

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 98-2836-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PETERS & VANDEN HEUVEL, S.C.,

PLAINTIFF-RESPONDENT,

v.

RICHARD VANDEN HEUVEL,

DEFENDANT-APPELLANT,

WILLIAM PETERS,

NECESSARY-PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Richard Vanden Heuvel appeals from an order denying his motion for relief from judgment.¹ Because we conclude that Vanden Heuvel is judicially estopped from seeking relief from an order to which he agreed, we affirm.

The procedural history to this litigation is lengthy. However, it is relevant to this appeal and we will briefly recite it. Richard Vanden Heuvel and William Peters were principals in an accounting firm, Peters and Vanden Heuvel, S.C. Vanden Heuvel told Peters that he wanted to leave the firm, but they were unable to agree to the terms of a dissolution. This litigation ensued.

After a bench trial, the court issued a lengthy written decision resolving some issues in Vanden Heuvel's favor and some issues against him. Counsel for the corporation submitted a proposed judgment to the court for signature, and judgment was entered on April 21, 1997.² On April 23, Vanden Heuvel filed an objection to entry of the judgment. On May 2, 1997, the court notified the parties that "[b]ecause of any confusion regarding the signing date of the judgment the parties shall have until May 23, 1997 to file any motions for reconsideration." Notice of entry of judgment was filed on May 9, 1997. Both parties filed reconsideration motions on May 23.

Vanden Heuvel sought reconsideration on several issues, including the court's valuation of sick leave, acknowledging that the court made a

¹ This is an expedited appeal under RULE 809.17, STATS.

² Vanden Heuvel complains that the court signed the judgment without waiting the "customary" five days to provide opposing counsel an opportunity to object to form or content. Vanden Heuvel does not suggest that any "custom" has been reduced to a formal local court rule, or that the trial court erred by entering the judgment when it did.

mathematical error that worked to his advantage. The corporation also sought reconsideration on the sick leave issue. On July 15, 1997, the court denied reconsideration on all issues but the sick leave valuation. On that point, the court noted that the parties agreed it had made a mathematical error, and the court amended the judgment to correct the error.

Vanden Heuvel appealed both the April 21, 1997 judgment and the July 15, 1997 reconsideration order. This court dismissed both appeals. Because the reconsideration motions were not timely filed under § 805.17(3), STATS., we determined that the appeal period was not enlarged by operation of that statute.³ Therefore, Vanden Heuvel's notice of appeal from the April 21, 1997 judgment was not timely filed under § 808.04(1), STATS. We also noted that because the reconsideration motions were not timely filed under § 805.17(3), the circuit court was "preclude[d]" from acting on the motions. *Peters & Vanden Heuvel, S.C. v. Richard Vanden Heuvel et al.*, Nos. 97-2141 and 97-3000, unpublished order at 3 (Wis. Ct. App. Apr. 10, 1998). Therefore, we also dismissed Vanden Heuvel's appeal from the reconsideration order.

Vanden Heuvel then returned to the circuit court and filed a motion under § 806.07, STATS., for relief from the judgment and reconsideration order. The circuit court denied the motion and Vanden Heuvel appeals.

A motion for relief from a judgment or order is addressed to the sound discretion of the trial court. See *Breuer v. Town of Addison*, 194 Wis.2d

³ A timely motion for reconsideration under § 805.17(3), STATS., effectively enlarges the time for appeal to permit the trial court an opportunity to decide the motion. Because Vanden Heuvel's motion for reconsideration was not timely filed, it did not trigger the provisions of the statute, and his notice of appeal was not timely filed.

616, 625, 534 N.W.2d 634, 638 (Ct. App. 1995). This court will not disturb a discretionary order if the record shows that the circuit court exercised its discretion and there is a reasonable basis for its decision. *See Nelson v. Taff*, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993).

We first address whether the trial court properly exercised its discretion when it denied Vanden Heuvel's motion for relief from the reconsideration order. Vanden Heuvel argues that the order was void, relying on our language in the dismissal order that the trial court was "preclude[d]" from entering the order because the reconsideration motions were not timely filed.

The trial court declined to vacate the reconsideration order. The court recognized that the order re-affirmed its earlier judgment in all respects except for a correction of "what in essence was a joint request" on the sick leave valuation issue. The court noted that if it vacated the reconsideration order, thereby reinstating its earlier mathematical error, Vanden Heuvel would receive a benefit "that both sides acknowledge [he] should not receive."

The trial court properly exercised its discretion. In his reconsideration motion, Vanden Heuvel admitted that the court erred in its valuation of sick leave. Because he consented to the correction of the error, Vanden Heuvel cannot now complain. *See County of Racine v. Smith*, 122 Wis.2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984). Vanden Heuvel is judicially estopped from asking the court to effectively reinstate the admittedly erroneous valuation. *See State v. Petty*, 201 Wis.2d 337, 345-46, 548 N.W.2d 817, 820 (1996) ("[I]t is contrary to fundamental principles of justice ... to permit a party to assume a certain position in the course of litigation which may be

advantageous, and then after the court sustains the position, argue on appeal that the action was error.”).⁴

The second issue is whether the trial court properly exercised its discretion when it denied Vanden Heuvel’s motion for relief from the April 21, 1997 judgment. Vanden Heuvel argues that relief should be granted because he was misled by the trial court’s establishment of a May 23, 1997 deadline for reconsideration motions—a date outside the twenty-day limit for reconsideration motions under § 805.17(3), STATS. Vanden Heuvel reasons that he did not file a timely notice of appeal because he relied on the trial court’s ability to extend that deadline.

Vanden Heuvel’s argument is substantially the same one that he advanced to this court when the timeliness of his earlier appeals was questioned. At that time, Vanden Heuvel argued that the trial court’s erroneous extension of the time for filing reconsideration motions was a circuit court mistake which should be remedied pursuant to *Edland v. Wisconsin Physicians Serv. Ins. Corp.*, 210 Wis.2d 638, 563 N.W.2d 519 (1997). We declined to do so, and held that the “narrow holding” of *Edland* should not be extended to these facts. That decision is law of the case. See *State v. Brady*, 130 Wis.2d 443, 447, 388 N.W.2d 151, 154 (1986). The trial court’s denial of Vanden Heuvel’s motion for relief from the judgment was consistent with our previous order, and thus, was a proper exercise of discretion.

⁴ We do not believe that the untimeliness of the reconsideration motions under § 805.17(3), STATS., prevented the court from correcting a mathematical error that both parties agreed occurred.

By the Court.—Order affirmed.

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

