COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP202 **Cir. Ct. No. 2006FA801**

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

IN RE THE MARRIAGE OF:

MARCELENE C. VAN DYN HOVEN,

JOINT-PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

GERALD G. VAN DYN HOVEN,

JOINT-PETITIONER-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Gerald Van Dyn Hoven appeals from an order that denied his WIS. STAT. § 806.07 (2015-16)[1] motion to reopen the marital settlement agreement (MSA) between him and his ex-wife, Marcelene Van Dyn Hoven, and imposed sanctions against him. Marcelene cross-appeals the order, challenging the adequacy of the sanction. We affirm the order in its entirety.

¶2 The parties were granted a judgment of divorce effective January 1, 2008. Several issues remained unresolved, including the disposition of their largest asset, three automobile dealerships. The circuit court retained jurisdiction of the dealerships and ordered that, within nine months, Gerald either sell them or obtain financing to buy out Marcelene's share. Neither occurred.

¶3 A flurry of motion activity ensued. The parties' efforts at mediation failed. Both Marcelene and Gerald got new counsel.

¶4 Gerald's new counsel, Howard T. Healy, Jr., became aware that another local car dealership, Bergstrom Corporation, was interested in buying the Van Dyn Hoven dealerships. Healy informed Gerald that he had a conflict, as his firm had performed work for Bergstrom. Healy referred Gerald to Attorney Patrick Coffey of another law firm to advise Gerald on dealership issues; Healy would continue to represent Gerald on other postdivorce matters.

¶5 In January 2009, Bergstrom presented the parties with a letter of intent to purchase the dealerships for just over $33.2 million. In February, the circuit court ordered that they be sold to Bergstrom, but gave Gerald a right of first refusal to match Bergstrom's offer. The right was terminated when Gerald could

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

not secure the financing to buy out Marcelene's share. The transaction with Bergstrom closed in March.

¶6 Contending the dealerships were sold for millions less than they were worth, Gerald filed a claim for marital waste against Marcelene, alleging that she failed to exercise due diligence regarding the sale. The matter was set for a five-day hearing to begin on May 23, 2011.

¶7 Gerald hired an expert in the new vehicle dealership industry to provide an opinion regarding Marcelene's due diligence. After the expert opined in his April 2011 report that her efforts could have been better, the parties engaged in settlement talks. By May 19, the parties had entered into two nearly identical MSAs;[2] important here, each provided that "[b]oth parties waive all claims against each other." At the hearing to formalize the MSA, Gerald confirmed to the court that he had sufficient time to discuss the MSA with his counsel, understood all of the terms, and entered into it freely and voluntarily. The court approved the agreement.

¶8 In May 2012, now represented by Attorney Charles Hertel, Gerald filed a motion for relief from the May 2011 MSA pursuant to WIS. STAT. § 806.07(1)(a), (b), (g), or (h). He contended that Coffey had advised him verbally and in writing that he could move to reopen the judgment to raise the marital-waste claim within a year[3] and that, as the MSA did not address marital

[2] "Option Two" provided that if Gerald did not close on a proposed stock-and-cash transaction by June 30, 2011, the parties would settle based on "Option One."

[3] Gerald points to a March 2011 presettlement-discussion letter from Coffey stating, "As you and I have discussed on a number of occasions, there is a ***possibility***" (emphasis Coffey's) that a marital waste claim could be brought against Marcelene.

waste, he did not understand he was forever waiving the issue. Gerald also alleged he could not have knowingly and intelligently entered into the MSA because Healy never described the extent of the conflict of interest with Bergstrom and, further, remained involved in matters regarding the sale of the dealerships to Bergstrom.

¶9 Soon thereafter, Gerald retained Attorney Dean Dietrich, an expert in legal ethics. Dietrich opined that Gerald apparently was given improper advice about the ease of reopening or vacating the settlement and that, due to Healy's conflict, it was "impossible to state with any certainty that Gerald knowingly and voluntarily entered into the Agreements."

¶10 Claiming Gerald's motion was frivolous, in October 2012, Marcelene served Gerald's counsel with a WIS. STAT. § 802.05 motion for proposed sanctions.

