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DISTRICT III

August 2, 2022

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You are hereby notified that the Court has entered the following opinion and order:

2021AP681 Skyler B. Ewing v. State Automobile Insurance Company
(L. C. No. 2015CV481)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Skyler Ewing appeals a circuit court order denying his motion to vacate the judgment dismissing defendant Jonathan Davis, Jr., from his personal injury suit. Ewing argues that he has newly discovered evidence that would affect the court's determination that it had no personal jurisdiction over Davis, and that extraordinary circumstances justify relief under WIS. STAT. § 806.07(1)(h) (2019-20).[1] Based upon our review of the briefs and the record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

On July 2, 2015, Ewing filed a personal injury claim against Davis, as well as against State Automobile Insurance Company and Horace Mann Property & Casualty Insurance Company ("Horace Mann").[2] Ewing alleged that he was injured while a passenger in a vehicle driven by Davis, when Davis attempted to pass another vehicle in a no passing zone, lost control, and caused a collision. On September 10, 2015, Davis filed an answer to Ewing's complaint, asserting the affirmative defense of lack of jurisdiction due "to insufficiency of process and insufficiency of service of process."

On January 4, 2016, Ewing filed an affidavit of service executed by "C. Smith." The affidavit stated that Smith "personally delivered the [summons and complaint] to the party or person authorized to receive service of process for the party … on: 07/23/2015 … at: 6:15PM."

On June 22, 2018, Davis and Horace Mann filed a motion for summary judgment, arguing that "plaintiff's service was defective and insufficient." As part of this motion, Davis submitted an affidavit describing how the process server attempted to serve Davis while he was warming up before a minor league baseball game in Lancaster, California. According to the affidavit, the process server threw a manila envelope onto the field, where a coach picked it up

[2] Ewing alleged that State Automobile Insurance Company was the insurer of the vehicle that crashed and was therefore liable for any injury to passengers. Ewing initially named "ABC Insurance Company, a fictitious insurance company" as a defendant, with the intent to amend the complaint to add any other insurer that may have provided coverage for Davis or Ewing. Horace Mann subsequently identified itself as Davis's insurer.

and delivered it to Davis. Davis further stated that he had not authorized his coach to accept service of process on his behalf.

On July 10, 2018, shortly after Davis filed his motion for summary judgment, Ewing filed a "Motion to Declare Defendant Jonathan G. Davis, Jr. Personally Served." (Formatting altered.) Ewing submitted another copy of Smith's affidavit of service and also pointed to Davis's deposition testimony regarding the attempt at service. Specifically, Davis had testified that the process server was around twenty feet above him in the stands, when he "threw down papers at me and said I had been served." Ewing argued that the facts set forth in Davis's deposition established that service was sufficient under Wisconsin law. Because "Davis was within speaking distance of the process server … and admits the process server threw papers down at him," Ewing asserted that "[s]ervice was proper in this case and this issue should be put to rest so counsel can focus on the merits of the case."

A few weeks later, on July 23, 2018, Ewing filed a brief in opposition to Davis's motion for summary judgment. Ewing again argued that the service upon Davis was proper, and he further argued that the personal jurisdiction argument had been waived as to Horace Mann. In support of his opposition, Ewing submitted an affidavit from his attorney, which addressed issues relating to Horace Mann's involvement in the case. Other than Davis's deposition testimony as described in the earlier motion, Ewing did not attempt to introduce any additional facts regarding how Davis was served.

The circuit court granted summary judgment to Davis[3] on November 13, 2018. The court determined that the facts relating to service, drawn from Davis's deposition testimony and affidavit, were undisputed. The court rejected Ewing's argument that this manner of service complied with Wisconsin law. The court concluded that, in the absence of proper service, the court lacked jurisdiction over Davis. Ewing appealed to this court, and we affirmed the circuit court's decision on June 30, 2020. *See* ***Ewing v. State Auto. Ins. Co.***, No. 2018AP2265, unpublished slip op. ¶2 (WI App June 30, 2020).

On August 10, 2020, Ewing filed a motion to vacate the judgment dismissing Davis from the lawsuit. Ewing argued that he had newly discovered evidence entitling him to relief under WIS. STAT. § 806.07(1)(b) in the form of an affidavit from Smith that contradicted key facts that the circuit court had relied upon in granting summary judgment to Davis. Specifically, Smith stated that he watched Davis pick up the summons and complaint and take it into the clubhouse. Ewing argued that this new evidence demonstrated that Davis had been served properly. Ewing further argued that his motion was timely even after appellate review, citing ***Sands v. Menard, Inc.***, 2013 WI App 47, 347 Wis. 2d 446, 831 N.W.2d 805.

