COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

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. 97-1769

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

RICHLAND COUNTY, CITY OF RICHLAND CENTER AND THE SYMONS NATATORIUM BOARD,

PLAINTIFFS-RESPONDENTS,

v.

P.G. MIRON COMPANY, INC.,

DEFENDANT-APPELLANT,

JOHN E. SOMMERVILLE ASSOCIATES, INC. AND KUBIAK POOL COMPANY, INC.,

DEFENDANTS.

APPEAL from an order of the circuit court for Richland County: MICHAEL KIRCHMAN, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. In 1986, Richland County, the City of Richland Center and the Symons Natatorium Board (collectively, "Richland") contracted with P. G. Miron Company for construction of a public indoor sports facility. In 1993, claiming to have discovered defects in the building, Richland sued Miron, the architect and one of the subcontractors, for damages. In the fall of 1994, Richland agreed to settle its claims against Miron for $2500. Several weeks later, Richland, now believing that its damages far exceeded $2500, wrote to Miron to withdraw its acceptance of the settlement. Miron moved the trial court for an order enforcing the settlement, and in September 1995 the court granted the motion.[1] In November 1996, Richland moved for relief from the terms of the settlement. The trial court granted the motion, and we granted Miron leave to appeal from the nonfinal order reinstating Richland's action.

We see the dispositive issue as whether Richland brought its motion for relief from the settlement agreement within a reasonable time under § 806.07, STATS., which provides:

> **806.07 Relief from judgment or order. (1)** On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect; ….
>
> **(2)** The motion shall be made within a reasonable time, and, if based on sub. (1)(a) … not more than one year after the judgment was entered or the order or stipulation was made ….

[1] We note that Judge Kent C. Houck presided over Miron's motion to enforce the settlement. Judge Kirchman presided over the subsequent proceedings.

The parties disagree whether Richland's motion was filed within the one-year time designation in § 806.07(2), STATS. Richland argues that the period should run from the entry of the order enforcing the stipulation (which would be within the one-year period), while Miron maintains that it should run from the date the stipulation was entered (which would be beyond one year). We are satisfied, however, that whether or not the filing met the one-year requirement, it was not filed within a reasonable time as required by § 806.07(2), STATS. The statute plainly states that the motion "shall be made within a reasonable time, and … not more than one year after the judgment was entered or the stipulation was made." If made beyond the one-year period it must be denied as untimely regardless of whether it was reasonable. *See* 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2866, at 391-92 (2d ed. 1995), discussing FED. R. CIV. P. 60(b), upon which § 806.07(2), STATS., is based. Similarly, a motion brought within the one-year period does not necessarily mean that it is timely under the statute. ***Rhodes v. Terry***, 91 Wis.2d 165, 171, 280 N.W.2d 248, 251 (1979). *See also* WRIGHT ET AL., *supra*, § 2866, at 389, stating, "The one-year period represents an extreme limit, and the motion will be rejected as untimely if not made within a 'reasonable time' even though the one-year period has not expired." (Footnote omitted.)

The material facts are not in dispute. Richland filed this action on June 4, 1993, claiming that the sports facility had been negligently designed and constructed in several respects, resulting in defects in the racquetball courts, pool deck tile, locker room floors, pool pump and boiler room venting. In addition to Miron, the complaint named the project architect and a swimming pool contractor as defendants.

Shortly after commencing the action, Richland hired an engineer, David Burbach, to inspect and report on possible defects in the facility's racquetball courts. Burbach reported to Richland in January 1994 that several problems existed with respect to the courts, most of which stemmed from the facility's design, rather than its construction. Several months later, in June 1994, Richland's attorney wrote to Miron stating that he was "willing to recommend to [his] clients that … Miron … be dismissed from this action with prejudice upon payment … of $5,000." Negotiations apparently ensued and, in a letter to Miron dated November 18, 1994, Richland's attorney stated:

> I'm writing to confirm the conversation which I had with your secretary today that my clients … did approve a settlement whereby … Miron … would be dismissed from this action upon payment … of $2,500.00. Please make the check payable to "Symons Recreational Complex" in that amount. I would appreciate it if you would draft for my signature such Release, Stipulation and Order, etc. as you deem appropriate.

