. American TV & Appliance***, 151 Wis. 2d 175, 186, 443 N.W.2d 662 (1989) (No standard exists to review a trial judge's subjective determination as to his or her state of mind.). Even if Joyce presented inadmissible evidence at trial, Ronald has shown no prejudice because the court did not rely on it.

¶11 Ronald also complains that had he appeared at trial he would have introduced persuasive evidence to impeach Joyce's credibility. That may be true. It does not, however, provide grounds to compel the trial court to reopen the judgment. Many litigants who default might benefit from the opportunity to present evidence. Forfeiting this opportunity is the inevitable result of a default.

By the Court.—Order affirmed.

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