COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2003

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. 02-1790 **Cir. Ct. No. 00-CV-205**

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

STEVEN H. HOYME,

PETITIONER-RESPONDENT,

V.

JANICE S. BRAKKEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Janice Brakken appeals an order denying her motion for relief from a trial court order approving a stipulation for an injunction. Brakken argues that the trial court erred when it (1) approved the stipulation absent her understanding; (2) limited the scope of testimony on her motion for relief from the order; (3) denied her relief from the injunction; and (4) awarded

Steven Hoyme attorney fees under WIS. STAT. § 814.025. Because the record supports the trial court's decision, we affirm the order. We further grant Hoyme's motion finding this appeal frivolous and remand for the circuit court to assess costs and reasonable attorney fees.

¶2 Following an evidentiary hearing before the Marinette County family court commissioner, Hoyme was granted injunctive relief restraining Brakken from contacting Hoyme in person, through a third person or in any way whatsoever. Brakken requested a de novo hearing before the circuit court. The evening before the hearing, the parties discussed settlement through their attorneys and by telephone.

¶3 The next morning, the court held a hearing at which Brakken's attorney appeared by telephone. The parties themselves did not participate; their attorneys advised the court that the parties had reached an agreement. The attorneys recited the terms on the record. The parties agreed that the injunction would remain in effect and, within thirty days, Brakken would be permitted to send Hoyme one letter without being in violation of the injunction. Other than that letter, no contact was permitted.

¶4 The court inquired whether any paperwork would be filed. Brakken's attorney stated:

> We both thought it would be wise under the circumstances to have this reduced to a written stipulation, but it's our intent the agreement be binding. I don't think Mr. Hoyme is likely to change his mind, but my client has a tendency to sometimes do that. I do have authority to enter into this agreement on her behalf.

¶5 The court responded: "It will be effective as of today, and I understand this will be followed up with a Stipulation and Order," to which both parties' counsel agreed.

¶6 Hoyme's attorney prepared a written stipulation but Brakken refused to sign it. She asserted that it did not match her understanding of what she had discussed with her attorney. Brakken claimed she notified her attorney of her objections but he did not immediately notify the court. When Brakken did not return the stipulation, Hoyme requested the court to enter an order approving it. Having heard no objection, the court signed the order. Brakken mailed Hoyme the one letter consistent with the stipulated order.

¶7 Brakken, pro se, sought relief from the order approving the stipulation. Brakken claimed the court erroneously approved the stipulation and the order should be re-opened. The court ruled that the parties' attorneys complied with WIS. STAT. § 807.05 governing stipulations but granted Brakken a hearing on whether she was entitled to relief under WIS. STAT. § 806.07.

¶8 At the hearing, the court permitted Brakken and her attorney to testify as to what took place just before the settlement agreement. Following testimony, the court ruled that Brakken had agreed to the stipulation and had authorized her attorney to enter into it on her behalf. It ruled that Brakken had failed to show grounds under WIS. STAT. § 806.07 and, therefore, that she was not entitled to relief from the stipulated order. It also determined that her defenses and motions were frivolous and awarded over $7,000 to Hoyme under WIS. STAT. § 814.025.

¶9 Brakken argues that the court erroneously approved the settlement on the basis of the attorneys' representations absent any testimony of the parties.

We are satisfied the court was entitled to determine that the stipulation was binding under WIS. STAT. § 807.05, which provides:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

The trial court, as the ultimate arbiter of weight and credibility, *see* WIS. STAT. § 805.17(2), rejected Brakken's testimony. The court found that her attorney was authorized to enter into the agreement on her behalf. The agreement was entered on the record by a court reporter.[1] Therefore, the court correctly determined that it was binding under WIS. STAT. § 807.05. *See also* ***Adelmeyer v. WEPC***, 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986).[2]

¶10 Brakken further contends that she repudiated the agreement before it was accepted. We reject this argument. The record discloses that the agreement was accepted in open court on the record at the April 12, 2001, hearing attended by the parties' attorneys. The record fails to support Brakken's contention that she repudiated the agreement before the April 12 hearing. To the contrary, Brakken sent Hoyme one letter, supporting a finding that she did not repudiate the agreement before it was accepted.

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[1] WISCONSIN STAT. § 807.13(4)(c) provides: "Regardless of the physical location of any party to the call, any waiver, stipulation, motion, objection, decision, order or any other action taken by the court or a party to a reported telephone hearing has the same effect as if made in open court."

[2] Brakken cites a number of divorce cases controlled by WIS. STAT. § 767.10. We conclude these family law cases have no application in the case before us.

