

STATE OF WISCONSIN
SUPREME COURT

FILED

FEB 09 2021

**CLERK OF SUPREME COURT
OF WISCONSIN**

Appeal No. 2018AP1672
Circuit Court No. 2015PR33

In re the estate of Elizabeth H. Lauer:

Richard A. Lauer, Appellant,

v.

Dennis Lauer, Personal Representative for the
Estate of

Elizabeth H. Lauer, Respondent.

MOTION FOR RECONSIDERATION OF THE DENIAL OF
MOTION TO EXPUNGE AS VOID THE SEPTEMBER 6, 2020
ORDER OF THE COA IN CONSIDERATION OF WIS.
Stat. 809.14(3) AND DUE PROCESS.
MOTION FOR RECONSIDERATION OF DENIAL OF
PETITION FOR REVIEW

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1-920-257-3330

MOTION FOR RECONSIDERATION OF THE DENIAL OF MOTION TO EXPUNGE AS VOID THE SEPTEMBER 6, 2020 ORDER OF THE COA IN CONSIDERATION OF WIS. STAT. 809.14(3).

Pursuant to Wis. Stats. 751.06, 808.09, 808.10, 809.14, 809.63, 809.64, and 857.15 Richard A. Lauer, the appellant in this matter, moves the Supreme Court (SC) to void the September 6, 2020 order of the Court of Appeals (COA) and to reconsider the denial of the relevant Petition for Review as it is predicated upon such order.

ISSUE: IT IS THE DUTY OF COURT TO ANNUL AN INVALID ORDER

"A judgment or order which is void may be expunged by a court at any time. Such right to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments. [Cases cited.]" *State ex rel. Wall v. Sovinski*, 234 Wis. 336, 342, 291 N.W. 344 (1940). See also, *Home Bank v. Becker*, 48 Wis.2d 1, 7, 179 N.W.2d 855 (1970).

The fact that the award came many years after the void order is of no consequence. In *Halbach v. Halbach*, 259 Wis. 329, 331, 48 N.W.2d 617 (1951), the void judgment was challenged ten years after entry. The court stated that laches did not apply even if the plaintiff had been dilatory or lackadaisical in his efforts to overturn the judgment. "It is the duty of the court to annul an invalid judgment." SEE: *Kohler Co. v. ILHR*, 259 N.W.2d 695, 81 Wis. 2d 11 (1977) @ ¶9

The September 6, 2018 order which dismissed appeal No. 2017AP1790 violated the statutes and due process rights. Richard had filed a motion for consolidation prior to the due date of his appellate brief. By operation of statute, this action automatically tolled the time for filing his brief.

By Order of 7-27-2018 the COA extended the time to file a brief until 8/24/18.

OCCD CA 07-27-2018 Motion for Stay

Filed By: Richard Lauer

Submit Date: 7-31-2018

Decision: (D) Deny

Decision Date: 8-2-2018

ORD that the motion to stay briefing is denied. FRO that the time for filing the appellant's brief is extended to 8/24/18.

Failure to timely file the brief or request an extension with good cause shown will result in dismissal of this appeal. See WIS. STAT. RULE 809.83(2).

Comment: Motion for Stay of appeal and Miscellaneous Relief; 1 copy rec'd via fax w/notation that addl copies were mailed, motion to be submitted for review upon receipt of requisite copies

On 8-23-2018 Richard filed a Motion to Consolidate Appeals [2017AP001790, 2018AP001672], which would also affect the disposition of an appeal and the content of his brief.

OCCD CA 08-23-2018 Motion to Consolidate

Filed By: Richard Lauer

Submit Date: 9-4-2018

Decision: (D) Deny

Decision Date: 9-6-2018

IT IS ORDERED that appeal No. 2017AP1790 is dismissed. IT IS FURTHER ORDERED that the motion for consolidation is denied.