When, in early December 1994, Richland's attorney informed Burbach of the settlement, Burbach responded that his report had, as Richland requested, been limited to the racquetball courts. He stated: "It is highly recommended that the [$2500] settlement with Miron be *only* limited to the plaster in the racquet ball courts, and not a general release for the entire project." (Emphasis in the original.) At Richland's request, Burbach undertook further investigations and, on February 9, 1995, submitted to Richland a lengthy "preliminary" report of several perceived defects throughout the facility. In a cover letter to Richland's attorney dated February 10, 1995, Burbach again emphasized that "a release of this scope should not be executed."

Richland's attorney wrote to Miron the same day stating that because he had not yet received the $2500 check, his clients had "decided to withdraw their previous acceptance of your client's settlement offer." "Therefore," the letter concluded, "my clients' acceptance of your … offer, as stated in my November 18, 1994 letter, is hereby withdrawn." The letter said nothing about new information regarding problems at the facility. Miron responded by forwarding a check for $2500 to Richland, together with a release. Richland's attorney wrote back stating his position that the case had not been settled and if Miron disagreed, it could bring an appropriate motion in circuit court.

On July 13, 1995, Burbach submitted a "confidential" memorandum to Richland estimating the total cost to remedy problems at the facility to be in the range of $360,500 to $390,100. Richland never released this information to Miron.

On August 7, 1995, Miron filed a motion for an order enforcing the November 18, 1994, settlement agreement. In its affidavits and brief opposing Miron's motion, Richland made no reference to any of the information received from Burbach, nor did it argue that it had entered into the agreement through mistake or inadvertence. The crux of its argument was that Miron had failed to timely consummate the settlement.

The trial court issued a memorandum decision on September 21, 1995, concluding that Richland's attorney's letter of November 18, 1994, constituted an enforceable stipulation. An order was entered on November 21, 1995, dismissing Richland's action against Miron.

On November 12, 1996, Richland filed its motion for relief "from the settlement agreement which the Court ordered to be enforced." The motion neither stated nor alleged any facts in support of the request. Then, on January 13, 1997, Richland refiled the motion, this time accompanying it with copies of various letters, reports and estimates it had received from Burbach over the past two years.

Miron's brief to the trial court in opposition to Richland's motion for relief from the settlement dealt at considerable length with the "reasonable time" requirement of § 806.07(2), STATS. It argued, among other things, that because Richland knew all the facts essential to claim that its actual damages exceeded $2500 many times over and waited more than two years to seek relief, the motion was not brought within a reasonable time. Miron renewed its timeliness argument at the hearing on Richland's motion. Richland's brief and oral argument to the court addressed only the issue of mistake and did not respond to Miron's argument that the motion was not filed within a reasonable time under § 806.07(2). Richland's brief mentioned the motion's timing only peripherally, noting that the court "could readily conclude that the motion is timely," because a brief filed August 29, 1995, in opposition to Miron's motion to enforce the settlement alluded to the possibility that Richland might, in the future, make such a motion.[2]

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[2] In its brief to the court, Richland stated that, should the court grant the motion, it was Richland's "intention to promptly make a Motion for relief from that stipulation under Sections 806.07(1)(a) and (b), Wis. Stats."

Responding to Richland's argument, Miron's counsel pointed out that the brief reference to a possible future motion for relief under § 806.07, STATS., "does not set forth any of the grounds or make any explanation of what such a motion would be about." Counsel continued:

> [E]ssentially what you have, Your Honor, is in August of 1995 an apparent admission of awareness that there was a potential argument under 806.07 for relief and yet we have a period of at

(continued)

At the conclusion of the hearing, the trial court ruled that Richland made the motion within one year of the court's order enforcing the stipulation. It then discussed the statute's "reasonable time" requirement:

> As to being filed within a reasonable time I didn't hear much about – I did hear something about the prejudice to the defendant by deciding this or this coming up at a later date but not so much about what it meant …. I also note that although the motion wasn't filed until about a year [later], the plaintiffs[']attorney had mentioned … [the] possibility or the statement that a motion would be filed for relief. So, I think it's within a reasonable time ….

