COURT OF APPEALS
DECISION
DATED AND RELEASED

October 31, 1996

NOTICE

No. 96-1804

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

W. GEORGE BOWRING AND EDWARD J. CALLAN,

Plaintiffs-Respondents,

v.

WISCONSIN DIVISION OF TRANSPORTATION,

Defendant,

WALTER MERTEN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

VERGERONT, J.[1] Walter Merten appeals from an order finding him in contempt for failure to execute and deliver a particular check as ordered in a judgment entered against him in favor of George Bowring and Edward

[1] This appeal is decided by one judge pursuant to § 752.31(2)(h), STATS.

Callan and for failure to comply with an order to file a financial disclosure statement. Merten argues that he did not have adequate notice of the contempt proceeding, that the court lacked the statutory authority to find him in contempt,[2] and that it erroneously exercised its discretion in finding him in contempt. He also challenges the award of attorney fees. We reject each argument and affirm.

Merten was sued by Bowring and Callan for appraisal services they performed for him with respect to property that the Wisconsin Department of Transportation (DOT) proposed to acquire. DOT sent Merten a check in the amount of $2,273 payable to him and the appraisers, but Merten refused to negotiate the check because he believed there were deficiencies in the appraisal report and statement for services. After a trial to the court, the court entered judgment on January 4, 1996, in the amount of $2,273 against Merten. The judgment also stated: "Judgment to be satisfied by defendant's negotiation of check for $2473.00 to plaintiffs. Plaintiffs to refund $200.00 to Dept. of Transportation. No costs awarded to either party. All counterclaims of defendant, Walter Merten, are dismissed."

On January 4, 1996, an order for financial disclosure and financial disclosure statement was sent to Merten by the court. Merten was ordered to pay the judgment in full within fifteen days of the entry of judgment or accurately complete the financial disclosure statement and mail or deliver it to the plaintiffs' counsel, whose name and address was provided. This order stated: "Failure to comply with this order may be contempt of court and subject you to the following penalties: imprisonment for up to 6 months, forfeitures of not more than $2000 per day, any other order necessary to ensure your compliance, punitive (criminal) sanctions under Chapter 785, Wis. Stats."

On January 18, 1996, Merten filed a notice of appeal from the judgment.[3] On that date, he wrote to the trial court, beginning the letter, "With

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[2] Under one argument heading, challenging the court's "jurisdiction," Merten argues both that he did not have notice and that the court did not have the authority to do what it did. We discuss and decide these as separate issues.

[3] We affirmed the judgment against Merten. ***Bowring and Callan v. Wisconsin Division of Highways and Transportation and Merten***, Case No 96-0246 (Ct. App. Sept. 30, 1996). Because many of the documents related to the contempt proceeding following

respect to the Financial Disclosure Statement, may I advise the court as follows." Merten went on to state that he had filed a notice of appeal; that if he paid the judgment as ordered, he would be waiving his rights to appeal; and that he was willing to explore with plaintiffs a way to negotiate the DOT check on certain conditions to avoid a waiver of his appeal rights. The court never responded to this letter. Plaintiffs' counsel, who had been sent a copy, did respond, demanding immediate endorsement and transmittal of the DOT check and objecting to the proposed conditions as not authorized by the statute relating to relief pending appeal.

There was further correspondence from Merten to plaintiffs' counsel, in which Merten continued to attempt to negotiate the terms on which he would comply with the judgment. Merten also provided plaintiffs' counsel, unsolicited, with an "Undertaking on Appeal" in the amount of $2,500. Merten did not ask the trial court for relief pending appeal pursuant to § 808.07, STATS.[4]

On or about March 21, 1996, plaintiffs filed a notice of motion and motion for execution of judgment. The notice stated that at the hearing, Bowring and Callan would move the court for: (i) an order for issuance of an execution of judgment under §§ 815.02 and 815.05, STATS., compelling Merten to satisfy the judgment by negotiating and delivering the DOT check to plaintiffs; (ii) holding Merten in contempt; and (iii) reasonable attorney fees and costs for the preparation and prosecution of the motion.

(..continued)
the judgment are contained in the record of Case No. 96-0246, we order that the record for that appeal be transferred to this appeal.

[4] Section 808.07(1) and (2), STATS., provide in part:

> (1) EFFECT OF APPEAL. An appeal does not stay the execution or enforcement of the judgment or order appealed from except as provided in this section or as otherwise expressly provided by law.
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> (2) AUTHORITY OF A COURT TO GRANT RELIEF PENDING APPEAL. (a) During the pendency of an appeal, a trial court or an appellate court may:
>
> 1. Stay execution or enforcement of a judgment or order[.]

At the close of the hearing on Bowring's and Callan's motion, held on March 29, 1996, the trial court found that Merten wilfully failed to negotiate the DOT check as ordered in the judgment and wilfully failed to comply with the court's order to provide a financial disclosure statement. The court ordered that Merten give to plaintiffs' attorney by April 4, 1996, either the DOT check duly endorsed by him or a personal certified check in the amount of $2,273. The court also ordered that Merten pay an additional sum of $668.19 by April 4, 1996, representing $68.19 in interest and $600 in attorney fees incurred by plaintiffs in bringing the motion. The court imposed a forfeiture of $500 per day commencing on April 5, 1996, which could be purged by making all payments by April 4.

Merten challenges both determinations of contempt on the same grounds. Because we conclude the court properly determined that Merten was in contempt for disobeying the order to negotiate the DOT check, we do not address the court's determination that he was also in contempt for disobeying the financial disclosure order.