¶11 Gerald was deposed in March 2014. He testified that he reviewed the May 2011 MSA before signing it and, while aware that it said both parties waived all claims against the other, he still thought he could pursue his "paramount" issue, the marital-waste claim. Based on that testimony, Marcelene moved to dismiss Gerald's WIS. STAT. § 806.07 motion and requested actual costs and attorney fees under WIS. STAT. § 802.05(3).

¶12 At the April 21, 2014 hearing on her motion, the parties agreed to have the court issue a decision based on a review of the record and any further submissions. The court gave Marcelene until April 23, 2014, to supplement her request for attorneys' fees and allowed Gerald "approximately 10 days" to file a response. Marcelene filed her supplement on April 23, 2014; Gerald filed his brief on June 24, 2015, 427 days later.

¶13 In February 2015, the circuit court denied Gerald's motion, reserving jurisdiction regarding attorneys' fees. It issued a final ruling a few months later after a hearing on sanctions. Finding that Marcelene satisfied the "safe harbor" provision of WIS. STAT. § 802.05(3), the court granted her motion for costs and fees. She requested $19,507.27, but the court ordered Gerald to pay her $12,000 and Hertel to pay her $500. Gerald appeals the denial of his WIS. STAT. § 806.07 motion and the sanction; Marcelene cross-appeals the sanction amount.

APPEAL

¶14 A party may move for relief under WIS. STAT. § 806.07 from a divorce judgment even if he or she stipulated to the provision now sought to be set aside. ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶32, 298 Wis. 2d 200, 727 N.W.2d 38; *see also* § 806.07(1). We do not reverse an order denying the motion unless the court erroneously exercised its discretion. ***Hottenroth***, 2006 WI App 249, ¶33. A court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law, and uses a demonstrated rational process to reach a conclusion a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). The court's factual findings will be reversed only if clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶15 Gerald maintains that the court should have reopened the judgment due to mistake or excusable neglect; newly discovered evidence; the judgment no longer being equitable; and other circumstances warranted relief. *See* WIS. STAT. § 806.07(1)(a), (b), (g), (h). We address them in turn.

¶16 First, though, Gerald complains that the circuit erroneously (1) determined that he lacked all credibility—not that the determination was

wrong in substance, but that it was made at all—and (2) rejected his ethics expert's uncontroverted opinions.

¶17 We need not address the credibility findings. Gerald signed the MSA waiving "all" claims against Marcelene and told the court he understood what he was doing. Further, the parties agreed to have the court decide the dispute on the contents of the record.

¶18 As to Dietrich's deposition testimony, even the uncontradicted opinion of an expert is not binding on the trier of fact. ***Capitol Sand & Gravel Co. v. Waffenschmidt***, 71 Wis. 2d 227, 233-34, 237 N.W.2d 745 (1976). Whether to credit it and what weight to give it are judgments for the fact finder to make. ***City of Stoughton v. Thomasson Lumber Co.***, 2004 WI App 6, ¶18, 269 Wis. 2d 339, 675 N.W.2d 487 (2003). Neither Healy nor Coffey were deposed. The circuit court found that Dietrich's opinions mainly were based on information from Gerald and that, even assuming the foundation was accurate, his opinions did not address the case's shortcomings—for example, why the word "all" ("[b]oth parties waive all claims against each other") merited an alternate meaning or why Gerald went after Marcelene instead of pursuing a legal malpractice claim.

¶19 Gerald also alleges two examples of mistake or excusable neglect: (1) trusting Healy who, despite his conflict of interest, remained involved with the sale of the dealerships and (2) relying on Coffey's advice that the marital-waste issue could be raised fairly easily at a later date. The question is whether Gerald's mistakes were excusable—i.e., the acts of a reasonably prudent person under the circumstances. *See* ***State v. Schultz***, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). In other words, although Gerald engaged lawyers of good reputation and relied upon them to protect his rights, we question whether Gerald himself

made sufficient reasonable inquiries. *See* ***Charolais Breeding Ranches v. Wiegel***, 92 Wis. 2d 498, 514, 285 N.W.2d 720 (1979). We conclude he did not.