Ewing also submitted an affidavit from his attorney, who explained that he had made at least a dozen unsuccessful attempts to contact Smith by telephone between June 25, 2018, and July 2, 2020. After we affirmed the circuit court's decision dismissing Davis, the attorney's "office manager d[id] some investigation and … found a new cell phone number for Mr. Smith." The attorney called both numbers and was able to reach Smith on the second attempt on July 2,

[3] The circuit court did not act on Horace Mann's motion because it determined that Horace Mann was not a party to the action.

2020. According to the attorney, Smith stated that he had been unavailable when the attorney tried to reach him in 2018, due to a family tragedy.[4]

On September 30, 2020, Davis filed a brief in opposition to Ewing's motion to vacate, pointing out that a motion based on newly discovered evidence under WIS. STAT. § 806.07(1)(b) must be filed "within one year after the verdict." *See* WIS. STAT. § 805.16(4). Davis further argued that ***Sands*** was inapplicable because it involved a motion for relief under § 806.07(1)(h), which authorizes a court to grant relief from judgment for "[a]ny other reasons justifying relief from the operation of the judgment." Davis therefore asked the circuit court to deny Ewing's motion as untimely.

On October 30, 2020, Ewing filed a second motion to vacate the judgment, this time pointing to WIS. STAT. § 806.07(1)(h) as the basis for relief. In his brief, Ewing argued that the circuit court could still vacate the judgment, notwithstanding the one-year bar for newly discovered evidence, in order to "ensure a meritorious decision." Ewing again relied on ***Sands***, this time for the proposition that "[e]ven if a movant's claim sounds in paragraph (b) [of § 806.07(1)] the movant may still obtain relief under paragraph (h) if extraordinary circumstances justify relief." *See* ***Sands***, 347 Wis. 2d 446, ¶24 n.11. Ewing contended that his attorney's difficulties in reaching Smith, coupled with the timing of Davis's motion, were sufficient to demonstrate extraordinary circumstances.

[4] Smith's affidavit does not reference this family tragedy or time period but, instead, states that he was unavailable when the attorney tried to contact him between late July 2015 and October 2015.

In a written decision, the circuit court denied both of Ewing's motions to vacate the judgment dismissing Davis from the lawsuit. The court agreed with Davis that Ewing's first motion under WIS. STAT. § 806.07(1)(b) was time-barred, and it further noted that it would have denied a timely motion due to Ewing's failure "to act diligently in the process of discovering that evidence." The court also rejected Ewing's effort to "shift[] statutory reliance" by filing a second motion under para. (1)(h), pointing out that "[t]he asserted extraordinary circumstances are essentially those asserted as constituting 'new evidence' by [Ewing]."

After surveying the case law identified by Ewing and Davis, the circuit court summarized its approach to Ewing's motion to vacate as follows:

> 1. The court examines the factual allegations accompanying the motion to vacate, with the assumption that those allegations are true.
>
> 2. If the court finds that there the facts alleged, taken as true, do not constitute extraordinary circumstances, the motion to vacate should be denied.
>
> 3. If the court finds that the facts alleged constitute extraordinary circumstances, such that relief may be warranted under [WIS. STAT. § 806.07] para. (l)(h), a hearing must be held on the truth or falsity of the allegations. The burden to prove such circumstances is on the party seeking relief.
>
> 4. After the hearing to determine the truth or falsity of the allegations, the court considers its findings and any other factors bearing on the equities of the case, in exercising its discretion to decide whether to grant relief from the judgment.

The court next identified the factors to consider in evaluating whether Ewing had demonstrated extraordinary circumstances, including:

> 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.

See ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶11, 282 Wis. 2d 46, 698 N.W.2d 610.

The circuit court then evaluated these factors from ***Sukala*** and concluded that "the facts presented by [Ewing], taken as true, do not constitute the extraordinary circumstances necessary to justify a hearing." Accordingly, the court denied both of Ewing's motions to vacate. Ewing now appeals.

"[T]he circuit court's denial of a motion to vacate under WIS. STAT. § 806.07 is a discretionary determination that we will not reverse absent an erroneous exercise of discretion." ***Werner v. Hendree***, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423 (2010). "The circuit court erroneously exercises its discretion when it applies the wrong legal standard or if the facts of record fail to support the circuit court's decision." ***Id.***

Ewing begins by arguing that Smith's affidavit constitutes newly discovered evidence under WIS. STAT. § 806.07(1)(b). He contends that the affidavit is substantial evidence that contradicts the facts that the circuit court relied upon in granting summary judgment to Davis. Ewing further argues that Smith's "conflicting testimony should have compelled the circuit court to hear [his] claim on its merits."

