COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1034

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

EVELYN FERRER,

PETITIONER-RESPONDENT,

V.

DAVID I. LOPEZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. David I. Lopez appeals from an order in which the circuit court reinstated a previously issued domestic abuse injunction. Lopez argues the circuit court erred in concluding that it did not have the authority under § 806.07(1)(h), STATS., to vacate the injunction. Because extraordinary

circumstances are necessary for a circuit court to vacate an injunction under § 806.07(1)(h) and none were present in this case, we conclude that the circuit court did not err. Accordingly, we affirm.

BACKGROUND

¶2 On July 28, 1998, Evelyn Ferrer filed a petition for a temporary restraining order against David Lopez, who was then her husband. After an evidentiary hearing, the circuit court issued a domestic abuse injunction against Lopez.

¶3 On October 5, 1998, Lopez moved the court to re-open the proceedings and vacate the injunction. The circuit court held a hearing and concluded that the basis on which it had entered the injunction was "extraordinarily weak" and "not sufficient." Therefore, it vacated the injunction.

¶4 Ferrer moved the court to reconsider its decision to vacate the injunction. After reviewing the relevant case law, the circuit court concluded that it committed error when it reopened and vacated the previous injunction. It determined that in order to vacate an injunction under § 806.07(1)(h), STATS., as it had done, it would have needed to determine that extraordinary circumstances, which justified vacating the injunction, existed. The court reasoned that its decision to vacate the injunction was not based on new evidence, but merely taking "another view of the same evidence" that it had considered at the initial hearing. The court concluded that did not amount to extraordinary circumstances that would merit reopening the proceedings and vacating the injunction. Therefore, it reimposed the injunction against Lopez. He appeals.

DISCUSSION

Standard of Review.

¶5 Construction of a statute, or its application to undisputed facts, is a question of law, which we review *de novo*. *See* ***Ansani v. Cascade Mountain, Inc.***, 223 Wis.2d 39, 45, 588 N.W.2d 321, 324 (Ct. App. 1998), *review denied*, 225 Wis.2d 489, 594 N.W.2d 383 (1999). Additionally, we decide as a matter of law whether an appeal is frivolous under § 809.25(3), STATS. *See* ***J.J. Andrews, Inc. v. Midland***, 164 Wis.2d 215, 225, 474 N.W.2d 756, 760 (Ct. App. 1991).

Vacating the Injunction.

¶6 The circuit court relied on the language of § 806.07(1)(h), STATS., when it vacated the domestic abuse injunction. Section 806.07(1) provides in relevant part:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party … from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> …
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Section 806.07(2) also provides that a motion based on (a), (b) or (c) may not be brought more than one year after the judgment was entered, while all other motions must be made within a "reasonable time."

¶7 In ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 363 N.W.2d 419 (1985), the supreme court considered the correct interpretation of § 806.07(1)(h), STATS., and addressed whether an aggrieved party who sought relief more than four years after a judgment was entered was entitled to relief. The appellant in ***M.L.B.*** originally sought relief under § 806.07(1)(a), (b) or (c). *See* ***M.L.B.***, 122 Wis.2d at 541, 363 N.W.2d at 421. The supreme court recognized that under those paragraphs, the appellant was precluded from relief because his motion was untimely. However, the court went on to examine whether the appellant could obtain relief under § 806.07(1)(h).

¶8 The first question the court answered was whether a claim that could have been brought under paragraphs (a), (b) or (c) also could be brought under (h). The circuit court had determined that the paragraphs were mutually exclusive; and therefore, if a claim could have been brought under another paragraph, it could not be brought under (h). *See* ***M.L.B.***, 122 Wis.2d at 545, 363 N.W.2d at 423. The supreme court rejected this interpretation because it noted that if applied, it would render (h) superfluous since almost every conceivable ground for relief arguably falls within paragraphs (a) through (g). *See* ***id.*** at 545, 363 N.W.2d at 423-24.

¶9 Recognizing that (h) mirrors its federal counterpart, the court then looked to cases interpreting Federal Rule of Civil Procedure 60(b)(6) for guidance. *See* ***id.*** at 542, 363 N.W.2d at 422. Several federal cases had held that motions that could have been made under § 806.07(1)(a), (b) or (c) also could be brought under (h). In balancing the sometimes conflicting goals of fairness and finality,

however, these same courts held that such motions may only be brought under (h) when there are "extraordinary circumstances." *See* ***id.*** at 549, 363 N.W.2d at 425. With these cases as guidance, the supreme court concluded, "[w]e are persuaded that the 'extraordinary circumstances' test is an appropriate way to approach claims for relief under sec. 806.07(1)(h)." ***Id.***

¶10 Lopez argues that notwithstanding the circuit court's conclusion that there were no extraordinary circumstances, it nevertheless had the authority under § 806.07(1)(h), STATS., to vacate the injunction. He contends that the extraordinary circumstances test announced in ***M.L.B.*** is applicable only to motions that could have been brought under § 806.07(1)(a), (b) or (c). And because the circuit court never found that his claim was brought under any of these paragraphs, the court had no reason to apply the extraordinary circumstances test.[1] We disagree.

