COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2026

Samuel A. Christensen
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. 2026AP1092 **Cir. Ct. No. 2025PR6**

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

IN RE THE ALLAN AND SHIRLEY MACKOWAY REVOCABLE TRUST DATED JANUARY 13, 2015:

ANNE M. BARTNIK,

PETITIONER-RESPONDENT,

V.

TODD A. MACKOWAY,

SUCCESSOR-TRUSTEE-PETITIONER-APPELLANT,

LINDSEY A. SORENSON, STEPHANIE L. KING, JARED W. BARTNIK, TANNER E. MACKOWAY AND HAILEE J. MACKOWAY,

BENEFICIARIES,

SHIRLEY A. MACKOWAY AND ALAN L. HOUGUM,

OTHER PARTIES.

APPEAL from an order of the circuit court for Marathon County: SUZANNE C. O'NEILL, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Todd A. Mackoway appeals a circuit court order granting in part and denying in part Anne M. Bartnik's motions for remedial contempt and to compel discovery. Specifically, Mackoway appeals that part of the court's order finding him in contempt for failing to timely answer Bartnik's written discovery requests. Mackoway contends that the court erred by finding him in contempt under WIS. STAT. § 785.01(1) because he did not "intentionally" refuse to timely respond to Bartnik's discovery requests. Rather, he asserts that he had a good faith belief that his pending motion to disqualify Bartnik's counsel would be granted and that he was not required to provide responses to the discovery requests until the court decided that motion. For the reasons that follow, we affirm.

BACKGROUND

¶2 On February 17, 2025, Bartnik filed a verified petition for declaratory relief, seeking to remove her brother, Mackoway, as successor general trustee of Shirley Mackoway's (their mother) two trusts.[2] The petition alleged that Mackoway breached his fiduciary duty as trustee by failing to "effectively, prudently, impartially, and in good faith administer" both of the trusts and that Mackoway's "open and avowed hostility" toward Bartnik rendered him unsuitable

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

[2] Going forward, because Shirley and Mackoway share the same surname, we will refer to Shirley by her first name.

to serve as trustee. In addition to removing Mackoway as trustee, and along with other demands, Bartnik's petition requested: (1) an order "compelling [Mackoway] to properly and completely provide a Trust Account reporting" on the trusts' "property, liabilities, receipts, and disbursements"; (2) an order compelling Mackoway to provide trust inventories and supporting documentation; (3) judicial review of Mackoway's conduct as Shirley's health care agent, including permitting Bartnik to review Shirley's health care records; (4) judicial review of Mackoway's conduct as Shirley's financial agent; and (5) an award of Bartnik's reasonable and actual attorney fees.

¶3 On March 14, 2025, Mackoway filed a motion to dismiss the requests for judicial review of his conduct as Shirley's health care agent and as Shirley's financial agent, contending that WIS. STAT. § 701.0201(3) "contains no authorization whatsoever for including such claims in a judicial proceeding involving a trust." Upon Mackoway filing this motion, all discovery and other proceedings were stayed for a period of 180 days or until the ruling of the circuit court. *See* WIS. STAT. § 802.06(1)(b). The court denied the motion to dismiss on July 24, 2025, and Mackoway responded to the petition on August 21, 2025.

¶4 On September 24, 2025, Bartnik served discovery on Mackoway, including interrogatories and requests for production of documents, to be answered within 30 days. On October 22, 2025, Mackoway's counsel sent Bartnik's counsel, Mary Sue Anderson, an email stating his belief that Mackoway consulted with Anderson as a prospective client for the same matter, that Anderson was professionally obligated to withdraw from representing Bartnik, and that Mackoway would therefore not be attending his mutually scheduled discovery deposition or providing Anderson with responses to the written discovery requests

until the issue of Anderson's withdrawal/disqualification was resolved. On the following day, Mackoway filed a motion to disqualify Anderson.

