COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP86 **Cir. Ct. No. 2007FA1397**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

MARLA JOY BAKER-WEISS,

PETITIONER-RESPONDENT,

V.

ROBERT GEORGE WEISS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Robert Weiss appeals a postdivorce judgment ordering him to pay $90,255.95 in attorney fees and costs as an overtrial sanction. He challenges the sanction's propriety and reasonableness. Marla Baker-Weiss, Robert's former wife, asserts that his appeal is frivolous and moves for appellate costs and attorney fees. We affirm the judgment and deny Marla's motion.

¶2 Robert and Marla divorced in 2010 after a twenty-one-year marriage and four children. Maintenance and child support for the two still-minor children was held open. In 2012, Marla lost her job. Having come to believe that Robert's business income was substantially greater than represented at the time of divorce, she moved for a change in the support order, alleging a substantial change in circumstances.

¶3 Robert ignored or inadequately complied with formal and informal discovery requests. The record is thick with the ensuing motions, subpoenas, petitions, affidavits, frequently sharp-tongued communications and legal memoranda, hearings, notices of postponed hearings, hearing exhibits, and summaries of the discovery efforts made. The records Robert did produce persuaded Marla that Robert's income had been higher than claimed and was steadily increasing.

¶4 The court commissioner found that Robert's business engaged in "'questionable' accounting practices" but concluded that Marla had not met her burden of proving a substantial change in circumstances. The commissioner denied the motion for a change in child support and maintenance. Marla filed a formal petition for a de novo hearing.

¶5 About the same time, Marla filed motions in the circuit court for contempt and overtrial and for appropriate sanctions. Five hearings later, the trial

court denied Marla's contempt motions but granted her motion for overtrial. The court ordered Robert to pay $90,255.95, the full amount Marla incurred in costs and attorney fees in bringing the overtrial action. This appeal followed.

¶6 Robert challenges the trial court's conclusion that overtrial occurred. "[O]vertrial is a common law doctrine [that] arises from the court's inherent authority to manage the family law cases over which it has jurisdiction." ***Zhang v. Yu***, 2001 WI App 267, ¶22, 248 Wis. 2d 913, 637 N.W.2d 754. It "may be invoked when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees." ***Id.***, ¶13. Whether excessive litigation occurred is a question of historic fact to be determined by the circuit court, but whether the facts as found by the court constitute overtrial is a question of law. ***Id.***, ¶11. The decision to award fees as a sanction for overtrial is reviewed for an erroneous exercise of discretion. ***Id.***, ¶12. The decision to award fees and whether the fees are reasonable lie within the trial court's discretion. ***Id.***, ¶12.

¶7 Robert argues that subpoenaing bank documents, examining his tax records, and conducting depositions were not overtrial when Marla would have undertaken such acts regardless of what he produced. He also argues that he simply was defending himself from Marla's own overlitigation. He contends she pursued unnecessarily drawn-out motion practice, including multiple contempt motions without first obtaining an order to compel discovery, *see* WIS. STAT. § 804.12(2)(a)4. (2013-14),[1] and emphasizes that she did not prevail on either the contempt motions or on her support modification request. He further asserts that he is not to blame for delay due to the family court commissioner's calendar

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

allowing for only half-day hearings spread out over several months or for difficulty involved in getting discovery from his accountant. Because Marla settled with the accountant, Robert argues that, based on the doctrine of respondeat superior, the release of the accountant releases him as well.

¶8 Robert's arguments do not persuade. Marla's release of the accountant from personal liability does not change that what she sought from him was Robert's financial information. When the trial court said, "Mr. Weiss is the boss," it recognized that the accountant's recalcitrance in providing the material likely came at Robert's instruction. The court reasonably laid at Robert's door the time and effort Marla spent trying to get his financial information from the accountant.

¶9 Also, Marla need not prevail on each issue for the trial court to find that Robert's dodging and foot-dragging unnecessarily extended the litigation. It well could be that Marla would not have spent the time litigating the issue of Robert's finances had he been more forthcoming in the first place. With complete financial documentation, she might have been able to establish a substantial change in circumstances.

¶10 The trial court found that the record was "very very replete" with evidence that Robert made "substantial efforts" to, if not hide his financial information, "obfuscate[]" and "shift[]" it and to not provide it in a timely fashion.

> [I]t's clear in this case because Mr. Weiss had so much available to him could easily, as was stated[,] at a stroke of a couple keys at a computer, provide information. He could indicate to the banks to provide information; could tell the accountant … to provide information. And there's the e-mail traffic that's on this record that demonstrates a reluctance to do so…. And, yes, eventually Ms. Weiss was able to get some information, a fair amount of information;

> but it was like pulling teeth. It was extremely difficult, and counsel went through substantial efforts to do so.
>
> ….
>
> I'm going to find that there has been clear, satisfactory, and convincing evidence that there was discoverable evidence that may have demonstrated a substantial change in circumstances. And that that was gained through the herculean efforts of Ms. Weiss and her attorney.
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> ….
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> I believe that there was no need for any of this, that things could have been done very much quicker. There could have been compliance with the request, compliance with the request was simple, that there was delay, that there was obfuscation, and there was in fact substantial delay and obfuscation on the part of Mr. Weiss, and therefore those attorney fees are merited in this case.

¶11 These findings are not clearly erroneous. The record confirms the difficulty in discerning Robert's true income. It is apparent that the court believed that his lack of cooperation with Marla's reasonable requests for his financial information significantly protracted the litigation. Time is money. The court's decision to award fees and costs was a proper exercise of discretion.

¶12 Robert also challenges the fee award itself and its reasonableness. In anticipation of the August 12, 2014 hearing, on July 1, Marla submitted a ten-page list of itemized attorney fees totaling $77,815.95. On August 5, she filed an update itemizing an additional $13,140 for July 1 to August 12, bringing the total to $90,955.95. The court ordered Robert to pay the full amount.

¶13 On the one hand, Robert says he did not file an objection to the fees' reasonableness before the overtrial/contempt hearing because "there was no requirement" that he do so. But he also did not object at the hearing or anytime

after. Indeed, he submitted a proposed order in which he challenged only the $1400 in fees from the morning of the hearing.

¶14 On the other hand, Robert directs us to the hearing transcript where, he insists, he argued that "attorney's fees sought for failure to provide discovery were excessive."[2] Those challenges went to overtrial, not the reasonableness of the fees. While related, overtrial and reasonableness of the fees are separate concepts. *See* ***Zhang***, 248 Wis. 2d 913, ¶12 ("[T]his court reviews both the decision to award fees [for overtrial] and the determination of the reasonableness of the fees ….") Robert has not shown that he brought the claimed error to the trial court's attention. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). This court need not consider issues raised for the first time on appeal. ***Id.***

¶15 Having disposed of Robert's arguments, we turn our attention to Marla's request that we declare this appeal frivolous and award her fees and costs of the appeal pursuant to WIS. STAT. RULE 809.25(3). Under this rule, we may declare an appeal frivolous only if every argument made by the appellant is frivolous. ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 403, 596 N.W.2d 828 (Ct. App. 1999). Such is not the case. We deny the motion.

By the Court.—Judgment affirmed.

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

[2] Robert asserts that at R. 324, p. 129, lines 5 through 10, he argued that "attorney's fees should not be awarded if the Court Commissioner did not make an award." We are unable to locate that argument in R. 324 or in R. 325, the transcript of the contempt/overtrial hearing.