¶11 Next, Brakken argues that the trial court erroneously excluded proffered testimony relating to her state of mind and her claim that the injunction was overbroad. We disagree. Evidentiary issues are addressed to trial court discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We uphold a trial court's evidentiary determination if the record reveals a rational basis. ***Id.***

¶12 Brakken's argument fails to specifically identify the testimony she claims was improperly rejected. Therefore, she has not adequately preserved her claim of error. *See* WIS. STAT. § 901.03(1). In any event, the portions of the record that she refers to indicate that the court rejected irrelevant evidence. Here, the record reveals that the court rejected testimony of what had happened before the family court commissioner. The court reasoned that Brakken had been granted a de novo hearing and entered into a stipulation. The issue before the court was whether Brakken was entitled to relief under WIS. STAT. § 806.07. Therefore, the court ruled that what transpired before the family court commissioner and facts concerning a subpoena were irrelevant. In addition, the record shows that Brakken was allowed extensive leeway with respect to testimony about her confusion and state of mind before entering into the stipulation. Because the court's ruling has a rational basis, it is not overturned on appeal.

¶13 Brakken further argues that the court erroneously excluded hearsay testimony. The record shows that Brakken called Mickey Kucheck as a witness. Brakken explained that this witness would testify that "two times, possibly three, after I had spoken with [Brakken's attorney] in the afternoon on April 11th and into the evening I called her as well." The court held that if the witness was merely to testify to what Brakken told her, it was hearsay. Brakken argues that the court erred because the witness would have testified as to Brakken's state of

mind, which falls within an exception to the hearsay rule. We do not address this argument because the record fails to indicate that Brakken raised the hearsay exception before the trial court. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶14 We further reject Brakken's contention that the trial court erroneously failed to accept evidence concerning the "overbreadth issue," which apparently refers to her complaint that the injunction is broader than necessary. This argument fails to adequately develop how overbreadth of the injunction is relevant to the issues before the court under WIS. STAT. § 806.07 and therefore will not be considered. *See* ***State v. Jackson***, 229 Wis. 2d 328, 336-37, 600 N.W.2d 39 (Ct. App. 1999).

¶15 Next, Brakken argues that the trial court erred when it denied her relief from judgment because she established excusable neglect.[3] We disagree. WISCONSIN STAT. § 806.07(1)(a) provides for relief from judgment, order or stipulation on the basis of "excusable neglect." Here, the trial court rejected Brakken's testimony on weight and credibility grounds. It accepted her attorney's testimony that Brakken had agreed to the stipulation and that he was authorized to enter into it on her behalf. Thus, the court's credibility finding was incompatible with Brakken's theory of excusable neglect and the court therefore rejected it. The trial court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of

[3] Brakken apparently characterizes her conflusion before entering the stipulation as excusable neglect.

nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Because the record demonstrates credible evidence to support the court's determination, we do not overturn it on appeal.

¶16 Interwoven in several of Brakken's arguments is her complaint that the injunction is broader than necessary. This issue exceeds the scope of our review of the court's denial of Brakken's WIS. STAT. § 806.07 motion and attempts to ask us to review the order of the family court commissioner, which is not properly before us because it is not an order of the circuit court. *See* WIS. STAT. § 808.03(1); *see also* ***Dane County v. C.M.B.***, 165 Wis. 2d 703, 708, 478 N.W.2d 385 (1992) (A court commissioner's order is not the equivalent of a final order or judgment of the circuit court.). Consequently, this argument is rejected.

¶17 Finally, Brakken argues that the trial court erroneously awarded Hoyme attorney fees under WIS. STAT. § 814.025.[4] First, she complains that the

[4] WISCONSIN STAT. § 814.025 provides for costs upon frivolous claims and counterclaims and reads:

> (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
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> (2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
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> (3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(continued)

court erroneously raised the issue sua sponte and without notice. The record belies Brakken's claim. In his September 25, 2001, brief opposing Brakken's motion for relief from judgment, Hoyme requested attorney fees for having to respond to baseless motions. He characterized the legal proceedings as "without legal or factual basis." We conclude that Hoyme gave Brakken adequate notice.

¶18 Brakken further complains that the court never made a finding of frivolousness nor any findings to support its decision. We disagree. The court expressly determined that Brakken's testimony was not credible and that she authorized her attorney to enter the stipulation. The court noted that the evidence showed Brakken had intended simply not to show up for the April 12, 2001, hearing until her attorney had pointed out the wisdom of seeking a stipulation instead.[5] The court stated:

> You just weren't going to bother to show up here. You are going to let the court come in here. You are going to let me sit down here and wait around. You are going to let [opposing counsel] have prepared for this. You will let her have whatever witnesses she had to bring in for this hearing, let them all show up, and you wouldn't show up.

> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

[5] Brakken faxed a note to her attorney stating: "We had left it that they would believe we would show [and] wouldn't. As you said, it would incur extra [money] on their behalf." The trial court was entitled to infer that Brakken's objective was to drive up Hoyme's attorney fees.

The court's opinion demonstrates that it found that no factual or legal basis for Brakken's motions and that she should have known that none existed. We conclude that the court's findings adequately support the award of attorney fees under WIS. STAT. § 814.025.[6] We further conclude that Brakken's appeal is frivolous and without any factual or legal basis. Hoyme is entitled to attorney fees on appeal pursuant to WIS. STAT. § 809.25. We remand for the circuit court to assess costs and reasonable attorney fees.

By the Court.—Order affirmed and cause remanded with directions.

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

[6] The amount of fees awarded is not challenged.