

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2012

Diane M. Fremgen
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. 2011AP1638

Cir. Ct. No. 2009CV334

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL & SONS AMUSEMENT, INC. AND MICHAEL J. JOHNSON,

PLAINTIFFS-RESPONDENTS,

V.

PAMELA K. JOHNSON,

DEFENDANT.

MICHAEL & SONS AMUSEMENT, INC. AND MICHAEL J. JOHNSON,

PLAINTIFFS-RESPONDENTS,

V.

JOHNSON AMUSEMENT PARKS, INC.,

DEFENDANT-APPELLANT.

JOHNSON AMUSEMENT PARKS, INC.,

PLAINTIFF-APPELLANT,

V.

MICHAEL & SONS AMUSEMENT, INC. AND MICHAEL J. JOHNSON,

DEFENDANTS-RESPONDENTS.

MICHAEL J. JOHNSON,

PLAINTIFF-RESPONDENT,

V.

SHIRLEY M. JOHNSON,

DEFENDANT-APPELLANT,

**PAMELA K. JOHNSON, JOSEPH A. SCHILZ, JOSEPH A. SCHILZ,
S.C., J. DENNY MOFFETT, MOFFETT & ASSOCIATES, PC, ABC
INSURANCE COMPANY AND XYZ INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from an order of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Shirley Johnson and Johnson Amusement Parks, Inc. (collectively “Shirley”) appeal an order enforcing a mediated settlement agreement between Shirley and Michael Johnson and Michael & Sons

Amusement, Inc. (collectively “Michael”),¹ and denying Shirley’s motions to vacate the agreement and for reconsideration. Shirley contends that the circuit court erred by: (1) failing to consider all of the interest of justice factors implicated by Shirley’s motion to vacate the settlement agreement under WIS. STAT. § 806.07(1)(h) (2009-10);² and (2) failing to hold an evidentiary hearing on Shirley’s motion to vacate the settlement agreement. We reject these contentions, and affirm.

BACKGROUND

¶2 In June 2010, Shirley and Michael reached a mediated settlement agreement as to four pending lawsuits between them concerning a dispute over amusement park funds and real estate. Michael moved to enforce the settlement agreement, and Shirley moved to vacate the agreement. In support of the motion to vacate the agreement, Shirley averred that she and Michael had signed releases in 2007 and 2008, but that Shirley was not aware of the releases or their legal significance at the time she entered the mediated settlement agreement. Shirley averred her participation in mediation would have been significantly different if she had knowledge of the releases.

¶3 The court consolidated the cases and held a hearing on the motions in March 2011. Michael argued that the parties had reached an unambiguous, enforceable settlement agreement, and that there was no reason for the court not to

¹ Because the parties share a surname, we refer to them by their first names for ease of reading.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

enforce it. Shirley argued that she was entitled to relief from the settlement agreement under WIS. STAT. § 806.07(1), based on her recently remembering that the parties had signed releases several years prior, which would have impacted her decision to enter the mediated settlement agreement. The court determined that the settlement agreement was enforceable, reasoning that the agreement was unambiguous and the fact that Shirley did not remember or understand the releases she previously signed did not provide a valid reason to void the agreement. The court accepted the statements in Shirley's motion and affidavit as true, and determined that those facts did not establish grounds to provide relief from the settlement agreement under § 806.07(1).

¶4 In April 2011, Shirley moved for reconsideration. The circuit court held a hearing on May 26, 2011, and issued an oral decision denying the motion for reconsideration. The court explained that it had determined that WIS. STAT. § 806.07 applies to the facts of this case; that the facts as alleged by Shirley did not support vacating the agreement under § 806.07; and that it exercised its discretion not to grant relief from the agreement. The court entered an order enforcing the settlement agreement and denying Shirley's motions to vacate the agreement and for reconsideration. Shirley appeals.

