COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 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. 04-1645

Cir. Ct. No. 02 FA 101

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MARRIAGE OF:

STEPHANIE ROBERTS,

PETITIONER-RESPONDENT,

V.

ROBBY JOSEPH ROBERTS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: J. D. MCKAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. This appeal concerns the property division in a divorce involving a family farming operation. The court divided the property based on evidence submitted by Robby Roberts' former wife, Stephanie. As a sanction following Robby's second contempt of court for failing to comply with

pretrial discovery orders, the court precluded Robby from submitting evidence. Robby argues: (1) the trial court erroneously exercised its discretion when it failed to make explicit findings to support its sanction of "default judgment"; (2) the record fails to support the imposition of the harsh sanction; (3) the court's ruling was prejudicial; and (4) the court failed to give Robby notice of his alleged non-compliance with discovery or an opportunity to refute or mitigate it.

¶2 We reject Robby's arguments for the following reasons: (1) the record supports the trial court's reasonable discretionary determination to impose the sanction; (2) Robby fails to establish the evidence that Stephanie presented was inaccurate; and (3) he fails to demonstrate any error of law. We affirm the judgment.

BACKGROUND

¶3 The parties were married in 1996 and the divorce petition was filed February 1, 2002. They have one minor child. At the time of the divorce, Robby owned and operated a farm[1] and Stephanie was unemployed. After finding Robby in contempt of court a second time for failing to comply with pretrial orders, the trial court entered a property division based upon evidence contained in Stephanie's exhibit while precluding Robby from submitting any additional evidence.

¶4 A procedural history is necessary to understand the issues. Trial had initially been set for October 2, 2002. Because, among other things, Robby "has income he has not reported on his financial disclosure statement" and Stephanie

[1] The record indicates that Robby owned a one-half interest in the farm that he operated as a partnership with his brother.

"needs time to obtain [Robby's] bank records," trial was reset for December 12. The trial was not held as scheduled. On January 22, 2003, because Robby had failed to respond to her request for production of documents served November 12, 2002, Stephanie sought a new trial date and moved for sanctions against Robby.

¶5 The request for production served November 12 had sought:

> 1. Bank statements, not a history inquiry, of the joint business account at Bank One from January 1, 2002 until present.
>
> 2. Receipts for Cattle bought or sold to [E]quitable [L]ivestock under the names of Robby Roberts, Ivan Roberts, or John Denil, or
>
> 3. Any documentation from Rick Schmidt for items either bought or sold through his auctions,
>
> 4. Give a statement of any income received from leasing out a feed truck.
>
> 5. Give a statement of the amount owed to Ivan Roberts.

Trial was rescheduled for June 18, 2003. In an April 9 order, each party was ordered to make a deposit for appraisal fees.[2]

¶6 On April 23, Stephanie sought contempt sanctions because Robby failed to make the deposits as ordered. At an August 4 hearing on her motion,[3] Robby was found in contempt for failing to comply with the court order requiring the deposits. The court stated that "I'm not going to stand still for continued lack

[2] The order required the parties to make deposits for the guardian ad litem fee with respect to their custody dispute, and "the parties shall each deposit one-half of the anticipated costs for the real estate and personal property appraisals with their respective attorneys within 10 days if the issue of property division is not resolved within that 10 days."

[3] The order to show cause hearing was originally scheduled for May 23, 2003, but due to an unrelated extended trial, the court rescheduled it to August 4, 2003.

of cooperation on these issues. … I expect the complete cooperation from both parties, and particularly now from you, Mr. Roberts." The record indicates that Robby made the deposits to purge the contempt.

¶7 On August 27, Robby forwarded to the court a "Preliminary Financial Disclosure Statement" dated July 11, 2002, listing the marital residence valued at $112,000. Under "Business Interests" Robby listed one twenty-seven-acre parcel of tillable farm land at $7,300, livestock, vehicles, crops, and a Harvestore silo, minus a $30,000 debt to Ivan Roberts, his father, to equal a net $56,800. He omitted any value for forty acres, a residence, machine shed, barn and three silos, as well as equipment and machinery, stating that these items were acquired before the marriage.

