

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 20, 2001**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 01-0369  
STATE OF WISCONSIN**

**Cir. Ct. No. 97CV007133**

**IN COURT OF APPEALS  
DISTRICT I**

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**WISCONSIN GAS COMPANY,**

**PLAINTIFF,**

**V.**

**BETH BAUER,**

**DEFENDANT-THIRD-  
PARTY PLAINTIFF-APPELLANT,**

**V.**

**INTEGRATED MAIL INDUSTRIES, INC.,**

**THIRD-PARTY DEFENDANT-  
RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Hoover, JJ.

¶1 FINE, J. Beth Bauer appeals from the trial court order denying her motion to vacate a judgment dismissing her third-party claim against Integrated Mail Industries, Inc. We affirm.

## I.

¶2 Bauer was a general partner in Globe Building Partnership, which owned a building on West Hopkins Street in Milwaukee. Wisconsin Gas Company sued her to recover the cost of gas supplied to the building. After vacatur of a default judgment entered against Bauer, she answered Wisconsin Gas's complaint, alleging that Integrated Mail was a tenant in the building using the gas provided by Wisconsin Gas, and that Integrated Mail and not Bauer was liable. Bauer then impleaded Integrated Mail as a third-party defendant.

¶3 Integrated Mail answered Bauer's third-party complaint and, ultimately, moved for summary judgment. In support of the motion, Integrated Mail submitted to the trial court evidentiary material showing the following:

- Wisconsin Gas records indicating that Bauer was responsible for paying for the gas supplied to Globe's building;
- Effective August 14, 1997, AMRESKO Financial I, L.P., the holder of the mortgage on the Globe building, agreed with the partnership and Beth Bauer and William F. Bauer as guarantors of the mortgage debt, to accept, or have its nominee (which turned out to be Tricoastal Resources, LLC) accept the building in lieu of foreclosure;
- As of August 6, 1997, there was due on the mortgage note more than \$2.1 million;
- Under the agreement with AMRESKO Financial, the partnership and the Bauers assigned to AMRESKO or its "nominee" "all matured and unmatured claims and causes in action with respect to" the Globe building;

- Under the agreement with AMRESKO Financial, Bauer and the partners agreed to give to AMRESKO a note secured by a mortgage on Bauer's property for \$100,000;
- The agreement recited that the "fair market value of the Property is less than the amount of the principal and interest due under the Note and is also less than the amount of the indebtedness and other obligations of [the partnership] and Guarantors [Beth Bauer and William F. Bauer]" secured by the mortgage on the Globe building;
- Under the agreement, the partnership was permitted to "retain all rents ... with respect to the [building] received prior to 5 p.m." on August 19, 1997;<sup>1</sup>
- The agreement listed as "consideration" for the transfer in lieu of foreclosure a release of both the partnership's obligations under the loan documents and the obligations of Beth Bauer and William F. Bauer;
- On August 14, 1997, the partnership assigned to Tricoastal Resources the Integrated Mail lease and all rents due under that lease as well as "all matured and unmatured claims and causes of action with respect to the Property." As noted, Tricoastal was AMRESKO's "nominee" under AMRESKO's agreement with the partnership and the Bauers.

The lease between the Globe Building Partnership and Integrated Mail is not in the appellate record.

¶4 Contemporaneously with the execution of the agreement with AMRESKO, the partnership executed a deed in lieu of foreclosure to AMRESKO's nominee, Tricoastal. On August 20, 1997, Tricoastal gave to Integrated Mail, "for One Dollar (\$1.00) and other valuable consideration," a

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<sup>1</sup> The August 19, 1997, date was inserted as a modification of the original clause, which was struck and which provided, as material here, that the partnership was permitted to retain the rents "received prior to" the closing date of August 14, 1997.

release of Integrated Mail's liability to Tricoastal for, among other things, "all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, damages, and any and all claims, demands and liabilities whatsoever of every name and nature" and "any past due ... utilities including: ... gas." This release was filed with the trial court on August 10, 1999, in connection with pre-trial proceedings.

¶5 Bauer submitted an affidavit in opposition to Integrated Mail's motion for summary judgment. In that affidavit, she averred:

- Integrated Mail "used over 99% of the gas charges" for which Wisconsin Gas sought recovery from her;
- During the course of Integrated Mail's tenancy, Integrated Mail was "having financial difficulties and kept defaulting under its rental obligations, including the payment of utilities";
- There were serious "environmental problems" in connection with the Globe building that "substantially diminished" its value.

