

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2002

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. 01-2441
STATE OF WISCONSIN**

Cir. Ct. No. 00 CV 3479

**IN COURT OF APPEALS
DISTRICT I**

**MICHAEL PEOT AND JUNE PEOT,
PLAINTIFFS-APPELLANTS,**

MILWAUKEE COUNTY,

PLAINTIFF,

v.

**PAPER TRANSPORT OF GREEN BAY
AND CONTINENTAL WESTERN
INSURANCE CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael and June Peot appeal from the circuit court order denying their motion for reconsideration, following the entry of the judgment dismissing the complaint they and Milwaukee County filed against Paper Transport of Green Bay and its insurer, Continental Western Insurance Company (collectively, “Paper Transport”). The Peots argue that this court’s decision in *Mullen v. Cedar River Lumber Co.*, 2001 WI App 142, 246 Wis. 2d 524, 630 N.W.2d 574, issued one day after the expiration of their time to appeal the judgment, established “extraordinary circumstances” justifying relief under WIS. STAT. § 806.07(1)(h) (1999-2000).¹ We affirm.

¶2 According to the complaint, on May 31, 1997, a Paper Transport driver drove a Paper Transport truck into a signpost on Interstate Highway 43 in Milwaukee County, causing the sign to fall. Michael Peot, an employee of the Milwaukee County Department of Public Works, was called to the scene to repair the sign. While repairing the sign, he tore the rotator cuff of his left shoulder. The Peots, and Milwaukee County as an involuntary plaintiff, sued Paper Transport for damages resulting from Michael’s injury.

¶3 Paper Transport moved to dismiss the complaint, based on the “firefighter’s rule.” The rule, “[a]s applied to firefighters, ... limits a firefighter’s ability to recover damages for injuries sustained while performing his or her duties as a firefighter.” *Pinter v. Am. Family Mut. Ins. Co.*, 2000 WI 75, ¶14, 236 Wis. 2d 137, 613 N.W.2d 110. The “firefighter’s rule,” however, as elaborated in *Hass v. Chicago & North Western Railway*, 48 Wis. 2d 321, 179 N.W.2d 885

¹ WISCONSIN STAT. § 806.07(1)(h) (1999-2000) provides, in relevant part, that “[o]n motion and upon such terms as are just,” a circuit court “may relieve a party ... from a judgment [or] order ... for ... [a]ny other reasons justifying relief from the operation of the judgment.” All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

(1970), “is an application of the standard public policy analysis that applies to all tort cases in Wisconsin”; it “is not an artificial, technical rule that applies only to firefighters.” *Pinter*, 2000 WI 75 at ¶32. Granting Paper Transport’s motion, the circuit court dismissed the complaint. Neither the Peots nor Milwaukee County appealed the judgment dismissing their action.

¶4 One day after expiration of the forty-five-day deadline for appeal of the judgment, this court decided *Mullen*. In *Mullen*, the City of Marinette superintendent of public works went to the scene of a diesel fuel spill resulting from a traffic accident. *Mullen*, 2001 WI App 142 at ¶3. He slipped on the spilled fuel and fell, suffering injuries. *Id.* at ¶4. He sued the Cedar River Lumber Company and its insurer, alleging that the Cedar River driver’s negligence was the proximate cause of his injuries. *Id.* at ¶5. The circuit court granted summary judgment to the defendants, based on the firefighter’s rule. *Id.*

¶5 This court reversed, concluding that, under the circumstances of Mullen’s case, the firefighter’s rule should not be extended to preclude the claim of a superintendent of public works against a negligent driver “for injuries sustained while assisting in the containment of diesel fuel spilled as a result of an automobile accident.” *Id.* at ¶17. Analyzing the nature of the plaintiff’s employment training, experience, and duties, in comparison to those of firefighters and emergency medical technicians who are “specially trained and employed to conduct rescue operations in dangerous emergencies,” we recognized that Mullen’s circumstances were significantly distinguishable; thus, we concluded that his claim was not foreclosed by the firefighter’s rule. *Id.* at ¶¶15-16 (citation omitted).

¶6 Based on this court’s decision in *Mullen*, the Peots moved for reconsideration under WIS. STAT. § 806.07. The circuit court heard the motion and denied it, concluding:

[T]he first reason for denying the motion is that [WIS. STAT. §] 806.07(1)(f)² does not apply where the case relied on by the trial court is not overturned but there is a new case. And in [*Schauer v. DeNeveu Homeowner’s Ass’n*, 194 Wis. 2d 62, 533 N.W.2d 470 (1995)], the [supreme court] explained that:

“... A judgment entered in a wholly separate case is not a ‘prior judgment’ under section 806.07(1)(f)... The statute does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled in an unrelated proceeding.”

Therefore, 806.07(1)(f) would not apply.

The [c]ourt finds that under section 806.07(1)(h), that statute requires extraordinary circumstances before the [c]ourt should grant the motion to reopen. [*Brown v. Mosser Lee Co.*, 164 Wis. 2d 612, 476 N.W.2d 294 (Ct. App. 1991)] explained that that statutory section allows reopening of judgments based on intervening changes in the law only in “extraordinary circumstances” and it should be invoked sparingly in such cases—“only when circumstances are such that the sanctity of the final judgment is outweighed by the incessant command of the court’s conscience that justice be done in light of all the facts.”

