COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1988 **Cir. Ct. No. 2008CV74**

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

BLACK RIVER COUNTRY BANK,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DUANE A. GERDES, STATE OF WISCONSIN, WISCONSIN BUREAU OF CHILD SUPPORT, DEPARTMENT OF WORKFORCE DEVELOPMENT AND MUBARAK, RADCLIFFE & BERRY, S.C.,

DEFENDANTS,

JULIE GERDES,

CLAIMANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. This case arises out of the interaction of a foreclosure action and a divorce. The foreclosure action was brought by Black River Country Bank (BRC Bank or the Bank) involving real estate owned by Duane Gerdes (Duane). The divorce action involved Duane and Julie Gerdes (Julie), the claimant-respondent-cross-appellant in this appeal. Although BRC Bank's foreclosure action was against Duane, this dispute is between BRC Bank and Duane's ex-wife, Julie.

¶2 After judgment was entered in the foreclosure action and a sheriff's sale held, Julie made a claim for surplus funds under WIS. STAT. § 846.162.[1] In the appeal, BRC Bank challenges the circuit court's decision to award Julie an amount equal to the surplus the Bank should have paid to the sheriff, plus damages under WIS. STAT. § 100.20(5). In the cross-appeal, Julie challenges the circuit court's decision to reduce the amount of her requested attorney's fees. We affirm the circuit court with respect to the appeal and, consistent with § 100.20(5), we remand for purposes of determining an appropriate amount of attorney's fees and costs to be awarded to Julie relating to this appeal. As to the cross-appeal, we agree with Julie that the circuit court based its decision to reduce her attorney's fees, in part, on confusion between arguments made in this case and a related case. We therefore reverse and remand for a redetermination of Julie's attorney's fees and costs.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Background

¶3 This case has a relatively complex procedural history, including several allegations of misconduct in both directions. Ultimately, the circuit court concluded that BRC Bank engaged in misconduct. On appeal, the Bank does not, for the most part, present developed argument challenging the circuit court's findings and conclusions in this respect. Accordingly, the following chronology omits details relating to alleged misconduct that do not affect the issues raised on appeal.

¶4 Julie and Duane were divorced in 2005. Duane failed to make child support payments to Julie. Consequently, in an order dated April 21, 2008, the circuit court granted Julie a lien on all real estate and personal property owned by Duane in the amount of the unpaid child support, which at that time was $20,624.90.[2]

¶5 BRC Bank held notes secured by a mortgage on a 16-acre farm owned by Duane. On April 28, 2008, the Bank commenced a foreclosure action.[3] The complaint alleged that Duane had executed an Elan/Visa credit card agreement and that he was in default on that agreement in the amount of $3,600.51. The Bank did not name Julie as a party, and she was never served with a copy of the summons and complaint.

[2] The Wisconsin Bureau of Child Support also held a lien against Duane's property. The parties do not suggest that this lien affects the issues in dispute in this appeal.

[3] BRC Bank also sought replevin of two semi-tractors and three semitrailers. Although the parties' briefs make several references to the replevin claim and other property-securing notes, neither party provides a meaningful explanation of how the replevin action or the non-real estate property affects any issues disputed on appeal. In particular, BRC Bank does not explain why this other property or the replevin claim matter.

¶6 On July 10, 2008, the circuit court entered a "Judgment of Foreclosure and Replevin," setting forth a balance due of $122,523.97. The order provided for a two-month period of redemption.

¶7 On September 9, 2008, the sheriff's sale was held. BRC Bank was the only bidder and purchased the property for $109,500.00.[4] No surplus amount was paid to the sheriff and, thus, none was transferred to the clerk of court.

¶8 On September 17, 2008, BRC Bank applied for confirmation of the sheriff's sale. The application asserted that the Bank was owed "Principal and Interest" of $108,198.41 and "Attorney Fees & Costs" of $1,304.53, amounts totaling $109,502.94.

¶9 Although not named as a party, Julie's attorney requested information from the Bank explaining the composition of the amounts the Bank alleged it was owed. In response, an attorney for the Bank sent a letter with an enclosed document entitled "Duane Gerdes Loan History" showing a balance owing on Note 37709 of $95,563.83 as of September 1, 2008. Apparently based on this information, Julie believed there should have been a surplus paid to the sheriff and, on October 6, 2008, she filed a claim under WIS. STAT. § 846.162 seeking surplus funds.

¶10 On October 8, 2008, the confirmation hearing was held. Julie's attorney attended. It was agreed that Julie's surplus claim would be addressed at a different date. The circuit court entered an order confirming the sale.

[4] The property was technically purchased by Black River Country Realty, Inc., but that company is a wholly owned subsidiary of BRC Bank. For ease of discussion, we will treat the purchase as having been made directly by BRC Bank.

