

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 14, 2007**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2006AP2867-FT**

**Cir. Ct. No. 2005CV000530**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**GINA M. BARTOLOTTA,**

**PLAINTIFF,**

**ZIMBRICK, INC. HEALTH PLAN,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**KEITH GIBNEY AND WENDY GIBNEY,**

**DEFENDANTS-APPELLANTS,**

**AMERICAN SECURITY INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Waukesha County:  
MARK S. GEMPELER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Keith and Wendy Gibney have appealed from an order entered in the trial court on November 7, 2006, denying their motion to reopen a July 10, 2006 order granting American Security Insurance Company's motion for summary judgment and dismissing it from this action. Pursuant to this court's order of December 11, 2006, and a presubmission conference, the parties have submitted memo briefs. Upon review of those memoranda and the record, we affirm the order of the trial court.

¶2 The Gibneys moved for relief under WIS. STAT. § 806.07(1) (2005-06).<sup>1</sup> A motion for relief from judgment under § 806.07 is addressed to the sound discretion of the trial court. *Brown v. Mosser Lee Co.*, 164 Wis. 2d 612, 616-17, 476 N.W.2d 294 (Ct. App. 1991). We will not reverse the trial court's discretionary determination if the record shows that discretion was in fact exercised and a reasonable basis exists for the trial court's decision. *Id.* at 617.

¶3 We conclude that the trial court acted within the scope of its discretion in denying the Gibneys' motion. We set forth the facts at length because they drive our decision on appeal.

¶4 The record indicates that this action was commenced by Gina Bartolotta in February 2005, for injuries suffered in a fall on the Gibneys' driveway. Bartolotta named the Gibneys and American, their homeowners' insurer, as defendants.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version.

¶5 An answer was filed on the Gibneys' behalf by Attorney Christopher Ceccato, an attorney retained by them. An answer was filed on behalf of American by Attorney Jonathan Ingrisano of Godfrey & Kahn, S.C. American initially denied that it had issued an insurance policy to the Gibneys, and moved for summary judgment on that ground. However, when it discovered that a policy existed, it withdrew its motion and, at a September 30, 2005 scheduling conference, accepted the tender of the Gibneys' defense without any reservation of rights.

¶6 On May 2, 2006, more than seven months after accepting tender of the defense, American moved for summary judgment determining that it had no duty to defend or indemnify the Gibneys. In support of the motion, American alleged that the Gibneys were willfully failing to cooperate with the counsel assigned by American and to participate in the defense of the case. American alleged that the Gibneys' conduct constituted a material breach of the provision in their homeowners' policy requiring cooperation with American.

¶7 In support of its motion, American attached an affidavit from Attorney Ingrisano, stating that he accepted Attorney Ceccato's tender of defense at the September 30, 2005 scheduling conference, and that Attorney Ceccato agreed to work with the Gibneys to execute a substitution of counsel. American also submitted an affidavit from Attorney Mark Schmidt of Godfrey & Kahn, stating that he forwarded a stipulation and order for substitution of counsel to Attorney Ceccato on October 7, 2005.

¶8 Attorney Schmidt's affidavit indicated that after leaving several unreturned telephone calls, he sent a letter to Attorney Ceccato on December 5, 2005, inquiring as to the status of the stipulation. In the letter, he reiterated that

American accepted the tender of the Gibneys' defense. He stated that American intended to satisfy its obligations under the policy by providing a defense to the Gibneys at no cost and would pay damages up to the \$25,000 limit of liability in the policy. He indicated that he and Attorney Ingrisano would be the Gibneys' new attorneys after the Gibneys executed the substitution of counsel, and that he and Attorney Ingrisano needed to review the case file and meet with the Gibneys to discuss the case.

¶9 After receiving no reply to the December 5, 2005 letter, Attorney Schmidt wrote directly to the Gibneys on January 3, 2006, informing them that American had retained Godfrey & Kahn to represent them, but that counsel had been unable to obtain cooperation from them and Attorney Ceccato. The letter was copied to Attorney Ceccato, and indicated that counsel had not yet received the executed substitution of counsel, nor been provided an opportunity to review the case file. The letter stated:

In order for American Security to assume your defense, we need to receive a fully executed Substitution of Counsel and access to your case file as soon as possible. After reviewing the case file, we will need to confer with you regarding the case. Time is short. Trial deadlines are approaching, and we need to contact opposing counsel about extensions.

If you want American Security to pay for your defense in this case, please contact Attorney Ceccato immediately and instruct him to immediately execute the Substitution of Counsel and provide us with the case file. Alternatively, if you do not want American Security to pay for your defense, please advise us in writing as soon as possible.

