COURT OF APPEALS DECISION DATED AND FILED

June 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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*** **§ 808.10 and RULE 809.62, STATS.**

No. 97-2774

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

IN RE THE MARRIAGE OF:

FLORIAN JOSEPH SMITH,

PETITIONER-RESPONDENT,

V.

ELEANOR BERNICE SMITH, N/K/A MALCZEWSKI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: RICHARD G. GREENWOOD and DONALD R. ZUIDMULDER, Judges. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Eleanor Smith appeals a trial court order that denied her § 806.07, STATS., motion seeking to reopen a divorce judgment. The

trial court ruled that the motion failed to comply with the statute and that Eleanor lacked "clean hands." Eleanor's motion claimed mistake, inadvertence, surprise, excusable neglect, extraordinary circumstances, and a miscarriage of justice. She claimed that the judgment contained errors overstating the marital estate by $117,000. Among other errors, she claimed that the trial court double-counted $89,191 in marital assets and wrongly counted $13,114 in inherited property. At the divorce trial, on Eleanor's stipulation, the trial court barred her from offering evidence to litigate the "value, character, and identity" of such assets as a sanction for obstructing discovery when she ignored depositions, left key interrogatories unanswered, and missed a trial date. According to Eleanor, this ruling, together with the trial court's computation errors, imposed an exceedingly harsh sanction for her admitted pretrial misconduct. The divorce judgment also held Eleanor's $400,000 retirement account open for division one-year later or at her retirement, if earlier.

On appeal, Eleanor claims that the trial court's errors have brought about a miscarriage of justice under § 806.07(1)(h), STATS. She claims that the trial court wrongly charged her with concealing $89,191 in marital funds she withdrew from a credit union. She claims to have reinvested the money in Door County real estate that the trial court considered in the property division and thereby double counted the same essential asset. She also objects to the division at a later time of her $400,000 retirement account from Proctor & Gamble. She further attacks the overall unfairness of the discovery sanctions and the inclusion of the inherited property in the marital estate.

The trial court made a discretionary decision on her § 806.07, STATS., motion that we must uphold absent an erroneous exercise of discretion. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 541, 363 N.W.2d 419, 422

(1985). The trial court's decision must simply have a reasonable basis to survive our review. *See* ***Littmann v. Littmann***, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973). We conclude that the trial court reasonably denied Eleanor's § 806.07 motion. Eleanor was simply making a collateral attack on the discovery sanctions and judgment, without having appealed them in a timely way. We therefore affirm the trial court's postjudgment order.

Initially, the trial court barred Eleanor from contesting the "value, character, and identity" of the marital property. It did relent somewhat at the divorce trial, permitting her to testify as to her assets. She never raised there, however, the matters she raises now. Eleanor never appealed them, and an appeal was the way to contest them. Instead, she filed a § 806.07 motion. This came too late, unless it met the tests of mistake, inadvertence, surprise, excusable neglect, extraordinary circumstances, or miscarriage of justice contained in § 806.07.

Here, the trial court reasonably ruled that Eleanor lacked "clean hands" from her discovery stage wrongs. Eleanor had obstructed discovery; this discovery had concerned in part the credit union withdrawals. This fully justified the "clean hands" rule. This equity doctrine can bar postjudgment motions, *see, e.g.,* ***First Nat'l Exch. Bank v. Harvey***, 176 Wis. 64, 67-68, 186 N.W. 215, 216 (1922), and the trial court had discretion to use it to bar Eleanor from waging a collateral attack to undo the fruits of her discovery stage obstructions. Once the trial court reached this conclusion, the trial court's other findings under § 806.07 became superfluous.

In any event, Eleanor has not shown that the trial court misjudged other issues under § 806.07, beyond the "clean hands" doctrine. First, the trial court had a great deal of discretion on discovery sanctions. *See* ***Johnson v. Allis***

Chalmers Corp., 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). The sanctions were reasonable and stipulated to; we see nothing extraordinary under § 806.07(1)(h). Second, Eleanor's inherited-property and double-counting claims, if true, would be no more than ordinary error, not the kind of extraordinary matter envisioned by § 806.07(1)(h). *See* ***M.L.B.***, 122 Wis.2d at 549, 363 N.W.2d at 425. Third, the size of the claimed $117,000 error is not itself an extraordinary matter under subsection (1)(h). Eleanor had flagrantly breached the discovery rules, and the trial court tried to send a strong message. Eleanor must bear accountability for the size of the sanctioned loss; it was she, not the trial court, who misgauged the consequences of her obstructive acts. Last, the trial court had the right to divide her retirement assets; they were part of the marital estate and raised nothing extraordinary under subsection (1)(h). *See* ***Bloomer v. Bloomer***, 84 Wis.2d 124, 136, 267 N.W.2d 235, 241 (1978) . In short, Eleanor did not show extraordinary circumstances or a miscarriage of justice.

By the Court.—Order affirmed.

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