¶11 Two hearings were held on Julie's surplus claim. At both, BRC Bank took the position that Julie's rights as an unnamed junior lienholder were limited to the remedy discussed in ***Buchner v. Gether Trust***, 241 Wis. 148, 5 N.W.2d 806 (1942).

¶12 At the first hearing, held on February 13, 2009, an attorney for BRC Bank admitted that the Bank should have named Julie as a party in the foreclosure action. The attorney apologized to the court "for not including [Julie] as a party to this action." The parties also addressed disputed amounts that made up what the Bank claimed it was owed and could collect in the foreclosure action, but nothing was resolved.

¶13 On February 19, 2009, BRC Bank filed an action against Julie, circuit court Case No. 2009CV36. In that action, BRC Bank sought declaratory relief in the form of an order stating that Julie's remedy was limited to an opportunity to redeem the property. As in this action, the Bank asserted that, under ***Buchner***, Julie was entitled to no more. On April 22, 2009, the circuit court ruled in favor of the Bank in this action based on its agreement with the Bank that ***Buchner*** "controls the rights of [Julie] in this matter," but reserved Julie's right to surplus in the present case.

¶14 On May 14, 2009, Julie sought discovery from the Bank. In response, BRC Bank filed a "Motion for Protective Order." After briefing and a hearing, the circuit court ordered the Bank to comply with Julie's requests.

¶15 A second hearing on the surplus issue was held on January 6, 2010. At this hearing, an attorney for BRC Bank admitted that three items were incorrectly included in the amount the Bank alleged it was owed on the notes. The three items were amounts BRC Bank had not actually paid: real estate taxes

($3,000.00), a transfer fee ($327.00), and an insurance premium ($137.50). Thus, the Bank admitted, in effect, that it had obtained from the proceeds of the sheriff's sale a sum totaling $3,464.50 relating to amounts that it was not owed under the notes.

¶16 At this second hearing, the parties debated the status of Duane's credit card debt ($2,493.97) and whether that debt was properly included as an amount recoverable by the Bank in the foreclosure action. The Bank's president testified, and credit card documents were admitted. The president testified that the credit card debt was "secured" by Duane's real estate. However, nothing in the credit card documents executed by Duane indicated that the Bank had any right to collect money from Duane with respect to credit card debt. Rather, the credit card documents indicated an agreement between Duane and Elan/Visa. Under a separate agreement between the Bank and Elan/Visa, the Bank was entitled to share a portion of the collections and losses.

¶17 On March 16, 2010, the circuit court ruled orally from the bench. The court found that BRC Bank committed "unfair trade practices" by violating various provisions of WIS. STAT. § 224.77. That statute specifies prohibited acts and practices by mortgage bankers, mortgage loan originators, and mortgage brokers. Without specifying subsections of that statute, the circuit court found that BRC Bank violated the statute in the following ways:

- BRC Bank "made substantial misrepresentations ... [which were] injurious to a party in the transaction, that being [Duane] Gerdes."
- BRC Bank "acted for more than one party, that is Visa, in a transaction without the knowledge and consent of all parties and on whose behalf the mortgage banker was acting."
- BRC Bank "paid or offered to pay commission money or other things of value to Visa for acts or services."

- BRC Bank violated the Truth in Lending Act.

As to damages, the court awarded Julie three amounts that the court determined were improperly held by the Bank, rather than being paid as surplus. The three amounts were: $3,000.00 (representing the real estate taxes not paid), $327.00 (representing the transfer fee not paid), and $2,493.97 (representing the credit card debt the court concluded that the Bank was not entitled to recover in the foreclosure action).[5] The court, relying on authority in WIS. STAT. § 100.20(5), also doubled the $2,493.97 award relating to credit card debt based on its conclusion that the Bank had engaged in unfair trade practices. The court also directed Julie's counsel to submit reasonable attorney's fees and costs.

¶18 In effect, the circuit court determined that, regardless how BRC Bank arrived at its bid/purchase price, the Bank could retain only the amount it was owed under the notes. The court determined that that amount was $103,679.03 ($109,500 - $3,000 - $327 - $2,493.97). And, the circuit court determined that, as a sanction for the underlying unfair trade practices, BRC Bank should pay Julie the attorney's fees and costs and double the amount relating to the credit card debt.

¶19 After Julie's attorney submitted an application for attorney's fees and costs in the amount of $9,430.79, the circuit court issued a written order awarding $7,130.79. The court reduced the attorney's fees for multiple reasons, including its apparent belief that Julie's attorney was unsuccessful in disputing BRC Bank's claim that ***Buchner*** prevented Julie from recovering any amount

[5] The court disallowed $137.50 relating to insurance, and Julie does not challenge this decision.

from the Bank. BRC Bank appeals the award to Julie, and Julie cross-appeals the reduction to her requested attorney's fees.

