COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2219 **Cir. Ct. No. 2010CV62**

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

BERNARD SEIDLING,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DORI STEPAN,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Douglas County: ROBERT E. EATON, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Bernard Seidling appeals an order awarding Dori Stepan compensatory damages, punitive damages, and actual attorney fees and costs on her counterclaim alleging abuse of process and Wisconsin Consumer Act

violations. Seidling argues: (1) the circuit court erred by declining to enforce a settlement agreement between the parties; (2) the court erred by granting Stepan default judgment as a sanction for Seidling's failure to appear at a hearing; (3) the court erroneously exercised its discretion by awarding Stepan attorney fees and costs in the amount of $97,735.51 as compensatory damages; (4) the court erroneously exercised its discretion with respect to the amount of punitive damages; and (5) the court erred by awarding Stepan actual attorney fees and costs. We reject each of these arguments and therefore affirm in part.

¶2 In a cross-appeal, Stepan argues the circuit court erred by determining its award of punitive damages was limited by WIS. STAT. § 895.043(6)[1] to twice the amount of the compensatory damages. We agree with Stepan that § 895.043(6) does not apply to her counterclaim against Seidling. We therefore reverse the punitive damages award and remand with directions that the court award Stepan $350,000 in punitive damages—the amount the court stated it would have awarded absent the limitation in § 895.043(6).

¶3 Stepan also argues in her cross-appeal that the circuit court erred by failing to address her supplemental request for attorney fees and costs. The record does not indicate whether the court inadvertently failed to address Stepan's supplemental request, or whether it considered the request and deliberately rejected it, but failed to state its reasons for doing so on the record. We therefore remand for the court to address Stepan's supplemental fee request.

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

BACKGROUND

¶4 Seidling and Stepan were parties to a prior lawsuit filed in Douglas County regarding a land contract. In that case, the circuit court granted Stepan's request to rescind the land contract and awarded her damages.

¶5 Thereafter, two small claims actions were filed against Stepan in Dane County: ***MAW Expressways v. Stepan***, Dane County case No. 2009SC10003, and ***Diversified Services v. Stepan***, Dane County case No. 2009SC10894. On appeal, it is undisputed that Seidling either filed these small claims actions or caused an agent to file them on his behalf. It is further undisputed that Stepan did not live in Dane County, that Seidling knew she did not live in Dane County, and that no bona fide effort was made to personally serve Stepan with the small claims summonses and complaints. Nevertheless, Seidling concedes he filed documents with the Dane County clerk of court representing that Stepan lived in Dane County and that unsuccessful attempts had been made to serve her in Dane County. As a result of Seidling's false representations, the Dane County circuit court granted default judgment against Stepan in the ***Diversified Services*** lawsuit on November 23, 2009, and in the ***MAW Expressways*** lawsuit on November 24, 2009. Seidling was awarded $5,119.52 in each lawsuit.[2]

[2] Seidling's actions toward Stepan were not isolated events; rather, the record shows they were part of a larger pattern of conduct that involved multiple victims. On November 9, 2011, Seidling was indicted in the United States District Court for the Western District of Wisconsin on fifty counts of mail fraud. The indictment alleged that Seidling "devised … a scheme to obtain money and property by means of false and fraudulent pretenses and representations," specifically, by "ma[king] false representations in Wisconsin small claims court actions" and "us[ing] the Wisconsin court system to obtain small claims judgments against individuals and corporations based on the false and fraudulent representations made in the lawsuits he filed." Three of the counts in the indictment were based on a small claims lawsuit Seidling filed against Stepan in

(continued)

¶6 On November 24, 2009, third parties alerted Stepan's attorney to the existence of the Dane County cases. The following day, Stepan moved to reopen the default judgments. She also filed an answer and counterclaim in each case and moved to consolidate the two cases and change venue to Douglas County, where she resided. Stepan's motions were granted, and the consolidated cases were transferred to Douglas County. They proceeded under WIS. STAT. chs. 801 to 847, rather than as small claims cases.

¶7 Stepan subsequently filed an amended answer, counterclaim, and third-party complaint in Douglas County circuit court. The amended counterclaim alleged that Seidling's conduct in filing the two small claims actions constituted an abuse of process, as well as a prohibited debt collection practice in violation of the Wisconsin Consumer Act. The third-party complaint asserted a claim against "Gregg Beckley," the purported signatory of the affidavits of nonservice that Seidling had caused to be filed in Dane County. Stepan sought compensatory damages, punitive damages, and actual attorney fees from both Seidling and Beckley.

¶8 Stepan subsequently moved for partial summary judgment with respect to liability on her third-party claim against Beckley. The circuit court, the Honorable John P. Anderson presiding, granted that motion at a hearing on June 30, 2010. Seidling appeared at the hearing pro se. At the close of the hearing, the court scheduled a pretrial motion hearing and scheduling conference

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Polk County. Seidling ultimately stipulated to the facts alleged in the indictment and was convicted of all fifty charges. His conviction was affirmed on appeal. *See* ***United States v. Seidling***, 737 F.3d 1155 (7th Cir. 2013).

for September 8, 2010 at 9:00 a.m. Two days later, the court sent the parties a written notice regarding the September 8 hearing.

¶9 On July 27, 2010, Seidling filed a third-party claim against Lisa Kusel, "Jane Doe, # 1, 2, 3, and 4," and "John Doe, # 1, 2, 3, and 4." On August 16, 2010, he moved for partial summary judgment on Stepan's counterclaim. Stepan filed a motion to compel discovery and a motion to compel Seidling to comply with "civil procedure and local rules." All of these motions were scheduled to be heard at the September 8 hearing.

¶10 On September 1, 2010, the Douglas County clerk of court received a letter from "R Johnson," which stated, in its entirety, "I have been served a summons and complaint, I am not John Doe rather I am R Johnosn [sic] and demand a new judge be assigned to hear this matter." (Capitalization altered.) The letter did not reveal the sender's full name. The only return address listed was a post office box in Eau Claire.

¶11 On September 8, 2010—the day of the pretrial motion hearing and scheduling conference—Seidling faxed the circuit court a document entitled "Withdrawal of Motion for Partial Summary Judgment Pending Assignment of Judge." The document stated:

> PLEASE TAKE NOTICE, that plaintiff hereby withdraws it's [sic] motion for partial summary judgment pending the assignment of a new judge based on the substitution request as filed in the Clerk[']s office pursuant to CCAP. Plaintiff has been informed that the hearing previously scheduled for this date can not be held until a new judge is assigned. Therefore, plaintiff will not travel the approximately 2 ½ hours to attend this hearing which he is advised can not be heard. In the event he is incorrectly informed he is available telephonically and respectfully requests the Court contact him at [toll-free telephone number].

