

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 19, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 99-0485
99-1620**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**ALBERT A. TADYCH, A/K/A ALBERT A. TADYCH TRUST
FUND,**

PLAINTIFF-APPELLANT,

V.

**WAUKESHA COUNTY, A WISCONSIN CORPORATION,
PATRICIA G. KARCHER, WAUKESHA COUNTY TREASURER,
PATRICIA E. MADDEN, WAUKESHA COUNTY CLERK AND
RICHARD L. MANKE, WAUKESHA COUNTY BOARD
SUPERVISOR,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for
Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Albert A. Tadych appeals pro se from a judgment dismissing his claims against Waukesha County, Patricia G. Karcher, Patricia E. Madden and Richard L. Manke to recover damages for the County's refusal to allow him to repurchase land the County obtained by tax foreclosure. He also appeals from an order denying his motion for relief from the judgment under WIS. STAT. § 806.07 (1997-98).¹ Tadych's claims rest on his belief that he was not given an adequate opportunity to retain substitute counsel so he could meaningfully respond to the motion for summary judgment. We reject his claims and affirm the judgment and the order.

¶2 In 1993, the County foreclosed on two parcels of land owned by Tadych for his failure to pay taxes in 1988 and 1989. The foreclosure judgment was reversed because Tadych, a minor at the time, was not adequately represented by a guardian ad litem in the foreclosure action. *See Waukesha County v. Tadych*, 197 Wis. 2d 653, 541 N.W.2d 782 (Ct. App. 1995). Tadych redeemed the property on remand of the foreclosure action.

¶3 In December 1996, Tadych commenced this action alleging that the County had attempted to illegally seize his property through the tax foreclosure and deliberately gave him false information about his redemption rights. An amended complaint was filed in October 1997 alleging a violation of 42 U.S.C. § 1983 because he had not been allowed to repurchase his property prior to his appeal from the foreclosure judgment contrary to a consistent practice of allowing owners to repurchase.² Karcher, the county treasurer, Madden, the county clerk,

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

² The amended complaint was filed without leave of the court. At a hearing on April 6, 1998, Tadych was given permission to file the amended complaint. An answer to the amended complaint was filed on April 10, 1998.

and Manke, a county supervisor, (collectively referred to as the individual defendants) served on the county's tax deed committee which denied Tadych's request to repurchase the property. Tadych sought to recover the attorney fees incurred in prosecuting the foreclosure appeal, damages for the loss of enjoyment and use of his property between the time of the refused repurchase and the reversal of the foreclosure judgment, and the payment of property taxes for 1993, 1994 and 1995, the time during which the County was the exclusive owner of the property. He also demanded punitive damages.

¶4 When the action was started Tadych was represented by his father, Attorney Albert R. Tadych. As the case progressed, it became apparent that Attorney Tadych was going to be a witness regarding communications with the County regarding the request to repurchase the property. Attorney Tadych indicated that he was going to withdraw from representation.³ In October 1997, the County and the individual defendants moved for summary judgment.⁴ At a scheduling conference held on May 11, 1998, Attorney Tadych's continued deposition was scheduled, and Tadych was required to obtain new counsel by August 1, 1998.⁵ A hearing on the motion for summary judgment was scheduled for August 31, 1998. On July 28, 1998, the County and the individual defendants

³ By a letter of July 3, 1997, Attorney Tadych advised defense counsel that either cocounsel or substitute counsel would be retained within two weeks. On September 12, 1997, Attorney Tadych submitted a witness list which included himself. Attorney Tadych's deposition was taken on November 11, 1997.

⁴ This motion was not heard as scheduled because Tadych sought judicial substitution.

⁵ Attorney Tadych appeared at the scheduling conference contrary to the circuit court's order of April 26, 1998, which provided that Tadych be represented at the scheduling conference by his new attorney.

filed a second motion for summary judgment to be heard on August 31, 1998. Tadych did not file any response to the motion for summary judgment.