Discussion

I. BRC Bank's Appeal

¶20 The disputes in this case arose, for the most part, because BRC Bank failed to act properly in several respects. First, the Bank failed to properly calculate the amount it was owed under the notes. This first error by the Bank led to its second error—that it paid more than the amount it was owed at the sheriff's sale and it failed to pay to the sheriff the surplus—the difference between its bid and the amount it was owed on the notes. Third, BRC Bank failed to name Julie as a party to the foreclosure action. Along the way, BRC Bank violated at least some provisions of WIS. STAT. § 224.77, a statute prohibiting certain acts and practices by mortgage bankers. Julie made a claim for surplus funds, and the circuit court eventually awarded Julie an amount equal to the surplus the Bank should have paid to the sheriff, plus damages under WIS. STAT. § 100.20(5).

¶21 In the following subsections we address and reject each of the Bank's arguments before turning to Julie's cross-appeal.

A. Whether Julie's Claim For Surplus Under WIS. STAT. § 846.162 Is Precluded By ***Buchner***

¶22 BRC Bank argues that this case is controlled by ***Buchner***, 241 Wis. 148. We disagree.

¶23 The ***Buchner*** court addressed whether the failure of a first lienholder to make a junior lienholder a party to a foreclosure action should result in the "destruction" of the mortgage and the promotion of the junior lienholder to the

position of first lienholder. ***Id.*** at 150-52. The ***Buchner*** court concluded that the answer was no—that the junior lienholder had "the same rights that he would have had, had he been made party to the foreclosure proceedings," but that "his rights are not improved, or the rank of his judgment lien advanced." *See* ***id.*** at 151-53.

¶24 BRC Bank interprets ***Buchner*** as holding that under no circumstances may a junior lienholder be in a better position following the failure of a first lienholder to make the junior lienholder a party. In BRC Bank's view, regardless of the particular circumstances, under ***Buchner***, the only remedy available to a junior lienholder who was not made a party to a foreclosure action is to restore the rights the junior lienholder would have had if he or she had been made a party to the foreclosure action. ***Buchner***, however, does not purport to address all situations. In particular, it does not address the calculation, payment, or distribution of a surplus, much less what happens when a party improperly fails to pay a surplus to a sheriff.

¶25 In this case, Julie did not challenge the foreclosure judgment or the confirmation order. The only question here is whether, under WIS. STAT. § 846.162, and the circuit court's equitable powers, Julie is entitled to the amount BRC Bank should have paid as a surplus to the sheriff.

¶26 Under WIS. STAT. § 846.162, a junior lienholder such as Julie may be entitled to a portion of a surplus. That statute reads, in pertinent part:

> **846.162 Disposition of surplus.** If there shall be any surplus paid into court by the sheriff or referee, ... any person not a party who had a lien on the mortgaged premises at the time of sale, may file with the clerk of court into which the surplus was paid, a notice stating that the party or person is entitled to such surplus money or some part thereof, together with the nature and extent of the party's or person's claim. The court shall determine the

> rights of all persons in such surplus fund by reference or by testimony taken in open court ....

¶27 BRC Bank does not seriously dispute that, based on the amount it actually bid for Duane's property at the sheriff's sale, there was an amount the Bank should have paid to the sheriff as a surplus. Rather, BRC Bank contends that there was no "surplus" within the meaning of WIS. STAT. § 846.162 because, in the words of the statute, no "surplus [was] paid into court by the sheriff or referee" and, thus, the clerk of court had no "surplus" to distribute. In essence, BRC Bank argues that there was no surplus here because the Bank did not pay in a surplus, even if it should have.

¶28 As Julie points out, however, the foreclosure statutes do not contemplate all possible scenarios and, when a court is faced with a situation not covered by the statutes, it has equitable authority to fashion a remedy. In ***Bank of New York v. Mills***, 2004 WI App 60, 270 Wis. 2d 790, 678 N.W.2d 332, we explained:

> Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings. This discretion extends even after confirmation of sale, if necessary, to provide that no injustice shall be done to any of the parties. *The court has the authority to grant equitable relief, even in the absence of a statutory right.* Moreover, a circuit court's equitable authority may not be limited absent a "clear and valid" legislative command.

Id., ¶8 (emphasis added; citations omitted).

¶29 We agree with Julie that the scenario here is not within the contemplation of the statutes. WISCONSIN STAT. § 846.162 presupposes that the party purchasing a property at a sheriff's sale will pay any surplus to the sheriff, who will then transmit that sum to the clerk of court. Here, BRC Bank failed to

pay to the sheriff the difference between the amount it was owed and the amount of the bid. The foreclosure statutes do not explain what should occur in these circumstances and, based on the arguments before us, we perceive no reason why the circuit court could not fill the void using its equitable authority.