¶8 In her pretrial conference statement dated September 11, 2003, Stephanie advised that her property had been appraised, but Robby had not yet had his property appraised as ordered. On September 19, Robby filed another statement of assets and liabilities, which omitted mentioning the forty-acre farm.

¶9 On September 23, 2003, Stephanie again sought contempt sanctions against Robby because he failed to obtain appraisals and failed to respond to the production of documents request served on November 12, 2002. Stephanie's attorney's affidavit stated that "[p]ursuant to the terms of the order entered January 13, 2003, [Robby] was to have all items in his possession appraised" and "provide a list of his property."[4]

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[4] The record fails to reveal a January 13, 2003, order. However, at the March 21, 2003, hearing, Robby's attorney acknowledged: "There is an order in existence that there was going to be an appraisal …." In any event, at the March 21 hearing, the court ordered the parties to deposit the appraisal fee and "get it done."

¶10 An order to show cause hearing was set for October 1, 2003, but it was not held and a November 4 contested divorce trial was scheduled instead. The court ruled that the divorce trial would resolve all issues but property division, explaining: "all issues but for division of property would be resolved and … we would complete the divorce, and then subsequently the parties would either resolve the property dispute or try that matter to the Court at a date to be rescheduled."

¶11 At the November 4 divorce trial, Stephanie testified that two real estate parcels had been appraised, but the forty-acre farm,[5] as well as personal property in Robby's possession, had not. These items, listed on "Exhibit 2," included a cattle trailer, six vehicles, a "2000 Fat Boy Harley Davidson," a dump trailer, a snowmobile trailer, other farm equipment and feed, crops, pigs, cows, heifers, steers and young stock. Stephanie testified that to proceed with the property division, she needed to have the appraisals completed. Stephanie's counsel stated: "[M]y questions really go to the property that yet needs to be appraised … if he will agree that the exhibit list … could be yet appraised and also the 40 acres of property that hasn't been appraised."[6]

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[5] The record indicates that Robby owned a one-half interest in the forty-acre farm.

[6] Robby's financial disclosure statement presented at trial valued the parties' residence at $114,000 and twenty-seven acres of land at $7,300, along with four vehicles. The forty-acre farm was not listed. Robby listed debts of $42,170 to Ivan J. Roberts, the purpose of which was marked, "Misc." It also listed a $47,020 debt to Ivan G. Roberts, also marked "Misc." Other debts listed $6,153 in landscaping, and $28,604.14 to John Denil for "Labor & Equip." and $3,250 to John Denil for car repairs.

Robby also presented his real estate appraisal, showing the home to be worth $136,000. He also presented an appraisal of personal property, which included two tractors and a 2002 Chevrolet 2500 diesel pick-up with a plow. The total value of the personal property that was appraised was listed at $85,027.

¶12 The trial court entered a judgment of divorce. It found that Robby's gross annual income was $175,000 and that Robby claimed he paid $140,400 per year for the purchase of cattle. The court ordered: "the parties either reach an agreement or have an appraisal done on all the items as set forth in Exhibit 2, and I'm going to order that there be an appraisal done of the forty-acre parcel that constitutes the [farm]."

¶13 The court scheduled the property division hearing for December 3 and admonished the parties:

> I'm not going to stand for any unnecessary delays in the future caused by anybody in terms of getting the remaining issues resolved. And I expect those issues to either be stipulated to or the numbers generated by December 1st so that we can schedule the hearing ….
>
> … I expect to have all that information on December 3rd. And if you haven't reached an agreement, I expect to reach one for you that day. I'm not taking this under advisement any longer.

No hearing was held on December 3.[7] The court appointed Judge Richard Greenwood to serve as a referee, who scheduled a property division hearing for January 2, 2004.