¶10 In his affidavit, Attorney Schmidt indicated that neither the Gibneys nor Attorney Ceccato responded to this communication. However, because deadlines were approaching, Attorney Schmidt filed a motion to amend the

scheduling order on January 30, 2006, thus obtaining more time to prepare a defense for the Gibneys.

¶11 On February 15, 2006, Attorney Jean Heller, claims counsel for American, wrote to the Gibneys, explaining that their policy gave American the right to choose the attorney who would represent them when it paid for their defense, and that American had chosen Godfrey & Kahn. The letter further explained that Attorney Ceccato had not executed the stipulation for substitution of counsel. The letter warned the Gibneys that they must cooperate in order for American to be responsible for paying for their defense and paying damages under their policy. It informed them that failure to cooperate with American's attempts to defend the case would constitute a waiver of their right to a defense and indemnification from American. The letter asked the Gibneys to contact Attorney Heller or Attorney Schmidt immediately if they wanted American to pay for their defense, and stated that if the Gibneys did not contact them by March 6, 2006, American would seek a court determination that it had no duty to defend or indemnify them.

¶12 Attorney Schmidt's affidavit indicated that on March 6, 2006, Attorney Ceccato telephoned him. According to the affidavit, Attorney Ceccato stated that the Gibneys wanted American to handle their defense, and that he would execute the stipulation for substitution of counsel, forward the case file, and instruct the Gibneys to contact Attorney Schmidt.

¶13 Attorney Schmidt's affidavit indicated that when none of this occurred, he again wrote to the Gibneys on April 11, 2006, with a copy to Attorney Ceccato. This letter again advised the Gibneys that their policy required them to cooperate with American and gave American the right to choose the

attorneys to represent them. The letter reiterated that cooperation, including forwarding the substitution of counsel and case file, had not been forthcoming to date. The letter advised the Gibneys that if they wanted American to assume their defense, they had to call Attorney Schmidt immediately and set up a time to discuss the case. It also advised them that they had to sign the enclosed stipulation for the substitution of counsel and obtain Attorney Ceccato's signature; obtain the case file from Attorney Ceccato; and forward to Attorney Schmidt, or have Attorney Ceccato forward, the executed stipulation and case file. The letter again warned that the Gibneys' failure to cooperate would constitute a waiver of their rights to have a defense paid for by American and indemnification up to the limit stated in the policy. It stated that if Attorney Schmidt did not hear from the Gibneys by April 20, 2006, American would seek a court determination that it had no duty to defend or indemnify them in this action.

¶14 Attorney Schmidt's affidavit indicated that no response was made by the Gibneys or Attorney Ceccato to the April 11, 2006 correspondence. Based upon the affidavits of Attorneys Schmidt, Ingrisano and Heller, American moved for summary judgment determining that the Gibneys had materially breached their duties under the policy by failing to execute a substitution of counsel or forward the case file, and refusing multiple requests to contact counsel to discuss the case. American further alleged that it was materially prejudiced by the Gibneys' failure to cooperate.

¶15 A hearing was held on American's motion on June 26, 2006. At the hearing, Attorney Ceccato appeared on behalf of the Gibneys, who did not personally appear. Attorney Ceccato acknowledged that no written response had been filed to the motion, and stated:

Your Honor, I've advised my client time and again to get in touch with the insurance company and cooperate with the insurance company. She's chosen not to for whatever reason; it escapes me.

I'm not going to oppose the motion from the insurance company. If my client chooses not to cooperate, accept their help, that is her choice. It was my professional advice that she do so.

I'm at a loss to explain why she won't cooperate with them, and I really have no objection.... I know it's a bad choice on her part but she's made it, and I've explained to her that they were here to help her, that she needed to cooperate, and why they're choosing not to, I'm at a loss.

After Attorney Ceccato's comments, Attorney Ingrisano stated:

Out of candor to the Court, Your Honor, I would advise that after filing this motion, Wendy Gibney did call my colleague, Mark Schmidt ... and generally complained of American Security's motion, did state her intent to file an affidavit in opposition to that motion. I have not been served with that nor has she filed anything with the Court.

¶16 The trial court granted American's motion for summary judgment, concluding that there was no genuine issue of material fact. It concluded that the Gibneys had breached their contract and duty to cooperate with American, that the breach was material, and that the breach prejudiced American. It concluded that the Gibneys had therefore waived their right to a defense or indemnification from American, and dismissed American from the case.

