

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1625

Cir. Ct. No. 2001FA209

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MICHELE KAE TRIEBOLD,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

MARK EDWIN TRIEBOLD,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark Triebold, pro se, appeals that part of an order denying his WIS. STAT. § 806.07¹ motion for relief from an order for property division following his divorce from Michele Triebold. Mark argues the trial court erred by including Michele’s credit card debt as marital debt subject to property division. We reject this argument and affirm that part of the order.

¶2 Michele cross-appeals that part of the order updating the debt owed on her Subaru as of the date of the divorce while utilizing the automobile’s value as of the date divorce proceedings commenced. Michele argues the trial court erred by relieving Mark from stipulations he made regarding the Subaru’s value and debt. Alternatively, Michele contends the trial court erroneously exercised its discretion by adjusting the amount of debt owed on the car without adjusting the car’s gross value. We agree with Michele’s arguments and reverse that part of the order.

BACKGROUND

¶3 Michele filed for divorce in July 2001. In January 2002, the family court commissioner entered a temporary order providing: “Both parties are hereby restrained from making any further debts against the credit of the other party. Further, unless otherwise ordered, any debt incurred after the date of this order is the sole responsibility of the party incurring the debt.” At the time of the June 2003 judgment dissolving Mark and Michele’s marriage, the circuit court acknowledged that a number of issues remained with respect to the division of property and debts. In October 2003, the court entered a decision and order

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

resolving the majority of these issues. In particular, the court acknowledged that the parties had agreed the Subaru would be assigned to Michele with a value of \$24,705 and a debt of \$23,300. Because some “minor differences” remained with respect to a few bank and credit card accounts, the court scheduled a hearing in the event the parties were unable to resolve these outstanding issues. Ultimately, in December 2003, the parties returned to court indicating they had agreed that Mark’s cash equalization payment would be \$61,164.49. Mark’s counsel informed the court:

My understanding, Your Honor, if I may, [Michele’s counsel] and I did confer. We have agreed on the underlying numbers. There are about four areas where we were looking at some adjustments. We have done that. The amount [counsel has] put in the proposed judgment that he sent over of 61 thousand and change is correct.

¶4 After the court entered an order confirming the amount of the equalization payment, Mark filed a WIS. STAT. § 806.07 motion for relief seeking to reduce the payment. Relevant to this appeal, Mark challenged the inclusion of certain credit card debt as marital debt subject to property division and argued that the debt owed on Michele’s Subaru did not reflect payments made while the divorce was pending. The trial court denied Mark relief with respect to the credit card debt and granted him relief with respect to the Subaru. This appeal and cross-appeal follow.

DISCUSSION

¶5 WISCONSIN STAT. § 806.07 allows a circuit court, on motion, to relieve a party from a judgment, order, or stipulation upon such terms as are just

and for one of the eight reasons enumerated in § 806.07.² Motions under § 806.07 are reviewed for erroneous exercise of discretion. *Nelson v. Taff*, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993). Therefore, we are not deciding whether we would have granted the motion, but whether the trial court's decision was within the wide band of decisions that a reasonable trial court could have made. We review a trial court's discretionary decision to determine whether the court examined the relevant facts, applied the proper legal standard and, using a rational process, reached a reasonable conclusion. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

² WISCONSIN STAT. § 806.07 provides:

On motion and upon such terms as are just, the court ... may relieve a party ... from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released or discharged;
- (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
- (g) It is no longer equitable that the judgment should have prospective application; or
- (h) Any other reasons justifying relief from the operation of the judgment.

¶6 Mark argued he was entitled to relief under WIS. STAT. § 806.07 on grounds of mistake and fraud. Specifically, Mark claimed that despite the temporary order governing the subsequent acquisition of debt by either party, Mark's counsel mistakenly agreed to include the subject credit card debt in the property division. Mark also claimed that Michele engaged in fraud by misrepresenting her credit card debt as marital debt in her financial disclosure statement. We are not persuaded.

¶7 Not every mistake is sufficient to entitle a moving party to relief. *State v. Schultz*, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). Courts may grant relief from a judgment for excusable and justifiable mistakes. *Id.* A mistake is excusable when the mistake would have been reasonable under the circumstances. *See id.*

¶8 Here, the trial court could reasonably determine that Mark's counsel's claimed mistake of including Michele's credit card debt was not excusable but, rather, a product of carelessness or inattentiveness. *See Martin v. Griffin*, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984). The record shows that both parties exchanged financial information before trial, Mark's counsel cross-examined Michele and made arguments to the trial court regarding the disputed credit card debt. Although Mark and his counsel were aware of a potential issue concerning this debt, Mark nevertheless agreed to a compromised settlement that effectively relinquished this issue.

¶9 Mark's stipulation to the cash equalization payment arose from weeks of negotiations, correspondence and motion hearings. Mark and his counsel had ample opportunity to analyze the facts and make an informed decision regarding the stipulation. The fact that the stipulation appeared, in hindsight, to

have been a bad bargain is not sufficient by itself to warrant relief. *See Burmeister v. Vondrachek*, 86 Wis. 2d 650, 665, 273 N.W.2d 242 (1979). Further, to the extent Mark contends he did not authorize the stipulation, there is no evidence to support this claim. Mark never testified at the motion hearing that his attorney lacked the authority to settle the case. *See Balzer v. Weisensel*, 258 Wis. 566, 569, 46 N.W.2d 763 (1951) (to be relieved from an agreement made by counsel, client has burden of showing that counsel exceeded his or her authority).

¶10 With respect to Mark's fraud claim, the trial court properly rejected this argument because Mark never offered evidence of a signed financial disclosure statement. Moreover, cross-examination of Michele and arguments made at an earlier hearing establish that Mark was aware the subject debt was incurred after the temporary order and that he believed this debt was non-marital. Because Mark was not misled by any claimed misrepresentations in Michele's financial disclosure statement, no fraud was committed. *See Wausau Medical Center v. Asplund*, 182 Wis. 2d 274, 290, 514 N.W.2d 34 (Ct. App. 1994) (elements of intentional misrepresentation are that the party believed the representations and detrimentally relied upon them). Based upon the foregoing, we affirm that part of the order including Michele's credit card debt as marital debt to be used in determining the cash equalization payment.³

¶11 Turning to the cross-appeal, Michele argues the trial court erred by relieving Mark from his stipulation to the Subaru's value and debt as well as his stipulation to the cash equalization payment. We agree. The record contains no

³ To the extent Mark raises new issues in his reply brief, this court will not consider arguments raised for the first time in a reply brief. *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

evidence to support relief under WIS. STAT. § 806.07 because Mark failed to establish fraud, mistake or excusable neglect with respect to the debt and value of the subject automobile. Mark chose to settle upon negotiations rather than try the issue of the Subaru's value and debt. As noted above, there is no evidence in the record that Mark's counsel lacked the authority to settle that issue. *See Balzer*, 258 Wis. at 569. Further, even if we were to conclude Mark was entitled to relief under § 806.07, the trial court erroneously exercised its discretion by not assessing the automobile's value *and* debt as of the date of the divorce. As Mark concedes, the trial court's failure to arrive at the net value of the Subaru by considering both its value and debt was error. We therefore reverse that part of the order granting Mark relief with respect to the Subaru.

By the Court.—Order affirmed in part, reversed in part and remanded to the circuit court for further proceedings consistent with this opinion.

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