COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP799 **Cir. Ct. No. 2003FA7901**

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

IN RE THE MARRIAGE OF:

ELIZABETH J. PENDERGAST, N/K/A ELIZABETH J. SPIVEY JOHNSON,

PETITIONER-APPELLANT,

V.

THOMAS R. PENDERGAST,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed; motion for frivolous appeal costs denied.*

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

¶1 FINE, J. Elizabeth J. Pendergast, n/k/a Elizabeth J. Spivey Johnson appeals an order denying reconsideration of her motion for relief from a default judgment of divorce. Johnson claims that the circuit court erroneously exercised its discretion because she contends that extraordinary circumstances exist under WIS. STAT. § 806.07(1)(h) justifying the reopening of the divorce judgment.[1] We affirm.

¶2 Thomas R. Pendergast seeks frivolous-appeal costs and fees under WIS. STAT. RULE 809.25(3). We deny the motion.

I.

¶3 Johnson filed for a divorce from Pendergast in October of 2003. As material, the circuit court held a status conference on June 7, 2004, where: (1) Johnson was served with a motion seeking to hold her in contempt for allegedly disposing of Pendergast's personal property; and (2) the circuit court scheduled a trial for October 14, 2004.

¶4 A pretrial conference was scheduled for August 11, 2004. Johnson's lawyer appeared at the conference; Johnson did not. A hearing on Pendergast's contempt motion was then scheduled for August 24, 2004.

[1] The circuit court denied Johnson's motion for relief from the divorce judgment on October 9, 2006. Any appeal from that order had to be filed within ninety days. *See* WIS. STAT. RULES 808.04(1), 809.10(1)(e). Johnson did not do so. Her notice of appeal filed on April 4, 2007, relates to the circuit court's order denying her motion for reconsideration entered on March 5, 2007. Accordingly, we do not consider on this appeal any issues Johnson raises related to the October 9 order. *See* ***Silverton Enters., Inc. v. General Cas. Co. of Wisconsin***, 143 Wis. 2d 661, 665, 422 N.W.2d 154, 155–156 (Ct. App. 1988) (A party may not use a motion for reconsideration either to extend the time within which to file an appeal or to raise issues that were "determined in the order or judgment sought to be reconsidered.").

¶5 Johnson's lawyer withdrew on August 23, 2004. Johnson did not appear at the August 24 hearing. The circuit court found that Johnson knew of the hearing through her former lawyer and scheduled a contempt hearing for September 3, 2004. Although the docket entries reflect that, as phrased by those entries, Johnson filed "numerous papers" with the circuit court on September 2, those documents are not in the appellate Record. Johnson did not appear at the September 3 hearing, however. The circuit court deferred the contempt matter until the October 14 trial date.

¶6 Johnson did not appear for the October 14 trial. On that date, the circuit court found the marriage irretrievably broken, adopted Pendergast's proposed marital-settlement agreement, and granted Pendergast a default judgment of divorce.

¶7 On November 15, 2004, Johnson filed a written objection to Pendergast's proposed marital-settlement agreement, challenging the award to Pendergast of: (1) a car; (2) more than $10,000 for Pendergast's missing personal property; and (3) all of the money in Johnson's and Pendergast's attorneys' client trust accounts. Johnson also claimed in her written objection that she did not show up in court because she was "very sick," and attached an excuse from a physician, purporting to excuse her from appearing in court on August 11, August 24, September 2, and October 14, 2004. The circuit court entered its findings of fact, conclusions of law, and divorce judgment on November 17, 2004.

¶8 In February of 2005, Johnson sought relief from the default divorce-judgment under WIS. STAT. § 806.07(1)(a) and (h), claiming that her failure to

appear was due to excusable neglect or, in the alternative, extraordinary circumstances.[2] *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 549, 363 N.W.2d 419, 425 (1985) (party must show extraordinary circumstances to establish grounds for relief under § 806.07(1)(h)). Specifically, Johnson claimed that she was unable to attend the September 3 hearing and the October 16 trial because of what she claimed was her disability, which she said included "depression, insomnia, and hypertension."

