COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2383

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

CONSOLIDATED IN TRIAL COURT
T.C. #94-PA-124775 & XR44-500
IN RE THE PATERNITY OF JASON M., A MINOR:

JASON M.,

Petitioner,

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

SHANE C.C.,

Respondent-Appellant,

KAREN ANN M.,

Respondent-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Shane C., *pro se*, appeals from the trial court order denying his motion for relief from the judgment resulting from a stipulation he entered into regarding the paternity of Jason M. Shane argues that the trial court erroneously exercised its discretion in applying § 806.07, STATS., when it refused to order the return of all child support that he had paid despite the fact that his non-paternity was subsequently established. We reverse and remand for further proceedings.

In 1979, Karen M. gave birth to Jason. Represented by Milwaukee County Corporation Counsel in a paternity action, Karen M. named Shane as Jason's father. She testified at a preliminary hearing that Shane was her only sexual partner during Jason's legally defined presumptive conceptive period. Subsequent blood tests did not exclude him as the father. Consequently, Shane entered into a "denial stipulation agreement" or "illegitimacy settlement," in which he denied paternity but agreed to pay $5,003.53 for birthing expenses, and $10,000 in a lump sum settlement payable in monthly installments of $208. (Because Karen M. was an A.F.D.C. recipient, she assigned the State her right to these payments.) Shane made all payments. Additionally, because Shane's income assignment was not terminated upon completion of the settlement amount, payments continued for a total of approximately $31,000.

In 1994, Jason, then fifteen years old, by his guardian ad litem, brought a new paternity action to name Shane as his father and to "set reasonable support." In conjunction with this suit, Karen M. executed an affidavit reiterating her previous claim that Shane was her only sexual partner during the conceptive period. The court commissioner ordered blood testing. This new HLA blood test, however, excluded Shane as the father. The court commissioner thus dismissed the paternity action with prejudice. The court commissioner also ordered all amounts paid in excess of the original $15,000 be returned to Shane, but refused to order the original $15,000 returned.

Shane brought a motion for relief from the stipulation under § 806.07, STATS., in the trial court.[1] The trial court denied his motion, reasoning:

> [Shane] apparently made a decision back then not to seek any HLA testing. Counsel, his counsel has represented to the Court that back in 1979 such a test was available. There was the technology in place for such a test. So that to the outside world and legally speaking he has maintained a denial of paternity, but as an accommodation has agreed to pay this money. Now he has come into evidence buttressing his denial. He was allowed to maintain that denial unchallenged for all of these years. In consideration for that, he paid certain amounts of money. Now along comes some evidence to buttress his denial and he is coming in saying wait a minute, I now want to change the rules now 15 years later. I have trouble being sympathetic with that.

Shane argues that he is also entitled to the original $15,000. He contends that:

> the denial stipulation agreement or "illegitimacy settlement" that he entered into on June 19, 1980, is void on its face as [he] was fraudulently induced into entering into this agreement by the false and perjured averments of Karen M. with respect to her allegedly "exclusive" relationship with Shane C. during the presumptive conceptive period.

An appellate court's review of a trial court's decision on a motion under § 806.07, STATS., is limited to the issue of whether the trial court erroneously exercised discretion. *See* ***State ex rel. Cynthia M.S. v. Michael F.C.,***

[1] We reject the State's argument that Shane's motion was untimely. Shane is not challenging the court commissioner's decision, but rather is seeking to be relieved under § 806.07(h), STATS., from the original judgment.

181 Wis.2d 618, 624, 511 N.W.2d 868, 871 (1994). Section 806.07 entitled "Relief from judgment or order," provides:

> (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order, or stipulation for the following reasons:
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> (a) Mistake, inadvertence, surprise, or excusable neglect;
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> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
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> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
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> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
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> (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.
>
> (2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party

> from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

"Sec[tion] 806.07 attempts to achieve a balance between the competing values of finality and fairness in the resolution of a dispute." ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 542, 363 N.W.2d 419, 422 (1985). "Since almost every conceivable ground for relief may arguably come within subsections (a) through (g), a strict mutual exclusivity approach might render subsection (h) superfluous." ***Id.***, 122 Wis.2d at 549, 363 N.W.2d at 425. Therefore, "[s]ubsection (h) should be applied when the petition alleging factors arguably within (a), (b), or (c) also alleges extraordinary circumstances that constitute equitable reasons for relief." ***Id.***, 122 Wis.2d at 549-50, 363 N.W.2d at 425-26. Where extraordinary circumstances are found to exist, however, the fairness of the judgment may correctly be found to outweigh the finality of the decision. ***Id.***, 122 Wis.2d at 550, 363 N.W.2d at 426.

A motion under subsection (h) must satisfy two distinct criteria: "the ground for granting relief is 'justice' and the time for bringing the motion is 'reasonable.'" ***Cynthia M.S.***, 181 Wis.2d at 625, 511 N.W.2d at 871. To evaluate the "justice" criterion, the trial court must apply an extraordinary circumstances test. ***Id.***, 181 Wis.2d at 625-626, 511 N.W.2d at 871. "Under that test, a court must determine whether, in view of all the facts, 'extraordinary circumstances' exist which justify relief in the interests of justice." ***Id.***

In exercising its discretion, the circuit court should consider factors

> relevant to the competing interests of finality of judgments and relief from unjust judgments, including the following: 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 circumstance making it inequitable to grant relief.

