STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

LEONARD POZNER,

Plaintiff-Respondent,

v.

JAMES FETZER,

Defendant-Appellant.

APPEAL NO. 2024AP001361
Dane County Case No. 18CV3122
Hon. Frank D. Remington, presiding

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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Response to Issue 1: The circuit court properly denied Fetzer's attempt to re-open judgment, raising issues he had previously raised in the circuit court and this Court years earlier, and was not required to allow further briefing or discovery on the matter.

Issue 2: May a Circuit Court Judge deny a Request for Relief from Judgment or Order without a response from the Plaintiff and reply from the Defendant in violations of the Wisconsin Rules of Civil Procedure Chapter 802 before due process pleadings and discovery have occurred?

Response to Issue 2: The circuit court properly denied Fetzer's long-delayed attempt to re-open judgment and was not required to allow further briefing or discovery on the matter before doing so.

Issue 3: May a Circuit Court Judge grant a Motion to Seal or Redact a Court Record in violation of Wisconsin Rules of Civil

Procedure, Chapter 802 before the pleadings, with a response from the Defendant and reply from the Plaintiff, especially when the Court has denied due process discovery and cross-examination of the evidence?

Response to Issue 3: Under Wisconsin law, a circuit court, "may determine if a hearing is necessary on a motion to seal," Wis. Stat. § 801.21(3), and is not required to treat a motion as a pleading.

Statement on Oral Argument

Respondent does not believe this case is appropriate for oral argument as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

Statement on Publication

Respondent does not believe this case is appropriate for publication as the Court's decision is unlikely to have any significant value as precedent.

Summary of the Facts

Fetzer seeks review of three items, two of which are related: 1) the June 20, 2024, Decision and Order Denying Fetzer's Motion for Relief from Judgment (Record 615, hereafter all citations to documents

in the record will be referenced as "R."); 2) the June 24, 2024, declined proposed order on Fetzer's Request for Relief from Judgment or Order (R. 624); and 2); 3) the June 24, 2024, Order to Seal (R. 619) (collectively, the "June Orders"). The circuit court issued the June 20, 2024 decision and order in response to Fetzer filing a "Motion to Reopen Judgment Pursuant to Extrinsic Fraud and Fraud Upon the Court" and later denied a proposed order in support of same. (R. 599; R. 624.) The circuit court issued the Order to Seal, in response to a pro forma motion from Mr. Pozner. (R. 617.)

Fetzer filed his motion for relief from judgment and proposed order in support of same over three years after the circuit court entered final judgment against him. (R. 355; R. 599.) In his motion, he argued that the Federal Emergency Management Agency ("FEMA") perpetrated extrinsic fraud and that at least two of Mr. Pozner's attorneys committed fraud upon the court. (R. 599, at 1.) He based his claims on so-called research published in a 2015 book, some of which he wrote and/or edited titled, "Nobody Died at Sandy Hook," (R. 599, at 9, ¶ 29.) In his request, Fetzer quoted from the part of the 2021 decision of this Court in which it acknowledged that "Fetzer . . . takes the position

that the Sandy Hook shooting was an 'elaborate hoax' which, according to Fetzer, was staged by government authorities." (R. 599 at 15, ¶ 55.)

The circuit court issued the decision and order three days after Fetzer filed his motion to reopen. (R. 615.) The circuit court liberally construed Fetzer's motion as a motion for relief from judgment under Wis. Stat. § 806.07. (R. 615 at 2.) The circuit court acknowledged that under Wis. Stat. § 806.07(2), it had the discretion to allow "an independent action, based on fraud upon the court, to set aside a judgment." (R. 615 at 3.) The circuit court examined Fetzer's motion under both the standard of Wis. Stat. § 806.07(1) and the independent action standard of Wis. Stat. § 806.07(2). (R. 615 at 4-5.) Under either standard, the circuit court found that Fetzer waited too long to bring a motion alleging, "a series of frauds [Fetzer says] occurred during this litigation in 2019, the proof of which was contained in a book he wrote in 2015." (R. 615 at 4-5.) Fetzer included this decision and order in his notice of appeal. (R. 627.)

Because Fetzer included Pozner's home address in his filings and because Pozner is a crime victim who has been subject to threats at his home, Pozner asked the circuit court to seal two documents containing his address. (R. 617.) The circuit court granted the motion without a

hearing. (R. 619.) Fetzer included this order to seal in his notice of appeal. (R. 627.)