¶5 On October 27, 2025, Bartnik filed motions for remedial contempt and to compel discovery due to Mackoway's nonappearance at his noticed discovery deposition, his failure to timely respond to the written discovery requests, and his failure to request an extension of time to respond to the discovery requests or to formally object to discovery and seek a protective order. Among other forms of relief, Bartnik requested that the circuit court hold Mackoway in contempt, order Mackoway to answer her discovery requests, and order Mackoway to pay Bartnik's reasonable and actual attorney fees caused by Mackoway's failure to timely respond to the discovery requests.

¶6 On November 5, 2025, the circuit court held a hearing on Mackoway's motion to disqualify Bartnik's counsel, at which Mackoway's counsel stated that Mackoway divulged "significantly harmful information" to Attorney Anderson during his consultation with her, and Anderson stated that she had no recollection of consulting or communicating with Mackoway. The court entered an order staying discovery pending its decision on the motion and, on January 5, 2026, issued a decision denying the motion.

¶7 On January 23, 2026, Mackoway emailed Bartnik his responses to her interrogatories and requests for document production. Mackoway generally objected to each of the discovery requests, provided a few of the requested documents, and stated that he would provide further information on a confidential basis upon entry of a protective order. According to Attorney Anderson, she received "no substantive documents" in response to production requests 1-7,

received "some" documents for request 8, and received no documents for requests 9-14.

¶8 On February 4, 2026, the circuit court held a hearing on Bartnik's motions for remedial contempt and to compel discovery. Regarding Mackoway's failure to appear at the scheduled deposition, the court found that, due to the pending motion to disqualify Attorney Anderson, Mackoway's failure to appear for the deposition was made in good faith and that it was not a willful refusal to comply with the notice of deposition. The court explained that "to proceed with a deposition with the motion to disqualify pending could have been an enormous waste of resources" if the motion to disqualify were granted. Thus, the court did not find Mackoway in contempt for failing to appear at the deposition.

¶9 The circuit court did, however, find Mackoway in contempt for failing to timely respond to Bartnik's written discovery requests. The court found that Mackoway's discovery responses were due on October 24, 2025, and, although Mackoway had moved for disqualification of Bartnik's counsel the day prior, his discovery responses remained due, and Mackoway provided no justification for his failure to timely answer them. The court noted that while it stayed discovery on November 5, 2025, Mackoway had a duty to seek court intervention prior to that date—such as by filing a request to stay discovery or to extend the time to answer—and that he failed to do so. The court also noted that "there has been some response to that written demand, at least as of January 23rd," but it found that Mackoway's discovery responses "appear[ed] to not respond to many of those requests."

¶10 The circuit court therefore ordered that Mackoway provide "full and complete responses" to Bartnik's written discovery requests by February 11, 2026,

and it ordered that Mackoway pay Bartnik's reasonable attorney fees incurred in bringing the contempt motion pertaining to the written discovery requests. The court also temporarily granted Mackoway's motion "to enter a protective order for documents produced in the course of discovery which may contain confidential or propriety information and sensitive, private, protected health information" until the matter was fully heard by the court. Mackoway now appeals.[3]

DISCUSSION

¶11 Mackoway argues that the circuit court erred by finding him in contempt because there was no evidence that his failure to timely answer Bartnik's discovery requests was intentional. As to our standard of review, Mackoway asserts that "[w]hether the law permits the use of contempt under the given facts and circumstances of a case is a question of law because the procedures and penalties for contempt are prescribed by statute."

¶12 To clarify, we review a circuit court's use of its contempt power for an erroneous exercise of discretion. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). "A discretionary decision will be sustained if the … court has examined the relevant facts, applied a proper standard of law, and,

[3] Mackoway filed a petition for leave to appeal the circuit court's nonfinal order on May 7, 2026, and a notice of appeal on May 8, 2026. Because an appeal may be taken from an order for contempt as an order in a special proceeding, *see* ***State v. Heyer***, 174 Wis. 2d 164, 168 n.2, 496 N.W.2d 799 (Ct. App. 1993), and because we have jurisdiction over the appeal, we denied the petition for leave to appeal as unnecessary.