Whether to grant or deny a motion for relief from a judgment or stipulation under § 806.07, STATS., is discretionary with the trial court. ***EPF Corp. v. Pfost***, 210 Wis.2d 79, 85, 563 N.W.2d 905, 908 (Ct. App. 1997).[3]

> least a year and three months before anything was filed. I would respectfully submit that that is a demonstration that this has not been filed within a reasonable time under any stretch and certainly under the case law as is developed in Wisconsin.
>
> ….
>
> I respectfully submit that if there was an argument with respect to relief from the settlement stipulation made in November 1994 at the very latest it should have been brought to the Court's attention in August of 1995 when the Court was taking up the whole issue.

Additionally, Richland did not make good on the premise of the statement: it would promptly move for relief from the stipulation. The stipulation was effective November 18, 1994; the statement in the brief was made on August 29, 1995; the court's decision granting the motion to enforce the stipulation was issued on September 21, 1995; and a subsequent order conforming to the decision was issued on November 21, 1995. Yet Richland did not move for relief from the stipulation until November 1996—and even at that time, it did not provide any factual basis for the motion, submitting that information in a refiled motion in January 1997.

[3] In other contexts, we have said that the concept of reasonableness is a question of law, which we review independently. *Cf.* ***Lohr v. Viney***, 174 Wis.2d 468, 477-78, 497 N.W.2d 730, 733-34 (Ct. App. 1993). We have consistently held, however, that circuit courts have broad discretionary authority to grant relief from judgment under § 806.07, STATS., for any reasons justifying such relief—including, presumably, the reasonableness of delay. *See* ***Allstate Ins. Co. v. Konicki***, 186 Wis.2d 140, 148-49, 519 N.W.2d 723, 726 (Ct. App. 1994).

"Discretion contemplates a reasoning process dependent on the facts of record and yielding a conclusion based on logic and founded on proper legal standards." ***Id***. (citation omitted). Thus, where "[t]he circuit court fail[s] to engage in a reasoned consideration of the[] relevant factors … its decision ... constitutes an erroneous exercise of discretion." ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992) (emphasis omitted). A court also misuses its discretion when it relies on an erroneous view of the law, ***Prosser v. Cook***, 185 Wis.2d 745, 751, 519 N.W.2d 649, 651 (Ct. App. 1994), or its decision is not one a reasonable tribunal could reach, given the facts of record and the applicable law. ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990).

While we have often referred to our standard of review of a trial court's discretionary determinations as deferential in that we will look for reasons to sustain them, ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991), the supreme court has recognized that the exercise of discretion "is not the equivalent of unfettered decision-making." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982) (quoted source and internal quotation marks omitted). Rather, a discretionary decision must be the product of a rational mental process in which the trial court articulates the facts of record and the law it relied upon.

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion

> which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Hartung v. Hartung, 102 Wis.2d 58, 66, 307 N.W.2d 16, 20-21 (1981).

The trial court's decision in this case is grounded on a single sentence: Richland's statement in its brief opposing Miron's motion to enforce the stipulation in August 1995, that, should it lose the motion (which it did), it would promptly move for relief from the stipulation (which it did not). *See supra* note 2. Not only is the statement indefinite and unexplained, but the trial court's decision does not discuss how the statement might reasonably lead to the conclusion that a motion for relief filed some fifteen months later was made within a reasonable time as § 806.07(2), STATS., requires. Additionally, we agree with Miron that the statement demonstrates not only that, in August 1995, Richland was fully aware of its mistake—the sole ground advanced in support of its later motion for relief from the settlement—but also that it had realized that a motion for relief was appropriate. Yet Richland did not act on that knowledge until November 12, 1996, when its brief was filed.