Four days after the circuit court issued the decision and order, Fetzer submitted a proposed order on both his motion to reopen (that had already been denied) and the motion to seal (that had already been granted). In that proposed order, Fetzer proposed granting his motion for relief from judgment, explaining that the next step would be "an ANSWER by the Plaintiff to Defendant's complaint" which he said was the motion to reopen judgment. (R. 624.) Fetzer proposed that said answer be due, "within the time limit specified by the Rules of Civil Procedure from the filing date of this ORDER; and likewise with the Plaintiff's MOTION TO SEAL OR REDACT A COURT RECORD of June 20, 2024." (*Id*.) Fetzer did not explain what the last clause of this sentence meant. (*Id*.) The circuit court declined the proposed order as, "[n]either factually or legally meritorious." (*Id*.) Fetzer listed this denied proposed order as one of the bases for his appeal in the notice of appeal. (R. 627.)

Standard of Review

This Court reviews a circuit court's decision whether to grant relief from judgment under the erroneous exercise of discretion

standard. *Sukala v. Heritage Mut. Ins.* 2005 WI 83, ¶ 8, 282 Wis. 2d 46, 689 N.W.2d 610. An appellate court will not reverse a discretionary determination by a circuit court if the record shows that the discretion was in fact exercised and the reviewing court can perceive a reasonable basis for the court's decision. *Id.*

Similarly, this Court reviews a circuit court's decision to seal a document in the court record under the erroneous exercise of discretion standard. *Krier v. EOG Env't., Inc.,* 2005 WI App 256, ¶¶ 1, 23, 288 Wis. 2d 623, 707 N.W.2d 915.

Argument

This Court should not disturb the actions of the circuit court for at least two reasons. First, Fetzer does not have an appeal as of right because the June Orders are not final orders. Second, the circuit court did not erroneously exercise its discretion in issuing the June Orders without further briefings or a hearing. Below, Pozner explains each of these arguments.

I. Fetzer does not have an appeal of right from the June Orders and he has not requested interlocutory review.

This Court should dismiss this appeal because none of the orders at issue are final orders to which Fetzer has an appeal as of right and

he failed to petition for interlocutory review in time. Fetzer seeks review of a decision and order denying his attempt to re-open the final judgment entered years ago in this case and his proposed order for the same. He also takes issue with an order sealing a document in the record. None of these orders are final orders to which Fetzer has an appeal as of right.

Below, Pozner lays the standard for determining whether a judgment or order is final such that Fetzer would have an appeal as of right. Then, Pozner explains why the orders at issue are not final orders addressing first the June 20, 2024 Decision and Order and the related June 24, 2024 denial of proposed order and then the June 21, 2024, Order sealing one document.

Wisconsin litigants have an appeal as of right from a circuit court's final judgment or final order. Wis. Stat. § 808.03(1). Courts look to the answer to two questions to determine whether an order or judgment is final for purposes of appeal. First, courts ask, "whether the document is final as a matter of substantive law insofar as it disposes of the entire matter in litigation as to one or more parties." *Wamboldt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 27, 299 Wis. 2d 723, 728 N.W.2d 670. Second, courts look to, "whether the document is final

because it is the last document in the litigation, which is to say that the circuit court did not contemplate a subsequent document from which appeal could be taken." *Id.*

A party does not have an appeal as of right of a circuit court's order on a motion to vacate or modify a judgment when "the only issues raised by the motion were disposed of by the original judgment or order." *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972). In other words, a party cannot appeal such an order when the issues raised in the post-judgment motion could have been decided on appeal of the judgment itself. *Id.* at 24. With this limit, a party cannot needlessly relitigate issues and "wholly nullif[y]" the time limit to appeal. *Id.* at 26.

In *Ver Hagen*, Wisconsin Supreme Court concluded that a party was not entitled to appeal an order denying a motion for rehearing on issues decided on summary judgment. *Id.* There, the circuit court granted summary judgment in favor of the defendants. *Id.* at 23. The plaintiff sought rehearing and then appealed from the denial of the motion for rehearing. *Id.* The Wisconsin Supreme Court found the appellants were not entitled to appeal, "[s]ince appellants' motion

presented the same issues which the trial court decided when granting summary judgment." *Id.* at 26.

Similarly, Fetzer is not entitled to appeal the orders relating to his Motion to Open Judgment. Fetzer made the same arguments in his "Motion to Open Judgment" that he made in opposing summary judgment back in 2019. In his Motion to Open Judgment, Fetzer argued that Pozner's attorneys, "perpetrated Fraud [sic] upon the Court by falsely alleging a death that did not occur" and that he was "disallowed" from presenting, "his extensive and detailed evidence that the purported death had not occurred but was based upon a staged event." (R. 599 at 1.) In making this argument, Fetzer was merely repeating arguments he had already raised and lost. Fetzer had already argued that Sandy Hook, "was a FEMA mass casualty exercise involving children to promote gun control that was then presented to the public as mass murder" in his opposition to summary judgment back in June of 2019. (R. 231 at 142:12-15.)