After filing this appeal, Mackoway also filed a motion for reconsideration of the circuit court's order finding him in contempt. In a brief in support of the motion, Mackoway raised the same arguments he raises on appeal. The record does not reflect that the court considered the motion for reconsideration or issued any order regarding it. Mackoway did not move to remand this case to the circuit court to decide his motion for reconsideration.

using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898 (citation omitted). "[W]hen the contention is that the … court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue of law de novo." ***Hughes v. Hughes***, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998).

¶13 "Contempt of court," for the purpose of this appeal, is defined as the "intentional" "[r]efusal to produce a record, document or other object." *See* WIS. STAT. § 785.01(1)(d). In the context of a contempt proceeding, a volitional act is deemed intentional. *See* ***Oliveto v. Circuit Ct. for Crawford Cnty.***, 194 Wis. 2d 418, 427 n.3, 533 N.W.2d 819 (1995). "A court of record may impose a remedial or punitive sanction for contempt of court under [WIS. STAT. ch. 785]." WIS. STAT. § 785.02. WISCONSIN STAT. § 785.04(1) sets forth a nonexhaustive list of the remedial sanctions a circuit court can impose, which includes the "[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court." *See* § 785.04(1)(a), (e).

¶14 Further, the circuit court has broad power to impose sanctions on any party that fails to comply with the statutes governing civil procedure. *See* WIS. STAT. § 805.03; *see also* ***Rupert v. Home Mut. Ins.***, 138 Wis. 2d 1, 13, 405 N.W.2d 661 (Ct. App. 1987). As relevant to this appeal, WIS. STAT. § 804.12(4) provides:

> If a party … fails (a) to appear before the officer who is to take the party's deposition, after being served with a proper notice, or (b) to serve answers or objections to interrogatories submitted under [WIS. STAT. §] 804.08, after proper service of the interrogatories, … the court in which the action is pending on motion may make such orders in regard to the failure as are just…. In lieu of any order or in addition thereto, the court shall require the party failing to

> act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by [WIS. STAT. §] 804.01(3).

¶15 Mackoway does not contest that his responses to Bartnik's written discovery requests were due on October 24, 2025, and that he did not meet that deadline. Further, Mackoway does not challenge the circuit court's authority to find him in contempt, nor does he challenge the amount ordered as reimbursement for Bartnik's attorney fees in pursuing the contempt motion.

¶16 Rather, Mackoway argues that the circuit court erred because he "cannot possibly be said to possess the requisite mental state and state of knowledge to be held in contempt" because his failure to comply with the discovery deadline was "legally justified." In support, Mackoway states that the issue of "what a litigant should do about pre-trial discovery when a reasonable question has arisen about whether an opponent's attorney should be disqualified" is an issue of first impression in Wisconsin, and that he therefore reasonably relied on nonbinding authority from other jurisdictions stating that discovery "must temporarily come to a halt" until the disqualification issue is resolved.

¶17 We are not persuaded. As Bartnik correctly argues,

> Wisconsin's rules of civil procedure provide a litigant like Mackoway with a wide variety of options to seek judicial relief on the timing of discovery (including a stay). For reasons unknown, Mackoway elected not to avail himself of any of these available options.
>
> For example, Mackoway could have timely objected to Bartnik's written interrogatories and requests for production per [WIS. STAT.] §§ 804.08 (interrogatories) and

> 804.09 (requests for production). Mackoway could have filed a motion for protective order, for good cause shown, under WIS. STAT. § 804.01(3), and requested, among many options, that the written discovery be had only at a specified time. *See* § 804.01(3)(a)2. Mackoway could have filed a motion for protective order seeking to delay the timing of his discovery responses until after the Court ruled on his (ultimately unsuccessful) disqualification motion. *See* § 804.01(3).

¶18 The circuit court agreed and noted that, instead of taking any of the actions described above, Mackoway simply did nothing and let the discovery deadline pass. Further, because Mackoway knew or should have known that his failure to timely file responses to the discovery requests violated statutory requirements and his decision not to comply with the discovery deadline was volitional, his conduct satisfies the requirement that contempt be intentional. *See* ***Oliveto***, 194 Wis. 2d at 427 n.3.