Comment: [2017AP001790, 2018AP001672]

Wis. Stat. § 809.14(3)a states:

- (a) The filing of a motion seeking an order or other relief which may affect the disposition of an appeal or the content of a brief, or a motion seeking consolidation of appeals, automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order.

The COA dismissed appeal No. 2017AP1790 on 9-6-18 and further ordered that the motion for consolidation be denied.

OCCD CA 09-06-2018 Opinion/Decision

Judge Panel: Stark, Hruz, Seidl

Opinion: Memo Opinion

Decision: Delinquency Dismissal Pages: 2

Order Text: IT IS ORDERED that appeal No. 2017AP1790 is dismissed. IT IS FURTHER ORDERED that the motion for consolidation is denied.

The COA completely disregarded the statutory mandate of Wis. Stat. 809.14(3) and did not toll the briefing schedule. The COA has never disputed this and such dispute would be without merit. The CCAP filings are consistent with the actions of the COA.

Minimally, the COA was required to first dispose of the Motion for Consolidation and then reinstate the briefing period of one day.

Legal Basis for Position:

Whereas Wis. Stat. 809.14(3) automatically tolled the time for filing a brief based upon a motion for consolidation, which affected both the briefing and disposition of an appeal, Richard's brief was not due at the time the appeal was dismissed pursuant to Wis. Stat. 809.83(2).

Additionally, Wis. Stat. 809.83(2) requires that

"To dismiss an appeal under sub. (2), there must be demonstrated egregious conduct or bad faith on the party's or attorney's part." n. 809.83(2)

¶ 30. In Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 470 N.W.2d 859 (1991), we stated that "dismissal

[of litigation] is improper. . . unless bad faith or egregious conduct can be shown on the part of the non-complying party." Johnson, 162 Wis. 2d at 275, **SEE: State v. Smythe**, 592 N.W.2d 628, 225 Wis. 2d 456 (1999).

While a Court could likely determine egregiousness for the failure to timely file a brief, it is most unlikely that ANY COURT, could determine an iota of egregiousness for failure to file a brief that was not yet due.

Additionally, "Our supreme court has recognized that dismissal of an appeal pursuant to WIS. STAT. § 809.83(2) "represents an abrupt termination of litigation and in many cases it imposes a finality to both issues and claims." State v. Smythe, 225 Wis. 2d 456, 469, 592 N.W.2d 628 (1999). See: n. 7

The September 6, 2018 order which dismissed appeal No. 2017AP1790 is void for minimally lack of due process, which would include an unfair tribunal and a right to be heard with the imposition of a sanction for not filing a brief which was not due.

[94]"The due-process clause of the Fourteenth amendment requires at least a fair and adequate warning by court rule or notice of the imposition of the sanctions or penalties to be invoked for the failure to comply with a court order. Lacking such forewarning, a hearing should be had on the imposition of a penalty." See: **Neylan v. Vorwald**, 368 N.W.2d 648, 124 Wis. 2d 85 (1985).

Richard's due process rights were violated when the COA dismissed an appeal for his failure to file a brief that was not due and did not afford him a forewarning or provide him with the right to be heard on the imposition of a severely drastic sanction.

**SUPREME COURT AND APPELLATE COURT DUTY IS TO ANNUL
A VOID ORDER**

Issuance of Writ of Mandamus

As previously stated,

"A judgment or order which is void may be expunged by a court at any time."

"It is the duty of the court to annul an invalid judgment."

***Kohler Co. v. ILHR, 259 N.W.2d 695, 81 Wis. 2d 11
(1977) @ ¶9***

The SC should expunge the Order or invoke its supervisory authority and issue a writ of mandamus to the COA to expunge such order. Furthermore, writs often require the request be made to the COA unless it is impractical.

In this instance it is highly impractical. The COA has refused to address the issue numerous times and even in the instant appeal did not address it in its decision. Additionally, the COA used the Order to make a legal point regarding matters that could have been litigated. This is addressed below.