We thus conclude that the trial court did not exercise its discretion in the manner required by the authorities discussed above.[4] In such a situation, we may, of course, independently review the record to determine "whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490,

[4] The court's exposition of its reasoning need not be lengthy or complex. "While reasons must be stated, they need not be exhaustive. It is enough that they indicate to the reviewing court that the trial court 'undert[ook] a reasonable inquiry and examination of the facts' and 'the record shows that there is a reasonable basis for the ... court's determination.'" ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991) (quoted source omitted).

507 N.W.2d 172, 174 (Ct. App. 1993). Doing so in this case, we begin by considering the factors the supreme court has identified as relevant to a reasonableness determination under § 806.07, STATS.

> Determining whether motions under [the statute] have been made within a reasonable time requires a case by case analysis of all relevant factors.…
>
> What factors are "relevant" to the reasonableness inquiry will of course vary from case to case. Several federal courts, faced with the question, have divided the inquiry into two categories of analysis: the basis for the moving party's delay, and prejudice to the party opposing the motion.…
>
> We agree that any credible evaluation of a motion's timeliness will necessarily consider the reasons for the moving party's delay as well as the prejudice visited upon the non-moving party. As a result, the two-part analysis utilized by these courts can be a useful way of marshalling the analysis.

State ex rel. Cynthia M.S. v. Michael F.C., 181 Wis.2d 618, 627-28, 511 N.W.2d 868, 872 (1994) (citations omitted).

Richland has offered no reason or justification for the delay. Richland does not dispute that its attorney was aware that the stipulation may have been improvident as early as December 1994, when Burbach informed him that the earlier engineering report was quite limited and should not form the basis of a settlement. And by the time Richland received Burbach's supplemental report in July 1995, it was unequivocally aware that correcting the problems at the facility would cost substantially more than the amount of the settlement. Still, Richland never raised the issue of mistake when it responded to Miron's motion to enforce the stipulation—offering only a remark that, should it lose on the motion, it would seek further relief. Indeed, Richland never mentioned the issue at all until January

1997, when it "refiled" its motion seeking relief from the stipulation. The trial court's decision made no mention of these facts.

As to the potential prejudicial effect of the delay, Miron points to the fact that all of the basic work on the facility was subcontracted out and the project was completed in the late 1980s. Had it known of its "expanded" exposure in a timely fashion, it argues, it could have investigated and possibly pursued third-party claims against the subcontractors. Now, it says, any such action would likely face arguments that the claims are time-barred, since the statute of limitations on contract claims runs from the time of the breach, not the discovery. *See*, *e.g.*, ***CLL Assocs. Ltd. Partnership v. Arrowhead Pacific Corp.***, 174 Wis.2d 604, 609, 497 N.W.2d 115, 117 (1993); ***Williams v. Kaerek Builders, Inc.***, 212 Wis.2d 150, 160, 568 N.W.2d 313, 317 (Ct. App. 1997) (applying the rule to a construction contract).[5]

In sum, twenty-three months passed from the time Richland was first alerted to the "mistake" on which it grounded its request for relief—an underestimate of potential damages—and the time it first sought relief on that ground. Seventeen months passed between Richland's receipt of Burbach's full report—including specific "dollar" estimates of potential damages—and its motion for relief. We see no basis in either the applicable law or the facts of record on which discretion could reasonably be exercised to conclude that Richland's motion was filed within a "reasonable time" under § 806.07, STATS.

[5] Richland suggests that such a "hypothetical" argument should be disregarded as based on facts outside the record. It is undisputed, however, that Miron was the general contractor for the facility, assigning much of the work to subcontractors—including a plasterer whose work Richland's own engineering consultant specifically criticized. As to the "hypothetical" nature of the argument, any argument based on potential prejudice must be hypothetical, at least to a degree.

We therefore reverse the trial court's order and remand with directions to reinstate the order of November 21, 1995, dismissing Richland's claims against Miron.

By the Court.–Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.