¶5 Attorney Robert Sutton was retained on August 24, 1998, to represent Tadych. A motion to adjourn the August 31, 1998 summary judgment hearing and to extend the time to respond to the motion for summary judgment was filed. The circuit court denied the motion. After hearing argument, the individual defendants were granted summary judgment. The County's motion was taken under advisement and the parties were required to submit briefs. By a written decision of December 10, 1998, summary judgment was granted dismissing all of Tadych's claims.

¶6 On December 15, 1998, Tadych filed a pro se motion to vacate the grant of summary judgment to the individual defendants on the grounds that he was denied or without legal counsel.⁶ The motion was summarily denied. While an appeal was pending, Tadych filed a second pro se motion to vacate the final judgment. The motion filed on June 8, 1999, was supported only by an affidavit from Attorney Tadych which concluded that summary judgment had been obtained by mistake, inadvertence, surprise, and excusable neglect. An order was entered denying the second motion to vacate based on the existing record. Tadych also appeals from that order.⁷

⁶ Tadych's motion to vacate apparently crossed in the mail with the circuit court's final decision and therefore only addressed summary judgment granted in favor of the individual defendants at the August 31, 1998 hearing.

⁷ The appeals were consolidated for decision by an order of July 23, 1999. *See* WIS. STAT. RULE 809.10(3).

¶7 Tadych first argues that it was a misuse of summary judgment procedure to permit the County and the individual defendants to file a second motion for summary judgment. We conclude there was nothing improper about the circuit court entertaining the second motion for summary judgment. First, Tadych did not object to the second motion for summary judgment and has waived any claim of error. See *Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990). Second, after the first motion for summary judgment was filed, Tadych was given permission for the amended complaint. The amended complaint raised new claims. The second motion for summary judgment addressed those new claims. Further, at the April 6, 1998 hearing, the circuit court indicated that it would set a new date for filing summary judgment motions. Extending the time for summary judgment motions was within the circuit court's discretion. See WIS. STAT. §§ 802.08 and 802.10(3)(h). The second motion for summary judgment was filed a month in advance of the hearing and was timely. See § 802.08(2).

¶8 Tadych next argues that the circuit court erroneously exercised its discretion in refusing the requested adjournment of the summary judgment motion hearing and thus requiring strict compliance with the deadline for substituting counsel. A recurrent theme to Tadych's arguments is that he was not given sufficient time to obtain new counsel. We soundly reject this notion in that as early as September 1997, Tadych was aware that his father, Attorney Tadych, was going to be a witness and new counsel would be advisable. We also reject Tadych's characterization that the circuit court ordered Attorney Tadych to withdraw. There was no motion to have Attorney Tadych removed.⁸ There is no

⁸ There is no transcript of the May 11, 1998 scheduling conference at which Tadych claims that defense counsel requested an order for substitute counsel. It is the appellant's responsibility to assure that the record is complete. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

order in the record requiring Attorney Tadych to withdraw. It was Attorney Tadych himself who indicated that substitute counsel would be found. Attorney Tadych never formally withdrew⁹ and nothing prevented him from drafting a response to the motion for summary judgment.

¶9 The decision to grant a motion for an adjournment based on the retention of new counsel is committed to the circuit court's discretion. *See T & HW Enters. v. Kenosha Assocs.*, 206 Wis. 2d 591, 599, 557 N.W.2d 480 (Ct. App. 1996). The decision will be sustained if the circuit court examined the relevant facts, applied a proper standard of law and reached a conclusion that a reasonable judge could reach. *See id.* Tadych does not directly attack the circuit court's exercise of discretion on the day of the motion hearing. Rather, he argues that his motion for relief under WIS. STAT. § 806.07 on the grounds of excusable neglect in not timely complying with the deadline for substitution of counsel should have been granted. Relief under § 806.07 is also a discretionary decision. *See Eau Claire County v. Employers Ins.*, 146 Wis. 2d 101, 109, 430 N.W.2d 579 (Ct. App. 1988). The determination as to whether excusable neglect exists is discretionary. *See Gerth v. American Star Ins. Co.*, 166 Wis. 2d 1000, 1006, 480 N.W.2d 836 (Ct. App. 1992). "Excusable neglect is that which might have been the act of a reasonably prudent person under the same or similar circumstances." *Id.* at 1007.