¶12 The September 8 hearing remained on the calendar and proceeded as scheduled. Stepan and her attorney appeared at the hearing; Seidling did not, nor did "R Johnson" or any third-party defendant. During the hearing, the circuit court denied the substitution request purportedly filed by "R Johnson," noting that "R Johnson" was not a party to the action and, in any event, the request for substitution was not in the proper form and did not comply with statutory requirements. The court then addressed the fax it had received indicating Seidling did not intend to appear at the hearing, stating:

> [Seidling] inferred in his notice that he was told he didn't have to be here because nothing was going to be heard today. I asked the Deputy Clerk of Court to double-check with her office to see if anyone in the Clerk of Court's Office gave any direct or implied information, Mr. Seidling indicated he did not have to be here, and the Clerk of Court's Office emphatically indicated that did not happen. So why Mr. Seidling felt that he didn't have to be here today is a mystery to me.

¶13 The circuit court told Stepan's counsel it was "inclined" to grant a default judgment against Seidling due to his nonappearance, and it "would be willing to consider a request that he is in default." Although Stepan's counsel initially expressed some reluctance to move for default judgment, he ultimately did so. The court granted that motion and "set the matter for further proceedings regarding ultimate damages including punitive damages." The court subsequently entered a written order granting Stepan default judgment on her counterclaim and dismissing Seidling's claims against Stepan.

¶14 Thereafter, at a motion hearing on October 27, 2010, counsel for Stepan and Seidling informed the court they anticipated settling the case within the next forty-eight hours. Seidling asserts in his appellate brief that, later that day, the parties "completed their discussions and Ms. Stepan's attorney drafted a

settlement agreement and faxed it to Mr. Seidling's attorney." Seidling further asserts that, the following day, he and his attorney signed the agreement and faxed it to Stepan's attorney. However, neither Stepan nor her attorney signed the agreement. According to Seidling, the agreement required him to pay Stepan a certain amount of money "forthwith." Seidling asserts that, after the agreement was drafted, the parties disagreed about the meaning of the word "forthwith." Seidling apparently interpreted that word to mean he had twenty days to make the required payment, while Stepan believed he was required to make the payment within two or three days.

¶15 The circuit court held a hearing regarding the settlement agreement on November 17, 2010. The court refused Seidling's request to enforce the agreement, stating:

> I am satisfied that … while the parties may have reached at least some tentative understanding, no final agreement in my opinion has been reached, nothing has been signed, and I am satisfied this Court does not have the jurisdiction to interfere in due enforcement of an alleged agreement as a result of settlement negotiations.
>
> I am not allowed to get involved in settlement negotiations in any meaningful way. If it was a signed agreement that was approved by me and if enforcement was necessary that's a different story, but we don't have that.

At Seidling's request, the court ordered the written settlement agreement removed from the record.

¶16 The case then proceeded on the issue of Stepan's damages. However, on April 19, 2011, Seidling filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Southern District of Florida. The bankruptcy filing imposed an automatic stay on proceedings related to Stepan's counterclaim against Seidling. Just over two years later, the bankruptcy court issued an order

releasing Stepan from the automatic stay and allowing her to "proceed to liquidate her claim against [Seidling] in Wisconsin State Court." Although Stepan was permitted to "obtain a judgment against [Seidling] to the extent necessary to liquidate her claim," the order prohibited her from enforcing any claim against Seidling without the bankruptcy court's permission.

¶17 On November 7, 2013, Seidling moved to recuse Judge Anderson and to vacate the default judgment Judge Anderson had granted against him. The recusal motion was granted, and on November 11, 2013, the Honorable Robert E. Eaton was assigned to the case. The circuit court, Judge Eaton presiding, then held a hearing on Seidling's motion to vacate. Judge Eaton subsequently entered a written order denying that motion, in which he concluded Judge Anderson properly exercised his discretion by granting default judgment against Seidling.

¶18 A final hearing was held on March 5 and 6, 2015, to determine Stepan's damages. Following the hearing, both parties submitted briefs to the circuit court, as well as proposed findings of fact and conclusions of law. Stepan also submitted a supplemental request for attorney fees and costs.

¶19 On September 14, 2015, the circuit court entered a written order awarding Stepan a total of $122,735.51 in compensatory damages on her counterclaim. Specifically, the court awarded Stepan $25,000 for past and future pain and suffering related to emotional distress caused by Seidling's actions, and $97,735.51 in attorney fees and costs incurred to defend against Seidling's claims. The court also determined Stepan was entitled to $350,000 in punitive damages. However, pursuant to WIS. STAT. § 895.043(6), the court concluded it could not award punitive damages greater than twice the amount of Stepan's compensatory

damages. The court therefore reduced the award of punitive damages to $245,471.02.

¶20 The circuit court also determined Stepan was entitled to the remainder of her actual attorney fees and costs under two different theories. First, the court concluded Stepan was entitled to attorney fees and costs under WIS. STAT. § 425.308 due to Seidling's violation of the Wisconsin Consumer Act. Second, the court determined Stepan was entitled to attorney fees and costs under WIS. STAT. § 895.446 due to Seidling's attempted violation of WIS. STAT. § 943.20. The court further found that all of Stepan's claimed attorney fees and costs were reasonable and were actually incurred. It therefore awarded Stepan $177,948.32 in attorney fees and costs, which was the total amount claimed on the bill submitted during the final hearing, less the $97,735.51 already awarded as compensatory damages, less $47.50 in copying expenses that had been paid by Seidling's attorney. The court did not award any of the attorney fees or costs claimed in Stepan's supplemental fee request.

¶21 Additional facts are included in the discussion section as necessary.

DISCUSSION

I. Seidling's appeal

A. Refusal to enforce settlement agreement

¶22 Seidling first argues on appeal that the circuit court erred by refusing to enforce the parties' settlement agreement. The court refused to enforce the agreement based in part on its determination that there was no meeting of the minds between Seidling and Stepan with respect to settlement. For a contract to be formed, there must be a meeting of the minds upon all essential terms.

Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n, 238 Wis. 39, 42, 298 N.W. 226 (1941); *see also* ***Management Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996) ("Vagueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties' basic commitments and obligations."). Whether there has been a meeting of the minds is a question of fact. *See* ***Household Utils., Inc. v. Andrews Co.***, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1976). A circuit court's factual findings are upheld on appeal unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶23 Unfortunately, in this case, the record is insufficient for us to review the circuit court's finding that there was no meeting of the minds between Seidling and Stepan. The settlement agreement is not in the record; it was removed by the circuit court at Seidling's request. The parties did not present any testimony at the November 17, 2010 hearing regarding whether they intended to form an enforceable contract to settle Stepan's counterclaim against Seidling or the terms of such an agreement, if reached. The only document in the record that is related to the settlement agreement is a November 15, 2010 letter from Seidling's trial attorney to the circuit court, which purports to be a response to letters Stepan's counsel sent the court on November 9 and 15, 2010. The letters referred to in the November 15 correspondence are not in the record.