¶20 The court found: there was no evidence that, after retaining Coffey, Gerald had discussions with, or relied on information from, Healy related to the sale to Bergstrom; transcripts of proceedings around the time of the final hearing reveal that Coffey addressed the winding down of the business and Healy addressed only non-Bergstrom issues; and Gerald never attempted to correct the record when Healy indicated at hearings that his representation was limited to non-Bergstrom matters. The court also found that the March 2011 letter from Coffey about the "***possibility***" of bringing a marital-waste claim was written when it still was anticipated that disputed matters would be resolved at the May 23, 2011 hearing; that the parties subsequently negotiated the MSA by which they agreed to waive "all" claims; that Gerald is a sophisticated businessman familiar with contracts; and that the MSA language was plain and unambiguous, as the word "all" is not susceptible of more than one reasonable interpretation. *See* ***Gottsacker v. Monnier***, 2005 WI 69, ¶22, 281 Wis. 2d 361, 697 N.W.2d 436. The court concluded that for Gerald to waive all claims without clarifying at any point if the marital-waste issue remained viable was not *excusable* neglect.

¶21 Gerald also alleged newly discovered evidence, once more citing Healy's conflict of interest and also claiming that postsettlement discovery in a related lawsuit[4] confirmed that the dealerships were sold for millions less than they were worth. Evidence is newly discovered if it came to the moving party's

[4] Gerald sued the financial institution that declined his application for a loan. ***Van Dyn Hoven v. Community First Credit Union***, Outagamie County case No. 2010-CV-2583.

notice after trial; the failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; the evidence is material and not cumulative; and the evidence probably would change the result. WIS. STAT. § 805.15(3).

¶22 Healy's conflict of interest is not newly discovered evidence. Gerald knew of it in 2009 when he retained Coffey; indeed, it was the reason he retained Coffey. As the circuit court noted, besides retaining Coffey, Gerald does not say how his decisions were driven by Healy's conflict.

¶23 Observing that "valuation is an inexact science at best," the court likewise rejected Gerald's argument that the claimed newly discovered valuation of the dealerships warranted reopening the case. It noted that there were no offers besides Bergstrom's and, if that offer was so discounted, Gerald should have been able to secure a loan. Even with right of first refusal, Gerald gave up after one failed attempt and made no efforts to market the dealerships.

¶24 Gerald also contended that the judgment no longer is equitable because he is foreclosed from trying the merits of his underlying marital-waste claim. The circuit court found that the MSA was the culmination of lengthy negotiations with give-and-take from both parties. Allowing Gerald to reopen the portion of the judgment he now regrets also would require allowing Marcelene to revisit issues she agreed to relinquish. The result, said the court, would be to open a Pandora's box that would prove inequitable for all.

¶25 Finally, WIS. STAT. § 806.07(1)(h) allows reopening for "[a]ny other reasons justifying relief from the operation of the judgment." To establish grounds for relief under this subsection, a party must demonstrate that "extraordinary circumstances" justify relief. ***State ex rel. M.L.B. v. D.G.H.***, 122

Wis. 2d 536, 549, 363 N.W.2d 419 (1985). In determining whether extraordinary circumstances exist to justify relief, the circuit court examines

> 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. at 552-53. Gerald simply states in conclusory fashion that he meets all of the criteria. In fact, he meets none.

¶26 First, the negotiated MSA reflects both parties' conscientious, deliberate, and well-informed choice to end years of wrangling. Second, Gerald offers no evidence that either Coffey or Healy were ineffective; he suggests, but provides no proof, that Coffey wrongly advised him once settlement talks began and that Healy continued to have his hand in Bergstrom-related matters.

¶27 Third, the court had to "achieve a balance between the competing values of finality and fairness in the resolution of a dispute." *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶12, 282 Wis. 2d 46, 698 N.W.2d 610 (citation omitted). The parties' divorce and MSA are years in the past. Both came out of the marriage with considerable assets. Gerald's belief that he could have done even better does not tip the scales against the interest in the finality of judgments.