Merten first contends that he did not have notice that, at the hearing on March 29, 1996, the court would consider his compliance with terms of the judgment. There is no merit to this contention. Bowring's and Callan's notice of motion plainly advised Merten that they were asking the court to hold Merten in contempt. The only reasonable interpretation of that notice, the accompanying affidavit, and the brief in support is they were asking the court to hold Merten in contempt for failing to endorse and deliver the DOT check as ordered in the judgment. At the hearing Merten explained his reasons for not doing so. He never indicated to the court that he did not understand that would be the subject of the hearing or that he needed a continuance to adequately respond.

Merten next contends that, since Bowring and Callan moved for issuance of an execution of judgment under § 815.02, STATS., the court had authority to determine only whether an execution of judgment should issue and could not consider his failure to comply with a court order in the judgment. There is no merit to this contention, either.

Section 815.02, STATS., provides:

> **Judgments, enforced by execution.** A judgment which requires the payment of money or the delivery of property may be enforced in those respects by execution. *Where it requires the performance of any other act a certified copy of the judgment may be served upon the party, person or officer who is required to obey the same, and if he or she refuse he or she may be punished for contempt, and his or her obedience enforced.*

(Emphasis added.) The judgment against Merten ordered that judgment be satisfied by his negotiation of the DOT check. This in an act in addition to the payment of money or delivery of property. Refusal to perform this act may under § 815.02 properly result in a determination of contempt and enforcement of obedience to the order.[5]

In addition, under § 785.02, STATS., the court has the power to impose a remedial sanction for a continuing contempt, defined to include a "disobedience, resistance or obstruction of the authority, process or order of a court." Section 785.01(1)(b), STATS. A remedial sanction means a "sanction imposed for the purpose of terminating a continuing contempt of court." Section 785.01(3). Therefore, both §§ 815.02 and 785.02, STATS., provide authority for the court to find Merten in contempt for refusing to comply with the order to negotiate the DOT check and for imposing sanctions to bring about compliance.

Having concluded that Merten had notice that the court would decide at the March 29 hearing whether he was in contempt for failing to negotiate the DOT check, and that the court had the statutory authority to do so, we now consider whether the trial court erroneously exercised its discretion in finding Merten in contempt. We conclude it did not.

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[5] Plaintiffs' counsel's affidavit avers that a certified copy of the judgment was served on Merten as required by § 815.02, STATS., and Merten does not dispute that.

A trial court's use of its contempt power is reviewed for an erroneous exercise of discretion. *See* ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). We affirm a discretionary determination if the court applied the correct law to the facts of record and reached a decision that a reasonable judge would reach. ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989). We do not overturn the court's findings of facts unless they are clearly erroneous. ***Currie v. Schwalbach***, 132 Wis.2d 29, 36, 390 N.W.2d 575, 578 (Ct. App. 1986), *aff'd* 139 Wis.2d 544, 407 N.W.2d 862 (1987).

Merten contends that the trial court erred because a money judgment may not be enforced by means of remedial sanctions for contempt. We will assume for purposes of argument that Merten's premise regarding the enforcement of money judgments is correct. We nevertheless conclude that the court could properly find Merten in contempt for disobeying the order to negotiate the DOT check to the plaintiffs. The judgment entered against Merten was a money judgment for the amount of $2,273 but it also contained an order that Merten satisfy the judgment by negotiating the DOT check to the plaintiffs and an order that the plaintiffs reimburse DOT $200. Both orders may be enforced by contempt. *See* §§ 815.02 and 785.01(1)(b), STATS.

Merten insists that the language in the judgment, "Judgment to be satisfied by defendant's negotiation of the check ..." is not really an order but simply gives him the option of satisfying the money judgment in this manner. That is not what the plain language says, nor is that what the trial court intended, as the court explained in response to this argument at the hearing on the plaintiffs' motion. Merten's claim that he did not understand that negotiating the DOT check was the only way to satisfy the judgment is not a defense to contempt since he did not make any payment to the plaintiffs in lieu of negotiating the DOT check.

Merten's explanation for not negotiating the check as ordered is that, before complying, he was entitled to assurances from plaintiffs and/or the court that compliance would not waive or jeopardize his right to appeal from the judgment. There is no merit to this contention. Merten is entitled to no more than the applicable statute provides for every appellant. In the absence of a court order staying execution or enforcement of a judgment pending appeal, the filing of an appeal does not act as a stay. Section 808.07(1) and (2), STATS. There is no authority for an appellant to unilaterally substitute an undertaking

for compliance with a judgment pending appeal. If a court grants a stay, the court may condition the stay upon the filing of an undertaking. Section 808.07(3).

The trial court had to decide whether Merten's conduct in failing to comply with the order was a wilful refusal to obey a court order. This determination involves an assessment of Merten's intent, motives and credibility, all matters for the trial court sitting as the trier of fact to determine. *See* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 121, 260 N.W.2d 30, 33 (1977). There is ample evidence to support the trial court's determination that Merten's noncompliance with the order was a wilful refusal. We conclude the trial court properly exercised its discretion in determining that Merten was in contempt for failing to negotiate the DOT check.

Merten also challenges the award of attorney fees. This, too, is without merit. Merten had notice that the plaintiffs were seeking an award of fees when they filed their motion. He did not object at the hearing to the amount of fees requested and therefore has waived that issue. The court had the authority under § 785.04(1)(a), STATS., to order payment of a sum of money to the plaintiffs "sufficient to compensate [them] for a loss or injury suffered by [them] as a result of a contempt of court." Had Merten not disobeyed the order to negotiate the DOT check, plaintiffs would not have incurred attorney fees to enforce that order. The amount ordered for attorney fees, and the interest, are well within the court's authority.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.