¶9 The circuit court held a hearing, at which Johnson and her psychiatrist, Gary Schnell, M.D., testified. Dr. Schnell was not the doctor whose note Johnson attached to her November 15, 2004, written objection to Pendergast's proposed marital-settlement agreement referred to in ¶7. Dr. Schnell told the court that he began to treat Johnson in April of 2004. He testified that he had initially diagnosed Johnson with "a major depressive illness, moderate in severity," but in August of 2004, "added" a diagnosis of a "delusional disorder, persecutory type." He told the court that Johnson's delusional disorder:

> made it very difficult for her to attend legal functions, depending on the intensity and requirements of those legal activities. I think, for example, she may not have been able

[2] WISCONSIN STAT. § 806.07(1) provides, as relevant:

> **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 or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.

> to show up for court proceedings in August because of her illness, fearing that attorneys and judges were working against her.

¶10 On cross-examination, Dr. Schnell admitted that he did not know that Johnson had attended two hearings in February and April of 2004 without apparent problem. He told the court that he provided a doctor's excuse for Johnson's absences, but admitted that he could not say "with a hundred percent certainty" that she did not appear because of her delusional disorder:

> These diagnoses are very fluid, they wax and wane, they can be bad one day and not so bad another day…. I can't say with a hundred percent certainty that she didn't make it on that date because of her delusional disorder but I think it is reasonable to say that that was the case.

Dr. Schnell testified that he was not surprised that Johnson had frequently filed documents with the court because that was consistent with her delusional disorder.

¶11 Johnson admitted that she had been aware of the final trial date and that she had received a copy of the proposed marital-settlement agreement. She told the court, however, that she did not show up on October 14 because she "was afraid, [and] was depressed, [because her husband and his lawyer] had to try to get me put in jail then." Johnson testified that she wanted to object in writing to the proposed marital settlement agreement, even though she did not show up in court, because:

> I felt safe, that when I show up in court a couple of times a sheriff took me and gave me a copy of the contempt court [*sic*—order?] and I figured if I do it when there is no court date, I can't get arrested; but I can still let the Court know that I am objecting without getting arrested.

¶12 On cross-examination, Johnson admitted that she was depressed on the February, April, and June of 2004 hearing dates. Johnson conceded that she

did not see the doctor referred to in ¶7 on the dates he purported to excuse her. Further, she admitted that she had filed documents with the court on September 2 even though there was no hearing on that date.

¶13 The circuit court denied Johnson's February of 2005 motion, and, in a written decision, concluded that Johnson had not shown excusable neglect or any other reason justifying relief from the judgment:

> The court finds that [Johnson] did suffer from and was receiving treatment for mental health problems during the period in question in 2004. The court also finds that [Johnson] did receive notice of both the August 24 and October 14 court dates; that she was able to personally file papers with the trial court on September 2, 2004, and file a written objection with the court [in] November…. The court is unable to conclude that her failure to appear on October 14, 2004, or to attempt to have the date adjourned, was the result of excusable neglect or any other reason justifying relief from the judgment.

¶14 Johnson moved for reconsideration on the ground that the circuit court had not considered whether extraordinary circumstances existed under WIS. STAT. § 806.07(1)(h). *See* ***M.L.B.***, 122 Wis. 2d at 552–553, 363 N.W.2d at 427 (factors circuit court may consider in determining whether extraordinary circumstances exist).

¶15 At a February 16, 2007, hearing, the circuit court concluded that extraordinary circumstances had not prevented Johnson from attending the October 14 trial, and denied Johnson's motion for reconsideration.

II.

A. *Relief from Judgment.*

¶16 A circuit court's determination whether extraordinary circumstances are present and its ultimate decision to grant or deny relief from judgment is within the circuit court's discretion. ***State v. Sprosty***, 2001 WI App 231, ¶18, 248 Wis. 2d 480, 494, 636 N.W.2d 213, 220–221. A circuit court's decision denying or granting a motion for reconsideration is also within the circuit court's discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 403–404, 685 N.W.2d 853, 856. We will reverse the circuit court's exercise of discretion only if the Record shows that it failed to exercise its discretion, applied an incorrect legal standard, or if the facts do not support its decision. ***Sprosty***, 2001 WI App 231, ¶18, 248 Wis. 2d at 494, 636 N.W.2d at 221.