STANDARD OF REVIEW

¶5 We review a circuit court's decision on a motion for relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion.³ See *Miller v.*

³ For purposes of this opinion, we assume, without deciding, that WIS. STAT. § 806.07 is applicable to the facts of this case. Accordingly, we do not address the parties' arguments over the applicability of the statute. We note, however, that it appears that under the procedural posture of this case, § 806.07 may not be applicable. Shirley moved for relief from the settlement agreement before the circuit court had taken any action on the agreement, and § 806.07 appears to

(continued)

Hanover Ins. Co., 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. A court properly exercises its discretion if its decision is based on the facts in the record and the proper legal standard. *Id.* Additionally, if the circuit court does not fully explain its exercise of discretion, we will independently review the record to determine if it supports the court's decision as a proper exercise of its discretion. *Id.*, ¶30.

DISCUSSION

¶6 Shirley contends that the circuit court erroneously exercised its discretion by denying Shirley's motion for relief from the settlement agreement. She contends that the court erred by failing to consider the following five interest of justice factors outlined in *Miller*:

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.

See *id.*, ¶¶36, 41 (citation omitted). Shirley asserts that the circuit court reasoned only that Shirley's claim that she did not remember or appreciate the significance of the releases she and Michael previously signed when she entered the settlement

contemplate relief from a court's judgment or order or a court-approved stipulation. See *Larry v. Harris*, 2008 WI 81, ¶18, 311 Wis. 2d 326, 752 N.W.2d 279 (explaining that the purpose underlying § 806.07 is to allow circuit courts to balance the interest between the fair resolution of disputes and the finality of judgments). However, because we need not address this issue for purposes of this opinion, we will assume the statute applies, as did the circuit court.

agreement did not provide grounds for relief from the settlement agreement, rather than addressing the five factors mandated by *Miller*.

¶7 Shirley then contends that an analysis of the five interest of justice factors supports granting Shirley relief. *See id.*, ¶47 (explaining that, if the circuit court did not properly analyze the five interest of justice factors, the reviewing court will examine the record to determine if it provides a reasonable basis for the court's decision). Shirley contends that: (1) the settlement agreement was not the result of Shirley's conscientious, deliberate, well-informed choice, because Shirley would not have entered into a settlement agreement had she been aware the prior releases potentially barred Michael's actions against her; (2) Shirley received the effective assistance of counsel, because her attorney would not have known to search for releases prior to representing her in mediation; (3) there has been no judicial consideration of the merits of the claims in the consolidated cases, because the parties participated in early mediation; (4) the releases establish Shirley's meritorious defense to Michael's claims; and (5) there are no intervening circumstances making it inequitable to grant Shirley relief, as the parties will be restored to the same position they were in prior to mediation. Finally, Shirley contends that the lengthy and complicated litigation history between the parties is another factor bearing upon the equities of this case, weighing in favor of granting Shirley relief from the settlement agreement. *See id.*, ¶58.

¶8 Shirley also contends that the circuit court erred by failing to hold a hearing to determine the truth of the assertions in her motion. She argues that the circuit court found that the facts alleged did not constitute excusable neglect or newly discovered evidence, but did not specifically find that the facts alleged were not extraordinary circumstances warranting relief under WIS. STAT. § 806.07(1)(h). *See Miller*, 326 Wis. 2d 640, ¶34 (explaining that a circuit court

must hold a hearing on a motion to vacate a judgment under § 806.07 to determine the truth of the allegations in the motion, if those allegations constitute extraordinary circumstances warranting relief).

¶9 Michael responds that Shirley did not meet her burden to establish that extraordinary circumstances exist to justify relief from the settlement agreement.⁴ See *id.*, ¶34. He points out that “extraordinary circumstances are those where ‘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,’” and argues that the circuit court properly exercised its discretion in determining that such circumstances were not present in this case. See *id.*, ¶35 (citation omitted). He argues that the circuit court held two hearings on Shirley’s motion, and Shirley never presented any argument to meet her burden of establishing extraordinary circumstances to warrant relief from the settlement agreement. Michael contends that the circuit court was not required to hold a hearing to determine the truth of the allegations in Shirley’s motion, because the court determined those allegations, if true, did not warrant relief from the judgment.

