

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 28, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2009AP3206**

**Cir. Ct. No. 2006FA2**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**SHAWN E. DREW,**

**PETITIONER-RESPONDENT-CROSS-APPELLANT,**

**V.**

**DAWN M. DREW,**

**RESPONDENT-APPELLANT-CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Dawn Drew appeals and Shawn Drew cross-appeals from the part of a judgment of divorce that divided the parties' marital property. Dawn argues that the circuit court erred when it admitted into evidence the deposition testimony of two of Shawn's experts. She also argues that the court erred when it prohibited her from calling an expert rebuttal witness. Shawn argues in the cross-appeal that the circuit court erred when it did not include all of Dawn's retirement account in the property division and when it determined the value of Shawn's business to be \$35,000. We conclude that the circuit court did not err when it allowed Shawn to use the deposition testimony or when it refused to allow Dawn to call a rebuttal witness. However, we conclude that the circuit court did not properly exercise its discretion when it valued either Dawn's retirement account or Shawn's business. Consequently, we affirm in part and reverse in part, and we remand the matter to the circuit court for further findings consistent with this opinion.

¶2 Dawn's first argument is that the circuit court erred when it allowed Shawn to use expert testimony from two depositions at trial. Dawn claims that her counsel did not receive notice of one of the depositions, and that her counsel did not receive timely notice of the change in the location of the other deposition. The circuit court found that Dawn had received proper notice of both depositions.

¶3 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). Here, Shawn's counsel offered evidence to show that he sent notices of the depositions, including a notice that the location of one of the depositions had been changed. We see no reason to disturb

the circuit court's exercise of discretion. Dawn also argues that the use of the deposition testimony deprived her of the opportunity to cross-examine Shawn's expert witnesses. We have already concluded, however, that the circuit court properly admitted the deposition testimony, and we need not address this argument further.

¶4 Dawn argues both that there was an absence of “a factual basis or foundation” for the court's decision that certain property was actually Shawn's property, and that the use of the deposition testimony violated the rules of discovery. An appellate court may decline to address issues that are not, or are inadequately, briefed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We conclude that neither of these arguments is sufficiently developed to warrant our consideration. We will not address them further.<sup>1</sup>

¶5 Dawn's last argument is that the circuit court erred when it would not allow her to call an expert rebuttal witness. Prior to trial, the court entered a scheduling order that included a deadline for naming expert witnesses. Dawn failed to comply with this deadline. Shawn filed a motion in limine asking the court to forbid Dawn from calling any experts because she had not complied with the scheduling order. The court granted Dawn two additional weeks to comply with the scheduling order. Dawn still did not comply, so the court granted the motion in limine.

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<sup>1</sup> The Table of Contents for Dawn's brief-in-chief identifies another issue: whether there was a basis for the circuit court's award of fees against her for over trial. Dawn does not address the issue anywhere else in her brief-in-chief. We conclude that she has forfeited that issue. In her reply brief, Dawn includes one paragraph that addresses the award for over trial. We will not consider an issue raised for the first time in a reply brief. *See Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

¶6 At the beginning of the trial, the circuit court ruled that it would not allow Dawn to call any expert rebuttal witnesses because she had not complied with the scheduling order. At the end of trial, Dawn attempted to call a rebuttal witness to challenge the basis on which Shawn's expert appraised certain equipment. Shawn objected because Dawn had not disclosed the witness prior to trial. The court would not allow the witness to testify. Dawn argues that the circuit court erred by not allowing her to call the rebuttal witness. Dawn does not explain what her rebuttal witness would have said, but says only that the witness was necessary to create a thorough record and prevent an injustice.

¶7 A circuit court's decision to impose a discovery sanction is discretionary. *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. A discretionary decision will be sustained if the trial court has examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* The question is not whether we would have imposed the sanction; it is whether the trial court erroneously exercised its discretion in doing so. *Id.*

¶8 We conclude that the circuit court properly exercised its discretion by not allowing the expert rebuttal witness to testify. Dawn had ample opportunity pretrial to disclose the expert witnesses she intended to call. For reasons that are not at all apparent from the record, Dawn failed to comply with this order. The court properly exercised its discretion by not allowing Dawn to call a rebuttal witness.

¶9 In the cross-appeal, Shawn raises two arguments: (1) whether the circuit court erred when it did not consider the full amount of Dawn's retirement

account in the property division, and (2) whether the circuit court erred when it valued Shawn's business interest.

¶10 Property division is within the trial court's discretion. *Noble v. Noble*, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. We uphold the court's division of property "if the court gave rational reasons for its decision and based its decision on facts in the record." *Id.*

¶11 Shawn argues that the circuit court erred when it determined that the value of Dawn's retirement account was \$33,000. The circuit court heard argument from the parties. Shawn argued that the account should be valued at \$66,000. However, Shawn did not provide any support for that figure. The court set the amount at what it determined was the current value. In so doing, the court stated: "I don't know how to do it with your pension. There is a legal way to calculate that. I don't – I just do not know what it is." The court ultimately decided to rely upon the present value of the pension, which it found to be \$33,000.

¶12 The parties did not present any evidence, expert or otherwise, on the proper way to value a pension, and the court stated on the record that it did not understand the law on the issue. In the absence of testimony or other evidence to support the proper method for valuing a pension, and given the court's stated lack of knowledge about the proper way to value it, we conclude that the circuit court did not properly exercise its discretion when it valued Dawn's pension.<sup>2</sup>

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<sup>2</sup> We note that this issue may have been resolved with the use of a Qualified Domestic Relations Order (QDRO).

¶13 We also conclude that the court did not properly value Shawn's business interests. The circuit court did not base its valuation on facts of record, but rather selected what it thought would be a "fair" value. The valuation should be based on the facts of record.

¶14 We conclude that the court did not properly exercise its discretion when it valued Dawn's pension or Shawn's business interests. Consequently, we affirm the judgment of divorce, but we reverse those portions of the judgment that value Dawn's pension and Shawn's business interests, and we remand the matter to the circuit court to take additional evidence on both of these issues.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

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

