

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2007

David R. Schanker
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. 2005AP2993

Cir. Ct. No. 2004CV468

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**MARSHALL & ILSLEY TRUST COMPANY, N.A., STEWART C. MILLS,
III AND MII LIFE INCORPORATED,**

PLAINTIFFS,

V.

BARBARA HINTZ AND ESTATE OF TIMOTHY A. HINTZ,

DEFENDANTS,

KRISTYLEE M. HINTZ AND STEPHANIE M. HINTZ,

DEFENDANTS-RESPONDENTS,

BRANDON T. BRETTKREUTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Brandon Brettkreutz, former step-son of Timothy Hintz, who is deceased, appeals the circuit court's order for summary judgment in favor of Hintz's biological children in this dispute over the division of Hintz's retirement and insurance proceeds. We affirm.

¶2 Brettkreutz first argues that summary judgment should not have been granted because there were disputed issues of material fact. Summary judgment is proper when there are no material issues of disputed fact and one party is entitled to judgment as a matter of law. *Lambrech v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. Brettkreutz contends that his lawyer's affidavit, which recounts a conversation with Brettkreutz's mother about Timothy Hintz's intent to provide for his stepchild, put material facts in dispute. Respondents Stephanie H. and Kristylee Hintz, Hintz's biological children, one of whom is a minor, respond by arguing that the lawyer's affidavit contains only hearsay, on which the circuit court correctly concluded it could not rely. Brettkreutz has not filed a reply brief disputing this argument, so we consider his failure to do so a concession on this point. See *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 196 Wis. 2d 578, 603, 539 N.W.2d 111 (Ct. App. 1995), ("A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted."), *aff'd in part, rev'd in part on other grounds*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996).

¶3 Brettkreutz next argues that WIS. STAT. § 854.25 (2005-06),¹ on which Stephanie H. and Kristylee Hintz rely for their claim that Brettkreutz must repay them the value of the 401K plan proceeds he received, is preempted by the federal ERISA statute. Stephanie H. and Kristylee Hintz, on the other hand, contend that § 854.25 is not preempted by ERISA. They point out that ERISA is directed at providing uniformity in pension law throughout the United States so that 401K plan administrators know their obligations and do not have to consider the laws of each of the individual fifty states in making distributions under the plan. They contend that ERISA preempts state law, as applied to this case, only to the extent that it directs the 401K plan administrator to distribute funds to Brettkreutz. After that distribution, however, there is nothing in ERISA that precludes the State of Wisconsin from creating a cause of action in favor of the people who the legislature concludes are the proper beneficiaries (here, the biological children) so that they may recover the money. Once again, Brettkreutz does not dispute this argument in his reply brief. His failure to file a reply brief refuting this point constitutes a concession that Stephanie H. and Kristylee Hintz’s analysis is correct. *See Management Computer Servs. Inc.*, 196 Wis. 2d at 603.

¶4 Stephanie H. and Kristylee Hintz move for attorney’s fees and costs on the grounds that this appeal is frivolous. *See* WIS. STAT. RULE 809.25(3). Their motion was untimely because it was filed after the respondent’s brief had been filed. Although they contend that the untimeliness of their motion did not prejudice Brettkreutz, they point to no legal authority for this “no harm, no foul” argument. Therefore, we deny their motion for attorney’s fees and costs. *See*

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

State v. Lindell, 2000 WI App 180, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500 (arguments unsupported by legal authority will not be considered).

By the Court.—Order affirmed.

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