¶30 Here, the circuit court essentially considered all that BRC Bank had done in the foreclosure action and the confirmation proceeding, and then determined that BRC Bank improperly failed to pay the surplus to the sheriff. As a remedy, the court ordered the Bank to pay to Julie amounts that would have been available to Julie under WIS. STAT. § 846.162 if the Bank had paid the surplus to the sheriff. We discern no misuse of discretion.

¶31 In section 5 of its brief-in-chief, BRC Bank argues that the circuit court exceeded its equitable authority. The Bank argues that, whatever equitable authority a court might have over a surplus, there simply was no surplus in this case. But, of course, the reason there was no surplus in the hands of the clerk of court is that the Bank failed to pay the surplus to the sheriff. As indicated above, we perceive no reason why the circuit court may not use its equitable authority to remedy this situation.

¶32 Also in section 5 of its brief-in-chief, BRC Bank seems to argue that it would have been more equitable to permit the Bank to undo its "mistakes." For example, BRC Bank asserts that the court could have ordered that the bid price be amended to reflect the true amount that was owed to BRC Bank on the notes, leaving no arguable surplus. It is clear that the circuit court rejected this approach because of its conclusion that the Bank did not come to the table with clean hands. BRC Bank has not persuaded us that this conclusion was wrong or that the circuit court's response to it was inequitable.

B. Whether The Circuit Court's Decision Improperly Undermines The Finality Of The Foreclosure Judgment And Order Confirming The Sheriff's Sale

¶33 BRC Bank contends that the circuit court erred by undermining the finality of the foreclosure judgment and the order confirming the sheriff's sale. The Bank relies on law explaining that judgments of foreclosure and orders confirming a sheriff's sale are final appealable orders, and argues that such orders may not be collaterally attacked. BRC Bank also argues that the doctrine of claim preclusion[6] should prevent Julie from relitigating issues previously resolved, such as the amount due BRC Bank from the sheriff's sale.

¶34 BRC Bank's arguments are not developed. The Bank cites several cases, but does not meaningfully explain why they should govern here. For example, BRC Bank states:

> The finality of foreclosure judgments and confirmation orders has ... been addressed in the context of post-judgment relief. In ***Johns v. County of Oneida***, 201 Wis. 2d 600, 549 N.W.2d 269 (Ct. App. 1996), the Court of Appeals refused to allow a collateral attack upon a foreclosure judgment entered three (3) years earlier. Likewise, in ***Bank [One] Wisconsin v. Kahl***, [2002 WI App 312,] 258 Wis. 2d 937, 655 N.W.2d 525 (Ct. App. 2002), the Court of Appeals refused to allow a collateral attack upon a foreclosure judgment entered eighteen (18) months earlier.

But the Bank makes no attempt to explain why the facts here parallel those in either ***Johns*** or ***Bank One Wisconsin*** or why these cases otherwise require that Julie's surplus action be dismissed.

[6] BRC Bank uses the term "res judicata," but in Wisconsin that term has been replaced with the term "claim preclusion." *See* ***Barber v. Weber***, 2006 WI App 88, ¶11 n.3, 292 Wis. 2d 426, 715 N.W.2d 683.

¶35 BRC Bank asserts that claim preclusion prevents Duane from relitigating the issues, and argues that claim preclusion should likewise prevent Julie from relitigating the issues. The Bank does not, however, bother to identify the elements of claim preclusion, much less apply them to the facts here. Therefore, we address the matter no further, except to observe that we doubt the Bank could show the privity element of claim preclusion.[7]

¶36 In sum, BRC Bank has not persuaded us that its finality and claim preclusion arguments require reversal.[8]

C. Whether Duane's Credit Card Debt Was A Debt The Bank Could Recover In The Foreclosure Action

¶37 BRC Bank contends that the circuit court erred when it concluded that Duane's Visa credit card debt could not be included as an amount recoverable in the foreclosure action. BRC Bank essentially argues that this is a factual question, with the issue being whether Duane's credit card debt was "secured by

---

[7] Claim preclusion has three elements:

> "(1) identity between the parties or their privies in the prior and present suits;
>
> (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and
>
> (3) identity of the causes of action in the two suits."

Kruckenberg v. Harvey, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879 (citation omitted).