¶17 The order dismissing American was entered in the trial court on July 10, 2006. On July 13, 2006, Attorney Ceccato moved to withdraw as counsel to the Gibneys. In support of his motion he submitted an affidavit attesting that he advised the Gibneys to cooperate with the attorneys for American, and advised them that he could not provide them with any services beyond those being offered by American. On August 1, 2006, Bartolotta filed a motion for default judgment,

relying upon the Gibneys' failure to comply with the scheduling order and failure to participate in their defense by cooperating with Attorney Ceccato or counsel selected by American.

¶18 The Gibneys subsequently retained new counsel, who expressed an intention to file a motion for relief from the July 10, 2006 order. The Gibneys did not oppose Attorney Ceccato's motion to withdraw, and that motion was granted on August 21, 2006. At that hearing, the trial court deferred ruling on the motion for default judgment until resolution of the forthcoming motion for relief from the July 10, 2006 order.

¶19 On August 28, 2006, the Gibneys, by their new counsel, filed a motion for relief from the July 10, 2006 order, relying upon WIS. STAT. § 806.07(1)(a) and (h). In affidavits in support of their motion, the Gibneys attested that in December 2005, Attorney Ceccato advised them that Bartolotta was making a claim for permanent disability and that it therefore would be in their best interest not to sign the stipulation and order for substitution of counsel. They attested that Attorney Ceccato told them that he would be contacting Attorney Schmidt to resolve the issues surrounding the substitution of counsel.

¶20 Wendy Gibney further attested that after receiving the January 3, 2006 letter from Attorney Schmidt, she spoke to Attorney Ceccato, who assured her that he would handle the matter. She further attested that when she received the April 11, 2006 letter from Attorney Schmidt, she hand-delivered it to Attorney Ceccato, who again told her that he would take care of it.

¶21 Wendy attested that upon being served with American's motion for summary judgment, she again contacted Attorney Ceccato, who told her that the June 26, 2006 hearing was for lawyers only and that the Gibneys need not be

there. Wendy attested that Attorney Ceccato instructed her to call Attorney Schmidt and tell him that, pursuant to Attorney Ceccato's advice, the Gibneys would not be signing the stipulation and order for substitution of counsel. She stated that in accordance with these instructions, she contacted Attorney Schmidt and told him that Attorney Ceccato was advising the Gibneys not to sign the stipulation, and that he needed to talk to Attorney Ceccato about it. Wendy attested that the conversation ended with the understanding that Attorney Schmidt was going to call Attorney Ceccato, and either Attorney Schmidt or Attorney Ceccato would call her back.

¶22 Wendy attested that she never received a return call from Attorney Schmidt. She also attested that despite leaving multiple messages for Attorney Ceccato, she never heard from him before the June 26, 2006 hearing, and was never informed by him that if she and her husband did not sign the stipulation and order for substitution of counsel, American would be dismissed from the lawsuit.

¶23 Wendy attested that on June 28, 2006, Attorney Ceccato informed her that American had been dismissed because the Gibneys had failed to sign the stipulation and order for substitution. She stated that she told Attorney Ceccato that the only reason they had not signed the stipulation was because he advised them not to. Both she and Keith Gibney attested that they first learned of Attorney Ceccato's motion to withdraw from the case, his claim that the Gibneys had failed to cooperate in the case, and his failure to file a witness list and other necessary documents, when the Gibneys were served with Bartolotta's motion for default judgment. Both Gibneys attested that at all times during these proceedings, they followed the advice of and cooperated with Attorney Ceccato.

¶24 American responded to the motion with a brief and additional affidavit from Attorney Schmidt, attesting that after serving American's motion for summary judgment on the Gibneys, he received a telephone call from Wendy Gibney on May 15, 2006. He stated that Wendy told him that she did not want, and would not accept, representation from Godfrey & Kahn, and that she wanted to be represented by Attorney Ceccato.

¶25 A hearing was held on the Gibneys' motion for relief on October 26, 2006. The trial court stated that it had read the parties' briefs, and afforded counsel an opportunity to present any additional argument and authority. It then denied the motion, stating that reviewing the briefs and affidavits only fortified its belief that granting American's motion was appropriate. It concluded that American's efforts were genuine and in good faith, and that it had made a strenuous effort to resolve the matter. While acknowledging that it did not know how much Attorney Ceccato had participated, it concluded that "the architects of this circumstance were the Gibneys themselves," and that the situation they found themselves in was "one that they worked very hard to obtain." It then denied the Gibneys' motion for the reasons stated in American's brief, which it expressly adopted in whole.

¶26 We have set forth these facts at length because they guide our decision on appeal. The Gibneys argue that they are entitled to relief under WIS. STAT. § 806.07(1)(h). Section 806.07(1)(h) permits a trial court to grant relief under extraordinary circumstances. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 549, 363 N.W.2d 419 (1985). However, it "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.”” *Id.* at 550 (quoting *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970)).