¶24 Given this lack of evidence, we cannot meaningfully review the circuit court's factual finding that there was no meeting of the minds regarding settlement. As the appellant, it was Seidling's burden to ensure the record was sufficient for us to review the issues he raised on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). We

assume that any missing materials support the circuit court's findings. *See* ***id.*** For that reason, we affirm the court's decision not to enforce the settlement agreement.

B. Grant of default judgment against Seidling

¶25 Seidling next argues the circuit court erred by granting default judgment against him on Stepan's counterclaim as a sanction for his failure to appear at the September 8, 2010 hearing. He contends the court, Judge Anderson presiding, failed to accord him due process and erroneously exercised its discretion by granting the default judgment. He also argues the court, Judge Eaton presiding, erroneously exercised its discretion by denying his motion to vacate the default judgment.

i. Due process

¶26 Seidling asserts Judge Anderson was objectively biased and, as a result, violated his right to due process by granting default judgment against him. We presume a judge acted fairly, impartially, and without prejudice. ***State v. Herrmann***, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772. A party may rebut that presumption by showing: (1) that there are objective facts demonstrating the judge in fact treated a party unfairly, ***id.***, ¶27; or (2) that the appearance of bias reveals a great risk of actual bias, ***id.***, ¶46. "[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***State v. Gudgeon***, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. Whether a judge was objectively biased is a question of law that we review independently. ***Herrmann***, 364 Wis. 2d 336, ¶23.

¶27 Seidling argues Judge Anderson's actions on four occasions demonstrate he was objectively biased. First, Seidling cites the following comments Judge Anderson directed toward him during the June 30, 2010 hearing:

> I already know that you are involved in other legal entities. I already know that. You have been in my courtroom. Now whether you have—you are involved in these other matters, I don't know yet. But if you are or have been, you had better be forthright about it. I don't want to be lied to.

These comments do not demonstrate objective bias. As of June 30, 2010, there was sufficient evidence in the record to provide a basis for Judge Anderson's concerns regarding Seidling's credibility. As one example, during the June 30 hearing, Seidling gave evasive answers when asked by the court whether he was "involved in any way regarding Diversified Services or MAW Expressways as an unincorporated partnership, LLC, or sole proprietorship." During the same hearing, the court granted a motion to compel filed by Stepan, which alleged Seidling had failed to reasonably respond to Stepan's discovery requests. Because there was a reasonable basis for Judge Anderson's warning to Seidling about the need to be forthright in court proceedings, Judge Anderson's comments do not show that he was objectively biased against Seidling.

¶28 Seidling next cites Judge Anderson's comments during the September 8, 2010 hearing at which default judgment was granted. In particular, Seidling notes it was Judge Anderson, not Stepan, who initially raised the possibility of granting default judgment as a sanction for Seidling's failure to appear. However, none of Judge Anderson's comments during the September 8 hearing convince us the court was objectively biased against Seidling. As we explain in the next section of this opinion, the record indicates that Judge

Anderson appropriately granted default judgment as a sanction for Seidling's nonappearance. *See infra*, ¶¶32-45.

¶29 Seidling also claims several comments Judge Anderson purportedly made during a December 3, 2010 hearing demonstrate objective bias. However, the record does not contain a transcript of that hearing. Instead, Seidling cites a copy of an incomplete hearing transcript included in his brief's appendix. An appendix is not the record, *see* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322, and a party may not use his or her brief's appendix to supplement the record, *see* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). It was Seidling's burden to ensure the record was sufficient for us to review the issues he raised on appeal. *See* ***State Bank of Hartland***, 129 Wis. 2d at 423. Because he has failed to do so, we reject his claim that the circuit court's purported comments during the December 3 hearing demonstrate objective bias.

¶30 Finally, Seidling cites Judge Anderson's decision to recuse himself as evidence of bias. However, the record does not contain any explanation for that decision. Moreover, Seidling does not cite any authority for the proposition that a judge's ultimate decision to recuse him- or herself is evidence the judge was objectively biased against a litigant at the time an earlier decision was made.

¶31 For the foregoing reasons, we reject Seidling's argument that Judge Anderson was objectively biased and therefore violated Seidling's right to due process by granting default judgment against him. Seidling has demonstrated neither actual bias, nor any appearance of bias that reveals a great risk of actual bias. *See* ***Herrmann***, 364 Wis. 2d 336, ¶46.

ii. Erroneous exercise of discretion

¶32 Seidling next argues Judge Anderson erroneously exercised his discretion by granting default judgment as a sanction for Seidling's failure to appear at the September 8 hearing. *See* ***Smith v. Golde***, 224 Wis. 2d 518, 525, 592 N.W.2d 287 (Ct. App. 1999) (decision to enter default judgment reviewed under erroneous exercise of discretion standard). A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrated rational process to reach a reasonable conclusion. ***Id.***

¶33 The circuit court had authority to grant default judgment against Seidling as a sanction for his nonappearance at the September 8 hearing under WIS. STAT. § 805.03, which states in relevant part:

> **Failure to prosecute or comply with procedure statutes.** For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).[3] Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.

In addition to this statutory authority, a circuit court also has inherent authority to grant default judgment as a sanction for failure to comply with its orders. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768 ("[A] circuit court has both inherent authority and statutory authority under WIS. STAT. § … 805.038 to sanction parties for failing to obey court orders. … Pursuant to

[3] The orders authorized under WIS. STAT. § 804.12(2)(a) include orders "rendering a judgment by default against the disobedient party." Sec. 804.12(2)(a)3.

this authority, a circuit court may enter a default judgment against a party that fails to comply with a court order.").

¶34 A circuit court can properly impose default judgment as a sanction when: (1) the party against whom the sanction is imposed had notice that default judgment was a possible sanction for his or her conduct, *see* ***East Winds Props., LLC v. Jahnke***, 2009 WI App 125, ¶14, 320 Wis. 2d 797, 772 N.W.2d 738; and (2) the party's conduct was egregious, and there was no clear and justifiable excuse for the party's noncompliance, *see* ***Theis v. Short***, 2010 WI App 108, ¶6, 328 Wis. 2d 162, 789 N.W.2d 585. Both of these elements are satisfied in the instant case.

