COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2654

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

IN RE THE MARRIAGE OF:

PAULA STEINMETZ,

PETITIONER-APPELLANT,

V.

THOMAS STEINMETZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Paula Steinmetz appeals from a circuit court order denying her § 806.07, STATS., motion to reopen the judgment divorcing her from

Thomas Steinmetz.[1] Because we conclude that the circuit court did not erroneously deny the motion, we affirm.

The final hearing on the parties' divorce occurred in August 1996. The parties entered into a stipulation regarding the issues between them. The court approved the stipulation, granted a judgment of divorce, and directed Paula's counsel to prepare findings of fact, conclusions of law and the judgment of divorce. In November 1996, with new counsel, Paula moved the court under § 806.07, STATS., to reopen the judgment of divorce[2] claiming that her counsel did not properly prepare her for the final hearing, did not provide her with any information relating to that hearing, was himself not properly prepared for the hearing, and that she felt undue pressure to accept an unreasonable and inequitable settlement.

After a hearing, the circuit court denied the motion to reopen. In its ruling, the court borrowed the criminal law doctrine of ineffective assistance of counsel, *see* ***Strickland v. Washington***, 466 U.S. 668 (1984), and noted that divorce counsel did not testify at the hearing on Paula's motion to reopen. Because the testimony of trial counsel is essential to an ineffective assistance determination, *see* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), the court concluded that the absence of counsel's testimony precluded relief from the divorce judgment. Paula appeals.

[1] We acknowledge that the circuit court did reopen the judgment for the limited purpose of valuing Thomas's 401(k) plan. The parties have advised the court that a settlement has been reached regarding this asset.

[2] The written judgment was not entered until February 4, 1997, after Paula's previous counsel failed to prepare the document as ordered in August 1996.

The circuit court erroneously applied the criminal law doctrine of ineffective assistance of counsel to this divorce case. Nevertheless, we may sustain the circuit court's decision for other reasons. *See* ***Bence v. Spinato,*** 196 Wis.2d 398, 417, 538 N.W.2d 614, 620 (Ct. App. 1995). We conclude that a § 806.07, STATS., motion was not the proper vehicle for seeking relief due to divorce counsel's allegedly deficient representation.

In ***Village of Big Bend v. Anderson,*** 103 Wis.2d 403, 404, 308 N.W.2d 887, 888 (Ct. App. 1981), we held that a party in a civil case who alleges poor performance by trial counsel has a remedy by way of an action for legal malpractice against counsel, not by reversal of the adverse judgment, which would be a remedy against the opposing party. "A civil litigant whose rights have been adversely affected by a negligent attorney may hold that attorney liable for any monetary losses caused by the negligence." ***Id.*** at 406, 308 N.W.2d at 889. We apply the holding of ***Village of Big Bend*** to Paula's § 806.07 motion alleging poor performance of her divorce counsel.[3]

[3] The discussion in ***Village of Big Bend v. Anderson,*** 103 Wis.2d 403, 408, 308 N.W.2d 887, 890 (Ct. App. 1981), regarding the possibility of seeking relief under § 806.07, STATS., due to trial counsel's deficient representation acknowledges that a court may reopen a judgment in the interests of justice. But the rationale behind ***Village of Big Bend*** is that an innocent opposing party should not bear the burden of a new trial because the other party's lawyer was ineffective. The facts must be so unconscionable that the interests of justice demand overriding the ***Village of Big Bend*** policy. That has not been raised or argued here.

By the Court.—Order affirmed.

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