⁹ Tadych states that his father told him on July 29, 1998, that he was withdrawing as counsel because the circuit court had made it emphatically clear that Attorney Tadych was to be removed as the attorney of record before August 1, 1998. In an affidavit filed August 27, 1998, Attorney Tadych indicated that he was counsel of record from commencement of the action until May 11, 1998.

¶10 The motion for relief was denied based on the record made at the summary judgment motion hearing where the circuit court specifically addressed whether there was excusable neglect. The circuit court recalled that in setting the deadline for substitution of counsel, it was concerned with the fact that the case had long been pending and that it had conveyed a sense of urgency with respect to the established deadline. The court also reviewed the earlier efforts Tadych had made to retain counsel with the assistance of his father. The court found that in retaining certain attorneys, Attorney Tadych had ignored potential conflicts of interest.¹⁰ The circuit court acknowledged that it applied a bit higher standard to the effort to retain counsel because as an attorney, Attorney Tadych should have an understanding of the conflicts of interest standards within the legal profession. Thus, the court expressed that it had “a difficult time sympathizing with Mr. Tadych in his difficulty to find counsel.” The court found there was nothing remotely approaching excusable neglect in failing to timely retain new counsel.

¶11 The circuit court properly exercised its discretion. The deadline had been imposed as a remedial effort to promote progression of the case to trial. *See Schwab v. Baribeau Implement Co.*, 163 Wis. 2d 208, 217, 471 N.W.2d 244 (Ct. App. 1991). Tadych was made aware at the May 11, 1998 scheduling conference that the circuit court was concerned that an adjournment would be sought with a last-minute substitution of counsel. Although the court admittedly applied a standard somewhat higher than the reasonably prudent person standard to Tadych’s efforts to retain counsel, this was appropriate in light of the circuit

¹⁰ Tadych had retained two attorneys who had previously served as corporation counsel and were disqualified by the court. Attorney Tadych demonstrated his awareness of the types of conflicts of interest which would preclude certain attorneys from acting because he moved to have the circuit court judge originally assigned to this action disqualified because of the judge’s connections to corporation counsel prior to taking the bench.

court's finding that Attorney Tadych continued to be a driving force in the litigation.¹¹ Contrary to Tadych's contention, the court did not ignore the information about his efforts to retain counsel. The decision to adhere to the scheduling order is supported by a reasonable basis.

¶12 We turn to the ruling on the motion for summary judgment. Tadych contends that it was error for the circuit court to divide the defendants into separate groups and enter separate orders on summary judgment as to the individual defendants and the County. He cites no authority for his claim of error. We summarily reject it. Often the court will grant partial summary judgment. Here, the court could have granted summary judgment in favor of all the parties at the August 31, 1998 hearing because Tadych had not filed any response. However, Tadych benefited from the court's decision to take the motion under advisement as to the County. Moreover, summary judgment was ultimately granted to all of the defendants, so the division had no consequence.

¶13 Tadych characterizes the grant of summary judgment on August 31, 1998, to the individual defendants as a "default" summary judgment. We need not concern ourselves with what may be perceived as the "default" nature of the court's ruling that day. In arguing the motion for summary judgment at the hearing, Tadych's attorney stated, "I could care less whether the individuals are in or out." Having made that concession, Tadych cannot be heard to claim that the judgment dismissing the individual defendants was error. It is well established that where a party has induced certain action by the circuit court, he or she cannot

¹¹ The circuit court's ruling explained that Attorney Tadych made representations at the scheduling conference that he was attempting to save costs for his son and that he was somehow going to help "behind the scenes."

later complain on appeal. *See Zindell v. Central Mut. Ins. Co.*, 222 Wis. 575, 582, 269 N.W. 327 (1936).