¶35 Seidling argues he did not have notice that default judgment was a possible sanction for his nonappearance at the September 8 hearing because Judge Anderson "did not give [him] either a written or oral warning of the possibility of a default in the event he failed to appear." However, an express written or oral warning from the court was not required. In ***Trispel v. Haefer***, 89 Wis. 2d 725, 736, 279 N.W.2d 242 (1979), our supreme court held that the existence of WIS. STAT. § 805.03, in and of itself, is "sufficient notice to attorneys practicing in this state of the action which a court may take after a party's failure to comply with pre-trial orders."[4]

[4] Although Seidling was self-represented at the time of the September 8 hearing, pro se litigants are held to the same standards and are bound by the same rules as attorneys. *See* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992). Moreover, the record reflects that Seidling is an experienced litigant who has filed numerous actions in Wisconsin circuit courts.

¶36 Thereafter, in ***Neylan v. Vorwald***, 124 Wis. 2d 85, 368 N.W.2d 648 (1985), the court distinguished the type of notice required when sanctions are imposed for failure to prosecute from the type of notice required when sanctions are imposed for failure to comply with a court's orders. The ***Neylan*** court concluded that "actual notice" is required when a sanction is imposed for failure to prosecute because WIS. STAT. § 805.03 "does not state any time limit within which trial must proceed after commencement of the action and therefore does not import any constructive knowledge to litigants or their counsel of the outside time limits a court will consider as being a 'failure to prosecute[.]'" ***Neylan***, 124 Wis. 2d at 92-93. Conversely, in cases involving sanctions for failure to comply with a court's orders, the "constructive notice" provided by § 805.03 is sufficient to satisfy due process because the objectionable conduct—failure to comply with a court order—is "precise and ascertainable by a party." ***Neylan***, 124 Wis. 2d at 90, 93. We subsequently reiterated this principle in ***Buchanan v. General Casualty Co.***, 191 Wis. 2d 1, 12, 528 N.W.2d 457 (Ct. App. 1995), stating:

> [I]t is well settled that when a court imposes sanctions for failure to comply with a court order under § 805.03 … no prior notice is required. Instead, the statute provides sufficient notice to parties practicing law in this state that a trial court may dismiss a claim for noncompliance with its orders.

(Citations omitted.)

¶37 Here, the circuit court did not grant default judgment against Seidling as a sanction for failure to prosecute. Instead, it granted default judgment as a sanction for his failure to comply with a court order—that is, an order to appear at the September 8 hearing. As a result, actual notice of the possible

sanctions for nonappearance was not required, and the constructive notice provided by WIS. STAT. § 805.03 was sufficient.[5]

¶38 We further conclude Seidling's failure to appear at the September 8 hearing was egregious, and he lacked a clear and justifiable excuse for his nonappearance.[6] *See* ***Theis***, 328 Wis. 2d 162, ¶6. Seidling knew he needed to appear in person for the September 8 hearing. He was orally advised of the date and time of the hearing on June 30, and he received a written notice of the hearing shortly thereafter. During the June 30 hearing, he asked for permission to attend the September 8 hearing by telephone, and the circuit court expressly denied that request.

[5] Moreover, Seidling was given additional constructive notice that he could be sanctioned for failing to appear at the September 8 hearing by Douglas County Circuit Court Rule 214(2), which provides:

> Promptness of Proceedings. Attorneys and parties shall be prepared to proceed at the time matters are scheduled. Failure to proceed on time may be grounds for sanctions (including but not limited to costs, dismissal, judgment and ruling against the late party on the particular matter before the Court).

See Douglas County Circuit Court Rules, Rule 214(2), http://www.wisbar.org/Directories/CourtRules/Wisconsin%20Circuit%20Court%20Rules/Douglas%20County%20Circuit%20Court%20Rules.pdf.

[6] When granting default judgment against Seidling, Judge Anderson appropriately concluded there was no clear and justifiable excuse for Seidling's failure to appear at the September 8 hearing. *See supra*, ¶12. However, Judge Anderson did not expressly address whether Seidling's conduct was egregious. Nevertheless, the decision to grant default judgment is discretionary, ***Smith v. Golde***, 224 Wis. 2d 518, 525, 592 N.W.2d 287 (Ct. App. 1999), and when a circuit court fails to explain its reasons for a discretionary decision, we may independently review the record to determine whether it supports the court's exercise of discretion, ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). Here, the record supports a conclusion that Seidling's failure to appear at the September 8 hearing was egregious.

¶39 Nevertheless, on September 8—the day of the scheduled hearing—Seidling faxed the circuit court a document withdrawing his motion for partial summary judgment "pending assignment of judge." Seidling asserted he had been "informed" by an unspecified source "that the hearing previously scheduled for this date can not be held until a new judge is assigned." Seidling therefore stated he would not attend the scheduled hearing but would be available by telephone.

¶40 Seidling's alleged belief that he did not need to attend the September 8 hearing based on a nonparty's request for judicial substitution was unreasonable. Seidling did not receive any communication from the circuit court indicating that request had been granted. Moreover, Judge Anderson inquired at the clerk of court's office and determined no one from that office had told Seidling he did not need to attend the hearing. Further, although Seidling stated in his September 8 fax that he would be available to attend the hearing by phone, the Douglas County Circuit Court Rules specifically inform litigants that the use of telephone conferencing for non-evidentiary motion hearings is permitted only upon express permission of the court, and a request to appear by telephone must be made more than seventy-two hours before the scheduled hearing. *See* Douglas County Circuit Court Rules, Rule 216(1), http://www.wisbar.org/Directories/CourtRules/Wisconsin%20Circuit%20Court%20Rules/Douglas%20County%20Circuit%20Court%20Rules.pdf.

¶41 We have previously found conduct similar to Seidling's to be egregious and without a clear and justifiable excuse. In ***Buchanan***, an insurer sent a letter to the circuit court prior to trial indicating that, because its interests in the matter were limited to a subrogation claim, it did not intend to appear at trial unless it "hear[d] otherwise" from the court. ***Buchanan***, 191 Wis. 2d at 6. On the

first day of the scheduled trial, the circuit court dismissed the insurer's subrogation claim as a sanction for its failure to appear. ***Id.*** at 7.

¶42 On appeal, we agreed with the circuit court that the insurer's conduct was egregious and there was no clear and justifiable excuse for its nonappearance. We explained:

> A party failing to appear in court does so at its own peril. A party cannot choose to not appear in court by pronouncing that unless it hears from the court otherwise, it deems itself excused. Writing such a letter is insufficient to excuse a party from appearing and, as this case shows, is a dangerous practice.
>
> HMO's letter stated that it would assume it was excused from appearing unless it heard otherwise from the trial court and that HMO would remain available during the trial and await the trial outcome. HMO contends that this is an offer to make itself available by telephone in accordance with the trial court's condoned practice. We disagree.