¶11 Although the court in ***M.L.B.*** considered a claim that arguably could have been brought under (a), (b) or (c) in deciding whether relief could be sought under (h), the court's holding requiring extraordinary circumstances was not limited only to those claims that arise under (a), (b) or (c). The court, in laying out the procedure a circuit court should follow in analyzing all potential (h) claims, stated:

> To determine whether a party is entitled to review under sec. 806.07(1)(h), the circuit court should examine the allegations in the petition with the assumption that all assertions contained therein are true. If the facts alleged in the petition constitute extraordinary circumstances justifying relief under subsection (h), a hearing shall be

[1] We note that although the court did not determine whether Lopez's motion was one that could have been brought under § 806.07(1)(a), (b) or (c), STATS., Lopez himself grounded his motion to vacate on § 806.07(1)(c) (fraud) in addition to § 806.07(1)(h).

> held on the truth or falsity of the allegations. After determining the truth of the allegations and upon consideration of any other factors bearing upon the equities of the case, the court shall decide what relief if any should be granted the claimant and upon what terms.

M.L.B., 122 Wis.2d at 557, 363 N.W.2d at 429 (citation omitted). Nowhere in the court's suggested procedure does the supreme court state that a circuit court must first analyze whether a claim is one that originally could have been brought under § 806.07(1)(a), (b) or (c), STATS., and we decline to create such a requirement.

¶12 Additionally, we have previously considered a case involving a motion brought under § 806.07(1)(h), STATS., that could not have been brought under (a), (b) or (c), and have concluded that extraordinary circumstances were necessary to justify relief. In ***Brown v. Mosser Lee Co.***, 164 Wis.2d 612, 476 N.W.2d 294 (Ct. App. 1991), we addressed whether a change in the law which occurred several years after summary judgment was entered in a similar case warranted reopening the judgment under paragraph (h). Mosser Lee argued that it was error for the circuit court to refuse to reopen the judgment under § 806.07(1)(h). *See* ***Brown***, 164 Wis.2d at 616, 476 N.W.2d at 296. We stated, however, that paragraph (h) "allows reopening of judgments based on intervening changes in the law only in 'extraordinary circumstances ….'" ***Id.*** (citation omitted).

¶13 ***Brown*** makes clear that the extraordinary circumstance test applies to all motions brought under (h). Its holding is not supportive of Lopez's interpretation of § 806.07(1)(h), STATS., that extraordinary circumstances are required only if the motion could have been brought under paragraph (a), (b) or (c). We conclude that paragraph (h) permits a circuit court to grant relief only if there are extraordinary circumstances that justify that relief.

¶14 We are persuaded that both current case law and public policy considerations dictate this result. Litigants and the court system benefit from the certainty of final judgments. Additionally, allowing a motion under (h) without requiring extraordinary circumstances would clog the courts with those seeking relief on inconsequential grounds. On the other hand, the extraordinary circumstances test preserves the circuit court's authority to vacate judgments where it would be unfair to permit them to stand.

¶15 The circuit court admitted that when it vacated the injunction originally, it neglected to consider the extraordinary circumstances test established by ***M.L.B.*** On reconsideration, it undertook that analysis and concluded that there were no extraordinary circumstances which justified vacating the injunction. Rather, it had simply reconsidered the same evidence that it had before it at the initial hearing. It emphasized that no new evidence had been presented. We agree that the circuit court applied the proper standard to Lopez's motion. Therefore, we conclude that the circuit court did not erroneously exercise its discretion in determining that the facts of this case do not constitute extraordinary circumstances and that, as a result, it did not have the grounds necessary upon which to exercise its discretion under § 806.07(1)(h), STATS.

Frivolous Appeal.

¶16 Ferrer has moved this court, pursuant to § 809.25(3), STATS., for attorney fees and costs, contending that Lopez's appeal is frivolous. Section 809.25(3) provides in relevant part:

> (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section.
>
> …

> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶17 In support of her motion, Ferrer avers that Lopez is using this litigation to harass her and discredit her good name, and he is acting in bad faith in attempting to "exact revenge" on her due to his unhappiness with the terms of their divorce.

¶18 Ferrer refers to no factual findings from which this court could determine that Lopez proceeded in bad faith, or that his sole motive in filing this appeal was to harass or maliciously injure her. Relevant case law requires this court to have facts before it sufficient to determine Lopez's intent, as a matter of law, before a decision under § 809.25(3)(c)1., STATS., can be made. *See* ***Tomah-Mauston Broadcasting Co. v. Eklund***, 143 Wis.2d 648, 659, 422 N.W.2d 169, 173 (Ct. App. 1988). We conclude that we cannot determine on this record, as a matter of law, that the appeal was proceeded upon in bad faith solely to harass or maliciously injure Ferrer. Therefore, we deny Ferrer's motion.

CONCLUSION

¶19 Because extraordinary circumstances are necessary in order for a circuit court to vacate an injunction under § 806.07(1)(h), STATS., and none were present in this case, we conclude that the circuit court did not err in reinstating the injunction. Accordingly, we affirm.

By the Court.—Order affirmed.

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