¶14 On December 23, Stephanie served another request for production of documents and interrogatories.[8] The January 2 hearing took place before the referee but apparently no record of the hearing was made. On January 16, 2004, the referee wrote to the court that Stephanie "needs discovery materials, and by

[7] The record does not explain why the hearing was not held.

[8] The record includes Stephanie's affidavit of service, but does not include a copy of the discovery materials.

copy of this letter I am asking [Robby's attorney] to produce them without the necessity of a compulsory motion hearing before you."

¶15 On February 11, Stephanie again sought Robby's compliance with her discovery requests. In a motion for an order to show cause, she stated that Robby was served with a request for production on November 12, 2002, and December 23, 2003, as well as interrogatories dated December 23, but that Robby failed to produce all the requested information or respond to the interrogatories.

¶16 At the February 19 order to show cause hearing, the court inquired, "[L]et me just try to cut to the quick. Why has there not been compliance with these requests?" In response, Robby's attorney presented a procedural summary, claiming that Robby provided the asset information requested and only information regarding debts had not been provided.

¶17 The court rejected Robby's explanation, stating: "So up until today, February 19th, there could have been compliance with the request for production of documents and answer to interrogatories." The court found, "I believe what we have is a continuing reluctance, for want of a better word, and I'm being kind, on the part of [Robby] to provide information requested by the petitioner." The court pointed out that the referee "made it clear that he needed meaningful information so that he could respond to the Court" and that Stephanie's discovery request was "appropriate."[9]

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[9] In his statement of the case, Robby writes:

(continued)

¶18 The court inquired:

> I think I have the authority to say enough's enough. Mr. Roberts is precluded from providing any additional information whatsoever to the referee or to the master, and [Stephanie's counsel] is directed to provide reasonable numbers based on information currently available to her, and then [the referee] decides the issues.
>
> Would you agree, [Robby's counsel], I have the authority to do that?

¶19 Robby's counsel responded that the court had the authority but that "it wouldn't be appropriate in this case because she's only asking for asset information" and Robby had provided asset information. His counsel repeated that only the information regarding debts had not been provided. Stephanie's counsel vigorously disputed Robby's assertion and replied:

> We haven't been provided any financial information concerning the farm, any bank accounts, any profit or loss statements. He refused to have his cattle appraised. There's no cattle on there. Certain equipment is missing.
>
> … And so more appraisals have to be done. The appraisals we feel still aren't complete. How can you appraise a farm and have no cattle or no animals or livestock?

> Robby's attorney believed the issue of assets was closed and that Judge Greenwood would not be entertaining any testimony about assets on January 30th. … Because the discovery demands only sought information about assets, it was effectively moot after the January 2, 2004 hearing. … Robby had "already provided the asset information to Judge Greenwood. The only thing that hasn't been provided is information on the debts."

This statement of the case is incomplete because it neglects to point out that the circuit court rejected this argument, finding that Judge Greenwood indicated that Stephanie's discovery request sought appropriate discovery information.

She pointed out that Robby had not yet fully responded to the initial request for production served in November 2002. Stephanie's counsel also stated: "These [claimed] debts are bogus, and we haven't seen one iota of paper on those either. … the family debts, we don't even know where they came up from." Robby's counsel acknowledged that the debt list provided "may not be current."

¶20 Stephanie requested to be awarded the marital residence and one-half of the IRA to resolve Robby's continuing non-compliance, explaining she was "not looking to break up the family farm or take anything from that," and pointing out that this proposal had been made three times. Stephanie offered the court a summary based upon the financial information in her possession, marked Exhibit 1.[10] The court recessed, permitting the parties to discuss property division.

