

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 27, 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

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No. 96-0657

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SCOTT HILL AND KATHY HILL, HUSBAND AND WIFE,

Plaintiffs-Appellants,

v.

**JOSEPH A. PUCCIO AND ANTHONY R. PUCCIO,
INDIVIDUALLY AND D/B/A BAIT RIGS TACKLE
COMPANY, A WISCONSIN PARTNERSHIP,**

Defendants-Respondents,

**SUSAN PUCCIO, AND WESTERN SURETY COMPANY, A
FOREIGN INSURANCE COMPANY,**

Defendants.

APPEAL from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Scott and Kathy Hill appeal from an order granting relief from an order and money judgment in their favor against Joseph Puccio, Anthony Puccio, Susan Puccio and the Western Surety Company (collectively "the Puccios"). The sole issue on appeal is whether the Puccios' motion for relief from the judgment and order was timely filed. We conclude that it was and therefore affirm.

This action began with the Hills' complaint against the Puccios arising out of a contract dispute between the parties. The parties entered into a settlement agreement before trial, on September 8, 1994. Under that agreement, the Puccios were to pay \$34,000 in two installments, the first installment of \$22,000 due by October 15, 1994, and the balance of \$12,000 due by September 7, 1995. The action against the Puccios was to be dismissed with prejudice. The agreement also provided that if either payment was not made by the specified date, "time being expressly of the essence," the Hills could apply to the court to vacate the dismissal order and, upon the Hills' application, the court "shall enter a money judgment against the Puccios." If the first payment was not made as agreed, the money judgment was to be in the amount of \$37,000 plus \$2,300 in statutory costs; if the second was not made as agreed, the judgment was to be \$40,000 less any payment already made. On September 9, 1994, the court entered an order dismissing the action pursuant to the settlement.

The Puccios failed to make the second payment by September 7, 1995. On September 20, 1995, the Hills filed a petition to vacate the dismissal and for a money judgment in the amount of \$18,000 (since the Puccios had already paid \$22,000) plus prejudgment interest of \$2,242.85. The Hills state in their brief that a proposed judgment accompanying the petition was signed by the court. That judgment is not part of the record. However, the Puccios do not dispute the Hills' assertion about the judgment in their brief and the trial court's order makes a finding that the proposed order and money judgment were signed by the court on September 21, 1995, but not filed with the clerk of court. We therefore assume that is what happened.

Apparently the reason the signed money judgment was not filed with the clerk of court is that on the same day the court signed it, the court received a letter from the Puccios' counsel opposing the petition and stating an intention to file a motion in response. On October 1, 1995, the Puccios moved

for relief under § 806.07(1)(a), STATS.¹ They requested that the due date for the \$12,000 be extended to the date on which the Hills' counsel received tender of that amount by cover of letter mailed September 22, 1995. They also requested that, if the proposed money judgment had been entered, it be vacated and the dismissal order reinstated. Joseph Puccio's affidavit accompanying the motion averred that he mistakenly saved a copy of a draft of the settlement agreement to remind him of the due date rather than saving the final agreement; that draft stated that October 7, 1995, was the due date for the second payment.

Based on the affidavits of the parties, briefs and arguments, the court determined that Joseph Puccio's failure to pay the \$12,000 by September 7, 1995, was an excusable mistake, made by him as agent for the other defendants, and that upon discovery of the mistake the Puccios promptly paid the amount due and sought relief under § 806.07, STATS. The court concluded that the Puccios' motion under § 806.07 was from the order and judgment rendered on September 21, 1995, but not yet entered² and also concluded that the motion was timely because it was brought within one year of that date and within a reasonable time. The court decided, "[i]n the exercise of [its] discretion" to relieve the Puccios from the rendered but not entered order and money judgment dated September 21, 1995.

¹ Section 806.07, STATS., provides in part:

(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:

(a) Mistake, inadvertence, surprise, or excusable neglect;

...

(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....

² A judgment is rendered by the court when it is signed by the judge or by the clerk at the judge's direction; a judgment is entered when it is filed in the office of the clerk of court. Section 806.06(1)(a) and (b), STATS. The Hills do not contend that the distinction between rendering and entering a judgment is relevant to this appeal.

The Hills do not challenge the trial court's determination of excusable neglect. Their challenge is to the court's determination on the timeliness of the Puccios' motion. The Hills contend that the one-year time period for bringing a motion under § 806.07(1)(a), STATS., should run from September 9, 1994, the date on which the court entered the settlement agreement and dismissal order.³ We conclude the trial court correctly determined that the motion was for relief from the September 21, 1995 money judgment, and therefore timely.

The conduct that formed the basis of the Puccios' claim of excusable neglect was the retention of a non-final draft as a reminder of the date of payment. This conduct led to the failure to pay the second installment by September 7, 1995, which led to the Hills' petition for a money judgment and to the rendering of the money judgment. There is nothing in the wording of § 806.07(1), STATS., that would prohibit the Puccios' from moving for relief from that judgment simply because the manner of obtaining that judgment was the subject of a prior settlement agreement. The terms of the settlement order might well be relevant to determining whether relief from the judgment should be granted. But the Hills state that they are not disputing the determination of excusable neglect and are only challenging the timeliness of the motion.⁴

The Hills argue that the Puccios' motion for relief demonstrates that they were seeking modification of the settlement. It is true that the Puccios' motion sought court action with respect to both the settlement and the money

³ The settlement agreement was signed on September 8, 1994. It was contained in the same document as the order for dismissal, which simply dismissed the action with prejudice and costs based on the settlement agreement. The order was signed on September 9, 1994, and the entire document was then filed with the clerk of courts on that date. We assume the focus of the Hills' argument is on the settlement agreement, not the order of dismissal based on that agreement.

⁴ In their reply brief, the Hills argue that the court's determination of excusable neglect is inconsistent with the terms of the settlement that "time is of the essence," and that the court is, in effect, excusing a breach of the settlement agreement. This appears to be inconsistent with the statement in the Hills' first brief that they are not challenging the determination of excusable neglect, and inconsistent with their statement that the only issue is the timeliness of the § 806.07, STATS., motion. We do not consider matters raised for the first time in a reply brief. See *Schaeffer v. State Personnel Comm'n*, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989).

judgment, but, at the hearing on their motion, the Puccios' counsel stated that they were seeking relief from the money judgment. The wording of the motion did not preclude the Puccios from focusing only on the money judgment at the hearing and does not preclude the trial court from deciding that they seek relief from the money judgment and may properly do so.

The Hills also point out that relief from the money judgment does not afford the Puccios complete relief because, while the Puccios have obtained a vacation of the money judgment and a reinstatement of the order of dismissal, they are still in default of the settlement agreement. The Hills reason that as long as the settlement agreement remains unmodified, they can bring another motion to vacate the dismissal order and obtain a money judgment for the Puccios' failure to comply with the settlement. Even if the Puccios could also have sought relief from the settlement and even if that would have provided them a "fuller" remedy than relief from the money judgment alone--issues which we do not decide--it does not follow from those propositions that the Puccios cannot seek relief under § 806.07, STATS., from the money judgment. As for whether the Hills could in the future obtain a money judgment against the Puccios for failure to comply with the settlement since the settlement has not been modified, that issue is not before us.

Since the Puccios sought relief from the money judgment under § 806.07(1)(a), STATS., and since nothing in § 806.07 precludes them from doing so, we conclude that the time limit for bringing the motion runs from the date the money judgment was rendered.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.