COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1228 **Cir. Ct. No. 2014CV989**

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

KAREN J. WILKS,

PLAINTIFF-APPELLANT,

V.

MARY PANGMAN SCHMITT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Karen J. Wilks, pro se, appeals an order denying her motion for relief from a judgment. She contends the circuit court erred when it dismissed the underlying action on the basis of res judicata because that

conclusion rested on the mistaken belief that a prior small claims case had been dismissed with prejudice. We reject her arguments and affirm.

¶2 Wilks filed a pro se complaint that apparently alleged misrepresentation and breach of contract based on her claim that the home she bought through realtor Mary Pangman Schmitt had known mold issues. In a prior small claims action, Wilks had made similar allegations against Country Club Villas, Inc. Pangman Schmitt was personally served in that action as the president and sole owner of Country Club Villas. The small claims action had been dismissed without prejudice. At the January 30, 2015 trial to the court, Pangman Schmitt's newly retained attorney, Michael Verrilli, moved to dismiss the case on grounds of res judicata and/or collateral estoppel. The court granted Pangman Schmitt's motion to dismiss. Wilks did not appeal.

¶3 On May 11, 2015, Wilks, now represented by counsel, moved for relief from the judgment, pursuant to WIS. STAT. § 806.07 (2013-14),[1] and for reasonable attorney's fees and costs "because the arguments made by Attorney Michael A. Verrilli have no legal basis in law or fact." The record contains no brief or legal memorandum in support of the motion.[2]

¶4 On May 28, Wilks filed a memorandum that addressed only the attorney's fees issue. The essence of her argument was that, by contending that res judicata applied, Verrilli misrepresented to the court that the initial lawsuit was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

[2] We disregard the memorandum Wilks includes in the appendix to her reply brief. The memorandum is neither dated nor file-stamped. The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

adjudicated on the merits when he knew or should have known it was dismissed without prejudice. Wilks sought sanctions pursuant to WIS. STAT. §§ 802.05(3) and 895.044(2).[3]

¶5 Wilks appeared pro se at the motion hearing. Based on her May 28 legal memorandum, the circuit court construed her WIS. STAT. § 806.07 motion as seeking to reopen the case due to defense counsel's allegedly fraudulent conduct during the January 30, 2015 court trial. *See* § 806.07(1)(c). The court denied the motion. Wilks's pro se appeal followed.

¶6 WISCONSIN STAT. § 806.07 provides in relevant part:

> **(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;
>
> (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;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

[3] It does not appear that Wilks served Pangman Schmitt with the required twenty-one-day "safe harbor" letter. *See* WIS. STAT. §§ 802.05(3)(a)1. and 895.044(2)(a); *see also* ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶27, 302 Wis. 2d 299, 735 N.W.2d 1 Her counsel filed the WIS. STAT. § 806.07 motion on May 11, 2015, a notice of appearance on May 26, and the motion for §§ 802.05 and 895.044 sanctions on May 28.

> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

¶7 The denial of a motion to vacate under WIS. STAT. § 806.07 is a discretionary determination that we will not reverse absent an erroneous exercise of discretion. ***Werner v. Hendree***, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423. The circuit court erroneously exercises its discretion when it applies the wrong legal standard or if the facts of record fail to support its decision. ***Id.***

¶8 Verrilli moved to dismiss based on res judicata and/or collateral estoppel. Asked if she wished to respond, Wilks' full answer was as follows:

> This proceeding is—this lawsuit is based on misrepresentation of Mary Pangman Schmitt in the representation of me as a buyer, and I am not looking at Country Club Villas as I was in the original small claims court.
>
> It has exceeded small claims court. We are now looking at extensive damages because of inaction by the defendant. And so this has nothing though to do with Country Club Villas. It has to do with Mary Pangman Schmitt as an individual and realtor.

She did not argue mistake or any of the WIS. STAT. § 806.07(1) factors.

¶9 Wilks' request for sanctions pursuant to WIS. STAT. §§ 802.05(3) and 895.044(2), and her failure to argue mistake in her trial brief or at trial, supports the court's conclusion that her WIS. STAT. § 806.07 motion was based on § 806.07(1)(c). And as the court pointed out, Verrilli could not have perpetrated a fraud on the court because—as the record confirms—the court itself raised res judicata first. The court did not erroneously exercise its discretion in denying the motion under § 806.07(1)(c).

¶10 The court also noted that it had expressly advised Wilks at trial that she could appeal if she believed the ruling was legally wrong and had directed her to the proper statutory chapters for doing so. Wilks chose not to heed that advice. The court on its own may not use WIS. STAT. § 806.07(1)(h) to extend the time for appeal. *See* ***Eau Claire Cty. v. Employers Ins. of Wausau***, 146 Wis. 2d 101, 109, 430 N.W.2d 579 (Ct. App. 1988).

¶11 Finally, we recognize that pro se appellants tread a difficult path. Some leniency may be afforded them but they still are bound by the same rules that apply to attorneys on appeal. ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). We will not abandon our neutrality to develop arguments for them. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶12 Wilks' brief is rife with inaccurate, confusing record cites. She misrepresents the record by discussing in her briefs, and including in the appendix, unfiled documents or matters that postdate the filing of the notice of appeal. She makes disrespectful comments about the court's grasp of the law. We do not countenance such actions from any appellant, represented or not.

By the Court.—Order affirmed.

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