¶21 When the hearing resumed, the court ruled: "I think we've let this thing go too far. And I think that the only way to resolve this is if I resolve it. It should have been resolved a long time ago." Relying on Exhibit 1, the court determined the property values and entered the property division. It precluded Robby from submitting any additional information, finding:

> This matter has lingered entirely too long. Mr. Roberts has been held in contempt of this Court on at least one prior occasion. [F]or purposes of [Robby's] noncompliance with the requests that are set forth in the present order to show cause, I find him in contempt again; and I resolve that contempt by the entry of the judgment as I've just set it forth.

[10] Exhibit 1 awards Robby his interest in two pieces of real estate valued at $30,375 and $82,500, as well as $105,527 in personal property and a $20,000 individual retirement account, for a total award of $238,402. It awards Stephanie the marital residence, valued at $136,000, personal property of $38,978 and a $20,000 individual retirement account, for a total of $194,000.

The court found there was no evidence of marital debts but to the extent there were any debts, "the party that incurred them can pay them."

DISCUSSION

¶22 Robby argues that the trial court erroneously exercised its discretion "when it entered a default judgment on property division for alleged discovery violations." As a matter of clarification, we note that the court did not enter a default judgment for discovery violations but, instead, precluded Robby from submitting any additional evidence of assets and debts as a sanction under WIS. STAT. § 804.12, following the court's finding that Robby was in contempt of court for failing to abide by pretrial orders.[11] In any event, Robby complains that the trial court erroneously exercised its discretion when it failed to make explicit findings of egregious conduct, bad faith or lack of a clear and justifiable excuse as required under ***Rupert v. Home Mut. Ins. Co.***, 138 Wis. 2d 1, 14, 405 N.W.2d 661 (Ct. App. 1987). Because the record supports the trial court's exercise of discretion, we reject his argument.

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[11] At the hearing, the court referred to Stephanie's counsel's request to hold Robby in contempt and for "some form of default judgment." Later, Robby's counsel agreed with the trial court that it had the general authority to impose a sanction that precluded Robby from offering additional evidence. The court subsequently found Robby in contempt of court and divided the property based on Stephanie's exhibit.

In his reply brief, Robby contends that the trial court's use of the term "contempt" is "unfortunate and confusing," and "this was not a contempt finding pursuant to WIS. STAT. § 785.04." Our review of the record indicates that the trial court made an unmistakable finding of contempt of court, but proceeded to impose sanctions under WIS. STAT. § 804.12.

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

¶23 A circuit court has both inherent authority and statutory authority to sanction parties for failing to obey court orders. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768.[12] Under WIS. STAT. §§ 804.12(2)(a)1. and 2., if a party fails to obey an order to provide discovery, a court may make such orders as are just, including that "designated facts shall be taken to be established" and "prohibiting the disobedient party from introducing designated matters in evidence."

¶24 In the case of ***In re Dustin R.P.***, 185 Wis. 2d 452, 518 N.W.2d 270 (Ct. App. 1994), we concluded a trial court did not err by precluding the putative father's use of an expert witness and introduction of medical records into evidence bearing on the issue of sterility. ***Id.*** at 456-57. The father violated the scheduling order and offered no explanation for waiting until a week before trial to submit to testing. ***Id.*** at 466. We concluded that "[w]hile exclusion of evidence is a drastic remedy," the trial court was warranted in considering the tardiness exceedingly offensive. ***Id.***

¶25 To impose such a drastic sanction, "the circuit court must find that the non-complying party's conduct is without clear and justifiable excuse and conclude that the noncompliance was either egregious or in bad faith." ***Brandon Apparel Group, Inc. v. Pearson Prop., Ltd.***, 2001 WI App 205, ¶11 n.5, 247 Wis. 2d 521, 634 N.W.2d 544.[13] The court may conclude a party operated in bad

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[12] Because WIS. STAT. § 804.12(2)(a) provides a legal basis for the court's decision, we do not address the court's inherent powers or contempt powers to impose sanctions for violations of pretrial orders. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

[13] ***Brandon Apparel Group, Inc. v. Pearson Prop., Ltd.***, 2001 WI App 205, ¶11 n.5, 247 Wis. 2d 521, 634 N.W.2d 544, explains that this standard is disjunctive:

(continued)

faith when the party has "intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand." ***Id.***, ¶11 (citation omitted). "A circuit court is not required to analyze a specific set of factors … instead, it should focus on the 'degree to which the party's conduct offends the standards of trial practice.'" ***Id.***

¶26 "[E]ven though the court did not use the words 'bad faith,'" we may find that a party acted in bad faith as long as it is clear from the record the court was convinced of the party's bad faith. ***Id.*** In ***Englewood Cmty. Aptmts. Ltd. P'ship v. Alexander Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (Ct. App. 1984), we held that the circuit court implicitly found bad faith when it characterized a party's conduct as a pattern of abuse, dilatory, and reflective of a

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> There may be some ambiguity in our previous decisions on the appropriate standard. ***Hudson Diesel*** states that a circuit court may sanction a party for abuse of discovery based on conduct that is either egregious or in bad faith. ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 543, 535 N.W.2d 65, 69 (Ct. App. 1995). Egregious conduct is conduct that, although unintentional, is "extreme, substantial, and persistent." ***Id.*** at 543, 535 N.W.2d at 69-70. However, we held in a later decision that a trial court should dismiss a cause of action under WIS. STAT. § 804.12(4) only in the case of "egregious conduct," although our decision did not explicitly define "egregious conduct." ***Geneva Nat'l Cmty. Ass'n, Inc. v. Friedman***, 228 Wis. 2d 572, 580, 598 N.W.2d 600 (Ct. App. 1999). Both decisions cite ***Johnson v. Allis Chalmers Corp***., 162 Wis. 2d 261, 470 N.W.2d 859 (1991) for this proposition. We read ***Johnson*** to allow dismissal based either on bad faith or on egregious conduct. *See* ***id.*** at 275, 470 N.W.2d at 864; *see also* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶21, 247 Wis. 2d 501, 634 N.W.2d 553 (noting distinction between bad faith and egregious conduct).

While ***Brandon*** refers to a sanction of a default judgment, we accept the parties' apparent agreement that the same analysis applies to the sanction imposed here. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

cavalier approach. The failure to utter the precise "magic words" does not result in reversible error when the trial court has made "unmistakable but implicit findings to the same effect." ***Id.***; *see also* ***Brandon Apparel***, 247 Wis. 2d 521, ¶14. An implicit finding of egregious conduct or bad faith is sufficient if the facts provide a reasonable basis on review for the court's conclusion. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 310, 470 N.W.2d 873 (1991); ***Paytes v. Kost***, 167 Wis. 2d 387, 394, 482 N.W.2d 130 (Ct. App. 1992).

¶27 We review the court's sanctions for failing to obey court orders to determine whether the trial court erroneously exercised its discretion. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17. "But where a circuit court has applied an incorrect legal standard in deciding whether to enter [the sanction of default] judgment, the court has erroneously exercised its discretion." ***Id.***, ¶18. For an erroneous exercise of discretion to be ground for reversal, it must be shown to be prejudicial. *See* ***id.***, ¶28. To be prejudicial within the meaning of WIS. STAT. § 805.18(2), it must "affect the substantial rights" of a party.

¶28 "For an error to 'affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R.***, 246 Wis. 2d 1, ¶28. "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Id.***

¶29 Robby first argues that the trial court erroneously failed to make explicit findings of egregiousness, bad faith, or lack of a justifiable excuse. We reject his argument. Where the record unmistakably reveals a rational basis for the court's decision, the trial court's failure to make explicit findings does not require reversal. ***Brandon Apparel***, 247 Wis. 2d 521, ¶14.