¶28 Fourth, Gerald does not have a meritorious defense. The crux of that inquiry is whether, given another chance, he reasonably could expect a different result. *See* ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶14, 305

Wis. 2d 400, 740 N.W.2d 888. Gerald would have to prove that the dealerships would have sold for more when he was ordered to purchase or sell them. The automobile industry was in crisis. No other offers—higher or lower than Bergstrom's—were made. We reject Gerald's suggestion that he could show with any accuracy that he could have done better in that marketplace.

¶29 Fifth, there are intervening circumstances making it inequitable to grant relief. It would be unreasonable for Marcelene to have to pay Gerald a portion of her dealerships sale proceeds eight years later. The MSA required concessions by both parties. Marcelene may not have made certain compromises had she known the MSA later would be vacated.

¶30 In sum, the circuit court found, and we agree, that Gerald did not state "other reasons" justifying relief. *See* WIS. STAT. § 806.07(1)(h). He merely rehashed, and no more persuasively, the ones already raised and rejected. The court's findings of fact are not clearly erroneous, it properly contemplated the facts of the case in light of correct legal considerations, and it reached an appropriate decision. Its refusal to reopen the settlement agreement thus constituted a proper exercise of discretion.

¶31 We turn to the sanctions. We review both the decision to impose sanctions and the appropriateness of them under an erroneous exercise of discretion standard. ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. "[W]e will affirm the [circuit] court's decision if it examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion." ***Id.***

¶32 For a claim to be frivolous, a "party or attorney 'knew or should have known' that the claim was 'without any reasonable basis in law or equity.'"

Howell v. Denomie, 2005 WI 81, ¶8, 282 Wis. 2d 130, 682 N.W.2d 621 (citation omitted). Gerald asserts that, given the opinions of an expert of Dietrich's stature, his motion to reopen thus could not have been frivolous.

¶33 "We apply two different standards of review to allegations that a lawsuit is frivolous: one for determining whether actions are *commenced* frivolously and a second for determining whether actions are *continued* frivolously." ***Keller v. Patterson***, 2012 WI App 78, ¶21, 343 Wis. 2d 569, 819 N.W.2d 841. "Our review of the [circuit] court's decision that an action was commenced frivolously is deferential." ***Id.*** The nature and extent of investigation undertaken prior to filing a suit are issues of fact; how much investigation should have been done is a matter within the court's discretion. ***Id.***

¶34 As to whether an action was continued frivolously, what an attorney knew or should have known is a question of fact. ***Id.***, ¶22. Whether those facts support a finding of no basis in law or fact is a question of law we review de novo. ***Id.*** We resolve all doubts about whether a claim is frivolous in favor of the party or attorney claimed to have commenced or continued a frivolous action. ***Id.***

¶35 The circuit court adopted and incorporated the findings it made at the earlier hearing on Gerald's motion to reopen. It found here that for it to have granted Gerald's motion would have required it to ignore the commonly understood meaning of the word "all," portions of Gerald's supporting affidavit, and Gerald's "obvious business acumen." It also found that the record as a whole, as well as the facts, or lack of them, supporting Gerald's motion reveal that he undertook at least part of the motion for purposes of harassment.

¶36 Marcelene easily satisfied the twenty-one-day notice provision of WIS. STAT. § 802.05(3). The court found that despite being given ample time to

withdraw their motion, Gerald and his counsel continued to press the matter, regardless of having little to no legal basis for doing so, as Dietrich's opinion did not resolve the defects in Gerald's case.

¶37 Those findings are not clearly erroneous. The evidence as a whole demonstrates a clear lack of factual support for Gerald's motion. We conclude his action was both commenced and continued frivolously. It was within the circuit court's discretion, therefore, to order sanctions. *See* WIS. STAT. § 802.05(3).

¶38 Gerald persists. He contends the circuit court further erred in granting sanctions, as it did not conduct an evidentiary hearing or explain why the sanction ordered was the least severe sanction it could award. We disagree.

¶39 At the hearing on Marcelene's motion to dismiss Gerald's motion and her request for costs and fees under WIS. STAT. § 802.05(3), the parties stipulated to having the court issue a decision based on a review of the record and any further submissions. An evidentiary hearing is not required if the parties waive it. *See* ***Kelly v. Clark***, 192 Wis. 2d 633, 654-55, 531 N.W.2d 455 (Ct. App. 1995). Further, Gerald declined the court's offer to testify at the later sanctions hearing. The court also reviewed Gerald's and Dietrich's deposition testimony and Gerald's affidavit.