[8] Julie argues that, although claim preclusion does not apply to her, it should be applied against BRC Bank. Julie points to the disposition in a case brought by BRC Bank against Julie, Case No. 2009CV36, a case in which BRC Bank sought to compel Julie to decide whether to exercise her redemption rights. Julie points out that, in that case, the circuit court discharged her subordinate lien, but also held that "[Julie's] right to surplus in [this case] is reserved." We need not address this argument because we reject BRC Bank's arguments on other grounds.

his business collateral and personal residence." BRC Bank seemingly assumes that, if the credit card debt was "secured" by Duane's residence, then it is obvious that the Bank was permitted to recover that debt in the foreclosure action. It is not obvious.

¶38 BRC Bank's argument in this respect is both short and unpersuasive. The Bank asserts in its appellate brief-in-chief that its president testified that Duane's credit card obligations were for a "business purpose." But the Bank does not explain why this assertion, if true, means that the credit card debt is recoverable in the foreclosure action.[9]

¶39 Similarly, the Bank states, without elaboration, that Duane signed a Real Estate Security Agreement that included the language "to secure all debts, obligations and liabilities," and that he signed a Business Security Agreement and a Chattel Security Agreement, which both pledged his business property "to secure all debts, obligations and liabilities" owed to BRC Bank. However, the fact that Duane signed documents with the quoted language does not demonstrate that the Bank could collect Duane's credit card debt via the mechanism of a foreclosure action under WIS. STAT. ch. 846. The documents do not demonstrate that the credit card debt, even if owed fully to the Bank, was entitled to the same sort of first-in-line treatment as enjoyed by the Bank's notes. It is undisputed that the

[9] We note that, although the Bank quotes its president as using the term "business purpose," neither that term nor its equivalent appears in the pages of transcript cited by the Bank. We will, however, assume for purposes of this appeal that the president used the term "business purpose" because the net result is the same—the testimony does not address the legal basis for recovering the debt in the foreclosure action.

BRC Bank also points to allegations in its complaint that Duane's entire credit card debt was secured by his business collateral and personal residence. Obviously, the circuit court was not bound to accept allegations in a complaint.

Bank was entitled to a judgment of foreclosure and sale, giving it the ability to recover amounts directly related to the notes. But whether the Bank could utilize the foreclosure action to recover other debt, such as the credit card debt, is a different matter.

¶40 BRC Bank asserts that the circuit court erroneously relied on two cases for the proposition that Duane was a "customer" and the bank was a "creditor" under WIS. STAT. ch. 425. We agree with the Bank that neither of these cases is controlling. As the Bank points out, in ***Estate of Newgard v. Bank of America***, 2007 WI App 161, ¶8, 303 Wis. 2d 466, 735 N.W.2d 578, the bank conceded that the credit card transactions at issue were "consumer credit transactions" and, therefore, covered by the Wisconsin Consumer Act. And the other case the circuit court relied on does not provide authority because it is an unpublished decision. However, the circuit court's reliance on these cases does not mean that the circuit court erred.

¶41 So far as we can tell, there is no significant factual dispute. The documents relating to the foreclosure and the credit card agreements were in evidence, and the question for the circuit court was the import of these documents. Based on the argument before us, we have no basis for concluding that the circuit court erred when it concluded that Duane's credit card debt was not a debt the Bank could recover in the foreclosure action.

¶42 We could stop here, but we choose to briefly note Julie's position on the topic, a position to which BRC Bank does not reply. Julie argues that, although the Real Estate Security Agreement and Business Security Agreement have language indicating that they "secure all debts, obligations and liabilities" owed by Duane to the Bank, nothing in any of the documents identifies BRC Bank

as a party to whom Duane might owe money because of his Visa credit cards. Julie acknowledges that the record supports a finding that there was an agreement between BRC Bank and Elan/Visa, but she contends there is nothing indicating either that Duane was a party to that agreement or that Duane was informed that his credit card debt was secured by his property. In sum, Julie argues that the record reveals no agreement between Duane and BRC Bank that would permit the Bank to include Duane's credit card debt as an obligation secured by his real estate.

D. Whether Reversal Is Required Because The Circuit Court Engaged In An Ex Parte Communication With An Expert

¶43 When rendering its decision, the circuit court revealed in open court that it had consulted with the "head attorney" for the Wisconsin Banker's Association regarding whether credit card debt may be recovered through a mortgage foreclosure action. The circuit court stated:

> I'm going to move to what I saw as the real issue in this case, and that was the attempt to recover credit card debt through a mortgage foreclosure action. I started out not knowing or understanding whether that was or was not permissible, and I had contact with the head attorney of the Wisconsin Banker's Association and had this question posed to him anonymously and without reference to the banking institution. I was advised that you simply cannot do this; no bank can collect a credit card debt utilizing mortgage foreclosure. It is an unsecured debt, first of all, but more importantly, it is a debt owed in part in this case to Visa – part of it's owed to the bank, part of it is owed to Visa. The evidence seemed to indicate that the bank would extend to its customers the opportunity to acquire Visa credit cards but did not disclose to its customers that the bank would continue to participate in the credit card transactions retaining portions of any profits [and] commissions and sharing in any losses that might result from that particular account. The Banker's Association counsel advises that the reason why this can't be done, among other things, is that open-ended credit transactions are rescindable transactions and that it would be impossible

> for a bank to comply with all of the rescission requirements under [the Truth in Lending Act] and under the other Wisconsin statutes that are applicable, and that I'll address in a minute, and that the credit card debts, therefore, cannot be subsumed under a mortgage and included in a mortgage foreclosure action.