¶19 We further note that after the circuit court decided the disqualification motion on January 5, 2026, Mackoway could have immediately filed his response to Bartnik's discovery requests. While Mackoway served responses on January 23, 2026, the court found that Mackoway failed to respond to many of Bartnik's requests. Mackoway's failure to attempt to mitigate his refusal to timely and fully respond to discovery further supports the court's decision to find him in contempt and impose sanctions against him. *See* ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780 ("[A] reviewing court may search the record for reasons to sustain the circuit court's exercise of discretion.").

¶20 Mackoway argues that the circuit court erred by issuing an inconsistent order and by failing to explain the basis for the claimed inconsistency. Mackoway states that the court ruled that he "acted properly in refusing to appear

for his October 27th deposition because of his good faith belief that the disqualification issue necessitated a halt to discovery until it could be resolved." (Formatting altered.) He contends that, "[n]evertheless, the circuit court inexplicably ruled that Mr. Mackoway somehow did not act properly in refusing to serve his written discovery response so long as the disqualification motion remained unresolved." Mackoway asserts that "nothing exists in law or in logic to justify this unexplained distinction between deposition compliance and written-discovery compliance in the context of a disqualification motion."

¶21 The circuit court distinguished between Mackoway's refusal to participate in his noticed deposition and his refusal to provide responses to Bartnik's written discovery requests in issuing its contempt order, but it did not fully explain its reason for doing so. However, as noted above, we review the court's decision for an erroneous exercise of discretion, ***Benn***, 230 Wis. 2d at 308, and we may search the record for reasons to sustain the court's exercise of discretion, ***LaCount***, 310 Wis. 2d 85, ¶15. Here, the record reflects a reasonable basis for the order distinguishing between the reasonableness of Mackoway's refusal to attend his noticed deposition without leave of the court, and his contemptuous refusal to timely provide written discovery.

¶22 In denying Bartnik's request that Mackoway be held in contempt for failing to attend his noticed deposition, the circuit court noted that proceeding with the deposition would have been "an enormous waste of resources" if the disqualification motion were granted. Implicit in the court's ruling was the idea that during the deposition, Mackoway may have been improperly subjected to a number of questions based upon information that Attorney Anderson may have gleaned from her prior consultation with Mackoway. This could have resulted in

the need to provide some remedy for the improper disclosure of information if the motion to disqualify Anderson were granted.

¶23 On the other hand, Mackoway was aware of the content of Bartnik's written discovery requests for 28 days prior to refusing to timely respond to them. Mackoway did not argue in the circuit court, and he does not argue here, that any of the discovery sought was based upon any information Attorney Anderson obtained through prior consultation with Mackoway. A review of the discovery requests shows that they are general in nature and that they relate to the claims contained in Bartnik's petition, rather than information gleaned from prior contact between Mackoway and Anderson. Under these circumstances, the circuit court reasonably found that Mackoway's refusal to timely provide the written discovery as required by statute without first seeking court approval was willful and intentional, despite its comments regarding the deposition.

¶24 Mackoway also argues that his failure to provide timely discovery responses is somehow excused because he was surprised by Bartnik's counsel's refusal to acquiesce in his disqualification motion and citation to law in support of her position to which he was not prepared to respond. He asserts that because he had "no notice or knowledge—none whatsoever—about any potential argument" that Bartnik might use to defeat his motion to disqualify Attorney Anderson, he "cannot be charged with knowledge … that there was even a *ghost* of a chance" that Bartnik would prevail on the motion to disqualify. (Formatting altered.) However, Mackoway's self-proclaimed "surprise" does not excuse him from complying with his statutory discovery obligations. *See* ***Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship***, 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626 ("[E]very person is presumed to know the law and cannot claim ignorance of the law as a defense."). As Bartnik aptly argues,

> [A]ll the applicable Wisconsin law … was as equally available to Mackoway and his counsel … as it was to Bartnik and her counsel. Neither Mackoway's incorrect belief about the law, nor his failed bid to convince the circuit court to adopt foreign case law excuses Mackoway's intentional refusal to timely respond to written discovery.

¶25 Accordingly, we conclude that the circuit court did not erroneously exercise its discretion by finding that Mackoway intentionally failed to comply with the statutory discovery deadline and that this volitional act constituted contempt.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.