Id. at 11. We then quoted with approval the following passage from the circuit court's decision:

> Attorneys often send letters to one another and judges, which attempt to shift the burden of a response to the recipient. It is one thing, for example, to write a letter to the judge, stating, "In accordance with the usual practice of the court, I will assume that I may appear by telephone for the scheduling conference unless I am hereafter advised to the contrary." It is entirely another to write, "I will assume that I am excused from the trial unless the court hereafter advises me to the contrary." *While the former example is common and condoned by this court and many others, the latter is presumptuous and discourteous and finds no basis in any rule of procedure.*

Id. at 11-12 (emphasis in ***Buchanan***).

¶43 Seidling's conduct here is similar to the insurer's conduct in ***Buchanan***. Seidling knew there was a hearing scheduled for September 8. He

made a request to appear at the September 8 hearing by telephone, which was expressly denied. He then waited until the day of the hearing (which was scheduled for 9:00 a.m.) to inform the court he would not appear in person but would be available by telephone. This was contrary to the court's prior denial of Seidling's request to appear by telephone, as well as Douglas County Circuit Court Rule 216(1). Like the insurer in ***Buchanan***, Seidling's conduct was presumptuous and discourteous. Moreover, his alleged belief that he did not need to attend the September 8 hearing due to a judicial substitution request filed by a nonparty was unfounded and unreasonable and, as such, does not constitute a clear and justifiable excuse for his failure to appear.

¶44 Seidling argues his failure to appear at the September 8 hearing was not egregious because he committed only a single violation of the circuit court's orders. However, the ***Buchanan*** court affirmed a similar sanction based on a party's single failure to appear. In addition, while Seidling cites one case in which a court found egregious conduct based on repeated violations of procedural rules, he does not cite any authority for the proposition that egregious conduct cannot be based on a single violation. We therefore reject Seidling's claim that his failure to appear at the September 8 hearing was not egregious.

¶45 In summary, we conclude Seidling had constructive notice that his failure to appear at the September 8 hearing could result in the entry of default judgment against him, and we further conclude Seidling's failure to appear was egregious and lacked a clear and justifiable excuse. Under these circumstances, Judge Anderson properly exercised his discretion by granting default judgment against Seidling.

iii. Denial of Seidling's motion to vacate

¶46 Seidling also asserts Judge Eaton erred by denying his motion to vacate the default judgment granted by Judge Anderson. Whether to grant relief from judgment under WIS. STAT. § 806.07(1) is within the circuit court's discretion. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We observe that Seidling did not cite § 806.07(1) in his motion to vacate the default judgment or discuss the standards applicable to a motion filed under that subsection. Instead, his motion to vacate argued Judge Anderson erred by granting the default judgment because Seidling did not have notice default judgment was a possible sanction for nonappearance and because Seidling's conduct was not egregious. We have already addressed and rejected those arguments. *See supra*, ¶¶34-45.

¶47 On appeal, Seidling contends Judge Eaton "did not apply the proper legal analysis for reviewing a default judgment" when denying his motion to vacate. He asserts Judge Eaton should have considered whether Judge Anderson addressed the five factors set forth in ***Miller***, namely:

> whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id., ¶36 (quoting ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶11, 282 Wis. 2d 46, 698 N.W.2d 610). However, the ***Miller*** factors apply when a court considers whether to grant relief from a judgment under WIS. STAT. § 806.07(1), not when a

court is determining whether to grant default judgment in the first place. *See* ***Miller***, 326 Wis. 2d 640, ¶36. Accordingly, Judge Anderson was not required to address the ***Miller*** factors when deciding whether to grant default judgment against Seidling.

¶48 To the extent Seidling intends to argue that Judge Eaton erred by failing to consider the ***Miller*** factors, we observe Seidling did not cite ***Miller*** in his motion to vacate the default judgment, much less argue to Judge Eaton that he should apply the ***Miller*** factors. As noted above, Seidling's motion to vacate did not even cite WIS. STAT. § 806.07(1). "Arguments raised for the first time on appeal are generally deemed forfeited." ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810. "We will not ... blindside [circuit] courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).[7]

¶49 Regardless, when a circuit court sets forth inadequate reasons for its decision denying a motion for relief from judgment, we may independently review the record to determine whether it provides a reasonable basis for the court's

[7] Seidling also argues Judge Eaton erred by failing to "conduct either an objective bias or a demonstrated rational process review." Again, Seidling did not raise those arguments in the circuit court. His motion to vacate simply argued Judge Anderson erroneously exercised his discretion by granting the default judgment because: (1) Seidling did not have notice that entry of default judgment was a possible sanction for nonappearance; and (2) Seidling's failure to appear at the September 8, 2010 hearing was not egregious. Judge Eaton addressed and rejected those arguments.

Admittedly, Seidling's motion to vacate was combined with a motion to recuse Judge Anderson, which *did* assert Judge Anderson was biased. However, Seidling did not tie his judicial bias argument to his argument that the circuit court should vacate the default judgment. Moreover, Judge Anderson had already recused himself by the time the motion to vacate was considered, and Seidling did not raise any judicial bias argument during the hearing before Judge Eaton regarding the motion to vacate.

decision. *See* ***Miller***, 326 Wis. 2d 640, ¶47. Here, the ***Miller*** factors support Judge Eaton's decision to deny Seidling relief from the default judgment. First, the default judgment was the result of Seidling's deliberate choice not to attend the September 8, 2010 hearing. *See* ***id.***, ¶36. Second, Seidling represented himself at the time the default judgment was entered. *See* ***id.*** Third, although Judge Anderson did not consider the merits of Stepan's counterclaim before entering the default judgment, Seidling does not explain why "the merits and the interest of deciding [this] case on the merits outweigh[] the finality of judgments," particularly given that Seidling has now admitted committing the acts alleged in Stepan's counterclaim. *See* ***id.*** Fourth, Seidling has essentially conceded on appeal that he does not have a meritorious defense to Stepan's counterclaim for abuse of process. *See* ***id.*** Fifth, the record demonstrates that it would be inequitable to grant relief from the default judgment. *See* ***id.*** On the whole, our independent consideration of these factors demonstrates that Judge Eaton did not erroneously exercise his discretion by refusing to vacate the default judgment.

C. Award of attorney fees and costs as compensatory damages

¶50 Seidling next argues the circuit court erred by awarding Stepan $97,735.51 in attorney fees and costs as compensatory damages. Seidling concedes Stepan was entitled to recover as compensatory damages the reasonable attorney fees and costs she incurred to defend against his claims. *See* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 572-73, 547 N.W.2d 592 (1996) (tort victim may recover as compensatory damages attorney fees incurred to remedy the tortfeasor's improper actions). However, he argues the amount of attorney fees and costs awarded by the circuit court was unreasonable.