¶44 The parties both take the position that the ex parte communication the judge described was a violation of SCR 60.04(1)(g)2.[10] But whether the circuit court violated this rule is not an issue this court needs to resolve. Rather, the Bank correctly frames its argument in terms of whether the circuit court's conduct denied the Bank due process. The Bank contends that the circuit court denied the Bank "reasonable notice and an opportunity to object and defend their rights."

¶45 We first observe that it is not apparent that BRC Bank had no opportunity to object or respond. The circuit court made no attempt to conceal its communication. To the contrary, the court informed the parties about the contact with the expert early on during the proceeding in which it rendered its oral decision. BRC Bank did not object at the time, and we discern no reason why it could not have done so. If BRC Bank had objected—particularly, if the Bank had brought to the court's attention the court's ethical obligation to provide a reasonable opportunity to respond—it seems likely that the court would have given the Bank and Julie an appropriate opportunity. Thus, the Bank has not demonstrated that it was denied an opportunity to object and respond to the expert's opinion.

[10] SCR 60.04(1)(g)2. provides:

> A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

¶46 BRC Bank argues that the circuit court's action shows that the Bank was denied an impartial decision maker. We fail to understand, however, how the ex parte communication shows that the circuit court revealed bias. BRC Bank and Julie's attorney had each made confusing arguments relating to the Elan/Visa credit card debt, and the circuit court was attempting to sort through whether the Bank could properly have recovered this debt through the mortgage foreclosure action. In essence, the court was looking for a legal answer to a question it believed the parties had not sufficiently addressed. So far as the court's statements reveal, the court was interested in the correct answer to this question, not an answer that favored one party or the other. Thus, we find no basis for a conclusion that the Bank was denied an impartial decision maker.

¶47 The Bank appears to argue that, any time a circuit court obtains information through an ex parte communication, reversal is required. But the Bank does not back up that claim with a fully developed argument. The Bank cites ***Marder v. Board of Regents of the University of Wisconsin System***, 2005 WI 159, 286 Wis. 2d 252, 706 N.W.2d 110, for the proposition that due process is violated by an ex parte communication "if the decision-maker is provided new and material information in the course of the communication." *See* ***id.***, ¶28. But the "information" the ***Marder*** court was referring to was *evidentiary* information. Ultimately, the ***Marder*** court agreed that remand was necessary because it was uncertain whether the ex parte communication involved "the presentation of new facts on which [Marder's] termination was based." ***Id.***, ¶39.

¶48 Here the situation is different. The circuit court was interested in the answer to a legal question, and the court believed it obtained the answer to that question from a reliable source. The question then is what BRC Bank would have done had it had an opportunity to respond. The Bank does not tell us.

¶49 We observe that the answer to the question the circuit court posed to a third-party expert remains in dispute on appeal. In the preceding section, we explained that BRC Bank does not, even at this late date, present a developed argument on the topic. So far as we can tell, the circuit court was faced with essentially a bald assertion by the Bank that it was entitled to recover the credit card debt in the foreclosure action because the debt was "secured" by the residence, and Julie's response that nothing in the documentary evidence supported that assertion. So far as we can tell, Julie is correct that nothing in the documents supports the conclusion that the credit card debt could be recovered in the mortgage foreclosure action.

¶50 We conclude that there is no reason to suppose that the court's consultation with a third-party expert without advance notice to the parties improperly changed the outcome of the proceeding.

E. Whether The Circuit Court Erred When It Relied On WIS. STAT. § 100.20 To Award Damages

¶51 BRC Bank argues that the circuit court erred when it relied on WIS. STAT. § 100.20(5) for its decision to award double damages and attorney's fees to Julie relating to the credit card debt the Bank erroneously sought to recover in the foreclosure action. The circuit court concluded that the statute applied, stating: "[BRC Bank] engaged in misconduct in this case by hiding [its] relationship with Visa from [Duane] and then attempting to collect a credit card debt under the bank's mortgage in the course of foreclosure."