¶6 On September 28, 1999, the trial court granted summary judgment to Integrated Mail and dismissed Bauer's third-party complaint against it. The trial court noted that although in its opinion Bauer "can most likely prove the first two element[s] of an unjust enrichment" claim (benefit conferred by plaintiff on defendant; appreciation or knowledge by the defendant of the benefit) (citing *Gebhardt Bros., Inc. v. Brimmel*, 31 Wis. 2d 581, 584, 143 N.W.2d 479, 481 (1966)), Bauer "is unable to prove the final element of an unjust enrichment cause of action because she can not [*sic*] prove that [Integrated Mail] retained the benefit, use of the utilities, without payment." The trial court reasoned that Bauer "sign[ed] away her rights to collect for any previous claims relating to the building to Tricoastal for a valuable consideration," and Tricoastal released Integrated Mail

for “all past utility debts.” Thus, the trial court opined that if it “were to allow Bauer to continue with her unjust enrichment claim, [Integrated Mail] would have to pay two different entities for the same bill.” Formal judgment was entered on October 27, 1999, and, in a stipulation between Bauer and Wisconsin Gas filed with the trial court in December of 1999, Bauer agreed to pay Wisconsin Gas the money she owed for the gas service to the Globe building. The action was then dismissed.

¶7 On October 26, 2000, Bauer filed a motion to vacate the October 27, 1999, judgment dismissing Bauer’s third-party claim against Integrated Mail. In support of the motion, Bauer submitted an affidavit in which she averred that Integrated Mail and Tricoastal were related because “Bruce Arbit and Jerry Benjamin were shareholders of Integrated Mail” and, since June of 1997, “were managing members of Tricoastal” so that Integrated Mail and Tricoastal were “the same persons.” She also averred that in April of 1998, Tricoastal transferred the Globe building to Integrated Mail. She claimed that she had not known all of this and that had she “known Integrated Mail and Tricoastal were the same persons, I would have retained my claims against Integrated Mail and not have agreed to assign them to Tricoastal.” Bauer also alleged that as a result of the relationship between Integrated Mail and Tricoastal her negotiations with Integrated Mail during the August 14, 1999 to August 19, 1999 five-day period that she had retained under the agreement with AMRESKO Financial were a sham, and that by not disclosing their relationship, Integrated Mail committed a “fraud ... on me and this court.”

¶8 Bauer also submitted an affidavit executed by the attorney who had represented her in the Wisconsin Gas action. He averred that he also had not been “aware that Integrated Mail Industries, Inc. and Tricoastal Resources, LLC had

common ownership,” and that he “believe[d] that opposing counsel went to great lengths to deceive me and the court.” He claimed that had he known of the relationship between Integrated Mail and Tricoastal, he would “have argued that they defrauded my client with regard to her five day (August 14-19, 1997) right to negotiate with Integrated Mail as to the \$150,000 of back rent and the \$19,000 gas bill” and that “Integrated Mail was not running any risk of having to pay the same debt twice to two different entities.”

¶9 In further support of her motion to reopen and vacate the judgment, Bauer submitted an affidavit executed by “the building and mechanical manager for the former Globe Union building” to the effect that Alan Barland, the president of Integrated Mail, told the manager that Barland was making a show of looking for alternate locations for Integrated Mail’s business because, as phrased by the manager’s affidavit, Barland wanted Bauer “to think that Integrated Mail was moving and buying another building” so Barland could make her believe that the Globe building “would be empty” and, therefore, “he could buy it from her.”

¶10 Integrated Mail submitted to the trial court an affidavit executed by Bruce Arbit in opposition to Bauer’s motion to vacate the judgment dismissing Integrated Mail from the Wisconsin Gas action. In his affidavit, he averred: that Integrated Mail was a corporation organized in 1987; that he, Jerry Benjamin, Charles Pruitt, and Kent Eulberg were shareholders of Integrated Mail; that Tricoastal was a limited liability company created in 1997; that he, Benjamin, and Pruitt were members of Tricoastal; and that Integrated Mail and Tricoastal were, therefore, “different types of entities and have different owners.” Arbit denied that either he or his lawyer “ever made any misrepresentations of fact to the court in this lawsuit or at any time in these proceedings,” and that he “never withheld any

information from any persons regarding the identity of the members of Tricoastal Resources nor [sic] the shareholders of Integrated Mail Industries.”

¶11 At the hearing on Bauer’s motion to reopen and vacate the judgment dismissing Integrated Mail from the Wisconsin Gas action, the trial court asked Bauer’s lawyer: “What are you relying on to show that the companies are actually one company and not two?” The lawyer responded: “The fact that three of the four owners are the same.” After additional colloquy and argument, the trial court noted that Bauer had not taken discovery, and that Bauer had not made a sufficient showing “to vacate this judgment, and what would be necessary would be essentially to have a trial to determine whether the facts -- that these two companies are one or whether they are the same, whether there was a fraud perpetrated on the Court in that regard, or whether your client was misled [sic]. I’m not prepared to do that.” The trial court denied Bauer’s motion.

## II.

¶12 WISCONSIN STAT. RULE 806.07 provides, as material here:

**Relief from judgment or order.** (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:

...

(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;

...