The insurmountable obstacle to this argument is the one-year time limit for filing a motion to vacate based on newly discovered evidence. Specifically, WIS. STAT. § 806.07(2) provides: "A motion based on [§ 806.07](1)(b) shall be made within the time provided in [WIS. STAT. §] 805.16." In turn, § 805.16(4) states that "a motion for a new trial based on newly

discovered evidence may be made at any time within one year after verdict." Even if Ewing had a winning argument under § 806.07(1)(b), it is undisputed that the one-year time period had expired by the time Ewing filed his motion to vacate in August 2020. Thus, Ewing can only proceed under § 806.07(1)(h), which requires a showing of extraordinary circumstances.

Turning to the circuit court's finding that Ewing did not demonstrate extraordinary circumstances, Ewing argues that the court erred by "misapplying the law and ignoring facts of record." He contends that the court did not correctly balance the competing values of finality and fairness. Specifically, Ewing contends that "[t]he necessity to ensure a meritorious decision outweighs the desire for finality in this case." Ewing does not, however, develop any argument that the court applied the wrong legal standard. To the contrary, Ewing bases his arguments on the five factors set forth in ***Sukala***. He contends that if the court had properly applied these five factors to the record facts, it would have determined that extraordinary circumstances justified relief.

The first factor in addressing whether Ewing has demonstrated extraordinary circumstances is whether the judgment to be vacated "was the result of the conscientious, deliberate and well-informed choice of the claimant." *See* ***Sukala***, 282 Wis. 2d 46, ¶11. The circuit court concluded that this factor weighed against Ewing because summary judgment "was fully and fairly litigated." The court found it particularly significant that, during the earlier summary judgment proceedings, Ewing never alerted the court to his difficulties in reaching Smith, "nor was the court told that a key piece of the factual puzzle may be missing." The court explained that there were procedures available to Ewing to seek more time to "collect and verify the information from Smith," and that it could have stayed the motion for summary judgment and amended the scheduling order if Ewing had made such a request. The court determined that

the matter was fairly litigated "because the litigation process provided for relief from the circumstances now presented as extraordinary, but no such relief was timely requested."

Ewing contends that this first factor weighs in favor of vacating the judgment, arguing that the judgment "was a happenstance result of circumstances well outside the control of [his] counsel." He contends that his "counsel had no basis to believe an affidavit from [the process server] was necessary," while also noting that his attorney did attempt to contact the process server on several occasions. These arguments are mutually inconsistent. If Ewing's attorney did not think that the process server's input might be important to oppose summary judgment, then why attempt to contact him in the first place? At any rate, we can easily reject Ewing's argument that his attorney was not aware that an affidavit might be necessary because Davis specifically raised the defense of insufficient service of process in his answer. Thus, Ewing was on notice at a very early stage in the case that the manner of service might be an issue.[5]

Finally, Ewing points to Davis's "unexplained three-year delay in raising [a] motion for summary judgment." We fail to see how the timing of the motion for summary judgment affects

[5] In his reply brief, Ewing argues that Davis "testified that he had been properly served by a process server," pointing to the following exchange during Davis's deposition:

> Q: Okay. Do you recall being served with papers relative to the—this lawsuit—the beginning of this lawsuit?
>
> A: Yes.

This exchange does not demonstrate that Davis was conceding that he was properly served under WIS. STAT. § 801.11, nor is this a determination that a layperson is competent to make.

the circuit court's analysis.[6] If anything, this timing provides further support to the court's determination that it would have granted Ewing additional time to oppose summary judgment if Ewing had asked for more time to try to contact the process server. Indeed, after waiting three years to move for summary judgment on his service of process defense, Davis would have been in no position to argue that the motion needed to be briefed and decided promptly.

In short, if Ewing had wanted to create a factual issue regarding the details of service, the record suggests that the circuit court would have provided him additional time to do so. Instead, Ewing chose to argue that the manner of service, as described by Davis in his deposition, was sufficient. The affidavit submitted by Ewing's attorney does not identify any attempt to contact the process server between the time the circuit court rejected Ewing's argument and the time we affirmed this decision on appeal. Instead, the record reflects a twenty-month gap in which counsel made no effort to contact Smith. It was only after Ewing's unsuccessful appeal that his attorney obtained a new cell phone number for Smith. At that point, the attorney was able to reach Smith quickly. We therefore agree with the circuit court that the record reflects a conscientious, deliberate, and well-informed choice to proceed with summary judgment without any input from Smith.