¶10 We conclude that the record supports the court’s decision to deny Shirley’s motion to vacate the settlement agreement as a proper exercise of the court’s discretion. While the circuit court did not specifically address the five interest of justice factors, our review of the record indicates that the facts alleged

⁴ Michael also argues that the court was not required to consider the five interest of justice factors, because it was entitled to uphold the settlement agreement on contract principles, citing *Phone Partners Ltd. P’ship v. C.F. Communications Corp.*, 196 Wis. 2d 702, 542 N.W.2d 159 (Ct. App. 1995). Because we conclude that the allegations in Shirley’s motion do not amount to extraordinary circumstances under the five interest of justice factors, we need not address this alternative argument.

in Shirley's motion do not constitute extraordinary circumstances warranting relief under WIS. STAT. § 806.07(1)(h). See *Miller*, 326 Wis. 2d 640, ¶34.

¶11 Shirley's motion to vacate the settlement agreement and supporting affidavit allege the following: On June 29, 2010, Shirley and Michael and their respective counsel participated in mediation at the recommendation of the circuit court. The parties reached a mediated settlement agreement, agreeing to dismiss all pending lawsuits with prejudice; a mutual release of all claims; conveyance of certain property from Shirley to Michael; and execution of a mortgage from Michael to Shirley on that property. In December 2010, Shirley's attorney discovered two releases from 2007 and 2008 signed by Shirley and Michael, which indicated that Michael may not have had the right to file the lawsuits that were resolved by the mediated settlement agreement. Shirley was unaware of the existence of the releases when she entered into the mediated settlement agreement because she did not recall them at that time, and, in any event, she was unaware of their legal significance. Shirley's participation in the mediation would have been different if she had remembered previously signing releases and understood their legal significance.

¶12 At the outset, we note that the circuit court assumed the truth of the facts alleged in Shirley's motion, and thus determined that a hearing on the truth of those assertions was unnecessary. See *id.*, ¶34. Shirley argues that the circuit court erred by failing to hold a hearing on the truth of the allegations in her motion, but fails to explain why a hearing would have resulted in a different outcome when the circuit court already assumed the truth of those allegations. We, as well, assume the truth of Shirley's allegations as the first step in our inquiry. See *id.* We conclude that those facts, even if true, do not amount to extraordinary circumstances warranting relief from the settlement agreement.

Thus, we disagree with Shirley that the circuit court needed to hold a hearing to properly exercise its discretion.

¶13 Under the factors outlined in *Miller*, the facts asserted in Shirley's motion do not amount to extraordinary circumstances. First, Shirley deliberately entered the settlement agreement following her voluntary participation in mediation. *See id.*, ¶36. While Shirley asserts that her participation in mediation would have been different had she remembered the releases and understood that they may have barred Michael's actions against her, she does not assert that she did not choose to participate in the mediation and enter the settlement agreement. Second, Shirley admits that she had effective assistance of counsel when she entered the settlement agreement. *See id.* Third, in Shirley's favor, we agree that there has been no judicial consideration of the merits of the claims in the consolidated cases, based on the parties' participation in early mediation. *See id.* Fourth, while Shirley asserts that the prior releases establish that Michael's claims against her may have been barred, she also recognizes that this issue has not yet been litigated and that it is unclear at this point in the proceedings whether Michael's actions actually would have been barred by the prior releases. *See id.* Finally, the record does not reveal any significant factors weighing for or against allowing relief from the settlement agreement. *See id.*, ¶¶36, 58. Considering the totality of the facts alleged in Shirley's motion under the factors outlined in *Miller*, we conclude that these are not extraordinary circumstance warranting relief from the settlement agreement. Accordingly, we conclude that the circuit court properly exercised its discretion by denying Shirley's motion without an evidentiary hearing. We affirm.

By the Court.—Order affirmed.

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