¶30 It is clear from the record that the court was convinced of Robby's bad faith. Despite numerous discovery requests dating from November 2002, and the court's explicit order to provide financial information by December 1, 2003, it was undisputed that as of February 19, 2004, Robby had failed to provide complete information.[14] The court explicitly rejected Robby's excuse that he believed he needed only to provide debt information. The court found the referee "made it clear that he needed meaningful information so that he could respond to the Court" and that Stephanie's discovery request was "appropriate." This rejection amounts to a finding that Robby's failure to provide complete financial disclosure had no justifiable excuse.

¶31 The record reflects the court's concern this was Robby's second contempt finding in the proceeding. It stated it had found Robby in contempt at least one time previously and "I find him in contempt again." The court's finding was the equivalent of finding that Robby's conduct was intentional and continuing. *See* WIS. STAT. § 785.01(1). The court's frustration with Robby's intentional and unjustifiable non-compliance with court orders was explicit when it stated, "Enough is enough," and "we've let this thing go too far." The court determined that a sanction was necessary to resolve Robby's attempts to thwart the property division when it found, "the only way to resolve this is if I resolve it. It should have been resolved a long time ago." A court may conclude that a party operated in bad faith where the party has "intentionally or deliberately delayed,

[14] At the February 19, 2004 hearing, Robby conceded that his list of debts may not be current. Also, in his reply brief, Robby argues: "Appraisals were subsequently had on all of their real property and *most* if not all of the parties' personal property, including farm equipment. The only remaining point of contention was Robby's farm business." (Emphasis added). This argument concedes that the appraisals and, consequently, Robby's financial disclosures, were incomplete.

obstructed or refused the requesting party's discovery demand." ***Brandon Apparel***, 247 Wis. 2d 521, ¶11 (citation omitted).

¶32 The lengthy procedural history supports the court's implicit yet unmistakable finding that Robby's failure to comply with pretrial orders was intentional, without clear and justifiable excuse and in bad faith. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991) (Dismissal is appropriate where non-complying party's conduct is egregious *or* in bad faith and without a clear and justifiable excuse.). Thus, Robby's conduct sharply contrasts with that described in ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 546, 535 N.W.2d 65 (Ct. App. 1995), on which Robby relies, in which "the trial court did not find that Hudson's discovery violation stemmed from intentional conduct." In addition, Robby's reliance on ***Smith v. Golde***, 224 Wis. 2d 518, 592 N.W.2d 287 (Ct. App. 1999), does not command reversal. In ***Golde***, "the trial court precluded Golde from presenting evidence not as an additional sanction, but because the damages hearing was held in connection with a default judgment." ***Id.*** at 523, n.2.[15] That is not the case here, where the court precluded Robby from submitting additional evidence as a sanction.

¶33 Robby also relies on the ***Rupert*** case in which we stated that based on the record, "we cannot conclude that the trial court found, implicitly or otherwise, that Rupert's conduct had been egregious." ***Id.*** at 14. That is not the case here. After hearing Robby's explanations for his failure to comply with court orders, the court explicitly rejected them and found Robby in contempt.

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[15] We also note that Golde had made an offer of proof and that, here, Robby made no offer of proof. *See* WIS. STAT. § 901.03(1)(b).

¶34 We also reject Robby's contention that his conduct does not warrant the harsh sanction imposed. Without citation to the record, Robby contends: "Presumably, each and every one of the questions contained in the December 23, 2003, interrogatory was asked at the January 2, 2004 hearing [before the referee]" and "[t]he record also shows that farm real estate and equipment had been appraised …." Arguments made without record citation will not be considered.[16] *See* WIS. STAT. RULE 809.19(1)(e).

¶35 Also, Robby suggests that his compliance with discovery was adequate, because, "According to the record, the only reason another hearing was even scheduled was because *Robby* requested one to present evidence on debts."[17] (Emphasis in the original). To support his argument, Robby cites to his counsel's assertion:

> [M]y understanding was the hearing on January 2nd was about the assets. There was no testimony about debts. I asked for an opportunity to discuss the debts. [The referee] then scheduled the hearing for the 30th.