M.L.B., 122 Wis.2d at 552-553, 363 N.W.2d at 427.

Applying these factors to this case, it is clear that Shane did not make an informed choice at the time of the stipulation because he was under the mistaken belief, due to Karen M.'s misrepresentation, that he was her exclusive partner during the presumptive conceptive period. Further, Shane was advised by counsel of the law in 1979 with respect to paternity suits, which provided that "[t]he testimony of a complaining witness that she had intercourse with the defendant during the conceptive period and with no one else during that period is sufficient to sustain the verdict that the defendant is the father if the jury believes the testimony." ***State of Wisconsin ex rel. Brajdic v. Seber***, 53 Wis.2d 446, 449, 193 N.W.2d 43, 45 (1972). Thus, based on Karen M.'s misrepresentation together with the fact that the blood test did not exclude him as the father, Shane agreed to the denial stipulation.

The State points to ***State ex rel. R.A.S. v. J.M.***, 114 Wis.2d 305, 338 N.W.2d 851 (Ct. App. 1983), in which we held that an advancement in the science of paternity testing is not grounds for relief from a long-decided paternity judgment. ***R.A.S.***, however, is distinguishable. In ***R.A.S.***, paternity had been adjudicated and this court's decision deferred to the interest of finality of judgments. Here, by contrast, paternity has remained an issue and, indeed, this case returned to the court commissioner and trial court because of a renewed desire to determine paternity and "set reasonable support."[2] We conclude that Shane C. has established that "the ground for granting relief is 'justice.'" ***Cynthia M.S.***, 181 Wis.2d at 625, 511 N.W.2d at 871.

[2] Shane also offers an argument based on the advancements in blood testing. He claims the trial court improperly held against him his failure to have HLA testing in 1979. He cites ***J.B. v. A.F.***, 92 Wis.2d 696, 285 N.W.2d 880 (Ct. App. 1979), for the proposition that HLA test results were not admissible in 1979. ***J.B.***, however, held that HLA test results could not be used to affirmatively prove paternity under a statute which provided that blood tests were only admissible "where a definite exclusion is established." ***J.B.***, 92 Wis.2d at 698-705, 285 N.W.2d at 881-884. In the present case, Shane obviously was using the test results to disprove paternity. Thus, the impact of ***J.B.*** on this case is dubious. Still, the factors relating to Shane's original decision to not contest paternity—most notably, Karen M.'s misrepresentation—remain far more critical to our decision.

We next examine whether "the time for bringing the motion [was] 'reasonable.'" ***Id.***

> Determining whether motions under sec. 806.07(1)(h), STATS., have been made within a reasonable time requires a case by case analysis of all relevant factors. This analysis should be guided by the fact that while respect for the finality of judgments is an important concern, the purpose of sec. 806.07(1)(h) is to allow courts to do substantial justice when the circumstances so warrant.

Id., 181 Wis.2d at 627, 511 N.W.2d at 872. "What factors are 'relevant' to the reasonableness inquiry will of course vary from case to case." ***Id.***

Here, the most significant factors regarding the "reasonableness" inquiry are that Shane promptly brought this motion only after Jason initiated a paternity action in 1994, and only after the HLA testing established that he was not Jason's father. Additionally, ***Cynthia M.S.*** is persuasive. In that case, the purported father, Michael F.C., was excluded from paternity in 1979. ***Id.***, 181 Wis.2d at 620-621, 511 N.W.2d at 869. In 1990, the mother brought a § 806.07 motion, needing financial support for the child's education. ***Id.***, 181 Wis.2d at 622, 511 N.W.2d at 870. New tests established that Michael F.C. was the father. ***Id.*** The trial court reopened the matter, concluding that extraordinary circumstances existed and that the motion had been brought in a reasonable time. ***Id.***, 181 Wis.2d at 622-623, 511 N.W.2d at 870. Michael F.C. was not prejudiced by the reopening of the case resulting in a paternity determination against him where none previously existed. ***Id.***, 181 Wis.2d at 623, 511 N.W.2d at 870. We conclude that Shane brought his motion within a reasonable time.

Just as the trial court in ***Cynthia M.S.*** reopened the case based on new test results, the trial court here should have reopened this case where Shane promptly sought relief once Jason renewed prosecution of a paternity action founded on Karen M.'s misrepresentation. It is inequitable to impose any support responsibilities of a parent/child relationship on Shane if Karen M.'s false statements led him to erroneously believe he was Jason's father. *See* ***Nehls v. Nehls***, 151 Wis.2d 516, 522, 444 N.W.2d 460, 462 (Ct. App. 1989) ("[I]t is

inequitable to impose the responsibilities of this [father-child] relationship" where ex-wife's misrepresentations led appellant "to erroneously believe" that he was the father).

Therefore, we conclude that Shane C. has established extraordinary circumstances that require return of the full amount of his payments. Accordingly, we reverse the trial court's order and remand for entry of an order requiring the return of the balance of all money Shane paid in child support for Jason M.[3]

By the Court. – Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] We note that in his trial court motion Shane C. also requested interest calculated at 1.5% per month for each payment. On appeal the parties have not addressed whether any refund to Shane C. should include interest and, if so, in what amount. Thus, we further direct the trial court to make that determination.