¶27 The Gibneys’ first argument is that the trial court erroneously exercised its discretion by failing to address the factors relevant to its motion for relief and failing to provide an analysis of its reasons for denying the motion. We disagree. As set forth above, the trial court set forth reasons for its decision on the record, concluding that American tried to provide representation and a defense to the Gibneys, and was unable to do so because of the conduct of the Gibneys. It also concluded that the Gibneys were responsible for their conduct, regardless of Attorney Ceccato’s participation in the matter. Finally, it adopted the reasoning set forth in American’s brief, which responded to the remaining arguments raised by the Gibneys.<sup>2</sup> Under these circumstances, we cannot conclude that the trial court failed to adequately exercise its discretion.

¶28 The Gibneys’ next argument is that American had no right to demand that they execute a substitution of counsel. They contend that because Bartolotta’s claim exceeded the policy limits, they were entitled to their own counsel to defend the excess claim.

¶29 The defect in the Gibneys’ argument is that neither they nor Attorney Ceccato informed American that the Gibneys wanted counsel chosen by American to defend them and provide indemnification up to the policy limits, while retaining Attorney Ceccato as excess counsel. Absent notification that the Gibneys wanted to be defended by counsel chosen by American while retaining

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<sup>2</sup> Although the Gibneys object to the trial court’s adoption of the reasons set forth in American’s brief, they cite nothing which prohibits a trial court judge from doing this.

Attorney Ceccato as excess counsel, counsel selected by American reasonably requested execution of the stipulation and substitution of counsel.

¶30 The Gibneys' argument also ignores that they did more than simply fail to sign the stipulation. As is clear from the record, they failed to cooperate in any manner with counsel selected by American, failed to respond to letters and inform American of their intentions, and failed to provide the case file or meet with Attorney Schmidt to discuss the case. They also failed to appear and oppose summary judgment when American moved for dismissal based upon their lack of cooperation. Their lack of cooperation was thus clearly established.

¶31 The Gibneys contend that lack of cooperation should not be imputed to them because they relied upon Attorney Ceccato, and it was Attorney Ceccato who failed to follow through with counsel chosen by American. They contend that Attorney Ceccato failed to provide effective representation by keeping them well-informed. They cite *State ex rel. M.L.B.*, 122 Wis. 2d at 552, listing factors relevant to a motion for relief from judgment under WIS. STAT. § 806.07(1)(h), including whether the moving party received effective assistance of counsel.

¶32 As noted by the trial court, the Gibneys and Attorney Ceccato clearly dispute what advice Attorney Ceccato gave to them, and what representations were made by Attorney Ceccato in response to the letters and motion from Attorney Schmidt. However, even accepting the Gibneys' allegations as true, it remains that Attorney Ceccato was retained by them. As such, they are bound by Attorney Ceccato's actions and inactions in handling this case. See *Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 406, 308 N.W.2d 887 (Ct. App. 1981). Moreover, if they believe Attorney Ceccato has rendered ineffective assistance, they have a remedy by bringing a malpractice suit against

him. *Id.* The rationale behind *Village of Big Bend* is that innocent participants in a civil case generally should not bear the burden if the attorney chosen by another party renders ineffective assistance. *See id.* at 406.

¶33 As noted by the trial court, American made strenuous and good faith efforts to assume the Gibneys' defense, and was prevented from doing so by their recalcitrance or the conduct of their attorney. The trial court did not erroneously exercise its discretion when it concluded that the Gibneys, rather than American, should bear the burden of their failure, or the failure of their counsel, to cooperate with American. It therefore acted within the scope of its discretionary authority when it determined that the Gibneys failed to establish the kind of extraordinary circumstances that would justify relief under WIS. STAT. § 806.07(1)(h).

¶34 The Gibneys' final argument is that the law firm of Godfrey & Kahn had a conflict of interest in representing the Gibneys because it was the law firm that initially argued that American provided no coverage, rendering the firm adversarial to the Gibneys. However, as discussed earlier, although Godfrey & Kahn initially moved for summary judgment on the ground that the Gibneys had no policy with American, upon discovering that a policy existed, attorneys from Godfrey & Kahn withdrew the motion and accepted the tender of the Gibneys' defense.<sup>3</sup> No basis exists to conclude that this initial confusion made the Gibneys and American adversarial parties. Instead, their interest in disputing Bartolotta's negligence claim and minimizing the award of damages was the same. No conflict of interest therefore prevented Godfrey & Kahn from defending them both.

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<sup>3</sup> The record indicates that the initial confusion occurred because the policy listed the name of the Gibneys' mortgage company, rather than the Gibneys.

*By the Court.*—Order affirmed.

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