Discretionary Reversal

Richard requests the SC to invoke its authority pursuant to Wis. Stat. 751.06 and reverse the determination of the COA and/or minimally grant the Petition for Review.

The COA rationale that claim preclusion exists predicated upon the dismissal of an appeal for failure to file a brief not yet due is a tragedy of law. The bias of the COA and Circuit Court should be evident to the Supreme Court and its Commissioners.

Not only did the COA utilize a wrongly dismissed appeal as the basis for affirming the Circuit

Court courts denial of a lawful petition for the removal of a Personal Representative, but their rationale was also further evidence of ongoing bias.

The COA stated:

Under the statute's plain language, a court is not required to order a show-cause hearing unless the petition establishes that "grounds for removal appear to exist." By denying the motion, the court, sub silentio, determined no grounds for removal existed. In any event, the record supports the court's discretionary decision. As this court acknowledged in Richard's earlier appeal: "[T]he record supports the court's finding that Dennis was best suited to fill that role [of personal representative]. Eight of the ten heirs requested Dennis' appointment. The court reasonably found the other heirs would more likely cooperate with Dennis, including giving him access to places the alleged will might be found." Lauer, No. 2016AP465, ¶6. The circuit court properly denied the petition without ordering a show-cause hearing. COA ORDER - AUGUST 18, 2020, ¶ 7.

The COA affirmed the Circuit Court's unreasoned denial of a petition for removal of a personal representative by,

1. failing to address Richard's position that appeal 2017AP1790 was dismissed based on his failure to file briefs not yet due. Richard raised this issue in his briefing.
- 2.
3. failing to address the merits of the petition.
 - a. Neither the COA nor the CC demonstrated how the petition was flawed.

4. raising the issue of claim preclusion on behalf of the respondents relative to Appeal 2017AP1790.
 - a. The respondent did not raise such issue. He simply argued that the personal representative was properly appointed. The appointment was not contested.
5. alleging a sub-silentio determination by the Circuit Court Judge.
 - a. A written denial mandate is not sub-silentio and Circuit Courts must place their reasoning into the record.
6. reasoning that the record supported the denial of the petition because the personal representative had been properly appointed with the approval of certain of his siblings.
 - a. Such rationale is untenable. Appointment is a prerequisite for removal and Richard did not argue against the appointment.
7. contriving that the Circuit Court "determined no grounds for removal existed." This is in fact the wrong legal standard under Wis. Stat. 857.15 which requires that the court issue an order to appear to the personal representative predicated upon "When grounds for removal appear to exist..." not which do or do not exist. It is the duty of the Court to issue an order and the duty of the personal representative to show cause why they should not be removed.
8. adding language to the statute which provided the Circuit Court with discretion under Wis. Stat. 857.15 when none was warranted or authorized by the legislature.
 - a. Adding language is impermissible as a matter of law and cause for concern. The

statute is unambiguous, but the COA injects ambiguity into it for its own gain and for the benefit of the respondent.

These actions and reasonings by the COA are unfounded and unreasonable. The plain language of the statute provides no discretionary authority for the Circuit Court to deny a Petition which seeks the removal of a personal representative.

This further demonstrates that by the denial of the Petition for Removal of the Personal Representative, the real controversy has not been fully tried by the Circuit Court and by the immoral and illegal dismissal of an appeal predicated upon rulings, bias and misapplication of the law, justice has miscarried.

751.06 Discretionary reversal. In an appeal in the supreme court, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record, and may direct the entry of the proper judgment or remit the case to the trial court for the entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Discretionary Reversal by the SC is warranted whereas the matters under appeal were intentionally hindered by the COA without regard for the law.

The Supreme Court has supervisory authority over all appeals and jurisdiction to address this matter. PATIENCE DRAKE ROGENSACK, C.J. has

recently opined that as to Supreme Court Jurisdiction.

Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738.

BIAS AND PREJUDICE OF COA

Richard hates to belabor a point, but the bias of the COA is abject, obvious and animus laden.

