

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 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. 99-0467

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DEAN HEIKE,

PLAINTIFF-RESPONDENT,

V.

DAN HAWK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

CANE, C.J. Dan Hawk appeals from an order denying his motion and demand for a new trial. Hawk argues that he has the right to a new trial pursuant to § 799.28(1), STATS. However, because Hawk failed to comply with the statutorily mandated time limits for demand of trial under § 799.207, STATS., the circuit court order denying Hawk's motion to reopen and demand for trial is affirmed.

Dean Heike instituted a small claims action against Hawk to recoup payment for services provided to Hawk in preparation for the construction of a duplex. On March 24, 1998, a Brown County court commissioner rendered a written decision in favor of Heike—this decision was filed on April 6 and judgment against Hawk was thereafter filed on April 28. On July 9, Hawk filed a “Notice of Intent to Defend Garnishment” which included, *inter alia*, a motion to reopen. In the decision denying Hawk’s motion to reopen, the court commissioner noted that Hawk’s failure to timely demand a trial or file a motion for a new trial barred further proceedings on the merits of Hawk’s case.¹ Subsequently, on October 19, Hawk filed a demand for trial and motion to vacate with the circuit court, intimating that the court commissioner’s decision granted him leave to do so. The circuit court, denying Hawk’s motion and demand for trial, found that Hawk had failed to meet the statutory criteria to be afforded relief from judgment pursuant to § 806.07, STATS. This appeal followed.

Hawk urges this court to review the court commissioner’s decision and judgment in favor of Heike. Specifically, Hawk asserts that the court commissioner erred by allowing an allegedly false statement regarding Hawk to

¹ Section 799.207(2), STATS., governs time limits for demanding a trial before circuit court and states, in pertinent part, that “[t]he court commissioner’s decision shall become a judgment ... 16 days after mailing, if written, except that: ... (b) [e]ither party may file a demand for trial within 10 days from the date of an oral decision or 15 days from the date of mailing of a written decision to prevent the entry of the judgment.” Further, subsec. (3)(a) notes that [t]here is an absolute right to have the matter heard before the court if the requirements of this section are complied with.” Section 799.207(3)(a), STATS.

Section 799.28, STATS., governs motions for a new trial and states that “[a] motion for a new trial must be made and heard within 20 days after the verdict is rendered, unless the court extends the time as provided in s. 801.15(2)(b).” Where there is newly discovered evidence, however, subsec. (2) permits a motion to set aside a verdict or to open up a judgment and for a new trial to be made at any time within one year from the verdict or finding. *See* § 799.28(2), STATS.

influence her decision against him. However, Hawk's appeal to this court arises solely from the circuit court's order. Only a final order or judgment may be appealed as of right to this court, *see* § 808.03(1), STATS., and a court commissioner's order is not equivalent to a final order or judgment of a circuit court. *See Dane County v. C.M.B.*, 165 Wis.2d 703, 708, 478 N.W.2d 385, 386 (1992). As such, this court's inquiry is necessarily limited to whether the circuit court correctly dismissed Hawk's motion to reopen and demand for trial.

Whether Hawk failed to meet the statutory criteria required under § 799.207, STATS., is a conclusion of law that this court reviews *de novo*. *See First Nat'l Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977). As the record contains no transcript of the motion hearing held before the circuit court, review of the circuit court's order is limited to those parts of the record that are available to this court. *See In re Ryde*, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). The circuit court, presumably concluding that Hawk's failure to make a timely demand for trial precluded relief under either of §§ 799.207 or 799.28, STATS., focused on § 806.07, STATS., as a possible alternative for relief.²

This court's review of the record confirms that Hawk failed to comply with the time limits mandated under § 799.207, STATS. The court commissioner's decision was written on March 24, 1998, and judgment in favor of Heike was filed on April 28. Hawk first made a motion to reopen on July 9, and

² Although the circuit court looked to § 806.07, STATS., in denying Hawk's motion to reopen and demand for a new trial, the denial of Hawk's motion and demand was proper under § 799.207, STATS. This court will affirm the circuit court if it reached the correct result, even if this court disagrees with its reasoning. *See Negus v. Madison Gas & Elec. Co.*, 112 Wis.2d 52, 61, 331 N.W.2d 658, 663-64 (Ct. App. 1983).

no demand for trial was filed until October 19. Clearly, Hawk's attempts to reopen his case and demand a trial fell well beyond the sixteen-day time limit mandated under § 799.207. Further, given the language of § 799.28, STATS., one cannot move for a new trial unless one has had a trial. Specifically, § 799.28 states that a motion for new trial "must be made and heard within 20 days after the verdict is rendered," except where the court grants an extension of the time limit. Apart from a court-granted extension, the only other exception to the twenty-day time limit is where there is newly discovered evidence. *See* § 799.28(2), STATS. The record does not reveal any newly discovered evidence, nor does Hawk argue the existence of such evidence. In fact, the crux of Hawk's argument centers around his displeasure with a statement made by counsel for Heike before the court commissioner—a statement that allegedly characterized Hawk as a "free loader." As such, § 799.28 is inapplicable to these facts. Accordingly, this court affirms the circuit court's order denying Hawk's motion and demand for new trial.

Heike argues that Hawk's appeal is frivolous under § 809.25(3), STATS. In order to conclude that an appeal is frivolous under this section, this court must determine one or more of the following:

1. The 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 ... 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.

Section 809.25(3)(c), STATS. However, neither the record nor Hawk's briefs to this court reveal that his appeal was made in bad faith or that Hawk knew or should have known that the appeal was without any reasonable basis in law or

equity. This court holds that Hawk's appeal is not frivolous, as defined under § 809.25(3)(c).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