In the present case, the [c]ourt doesn’t see any extraordinary circumstances that should warrant relief under ... that statutory section. The sole basis for the requesting of relief is the ... subsequent decision in *Mullen*. And the interest of finality of judgments weighs in favor of denying the plaintiffs’ request for relief.

In [*Eau Claire County v. Employers Insurance of Wausau*, 146 Wis. 2d 101, 430 N.W.2d 579 (Ct. App. 1988)], that [c]ourt considered the fact that the plaintiff had 45 days to appeal to resolve any confusion in the court’s

² WISCONSIN STAT. § 806.07(1)(f) provides, in relevant part, that “[o]n motion and upon such terms as are just,” a circuit court “may relieve a party ... from a judgment [or] order” when “[a] prior judgment upon which the judgment is based has been reversed or otherwise vacated.”

decision. The [c]ourt stated that all of the issues raised by the County existed prior to entry of the judgment, and it's different from the present case where *Mullen* was decided after. However, the finality of the decision and the lack of extraordinary circumstances ... warrant the denial of the motion to reconsider under that statutory section[.]

And then, lastly, in considering *Mullen*, this [c]ourt is satisfied that that decision is distinguishable on the grounds that ... that case clearly indicated that it's limited to the specific facts and the individual involved, and that this [c]ourt considered the policy factors in its original decision.

And I think there is a distinction between the oil spill, hazardous waste spill that created the slippery condition which resulted in the plaintiff slipping and falling as compared to the situation in this case where the sign was knocked down. The plaintiff was called to the scene of the accident to repair it and suffered a torn rotator cuff.

(Footnote added.)

¶7 On appeal, the Peots do not challenge the circuit court's finding that WIS. STAT. § 806.07(1)(f) does not apply to their case. They do, however, contend that, under § 806.07(1)(h), "justice requires" reversal for two reasons: (1) Michael's circumstances were "very similar" to Mullen's, thus meeting the criteria for an exception to the firefighter's rule; and (2) "the circumstances in this matter were unusual in that the judgment ... was only 'final' for one day prior to new case law being issued." We are not convinced.

¶8 A motion for reconsideration under WIS. STAT. § 806.07(1)(h) is directed to the sound discretion of the circuit court, and relief "may only be afforded in extraordinary circumstances." *Eau Claire County v. Employers Ins. of Wausau*, 146 Wis. 2d 101, 109, 430 N.W.2d 579 (Ct. App. 1988). We will not reverse a circuit court's denial of relief under § 806.07(1)(h) "unless there has been a clear [erroneous exercise] of discretion." *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985).

¶9 Moreover, under the circumstances of the instant case, WIS. STAT. § 806.07(1)(h) “does not authorize the trial court to essentially expand the time for appeal when the time for such appeal ha[s] passed.” *Eau Claire County*, 146 Wis. 2d at 111. Here, as in *Eau Claire County*, “all of the issues raised” by the appellants “existed prior to the entry of the ... judgment[.]” dismissing their action in the circuit court. *See id.* Thus, like Mullen, the Peots could have pursued an appeal on the theory that the firefighter’s rule did not encompass Michael Peot’s circumstances or foreclose their action.

¶10 Our supreme court has explained:

To determine whether a party is entitled to review under [WIS. STAT. §] 806.07(1)(h), the circuit court should examine the allegations in the petition with the assumption that all assertions contained therein are true. If the facts alleged in the petition constitute extraordinary circumstances justifying relief under subsection (h), a hearing shall be held on the truth or falsity of the allegations.

State ex rel. M.L.B., 122 Wis. 2d at 557. In determining whether “extraordinary circumstances” justify relief under § 806.07(1)(h), the circuit court

should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including the following: whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id. at 552-53.

¶11 Here, we see no basis for concluding that the circuit court erroneously exercised discretion in determining that no “extraordinary

circumstances” required relief from the judgment. The Peots do not contend that the circuit court failed to consider the merits of their complaint.

¶12 While we can appreciate the Peots’ frustration in learning that *Mullen*, a decision potentially supportive of their theory, was decided just after their appeal deadline, *Mullen* would not necessarily control. In *Mullen*, we emphasized that “our analysis [would] focus on whether the firefighter’s rule should bar [Mullen’s] claim under the facts as alleged, given his specific job duties and training.” *Mullen*, 2001 WI App 142 at ¶11. Its holding, therefore, would not necessarily have solidified the basis for the Peots’ claim.

¶13 The supreme court has declared:

We are mindful—and the circuit courts should be mindful—that finality is important and that subsection (h) [of WIS. STAT. § 806.07(1)] should be used sparingly. Subsection (h) should be used only when the circumstances are such that the sanctity of the final judgment is outweighed by “the incessant command of the court’s conscience that justice be done in light of *all* the facts.”

State ex rel. M.L.B., 122 Wis. 2d at 550. Here, the circuit court recognized that relief from a judgment, by application of WIS. STAT. § 806.07(1)(h), is rare. The circuit court reasonably exercised discretion in determining that the Peots failed to establish “extraordinary circumstances” requiring such relief.

By the Court.—Order affirmed.

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