¶36 The court, however, rejected counsel's explanation:

> But once the hearing was conducted on January 2nd, [the referee] made it clear that he needed meaningful information so that he could respond to the Court, and he thought that [Stephanie's counsel's] request for discovery was appropriate under the circumstances.

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[16] The appellant, Robby, has the responsibility of providing a complete record, *see* ***In re Ryde***, 76 Wis. 2d 558, 563-64, 251 N.W.2d 791 (1977). We will assume the missing record supports the trial court's decision. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979).

[17] In a later portion of his brief, Robby concedes, "While it is true Robby had some history of non-compliance, this was an emotional divorce and he always had some understandable—even if mistaken—reason for his actions." The trial court rejected Robby's reasons for non-compliance.

The record fails to show that the court's finding was clearly erroneous.[18]

¶37 Robby further contends his conduct does not merit a harsh sanction because Stephanie was at fault in a number of ways. He complains, for example, that her discovery requests were not credible because she failed to specify what she needed and she failed to provide all the information requested by Robby. He further argues that his trial attorney was primarily to blame for his failure to provide written responses to discovery. However, he fails to indicate that he brought any trial court proceedings to evaluate Stephanie's or his trial attorney's conduct.

¶38 As an appellant, Robby has the responsibility to establish that he brought to the trial court's attention the issues he now seeks to raise on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Because the trial court was not given an opportunity to consider this argument, and either correct itself or make a ruling that this court could then review, the issue is not properly before us. *See* ***Hillman v. Columbia County***, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991).

¶39 Robby further complains "he was denied the opportunity to defend against Stephanie's allegations." No record citation follows this argument, *see*

[18] In his reply brief, Robby argues that it is "uncontradicted" that the scheduled January 30 hearing before Judge Greenwood was solely regarding debts. The record belies this assertion. Stephanie disputed this argument at the order to show cause hearing. The trial court rejected Robby's contention, finding that Judge Greenwood's letter demonstrated that Stephanie's discovery request sought appropriate and meaningful information. The record fails to show otherwise. As the appellant, Robby has the responsibility of ensuring a complete record to support his contentions. *See* ***Ryde***, 76 Wis. 2d at 563.

In any event, this argument concedes that Robby failed to provide complete debt information, in violation of the court's order at the November 4 hearing that all financial information must be provided before December 3.

WIS. STAT. RULE 809.19(1)(e), and our review of the record fails to uncover support for his contention. The record indicates that Stephanie and the court continually requested Robby to comply with disclosure requests, gave him a number of opportunities to do so and, at the February 19, 2004 hearing, the court inquired why there had not been compliance. Robby mischaracterizes the court's decision. The court did not deny Robby an opportunity to defend himself; the court rejected Robby's defense.

¶40 Robby also faults the trial court for failing to take testimony regarding the discovery disputes. Robby neglects, however, to suggest that he offered testimony or what testimony, if any, he offered. *See* ***Caban***, 210 Wis. 2d at 604; *see also* WIS. STAT. § 901.03. "[T]he appellant [must] articulate each of its theories to the trial court to preserve its right to appeal." ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995). Therefore, this argument fails as well.

¶41 Robby further claims that because he operated his farm business as a partnership with other family members, "obtaining financial records may have required their cooperation, assuming the records Stephanie sought even existed." Because this assertion is stated hypothetically, it suggests that Robby has not attempted to obtain the financial records Stephanie sought. We do not address hypothetical issues. *See* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998).

¶42 Throughout his briefs, without identifying it as a separate issue, Robby insinuates that the contempt finding was erroneous.[19] For example, he contends: "At a minimum, he did not purposely fail to comply with the discovery demands." The trial court, however, found to the contrary, and the record supports the court's finding. *See* WIS. STAT. § 805.17(2). We decline Robby's invitation to substitute his inference for that drawn by the trial court.