¶51 A circuit court's determination as to the amount of a party's reasonable attorney fees and costs will be upheld on appeal absent an erroneous exercise of discretion. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). Here, in determining the amount of attorney fees and costs Stepan could recover as compensatory damages, the circuit court began by finding that Stepan's counsel's hourly rate of $300, while higher than rates normally charged in Douglas County, was reasonable given the complexity of the case, counsel's "thorough presentation," and the fact that counsel's "devotion to this case likely prevented him from taking on other work." The court next acknowledged that Stepan could "only recover attorney fees as compensatory damages for those hours devoted to the defense of the underlying complaint, not for the time devoted to the counterclaim." Accordingly, the court explained it had "analyzed [counsel's] bill, determined what work was devoted to defending Seidling's claim, excluded the time working on the counterclaim, and split in half the time it appeared [counsel] was working on both claims simultaneously." Using this procedure, the court determined Stepan's counsel had "worked 319.35 hours on defending against Seidling's claim," which resulted in a total of $95,805 in attorney fees.

¶52 The circuit court acknowledged this amount was more than three times the damages it had awarded Stepan for pain and suffering.[8] However, based on the factors set forth in WIS. STAT. § 814.045(1), the court determined the attorney fee award was nevertheless reasonable because

[8] *See* WIS. STAT. § 814.045(2)(a) (When compensatory damages are awarded, a court "shall presume that reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded," but the presumption may be overcome if the court determines a greater amount is reasonable after considering the factors set forth in § 814.045(1).).

> [t]he time and labor needed was significant, particularly in light of Seidling's deceit; difficult questions of fact and law were involved; skill with attention to detail was required; it is likely that accepting this case precluded the attorney from other employment; the Court knows of few other attorney[s] who would attempt this litigation; the fee billed is not far off from other rates in the area; damages in the case are substantial; the result obtained was completely favorable for Stepan; the fee is fixed, rather than contingent; the case was complex; and it was through thorough and diligent effort that the illegitimate claims of Seidling were defeated.

The court further found Stepan had incurred reasonable costs in the amount of $1,930.51 in her defense against Seidling's claims.

¶53 As the above summary shows, the circuit court explained in detail its reasons for awarding Stepan $97,735.51 in attorney fees and costs as compensatory damages. The court examined the relevant facts, applied a proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. *See* ***Smith***, 224 Wis. 2d at 525. As such, we conclude the court properly exercised its discretion.

¶54 Seidling argues the circuit court erroneously exercised its discretion because it was unreasonable for Stepan's attorney to devote more than three hundred hours and to incur nearly $2000 in costs to defend against two small claims tort cases. Seidling also asserts the court "conflated the attorney time spent prosecuting [Stepan's] counterclaim with the attorney time spent defending against [Seidling's] original claims."

¶55 These arguments are inadequately developed. The circuit court's decision demonstrates that it analyzed the bills submitted by Stepan's attorney line-by-line and determined 319.35 hours were attributable to the defense of Seidling's claims. Seidling does not identify which of those hours he believes

were actually attributable to the prosecution of Stepan's counterclaim. Moreover, aside from conclusory assertions, Seidling does not present a developed response to the circuit court's determination that the defense of his claims presented complex issues that justified an expenditure of over three hundred hours of attorney time. He also fails to explain why any of the costs awarded by the court were either excessive or unrelated to Stepan's defense of his claims. We therefore decline to address Seidling's argument that the court erroneously exercised its discretion by awarding Stepan $97,735.51 in attorney fees and costs as compensatory damages. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address inadequately developed arguments).

D. Punitive damages

¶56 Seidling also argues the circuit court erroneously exercised its discretion with respect to the punitive damages award. He acknowledges Stepan was entitled to some amount of punitive damages. However, he asserts the amount awarded by the circuit court was excessive.[9]

[9] The parties disagree about the standard we should use to review the punitive damages award. Seidling asserts we should review the award under the erroneous exercise of discretion standard, while Stepan argues we should review the amount of the award de novo. In ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997), our supreme court stated an award of punitive damages is "entirely within the discretion of" the factfinder. However, the court subsequently clarified that, while a factfinder's decision to award punitive damages is accorded deference, "the size of the award … is subject to de novo review to ensure it accords with the constitutional limits of due process." ***Kimble v. Land Concepts, Inc.***, 2014 WI 21, ¶38, 353 Wis. 2d 377, 845 N.W.2d 395.

(continued)

¶57 ***Kimble v. Land Concepts, Inc.***, 2014 WI 21, ¶47, 353 Wis. 2d 377, 845 N.W.2d 395, sets forth six factors a court should consider in determining whether a punitive damages award is excessive: (1) the grievousness of the acts; (2) the degree of malicious intent; (3) whether the award bears a reasonable relationship to the award of compensatory damages; (4) the potential damage that might have been caused by the acts; (5) the ratio of the award to potential civil or criminal penalties for comparable misconduct; and (6) the wrongdoer's wealth. The ***Kimble*** court analyzed the first two of these factors—grievousness and malicious intent—together under the subheading "Reprehensibility." ***Id.***, ¶48. Relying on United States Supreme Court precedent, the court listed the following factors that are relevant to the reprehensibility determination:

> [W]hether … the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id., ¶49 (quoting ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 419 (2003)).

¶58 Based on the ***Kimble*** factors, we conclude the circuit court properly exercised its discretion by determining Stepan was entitled to $350,000 in punitive

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Seidling does not argue the circuit court's punitive damages award violated his constitutional right to due process. Instead, he argues the court erroneously exercised its discretion because it failed to consider some of the factors set forth in ***Kimble*** and because its determinations with regard to other factors were not supported by the record. In light of Seidling's failure to raise a due process argument, and given his assertion that we should apply a discretionary standard of review, we will review the punitive damages award for an erroneous exercise of discretion. However, we observe that, even if we were to review the award de novo, we would nevertheless affirm it.

damages.[10] With respect to the first two ***Kimble*** factors, the court found that Seidling's conduct toward Stepan was egregious. It noted Seidling "did not merely engage in sharp business practice or cross an ethical line on one occasion," he "systematically engaged in fraudulent conduct using the court system as an unwitting tool in the persecution of his victims." The court further stated Seidling "deceived the courts of this State to trample on" his victims' rights. The court observed that Stepan experienced "personal pain and suffering" due to Seidling's actions, and she "did not just suffer momentarily." The court also found that Seidling acted with malicious intent and "may have been motivated by Stepan's successful defense of her rights in an earlier claim to make her a victim of his criminal scheme."