(h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made.... A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

A trial court's grant or denial of a motion for relief from a judgment or order will not be reversed on appeal unless the trial court erroneously exercised its discretion. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419, 422 (1985). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." *Id.*, 122 Wis. 2d at 542, 363 N.W.2d at 422. A party seeking to overturn a judgment because of alleged fraud by the opposing party must not only demonstrate fraud but must also show that the fraud procured the judgment. *Uecker v. Thiedt*, 133 Wis. 148, 152, 113 N.W. 447, 448 (1907) ("Fraud which can be made the basis of an attack upon a solemn judgment of a court of record must have directly induced the rendition of the judgment, not merely have induced or brought about a condition upon the real existence of which the court acted as the basis of its decree.").

¶13 As noted, the trial court dismissed Bauer's third-party complaint against Integrated Mail on summary judgment. In order to determine whether the trial court erroneously exercised its discretion in denying Bauer's motion to vacate the judgment, we must look at the summary judgment record because, as also noted, a proper exercise of discretion must be based on an accurate legal analysis. We are not bound, however, by the trial court's analysis; we may uphold the trial court's decision even though we believe it based that decision on the wrong



reason. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

¶14 Our review of a trial court’s grant of summary judgment is *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). In order to survive summary judgment, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material “set[ting] forth specific facts,” WIS. STAT. RULE 802.08(3), material to that element. *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290–292, 507 N.W.2d 136, 139–140 (Ct. App. 1993). In determining whether summary judgment is required, we disregard facts about which there may be a dispute when those facts are not material to the issue. See WIS. STAT. RULE 802.08(2) (summary judgment shall be granted if “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law”).

¶15 In our view, Bauer’s allegations of fraud do not affect Integrated Mail’s entitlement to the summary judgment entered by the trial court on October 27, 1999. There are two main reasons.

¶16 First, as we have seen, Bauer sold to AMRESKO Financial or its “nominee,” which turned out to be Tricoastal, the right to seek reimbursement from Integrated Mail for Integrated Mail’s back-due rent and utilities arrearages in return, in part, for AMRESKO’s release of Bauer’s guaranty of the significant debt of the partnership. There is nothing in this record that indicates that AMRESKO Financial was or is anything other than an entity independent of Integrated Mail, Tricoastal, and any of their principals. At oral argument, Bauer’s counsel conceded that the assignment of Integrated Mail’s debts was part of the

consideration for AMRESO's release of the \$2.1 million debt, commenting that Bauer needed to do that to get the deal done. He also conceded that there was nothing in the agreement that prevented Integrated Mail from being the assignee directly, as AMRESO's nominee. Oddly, Bauer never sued Integrated Mail for either the rent or utility arrearages, and the record does not reveal why she did not. Moreover, although Bauer retained a five-day period during which she tried to persuade Integrated Mail to settle the rent-arrearage debt, her leverage was less than strong given: 1) her inability to settle that debt with Integrated Mail when she at least had the ability to either threaten or commence a collection action; and 2) the rapidly ticking five-day clock.

¶17 Second, there are, as recognized by the trial court, three elements to an unjust-enrichment claim:

- (1) a benefit conferred upon the defendant by the plaintiff;
- (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

***Gebhardt Bros.***, 31 Wis. 2d at 584, 143 N.W.2d at 481. Here, contrary to the trial court's view on summary judgment, it was not the *plaintiff*—Bauer—who conferred a benefit on Integrated Mail (if, in fact, Integrated Mail got a pass or close to one on the Wisconsin Gas arrearages) but, rather, it was either AMRESO Financial or Tricoastal, or both of them (depending on the underlying terms of Tricoastal's release of Integrated Mail for Integrated Mail's liability for "all past utility debts"). As we have seen, Bauer received consideration from AMRESO for her assignment of the right to pursue Integrated Mail on the Wisconsin Gas arrearages; whatever either AMRESO or Tricoastal, AMRESO's nominee, received from Integrated Mail did not affect Bauer.

Bauer's counsel acknowledged during oral argument that Bauer would not have benefited if Tricoastal had collected from Integrated Mail the full amount of the gas arrearages; she had assigned the right to collect that money. *See Tullgren v. School Dist. No. 1*, 16 Wis. 2d 135, 142, 113 N.W.2d 540, 544 (1962) (assignor retains no interest in the subject matter of an assignment following an unqualified assignment). Conversely, we do not see how she was harmed by the largess, if there was largess, by AMRESKO or Tricoastal in favor of Integrated Mail. Stated another way, if Bauer had wanted someone to assume her debt to Wisconsin Gas she could have made that a condition of her agreement with AMRESKO. She did not.

¶18 For the foregoing reasons, we conclude that summary judgment was properly granted to Integrated Mail dismissing Bauer's third-party complaint against it. Accordingly, the trial court did not err in refusing to vacate that judgment. If Bauer believes that any lawyer representing Integrated Mail committed a fraud on the court, she has a remedy under SCR 20:3.3, which requires candor towards a tribunal, and SCR 20:3.4, which requires fairness to opposing parties and to opposing counsel. *See* SCR 20:8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

*By the Court.*—Order affirmed.

Publication in the official reports is not recommended.