Judges Stark, Hruz and Seidl were the Judges in appeals No. 2017AP1790 and 2018AP1672.

Richard has demonstrated that these Judges dismissed an appeal for failure to file a brief which was not due and failed to establish any basis for egregiousness which warranted dismissal of an appeal. This is bias on its face.

These same Judges denied a Motion for Reconsideration which addressed these positions by a simple unreasoned denial.

In *SUMMERHILL v. Lins, 2020 W.I. App 31, 944 N.W.2d 358 (Wis. Ct. App. 2020)*, Judges Stark, Hruz and Seidl demonstrated they were aware that that it is "the duty of the court to annul an invalid judgment." However, relative to Richard's Petition for Removal or other filings, these same Judges would not even address the issue of the dismissal of appeal no. 2017AP1790 regarding legality, voidness, or expungement. They always just avoid the issue.

In the instant appeal, these same judges now raise the issue of claim preclusion on behalf of the respondent and address litigation procedures regarding issues which may have been litigated in earlier proceedings, when they are fully cognizant, they dismissed the relevant appellate

proceedings predicated upon an error of law, fact and violation of the statutes which they refused to correct or address.

They then oddly suggest that Richard could have raised these issues in the instant matter, in an "...earlier appeal...had he filed a brief."

This demonstrates a clear bias and lack of impartiality.

DISCUSSION

¶5 As an initial matter, Dennis suggests that Richard's appeal is procedurally barred. Under the doctrine of claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." *Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (emphasis added).

The elements of claim preclusion appear to apply, as the issues in this appeal could have been raised in Richard's earlier appeal, had he filed a brief. (emphasis added) COA ORDER AUGUST 18, 2020

Again, the brief was not due at the time of the dismissal of the appeal. The COA suggests that claim preclusion applies in a matter where they dismissed an appeal in violation of the statutes and that the absence of a brief which was not yet due, is the source of an argument that could have been previously litigated. This position is untenable.

PRIOR MOTION FOR CONSOLIDATION

This rationale by the COA additionally suggests a logical reasoning for why the two appeals should have been consolidated. The issues were similar in fact and could have been reconciled saving valuable judicial time. The COA denied Richard the

opportunity to file a brief by violating Wis. Stats. Rules 809.14(3) and 809.36(2) and dismissed his appeal without cause. To now assert he could have filed a brief is without sound reasoning.

MOTION FOR RECONSIDERATION

While a Motion for Reconsideration for the denial of a Petition for Review is arguably not warranted, Wis. Stat. 809.14 provides sufficient statutory basis for requesting reconsideration by the SC for the unreasoned denial of a motion for expungement of a void order.

Within the Petition for Review, Richard moved to SC to expunge the COA order of September 6, 2018 which dismissed his appeal under 809.63(2). The motion for consolidation, which affected the disposition of an appeal and the briefing, automatically tolled the time for filing Richard's appellate brief. As such, the brief was not due at the time the appeal was dismissed. This matter cannot in fairness be used by the COA to uphold an unreasoned Circuit Court decision.

Conclusion

Reconsideration of Richard's Motion to Expunge a void order is warranted under Wis. Stat. 809.14, particularly whereas the COA utilized this matter as the basis of its determination in the instant matter.

The basis of the COA rationale for sustaining the Circuit Court decision finds no support in the record. The Order of September 6, 2018 is void as a matter of both fact and law. It cannot serve as the basis for a claim preclusion assessment in the instant matter. It should be properly vacated.

Discretionary reversal is warranted. Justice requires a fair hearing in a fair tribunal. The

COA has demonstrated an egregious bias against Richard.

Additionally, when the Circuit Court denies a petition for removal of a personal representative, it is prima facie evidence that the matter was not fully nor fairly tried. There was no order issued to the personal representative as mandated by the statutes.

Hopefully, upon reconsideration this matter will return to the Circuit Court for a proper hearing and we can end this 11-year ordeal.

Respectfully submitted this 9th day of February 2021

 2-9-21

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