¶59 The circuit court next considered the fifth ***Kimble*** factor—the ratio of the award to potential civil or criminal penalties for comparable misconduct. *See* ***id.***, ¶47. The court noted that, had Seidling's conduct been charged in state court as false swearing, he could have been fined up to $500,000.

¶60 Lastly, the circuit court addressed the sixth ***Kimble*** factor—Seidling's wealth—which the court described as "a bit of a moving target." The court observed that Seidling appeared to have transferred title to some of his property to others. The court also observed that Seidling had ownership interests in multiple business entities. Nonetheless, the court stated it was satisfied that,

[10] As noted above, the circuit court determined Stepan was entitled to $350,000 in punitive damages, but it awarded her only $245,471.02 because it concluded punitive damages were limited to two times the amount of the compensatory damages. *See supra*, ¶19. As we explain below, that conclusion was erroneous. *See infra*, ¶¶73-74. We therefore consider, in this section of the opinion, whether the court properly determined Stepan was entitled to $350,000 in punitive damages.

whatever the net value of Seidling's assets might be, he "owns property valued in the millions of dollars." The court refused to speculate about the outcome of Seidling's bankruptcy case, stating that, although the debt Seidling owed Stepan might be dischargeable, and although Seidling's ex-wife might have a valid prior interest in his assets, those issues were "not for this court to decide."

¶61 The circuit court's written decision demonstrates that it applied the relevant facts to the proper legal standard and used a rational process to reach a reasonable conclusion regarding the amount of punitive damages. *See* ***Smith***, 224 Wis. 2d at 525. Although the court did not address the third and fourth ***Kimble*** factors, "Wisconsin courts are called upon to analyze only 'those factors which are most relevant to the case, in order to determine whether a punitive damages award is excessive.'" ***Kimble***, 353 Wis. 2d 377, ¶47 (quoting ***Trinity Ev. Luth. Church & Sch.—Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶53, 261 Wis. 2d 333, 661 N.W.2d 789). Moreover, when a circuit court sets forth inadequate reasons for a discretionary decision, we may independently review the record to determine whether it provides a reasonable basis for the court's decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). Here, we independently conclude the third and fourth ***Kimble*** factors support an award of $350,000 in punitive damages.

¶62 The third ***Kimble*** factor directs us to consider whether an award of punitive damages "bears a reasonable relationship to the award of compensatory damages." ***Kimble***, 353 Wis. 2d 377, ¶47. The circuit court awarded Stepan $122,735.51 in compensatory damages. An award of $350,000 in punitive damages is slightly less than three times that amount. In ***Kimble***, our supreme court determined a 3:1 ratio of punitive damages to compensatory damages was reasonable. *See* ***id.***, ¶71. In ***Trinity***, the court upheld an award of punitive

damages that bore a 7:1 ratio to the compensatory damages. *See* ***Trinity***, 261 Wis. 2d 333, ¶¶65, 69. ***Kimble*** and ***Trinity*** therefore support a conclusion that the punitive damages awarded in this case were reasonably related to the compensatory damages.

¶63 The fourth ***Kimble*** factor requires us to consider the potential damage that might have been caused by Seidling's acts. *See* ***Kimble***, 353 Wis. 2d 377, ¶47. Seidling argues the only potential harm his acts could have caused Stepan is that she "would have paid … $10,000 in wrongful judgments." However, Seidling ignores the fact that his actions actually did cause Stepan pain and suffering, for which the circuit court awarded her $25,000 in damages. Seidling also ignores the fact that Stepan incurred substantial attorney fees and costs to defend against his improperly filed claims. The harm that could have been—and actually was—caused by Seidling's acts was therefore significantly greater than the potential obligation to pay $10,000 in wrongful judgments.

¶64 Seidling claims the circuit court erroneously exercised its discretion with respect to punitive damages for four additional reasons. First, he asserts the court failed to consider all five of the "reprehensibility" factors set forth in ***Kimble***. *See* ***id.***, ¶49. Specifically, he contends the court failed to consider whether the harm caused by his conduct was physical, as opposed to economic; whether his conduct evinced an indifference to or a reckless disregard for the health or safety of others; and whether Stepan was financially vulnerable. *See* ***id.*** However, Seidling does not cite any authority supporting the proposition that a court is *required* to address all five of the "reprehensibility" factors set forth in ***Kimble*** when awarding punitive damages. Moreover, to the extent Seidling argues this case does not involve physical harm or an indifference to the health or safety of others, we observe that the circuit court awarded Stepan $25,000 in damages for

past and future pain and suffering. This indicates Seidling's conduct caused more than just economic harm. The record also supports a conclusion that, in filing the Dane County lawsuits, Seidling was indifferent to the effect his conduct would have on Stepan's emotional wellbeing.

¶65 Second, Seidling cites ***Kimble*** for the proposition that a court may only award a "high" ratio of punitive damages to compensatory damages in cases involving physical harm and an indifference to the health or safety of others. Again, this argument fails to acknowledge that the circuit court awarded Stepan $25,000 for pain and suffering. More importantly, while the ***Kimble*** court stated the circumstances of that case did not warrant a "high ratio punitive damages award" because the harm was economic rather than physical and the defendant's conduct did not evince an indifference to or reckless disregard for others' health or safety, ***id.***, ¶66, the court went on to conclude that a 3:1 ratio of punitive damages to compensatory damages was appropriate under the circumstances, ***id.***, ¶71. As noted above, the ratio of punitive to compensatory damages in this case is slightly less than 3:1.

¶66 Third, Seidling argues the circuit court could not award $350,000 in punitive damages because it did not have enough information to ascertain his net worth. This argument is unpersuasive. Although the court may not have been able to determine Seidling's net worth with precision, the record indicates it had enough information about his finances to determine that he had the ability to pay the award, and that the size of the award was sufficient in proportion to his wealth to deter further wrongdoing.

¶67 Fourth, Seidling argues the circuit court gave improper weight to the potential $500,000 criminal penalty for false swearing. He observes that, although

Kimble directs courts to consider the potential civil and criminal penalties for a defendant's wrongful conduct, *see* ***id.***, ¶47, it also states "a criminal penalty has 'less utility' when used to determine the dollar amount of the punitive damages award," ***id.***, ¶69 (quoted sources omitted). However, the ***Kimble*** court ultimately clarified that "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." ***Id.***, ¶69 (quoted source omitted). Here, the existence of a $500,000 criminal penalty shows that the state views Seidling's conduct as particularly egregious. Along with the other ***Kimble*** factors, this supports the circuit court's determination that Seidling's conduct warranted awarding Stepan $350,000 in punitive damages.