¶14 As to summary judgment in favor of the County, Tadych argues that factual issues exist as to whether the County allowed another taxpayer to repurchase property without a hearing before the tax deed committee, whether false and misleading statements were made by County officials during the foreclosure proceeding, and whether the County engaged in negotiations with a third-party for the purchase of Tadych's property prior to the public auction. Tadych did not file any counteraffidavits in opposition to the motion for summary judgment which demonstrate the disputed facts he recites. No factual disputes actually exist. *See Erickson v. Prudential Ins. Co.*, 166 Wis. 2d 82, 94, 479 N.W.2d 552 (Ct. App. 1991).

¶15 Even ignoring the evidentiary void, the factual disputes Tadych describes do not preclude summary judgment because they are not factual disputes material to the determination. To fend off summary judgment, the alleged factual dispute must concern a fact that affects the resolution of the controversy. *See Clay v. Horton Mfg. Co.*, 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992). The factual disputes Tadych raises pertain to the action of the tax deed committee. The circuit court correctly noted that the decision to allow a former owner to repurchase is discretionary, and the County enjoys immunity from suit for such decisions. *See Spencer v. County of Brown*, 215 Wis. 2d 641, 647, 573 N.W.2d 222 (Ct. App. 1997).

¶16 Tadych's argument that he was denied due process is different on appeal than the argument he presented to the circuit court in opposition to the

motion for summary judgment.¹² We generally will not review an issue that is raised for the first time on appeal. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Moreover, Tadych's due process claim is not supported by any citation to authority. It is not enough to simply say "another owner was allowed to repurchase without a hearing but a hearing was held in my case." This court need not consider issues that the appellant does not develop. *See Bartley v. Thompson*, 198 Wis. 2d 323, 341-42 n.10, 542 N.W.2d 227 (Ct. App. 1995). We conclude that summary judgment was appropriate.

¶17 Finally, Tadych argues that the circuit court erroneously exercised its discretion in denying his two motions for relief under WIS. STAT. § 806.07. We will not find an erroneous exercise of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for its decision. *See State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 542, 363 N.W.2d 419 (1985). Tadych would have us conclude that the circuit court misused its discretion because its single-sentence rulings on the motions demonstrate on their face no consideration of any of the factors on which the decision should be based.

¶18 In ruling on both of Tadych's WIS. STAT. § 806.07 motions, the circuit court indicated that the decision was based on findings already made in the record and that no new information was presented. Tadych sought relief under § 806.07(1)(a) which permits relief for a party's excusable neglect. The circuit court had already considered and rejected the contention that excusable neglect excused Tadych from timely retaining new counsel, which in turn affected his

¹² Tadych's circuit court brief argued that he was denied due process because the tax deed committee did not set forth reasons for denying his request to repurchase the property.

ability to respond to the motion for summary judgment. The court was not required to rule on the issue again.

¶19 Tadych's motion and his appellant's brief cite to WIS. STAT. § 806.07(1)(c), (g) and (h).¹³ Tadych's motion and supporting affidavit made no specific allegations on any cause for relief under those additional subsections. The circuit court was not required to hear the motion further in the absence of sufficient factual allegations that grounds exist for relief under the enumerated sections. *See M.L.B.*, 122 Wis. 2d at 557. Tadych's appellant's brief also fails to discuss the sections with specificity. We need not address the undeveloped contention further. We conclude that the circuit court properly exercised its discretion in denying the motions for relief from the judgment.

By the Court.—Judgment and order affirmed.

¹³ WISCONSIN STAT. § 806.07(1) permits relief from a judgment for the following reasons:

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

....

(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.

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