¶43 Next, we conclude that Robby fails to make a showing of prejudice. *See* ***Evelyn***, 246 Wis. 2d 1, ¶28; *see also* WIS. STAT. § 805.18(2). Robby fails to suggest any reasonable possibility of a more favorable outcome had he not been precluded from offering additional evidence. *See* ***Evelyn***, 246 Wis. 2d 1, ¶28. Robby does not indicate that the list of property and values contained in Exhibit 1, upon which the court relied to enter the property division, was inaccurate. While Robby refers to various claims he made regarding debt, he fails to point to evidence supporting his claims.

¶44 The trial court offered Robby the opportunity to provide evidence that Exhibit 1 was incomplete or inaccurate. The court stated:

> Any property not evidenced by the—by Exhibit 1, which has been marked, is not considered to be marital property or not known of as to be marital property. And to the extent that marital property exists outside the ruling of the Court, the parties in either instance are free to bring those matters back to the Court's attention should they learn the existence of the property for further consideration. I don't know if there's any property being hidden. There's certainly been some suggestion that there is. … As to the debts … Those other debts, I've never seen any evidence of them.

[19] Robby does not set out this argument under a separate heading. *See* WIS. STAT. RULE 809.19(1)(e).

¶45 Robby fails to show that he brought any postjudgment motions to establish that the record upon which the trial court relied was inaccurate. Our confidence in the outcome is not undermined. Thus, we are satisfied that the error complained of is not prejudicial. *See* ***Evelyn***, 246 Wis. 2d 1, ¶28.

¶46 Nonetheless, in a one sentence argument, Robby complains he was prejudiced because the court erroneously failed to account for $200,000 in "claimed martial debts."[20] In support of his argument, Robby cites to the following exchange:

> The Court: Well, how much are the debts?
>
> [Robby's Counsel]: Well, according to our numbers, more than $200,000.

However, the court "saw no evidence of marital debt." Because Robby's counsel's statement is not evidence, and Robby points to no other evidence of debt in the record, we cannot conclude the trial court's finding is clearly erroneous. *See* WIS. STAT. § 805.17(2).[21]

¶47 Finally, Robby argues that the trial court erroneously exercised its discretion when it failed to give Robby notice or opportunity to refute or mitigate his non-compliance with the discovery request. This argument is unaccompanied by legal citation and, therefore, we decline to address it further. It is not our

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[20] This argument is not separately identified, contrary to WIS. STAT. RULE 809.19(1)(e).

[21] It is evident that the trial court rejected Robby's unsupported declarations on his financial disclosure statements as proof of debt. Robby's preliminary financial disclosure statement, dated July 11, 2002, listed three debts: a $70,000 mortgage on the residence, a $17,000 truck loan, and a $30,000 obligation to Robby's father. This statement varied with others he submitted. Also, it is undisputed that the residential mortgage had been paid. Robby asserted that his father had paid the mortgage. The court ruled that because Robby's father was not a party to the action, it would not address the issue of the father's civil recourse to obtain repayment. This ruling is not challenged on appeal.

function to abandon our neutrality to develop one party's arguments.[22] *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

CONCLUSION

¶48 Contrary to Robby's assertion, the trial court did not enter a default judgment, but designated Exhibit 1 as established facts and precluded Robby from submitting evidence as a sanction for failing to obey the court's order to provide discovery. *See* WIS. STAT. § 804.12(2)(a)1. and 2. We will not reverse the court's discretionary decision unless it can be said that no reasonable judge, acting on the same facts and underlying law, could have reached the same result. ***State v. Jeske,*** 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Because Robby identifies no factual or legal error, and the record reveals that the court reasonably exercised its discretion, we will not overturn its decision.

By the Court.—Judgment affirmed.

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

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[22] Robby does not contend that Stephanie failed to provide notice of her intent to seek sanctions under WIS. STAT. ch. 804. We also note, that at the outset of the order to show cause hearing, the trial court inquired, "[L]et me just try to cut to the quick. Why has here not been compliance with these requests?" thus permitting Robby the opportunity to offer reasons in mitigation of his conduct.