E. Actual attorney fees and costs

¶68 Seidling's final argument on appeal is that the circuit court erred by awarding Stepan actual attorney fees and costs. As discussed above, after awarding Stepan $97,735.51 in attorney fees and costs as compensatory damages, the circuit court awarded her the remainder of her claimed attorney fees and costs, less $47.50 in copying expenses, pursuant to two different theories. We agree with the circuit court that Stepan was entitled to attorney fees and costs under WIS. STAT. § 425.308 due to Seidling's violation of the Wisconsin Consumer Act. Accordingly, we need not address the court's alternative rationale that Stepan was entitled to attorney fees and costs under WIS. STAT. § 895.446. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court of appeals need not address all issues raised by parties when one is dispositive of the appeal).

¶69 Stepan's counterclaim alleged that: (1) the underlying transaction between Stepan and Seidling was a consumer credit transaction under the Consumer Act; (2) in his dealings with Stepan, Seidling "acted in the course of his

business purpose to buy and sell real estate" and therefore qualified as a "merchant" under the Consumer Act; (3) Stepan qualified as a consumer for purposes of the Consumer Act; (4) Seidling's actions toward Stepan constituted prohibited debt collection practices; and (5) Stepan was therefore entitled to "damages, penalties and actual reasonable attorney fees" as provided in the Consumer Act. By virtue of the default judgment entered against him on Stepan's counterclaim, Seidling lost his right to challenge these allegations. Accordingly, pursuant to WIS. STAT. § 425.308, the circuit court properly awarded Stepan actual attorney fees and costs on her counterclaim.

¶70 Seidling argues the allegations regarding the Consumer Act in Stepan's counterclaim are legal conclusions, rather than assertions of fact. Citing ***Klaus v. Vander Hayden***, 106 Wis. 2d 353, 359-60, 316 N.W.2d 664 (1982), he argues a default judgment is only conclusive with respect to facts pleaded in a complaint, not legal conclusions. He asserts the factual allegations in Stepan's counterclaim are insufficient to establish a Consumer Act violation.

¶71 This argument is unpersuasive. The issue in ***Klaus*** was whether a default judgment granted against a receiver, which declared that the receiver had no interest in a certain property and was "forever barred from any estate or interest in the property, or the proceeds thereof," barred a successor receiver's suit for an accounting of the profits from the sale of the property. ***Id.*** at 356, 358. In addressing that issue, our supreme court observed that, as a general rule, a court "may grant such relief as it feels a party is entitled to, even if such relief has not been demanded." ***Id.*** at 359. However, "[i]n the case of a default judgment, relief is limited to that which is demanded in the plaintiff's complaint." ***Id.*** Stated differently, the "conclusiveness of a default judgment is limited to the material issuable facts which are well pleaded in the declaration or complaint. The

judgment does not extend to issues which were not raised in the pleadings." ***Id.*** at 359-60. With these principles in mind, the ***Klaus*** court analyzed the relief requested in the complaint filed in the earlier suit and concluded the "interest in profits from the proceeds of the future sale of the property was before the court" at the time the default judgment was entered. ***Id.*** at 360-61, 366. As a result, the court concluded the default judgment barred the successor receiver's suit under the doctrine of res judicata. ***Id.*** at 367-68.

¶72 When the ***Klaus*** court stated the conclusiveness of a default judgment is limited to "the material issuable facts" pled in the complaint, it was not, as Seidling asserts, drawing a distinction between factual assertions and legal conclusions. *See* ***id.*** at 359-60. It was instead drawing a distinction between issues raised in the complaint and issues not raised in the complaint. *See* ***id.*** at 360. Here, Stepan clearly raised the issue of Seidling's Consumer Act violation in her amended counterclaim. Accordingly, ***Klaus*** does not support Seidling's argument that the default judgment on the counterclaim was not conclusive as to the Consumer Act violation. Seidling does not cite any other authority in support of that proposition. We therefore reject his argument and, for the reasons stated above, *see supra*, ¶69, conclude the circuit court properly awarded Stepan actual attorney fees and costs based on Seidling's violation of the Consumer Act.[11]

[11] An argument could be made that the circuit court should have attempted to differentiate between the attorney fees specifically incurred in connection with Stepan's allegation that Seidling violated the Consumer Act and the fees incurred in connection with her abuse of process claim and awarded only those fees related to the Consumer Act claim. However, Seidling does not raise that argument on appeal, and we refuse to develop it for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (court of appeals will not abandon its neutrality to develop arguments for the parties).

II. Stepan's cross-appeal

A. Limitation of punitive damages

¶73 In her cross-appeal, Stepan first argues the circuit court erred by limiting its award of punitive damages to two times the amount of compensatory damages—or $245,471.02. Although the court determined an award of $350,000 in punitive damages was appropriate, it concluded it could not award that amount due to WIS. STAT. § 895.043(6), which limits punitive damages to "twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater."

¶74 As Stepan notes, WIS. STAT. § 895.043(6) was created by 2011 Wis. Act 2, § 23M. Act 2 provides that § 895.043(6) first applies to actions or special proceedings commenced on the act's effective date—February 1, 2011. *See* 2011 Wis. Act 2, § 45(5); *see also* WIS. STAT. § 991.11 (Unless otherwise specified, the effective date of an act is the day after publication.). Stepan's counterclaim was filed on December 10, 2009, before § 895.043(6) went into effect. Consequently, as Seidling concedes, the statutory limitation on punitive damages does not apply to Stepan's counterclaim. We therefore reverse the award of punitive damages and remand with directions that the circuit court award Stepan punitive damages in the amount of $350,000—the amount the court stated it would have awarded absent the limitation in § 895.043(6).

B. Failure to consider Stepan's supplemental request for attorney fees and costs

¶75 Stepan also argues the circuit court erred by failing to consider her supplemental request for attorney fees and costs, which she submitted after the final hearing on damages but before the court issued its written decision. Stepan

notes that the court indicated in its written decision that it intended to award her all of her attorney fees and costs. Stepan therefore argues "[t]he omission of the fees itemized in [her] supplement is only reasonably understood as a plain error of oversight."

¶76 We conclude, however, that there are two possible reasons the circuit court could have failed to award Stepan the attorney fees and costs claimed in her supplemental request. First, as Stepan asserts, the court could have inadvertently failed to address the supplemental request. Second, the court could have considered the request and deliberately rejected it, but failed to explain its reasons for doing so. On the record before us, we cannot determine which of these possibilities is the actual reason for the court's failure to award Stepan the additional attorney fees and costs she requested. We therefore remand for the court to address Stepan's supplemental request. If the court previously considered Stepan's supplemental request and deliberately declined to award her the fees and costs claimed therein, it must explain its reasons for doing so on the record.

¶77 Stepan may recover her appellate costs in both the appeal and cross-appeal. *See* WIS. STAT. RULE 809.25(1).

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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