¶52 BRC Bank contends that the court's reliance on WIS. STAT. § 100.20(5) was in error because an award doubling the loss plus attorney's fees under this statute requires an "unfair trade practice" and a "pecuniary loss"

flowing from the unfair trade practice. BRC Bank cites ***Tim Torres Enterprises, Inc. v. Linscott***, 142 Wis. 2d 56, 70, 416 N.W.2d 670 (Ct. App. 1987), for the proposition that a claimant under § 100.20(5) must show a "causal connection" between the unfair trade practice and the pecuniary loss suffered. BRC Bank argues that it follows that "there must be some evidence that the claimant was in fact damaged by the conduct."

¶53 Purporting to rely on this legal principle, BRC Bank argues that Julie did not suffer a pecuniary loss because of the inclusion of Duane's credit card debt in the foreclosure action. More specifically, BRC Bank argues that the circuit court "received no evidence that [Julie] was required to pay [Duane's] business credit card debt," that Julie "suffered no pecuniary loss," and that any "alleged unfair trade practice was solely between [Duane] and [BRC Bank]."

¶54 Julie responds that the circuit court found that Julie was harmed by BRC Bank's course of dealing with Duane. The circuit court explained:

> As I pointed out in that decision and as evidenced by the bank's records, there was a time in late July of 2008 when the principal owed to the bank reached a low of $89,538.66. During the further course of the foreclosure litigation by the bank, this amount grew to a total of $122,523.97 as evidenced by the Judgment granted by Judge Laabs. At the time of the Sheriff's Sale, when a wholly-owned subsidiary of the bank, Black River Country Realty, Inc., entered its bid, the amount of the bid was $109,500.00. The property ultimately was resold for $100,000.00, an amount still substantially in excess of the lowest principal balance point. If the bank had handled this foreclosure properly and had not engaged in any erroneous and/or improper conduct, it is the Court's opinion that the property could have been sold at Sheriff's Sale for an amount similar to that ultimately realized by the bank or its wholly-owned subsidiary in the later sale for $100,000.00. The Court believes that there was a probability that if this foreclosure had not been mishandled, that there would have, in fact, been a surplus available to the claimant, Julie Gerdes.

¶55 Julie argues that she was also damaged by BRC Bank when the Bank failed to transmit a surplus amount to the sheriff, which should have been an amount equal to the credit card debt plus amounts relating to other uncontested mistakes the Bank made in calculating the amount it was owed.

¶56 BRC Bank does not reply to Julie's arguments as to why she suffered a loss. We are uncertain what BRC Bank thinks with respect to the circuit court's view of why the entire course of dealing with Duane harmed Julie.

¶57 As to the difference between the Bank's bid and the amount owed under the notes, we surmise that BRC Bank would take the position that its "mistakes" in calculating the amount it was owed did not harm Julie because, in the absence of such "mistakes," the Bank would have bid a lesser amount at the sheriff's sale with the result being that there would have been no arguable surplus for Julie to take advantage of. The circuit court obviously viewed the situation differently.

¶58 Under the circuit court's view, it was not equitable to permit BRC Bank to "correct" its errors in the manner argued by the Bank because of the Bank's bad behavior. The circuit court instead took the view that BRC Bank was stuck with its bid price for the property, and the issue was whether the Bank should have paid in a surplus and, if so, who would have benefited from that surplus. The circuit court determined that Julie would have benefited from that surplus. The corollary to this view is that Julie suffered a pecuniary loss when BRC Bank wrongly failed to pay the surplus amount to the sheriff.

¶59 We conclude that the circuit court's view of the situation is not unreasonable and that it supports a finding that Julie suffered a pecuniary loss.

F. Whether The Award Of Attorney's Fees Was Excessive

¶60 Julie's attorney submitted a request for attorney's fees and costs in the amount of $9,430.79.[11] The circuit court reduced the amount of attorney's fees by 25% and awarded attorney's fees and costs in the amount of $7,130.79 for work relating to the dispute over Duane's credit card debt and whether that debt was recoverable in the foreclosure action. BRC Bank contends that this amount was excessive because it "primarily includes fees related to other surplus issues."

¶61 According to the Bank, Julie's attorney did not raise the credit card issue until he received discovery from the Bank, which, according to the attorney's affidavit, he reviewed on November 7, 2009. The Bank argues that the fees submitted for work prior to that date—65% of the total bill—should not have been included in the circuit court's award.