Not only did Fetzer already seek to litigate these issues, years ago, he also already appealed the final judgment on these issues. *Pozner v. Fetzer,* Case Nos. 2020AP121, 2020AP1570, 2021 WL 1031358, 2021 WI App 27, 397 Wis. 2d 243, 959 N.W.2d 89 (March 18,

2021) (unpublished opinion). In appealing the judgment entered against him Fetzer contended, "'if the entire Sandy Hook narrative is false, then death certificates associated with the event' including the copy of the death certificate Pozner released, 'also must necessarily be false.'" *Id.* at ¶ 19. This Court considered and rejected Fetzer's arguments.

Fetzer also cannot suggest that the order sealing one document is a final order. In the seal order, the circuit court did not dispose of the entire matter in litigation as to one or more parties. *See Wamboldt,* 2007 WI 35, ¶ 27, 299 Wis. 2d 723, 728 N.W.2d 670. Nor is the seal order, "the last document in the litigation," as Fetzer keeps filing more. (*See, e.g.,* R. 630.)

That is not to say that Fetzer had no potential for appellate review after the June Orders were entered. He could have sought interlocutory review. Wis. Stat. § 808.03(2). He has not done so. In fact, he sought interlocutory review of the decision granting partial summary judgment issued in 2019, so he is familiar with the process. (R. 232.) Regardless, with respect to the June Orders, he did not submit a timely petition for interlocutory appeal.

This Court should dismiss this appeal because Fetzer is not entitled to another bite at the apple to try to prove his hoax theory and he does not have an appeal as of right from a sealing order.

II. The circuit court did not abuse its discretion when it issued the June Orders without a briefing or hearing schedule.

Fetzer is wrong to suggest that the circuit court erred in issuing the June Orders without requiring a briefing schedule. Fetzer has no legal support for his argument, except a basic misunderstanding of the difference between a pleading and a motion. With respect to his Motion to Open Judgment and proposed order in support of same, he has no authority for his position that circuit courts must require a full briefing schedule before denying baseless motions. And, with respect to the Motion to Seal, circuit courts, "may determine if a hearing is necessary on a motion to seal," and are not required to hold a hearing.

The circuit court was not required to set a briefing schedule or hold a hearing before denying the Motion to Open Judgment. Fetzer cites Wis. Stat. § 802.01 to support his argument, but subsection two of that statute, titled, "MOTIONS," does not require response and reply briefs before a circuit court can deny a motion. Tellingly, Fetzer offers no legal support for the crux of his argument that, "[t]he Circuit Court

is not permitted to rule on a motion without following [Wis. Stat. § 802.01(1)].” (Opening Brief at 4.) In making his argument, Fetzer conflates a motion with a pleading. Under long-standing Wisconsin law, however, “a motion is not a pleading.” *State v. Sutton,* 2012 WI 23, ¶20, 339 Wis. 2d 27, 810 N.W.2d 210.

Even though the circuit court had the power, “to entertain an independent action to . . . set aside a judgment for fraud on the court,” the circuit court was not required to treat Fetzer’s motion to open as a pleading. *See* Wis. Stat. § 806.07(2). Here, the circuit court could not as Wisconsin limits the ability of parties to obtain relief from judgment or orders. One of those limits is that the moving party must make such a motion, “within a reasonable time.” *Id.* Fetzer does not and cannot even suggest he brought his motion in a reasonable time.

Nor was the circuit court required to set a briefing schedule or hold a hearing before granting the motion to seal. Wis. Stat. § 801.21(3). By filing a motion to seal, a movant can place the information at issue under temporary seal. Wis. Stat. § 801.21(2). Once the motion is filed and served on all parties, “[t]he court *may* determine if a hearing is necessary.” Wis. Stat. § 801.21(3).

Fetzer does not suggest, nor can he, that the circuit court erroneously exercised its discretion in granting the motion to seal without a hearing. Fetzer argues that the circuit court was required to set a briefing schedule before granting the motion. He does not argue that certain factors mitigate in favor of setting a hearing. Fetzer fails to cite to any facts or factors to support a position that a hearing should have been held here.

The circuit court did not erroneously exercise its discretion when it decided these motions and denied a proposed order without further briefing or a hearing. Fetzer argues that all motions should be treated as pleadings but, motions aren't pleadings. Pozner respectfully requests that this Court affirm the circuit court's decision to decide the June Orders without a hearing or further briefing.

Conclusion

This Court should dismiss this appeal because Fetzer does not have an appeal as of right from the June Orders. Even if this Court is willing to overlook this jurisdictional issue, Fetzer is wrong to suggest that he has a right to a briefing schedule and hearing on every motion filed. This Court should affirm the circuit court's discretionary decision

to decide the motions at issue without a hearing or the need for further briefing.

September 19, 2024 Respectfully submitted,

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Certificate of Brief Length

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief produced with a proportional serif font. The length of this brief, including footnotes, is 2438 words.

September 19, 2024 Quarles & Brady

Electronically signed by Emily M. Feinstein

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Certification Regarding Electronic Brief

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

September 19, 2024 Quarles & Brady

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