The second factor is whether Ewing received effective assistance of counsel. *See* ***Sukala***, 282 Wis. 2d 46, ¶11. The circuit court concluded that Ewing did receive effective assistance of

[6] Ewing suggests that Horace Mann stood to benefit from the delay, and he argues that equity requires that the resulting injustice to Ewing be remedied. Ewing has not developed any argument that a three-year delay in filing for summary judgment amounts to inequitable conduct. Moreover, the circuit court granted summary judgment only to Davis and declined to rule on summary judgment as to Horace Mann. Ewing does not provide any authority to support his argument that any inequity created by Horace Mann should be a factor in a motion to vacate the judgment dismissing Davis from the case.

counsel. Specifically, "[t]he record shows that the information from Smith was being sought by counsel, but that there was a decision, at some point, to proceed with argument on summary judgment without it." The court further noted that effective assistance of counsel does not require "perfect decisions" but rather only a "considered and deliberate strategic decision." Ewing does not argue that his attorney was ineffective. We therefore see no basis for revisiting the court's conclusion on this factor.

Ewing contends that the "latter three factors overwhelmingly favor" vacating the judgment. The last three factors in ***Sukala*** are

> 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.

The circuit court noted that Ewing may have been able to show a meritorious defense to summary judgment, but it explained that Ewing's argument regarding this factor was weakened by "the amount of time it took to find Smith, and the explanations that bridge the holes in the search process." In particular, Ewing failed to "show a consistent and effective attempt to employ the internet or other resources, to locate and communicate with Smith, over the two[-]year period in question." Instead, the court characterized the effort to locate and contact Smith as "an on and off again search that was put on the back burner, from time to time, until it was the last resort." The court also found it significant that Ewing's attorney submitted an affidavit in opposition to summary judgment, but he failed to mention any of the difficulties encountered in contacting the process server. Thus, the court concluded that although the facts

set forth in Smith's affidavit may have created a material issue of fact for summary judgment purposes, these facts were presented "well after parties had the right to rely upon the finality of the judgment."

Ewing argues that the circuit court should have also considered the strength of Ewing's negligence claim against Davis. He contends that "but for the finding of insufficient service (which is shown incorrect through Smith's affidavit), Ewing would have been able to satisfy his prima facie claim." Ewing further argues that the merits of the case outweigh the finality of judgment "because Ewing remains severely injured, due to Defendant Davis' *admitted* recklessness, yet has been left without a remedy."

Ewing's arguments regarding the strength of his underlying personal injury claim are not helpful to him because the judgment that he seeks to vacate relates to the threshold defense of insufficient service of process. As we explained in our earlier decision, the circuit court lacks personal jurisdiction over Davis unless Ewing is able to demonstrate proper service in accordance with WIS. STAT. § 801.11. ***Ewing***, No. 2018AP2265, ¶11. Because service implicates a defendant's due process rights, "Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh." ***Id.***, ¶12 (quoting ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶25, 339 Wis. 2d 493, 811 N.W.2d 756 (citation omitted)). Accordingly, we agree with the circuit court's conclusion that Ewing's interest in

obtaining another opportunity to oppose summary judgment is not outweighed by Davis's interest in the finality of the judgment.[7]

In sum, we agree with the circuit court's analysis of the factors set forth in ***Sukala***, which in turn support its conclusion that Ewing failed to demonstrate extraordinary circumstances under WIS. STAT. § 806.07(1)(h). We therefore conclude that the court did not erroneously exercise its discretion in denying Ewing's motion to vacate the judgment dismissing Davis from the case. *See* ***Werner***, 331 Wis. 2d 511, ¶59 (explaining that we affirm a discretionary decision as long as the circuit court applied the correct legal standard to the record facts).

Upon the foregoing,

IT IS ORDERED that the circuit court's order denying the motion to vacate is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[7] If anything, the circuit court was overly generous to Ewing when evaluating whether Smith's affidavit was likely to change the outcome at summary judgment. In our previous decision, we explained that under Wisconsin law, "[p]rocess papers should be physically placed in the hands of the party to be served, if possible." ***Ewing v. State Auto. Ins. Co.***, No. 2018AP2265, unpublished slip op. ¶2 (WI App June 30, 2020). We then rejected Ewing's proposed "speaking distance and tossing" rule as inconsistent with this requirement. ***Id.***, ¶24. Smith's affidavit confirms that he tossed the papers to Davis while at a distance of eight or nine feet. Nothing in the affidavit suggests that Smith made any effort to physically place the papers in Davis's hands. Thus, the new affidavit was unlikely to affect our conclusion that Davis was not properly served.