¶62 Julie responds that work performed by her attorney that predated November 7, 2009, helped her discover BRC Bank's attempt to improperly recover Duane's credit card debt in the foreclosure action. More specifically, Julie argues that, if her attorney had not filed the notice of claim, prepared for and attended the first surplus hearing, prepared interrogatories, requests for production of documents, and requests for admissions, disputed a motion for a protective order, and prepared for and attended a second surplus hearing, she would not have discovered the Bank's misconduct with respect to the credit card debt and, subsequently, would not have recovered the amount of that debt. Julie further

[11] This is the amount requested in Julie's attorney's first affidavit. For reasons that are not apparent, the circuit court appears to have ignored a supplemental affidavit requesting an additional $600.

contends that the arguments BRC Bank made in defense of her other surplus claims would have also applied to the surplus relating to the credit card debt. BRC Bank does not reply to these assertions.

¶63 Based on the arguments before us, we agree with Julie that it was reasonable for the circuit court to conclude that all of the work her attorney performed with respect to her surplus claim led to her successful recovery of the credit card debt amount and the discovery of the practices by the Bank that the circuit court deemed to be unfair trade practices.

G. Attorney's Fees And Costs Relating To This Appeal

¶64 Julie requests attorney's fees and costs relating to this appeal. She contends that such fees are authorized by WIS. STAT. § 100.20(5), as interpreted in ***Shands v. Castrovinci***, 115 Wis. 2d 352, 340 N.W.2d 506 (1983). We agree that ***Shands*** supports this proposition. *See* ***id.*** at 354, 359. BRC Bank's reply brief is silent on the issue. Accordingly, our directions include a remand for purposes of determining an appropriate amount of attorney's fees and costs relating to this appeal.

II. Julie's Cross-Appeal

¶65 Julie contends that the circuit court erred when reducing her attorney's fees by 25% because the court's decision was based in part on a mistaken belief that the time her attorney spent disputing BRC Bank's view of ***Buchner*** did not benefit Julie. Julie contends that the circuit court confused the ***Buchner*** issue in this case with the ***Buchner*** issue litigated in circuit court Case No. 2009CV36.

¶66 BRC Bank does not attempt to demonstrate that the circuit court did not confuse the two cases. Instead, the Bank focuses on Julie's use of the term "concern" and argues that Julie's "concern" that the circuit court confused the two cases is mere "guesswork."

¶67 We conclude that the only reasonable reading of the circuit court's comments is that it did confuse the ***Buchner*** issues in the two cases.

¶68 In its decision on attorney's fees and costs in this case, the circuit court wrote that it "found that the position consistently taken by [the attorney for BRC Bank] that the action was largely governed by [***Buchner***] was correct." Later in the written decision, the court again referred to what it believed was unproductive time Julie's attorney spent arguing against BRC Bank's reliance on ***Buchner***. The court wrote: "As I mentioned earlier, some time was spent by [Julie's attorney] arguing against the applicability of ***Buchner***.... Once this Court indicated that ***Buchner*** did control certain issues, [Julie's attorney] dropped his objections and stipulated to the Confirmation of Sale."

¶69 As our decision in the Bank's appeal makes clear, the Bank's argument that ***Buchner*** applies and controls in this case *did not* prevail before the circuit court. Indeed the Bank, in its brief-in-chief, complains that the circuit court "simply ignored ***Buchner***, allowing ***Buchner*** to control only the lien discharge litigation [Case No. 2009CV36]." Stated differently, BRC Bank was correctly pointing out that the circuit court effectively rejected the Bank's ***Buchner*** argument in this case, while previously adopting the Bank's ***Buchner*** argument in Case No. 2009CV36.

¶70 Thus, it is apparent that the circuit court's decision to reduce Julie's request for attorney's fees was based in part on confusing Julie's attorney's

successful ***Buchner*** argument in this case with his unsuccessful ***Buchner*** argument in Case No. 2009CV36. Because we are unable to tell the degree to which this error affected the court's decision to reduce Julie's request for attorney's fees by 25%, our remand directions include the directive that the circuit court revisit this issue.

¶71 Julie also argues in her cross-appeal that the circuit court should have assessed attorney's fees and sanctions under WIS. STAT. § 802.05. However, Julie states that we need only address this issue if we reverse the award under WIS. STAT. § 100.20(5) in the course of deciding the Bank's appeal and affirm the circuit court's 25% reduction in her cross-appeal. Because we affirm the award under § 100.20(5) and reverse with respect to the 25% reduction, we need not address whether the circuit court should have assessed fees and sanctions under § 802.05.

Conclusion

¶72 For the reasons above, we affirm the circuit court, except with respect to the amount of attorney's fees. As to attorney's fees, we reverse the judgment. We remand and direct the circuit court to award Julie attorney's fees, keeping in mind that Julie's attorney prevailed on his argument regarding the applicability of ***Buchner*** in this case. In addition, because we affirm the court's award under WIS. STAT. § 100.20(5), we also direct the circuit court to determine reasonable attorney's fees and costs for the appeal as it relates to the award under § 100.20(5).

By the Court.—Judgment 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.