¶17 As we have seen, to establish grounds for relief under WIS. STAT. § 806.07(1)(h), the party seeking relief must show extraordinary circumstances. *See* ***M.L.B.***, 122 Wis. 2d at 549, 363 N.W.2d at 425. Extraordinary circumstances are those in which "the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of *all* the facts." ***Mogged v. Mogged***, 2000 WI App 39, ¶13, 233 Wis. 2d 90, 98, 607 N.W.2d 662, 667 (quoted source and internal quotation marks omitted; emphasis in original); *see also* ***M.L.B.***, 122 Wis. 2d at 542, 363 N.W.2d at 422 ("Sec[tion] 806.07 attempts to achieve a balance between the competing values of finality and fairness in the resolution of a dispute."). Factors relevant to the competing interests of finality of judgments and relief from unjust judgments, include, but are not limited to, whether:

- "the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant";
- "the claimant received the effective assistance of counsel";
- "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";
- "there is a meritorious defense to the claim"; and
- "there are intervening circumstances making it inequitable to grant relief."

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

¶18 The circuit court here considered the appropriate factors. At the February 16, 2007, hearing, the circuit court first considered whether Johnson made a conscientious, deliberate, and well-informed choice not to attend the October 14 trial. It found that Johnson's failure to appear was not the result of her mental illness, but "a choice by her," explaining that "because she was able to come to court on other dates, filing papers and a written objection, that [it] could not conclude that her mental health issues were what prevented her from coming to court." It also noted that Johnson stopped coming to court after the contempt motion was filed:

> There was the contempt proceeding that was served on her at the last court date that she had appeared at and while it may be that her mental health issues played a role in this, I still think she had a choice to appear. I find and found then that her failure to appear was a choice by her.

¶19 The circuit court also considered whether Johnson had received the effective assistance of counsel. It found that this factor was not "controlling," noting that while Johnson "had been, earlier on, represented by very competent counsel," she was not represented when she did not appear for the October 14 trial.

¶20 The circuit court also considered whether there were factors that outweighed the need for finality. It confirmed that Johnson wanted to reopen the award to Pendergast of: (1) the car; (2) the money to replace Pendergast's missing personal property; and (3) the money in the client trust accounts. The circuit court noted that the missing personal property was the subject of Pendergast's contempt motion and found that the need for finality was not outweighed:

> The personal property is what was the subject of the contempt motion that [Johnson] didn't appear for -- or the contempt hearing. There are about seven handwritten pages of items in this file of personal property which were the subject of dispute between the parties, whether Mr. Pendergast got some of them, whether [Johnson] had some of them and more than that, what of those items of personal property -- what became of them. Were they carted away, did the movers lose them, where were these items of personal property?
>
> To reopen the judgment is to bring back the contempt finding or the contempt proceeding that relates to all of this allegedly missing personal property. I don't know how that outweighs the finality of the judgment. That is -- there is the contempt proceedings out there, I just cannot find that re opening [*sic*] all of this is of such equitable weight that it outweighs the finality of judgment.

¶21 The circuit court also considered whether the presumption in Wisconsin that marital property is divided equally, *see* WIS. STAT. § 767.61(3), changed things. It determined that Johnson did not carry her burden, *see* ***Connor v. Connor***, 2001 WI 49, ¶28, 243 Wis. 2d 279, 297, 627 N.W.2d 182, 191 (party

seeking relief has burden under WIS. STAT. § 806.07(1) to prove that requisite conditions exist):

> I don't know how this would all sort out if it were reopened, I don't know what the total value of the property would turn out to be. It is just not a case where it is clear that if the judgment were reopened there is concrete, identified property that could be the subject of an equitable split.

¶22 Finally, the circuit court did not find that it would be inequitable to deny Johnson relief. The circuit court did not erroneously exercise its discretion.

B. *Frivolous Appeal Costs.*

¶23 Pendergast seeks frivolous-appeal costs and fees under WIS. STAT. RULE 809.25(3). A frivolous appeal is one that is "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or "without any reasonable basis in law or equity" and for which no "good faith argument for an extension, modification or reversal of existing law" can be made. Sec. 809.25(3)(c). Although we were not persuaded by Johnson's contentions on appeal, we cannot conclude that they were made without any reasonable basis in law or equity, or that this appeal was taken in bad faith in order to harass or maliciously injure Pendergast. Accordingly, we deny the motion.

By the Court.—Order affirmed; motion for frivolous appeal costs denied.

Publication in the official reports is not recommended.