¶40 We reject Gerald's arguments that Marcelene failed to mitigate her damages by dragging out the notice period and engaging in considerable discovery in that time frame, that her motion should have been denied for being untimely, and that the court failed to take into account Marcelene's wealth.

¶41 Marcelene had the right to defend herself against Gerald's continued claim. In addition, "[t]he 21-day window specified in Rule 11 is a floor, not a

ceiling." ***Matrix IV, Inc. v. American Nat'l Bank & Trust Co.***, 649 F.3d 539, 552 (7th Cir. 2011) (addressing FED. R. CIV. P. 11, federal counterpart to WIS. STAT. § 802.05, and finding Rule 11 motion timely despite more-than-two-year gap between notice and filing of motion). Federal case law interpreting a federal rule is persuasive authority in construing an analogous state rule. ***Schauer v. DeNeveu Homeowners Ass'n, Inc.***, 194 Wis. 2d 62, 73, 533 N.W.2d 470, 474 (1995). The court voiced some reluctance to order sanctions but explained that it wanted to send a message to Gerald and it believed the motion was brought, at least in part, to harass. It also awarded Marcelene $7000 less than she requested. Gerald could have avoided all sanctions by withdrawing his motion.

¶42 The "wealth" argument is a curiosity. Gerald asserts that, as Marcelene exited from the marriage with substantial assets, she "[i]n no way … ha[d] a 'need' to receive attorney's fees … to finance her litigation." He also says that not only do the parties have relatively equal assets, but those "'equal assets' number in the millions." If Marcelene did not need the $12,000 awarded her, we think it fair to say that Gerald does not either. The primary aim of a sanction is to deter the wrongdoer, not to compensate the victim. *See* WIS. STAT. § 802.05(3)(b). We disagree that the court failed to explain why this sanction was the least severe available. We conclude it implicitly found that a lesser amount to Gerald, a man of ample means, would have been of little use in deterring his conduct.

CROSS-APPEAL

¶43 Marcelene requested $19,507.27 in attorneys' fees and was awarded $12,500. The amount was unreasonable, she argues, because even the full amount requested reflects only the fees incurred as of April 21, 2014, and four more hearings were held after that; to keep costs in check, her counsel used support staff

when able; and the full amount is far less than the $52,000 in legal fees Gerald purportedly incurred. We review her claim under an erroneous exercise of discretion standard. *See* ***Schultz***, 248 Wis. 2d 746, ¶8.

¶44 Citing ***Siegel v. Leer***, 156 Wis. 2d 621, 631, 457 N.W.2d 533 (Ct. App. 1990), Marcelene asserts that the court should have considered various factors in awarding reasonable attorneys' fees. ***Siegel*** and other cases like it address reasonableness in the context of fee-shifting statutes or provisions, however. *See* ***id.*** at 624; *see also* ***Betz v. Diamond Jim's Auto Sales***, 2014 WI 66, ¶26, 355 Wis. 2d 301, 849 N.W.2d 292, and ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶19, 275 Wis. 2d 1, 683 N.W.2d 58. "[A]n important purpose of fee-shifting statutes is to encourage injured parties to enforce their statutory rights when the cost of litigation, absent the fee-shifting provision, would discourage them from doing so." ***Betz***, 355 Wis. 2d 301, ¶26 (citation omitted).

¶45 Sanctions such as the attorneys' fees ordered here, by contrast, are imposed to deter repeated violations of WIS. STAT. § 802.05(2) or comparable conduct by others similarly situated. Sec. 802.05(3)(b). While compensation may be a consideration, it is limited to "some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." ***Id.*** The court here determined that "some" was sufficient. The issue is not whether we would have ordered the same sanction, but whether the sanction ordered reflects a proper exercise of the circuit court's discretion. ***Schultz***, 248 Wis. 2d 746, ¶8. It was.

¶46 No costs to either party.

By the Court.—Order affirmed.

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