

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2011

A. John Voelker
Acting 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. 2010AP2820

Cir. Ct. No. 2010CV909

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHAEL B. HOERIG,

PLAINTIFF-APPELLANT,

v.

CASSIE R. HOERIG, DAVID S. HUDY AND JAMES C. STEPHENS,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County:
MAXINE A. WHITE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Michael B. Hoerig, *pro se*, appeals from a circuit court order dismissing his claims against his wife and two men that he claims assisted her in wasting the Hoerigs' marital estate. He also appeals from the order denying his motion to reconsider. Because the circuit court properly exercised its

discretion by deferring to the family court presiding over the Hoerigs' divorce action, we affirm.

BACKGROUND

¶2 Hoerig initiated the action underlying this appeal by filing a document entitled "petition for injunction preventing the dissolution of assets and for financial accounting by durable financial power-of-attorney." The circuit court dismissed his claims on its own motion before any party filed an answer. The record is therefore sparse. We take the facts from the petition, from Hoerig's letters to the court, and from his motion to reconsider the dismissal order.

¶3 The petition reflects that Hoerig married Cassie R. Hoerig in April 2006, and he was imprisoned soon thereafter. He gave Cassie Hoerig temporary power of attorney, and he alleges that she then squandered the Hoerigs' assets. According to Hoerig, she was aided in doing so by David S. Hudy, who fathered her two children while Hoerig was incarcerated, and by James C. Stephens, who assisted her in selling a piece of real estate.

¶4 Hoerig sought compensation from Cassie Hoerig for losses he claims he incurred as a consequence of her alleged financial mismanagement. He also sought an accounting and an injunction preventing her from further disposing of the Hoerigs' property. In addition, Hoerig sought compensation from Hudy and Stephens for "their complicity in wasting [Hoerig's] assets."

¶5 Soon after Hoerig filed his petition, Cassie Hoerig filed for divorce. The circuit court concluded that Hoerig's claims all related to the dissolution of the marital estate and that the family court hearing the divorce proceedings

provided an appropriate forum for resolving the issues. The circuit court therefore dismissed Hoerig's petition.

¶6 Hoerig moved to reconsider. The circuit court denied the motion, and Hoerig appeals.¹

DISCUSSION

¶7 “A circuit court's decision to dismiss an action is discretionary.” *Lee v. LIRC*, 202 Wis. 2d 558, 562, 550 N.W.2d 449 (Ct. App. 1996) (citation omitted). We uphold a discretionary decision if the circuit court “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.” *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). An appellant, however, must offer reasons that the circuit court erred. A reviewing court cannot act as both advocate and judge. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶8 Here, Hoerig contends that the circuit court erroneously concluded that the family court should address his claims. In support of that position, he offers only a stream of complaints against the three respondents and assertions that he is entitled to relief. The circuit court, however, did not leave Hoerig without a

¹ Hoerig filed his notice of appeal before the circuit court entered the order denying his motion to reconsider dismissal. The order denying reconsideration is, however, in the appellate record. Therefore, although Hoerig did not file an amended notice of appeal after entry of the order denying reconsideration, we have jurisdiction over it and over the dismissal order. *See* WIS. STAT. § 808.04(8) (2009-10) (“If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.”). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

remedy. The circuit court merely deferred to the family court. Hoerig offers no case law or statute supporting his position that such deference was wrong. We need not consider arguments unsupported by legal authority. *See id.* at 646. We elect to do so only briefly here.

¶9 Hoerig sought compensation from his wife under a provision of the law governing marital property, WIS. STAT. § 766.70. Pursuant to that statute, one spouse may bring a claim against the other spouse for breach of the duty of good faith imposed by WIS. STAT. § 766.15. Claims cognizable under § 766.70, however, must be resolved in divorce court “once a divorce action is filed.”² *See Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 352, 591 N.W.2d 611 (Ct. App. 1999) (citing WIS. STAT. § 767.05(7) (1999-2000)).³

¶10 Hoerig states that he filed his petition before Cassie Hoerig filed a petition for divorce, but the timing of the petitions is not relevant. We have rejected the notion that a spouse is entitled to a separate civil action merely by

² We note the contention in Hoerig’s appellate brief-in-chief that Hoerig has a claim against his wife under WIS. STAT. § 244.61. That statute provides a model form that a Wisconsin resident may use to confer power of attorney on another person. Assuming without deciding that the statute creates a cause of action, Hoerig did not cite § 244.61 in the circuit court proceedings. He may not state a claim for the first time in this court. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (we do not consider issues raised for the first time on appeal). Moreover, Hoerig’s appellate argument in regard to the statute begins with his contention that Cassie Hoerig “failed to act in good faith with regard to her fiduciary responsibility to her husband.” This argument supports a conclusion that the circuit court appropriately deferred to the family court. “If a claim arises from a marital relationship and encompasses a breach of duty of good faith regarding matters of marital property, the claim must be resolved in divorce court.” *Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 355, 591 N.W.2d 611 (Ct. App. 1999).

³ Pursuant to 2005 Wis. Act 443, § 34, the legislature renumbered WIS. STAT. § 767.05(7). That statute is now WIS. STAT. § 767.331.

raising a claim before the filing date of a divorce action. See *Knafelc*, 224 Wis. 2d at 355.

¶11 Hoerig next contends that the claims he filed against Hudy and Stephens are “not appropriate to a divorce proceeding in family court.” Again, he offers no authority for his position. In fact:

[i]t is well established that, from earliest times, Wisconsin has allowed third-party joinder to impose an equitable remedy. *Zabel v. Zabel*, 210 Wis.2d 336, 342, 565 N.W.2d 240 (Ct. App. 1997) (husband’s mother joined as third party in divorce action where wife alleged that real property titled in mother’s name was marital property and subject to division as part of divorce) (citing *Damon v. Damon*, 28 Wis. 510, (1871)).

Richardson v. Henderson, No. 2009AP345, unpublished slip op. ¶12 (WI App Jan. 13, 2010). Here, Hoerig alleged that Hudy and Stephens helped Cassie Hoerig waste assets and deplete the Hoerigs’ resources. As the circuit court explained, Hoerig’s allegations “are all related to the dissolution of the marital estate.” Accordingly, the circuit court concluded that the claims should be heard by the divorce court.

¶12 In his motion to reconsider, Hoerig denied that he sought dissolution of the marital estate, and he stressed that “his overriding concern was the preservation of his marriage.” The family court is plainly in the best position to address claims related to the status of a marriage and any related financial disputes.

¶13 In sum, Hoerig cites no authority demonstrating that the circuit court erroneously exercised its discretion by deferring to the family court under the facts here. At most, Hoerig suggests that the circuit court might have proceeded differently, but that is not grounds for reversal. See *Hartung v. Hartung*, 102

Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether circuit court exercised discretion, not whether discretion could have been exercised differently). Accordingly, we affirm.⁴

By the Court.—Orders affirmed.

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

⁴ By order of May 25, 2011, we stated that we would reverse the circuit court's orders as to Cassie Hoerig if she failed to file a respondent's brief. She did not file a brief, but our further review of the record and Hoerig's submissions satisfies us that we must affirm as to all three respondents. As our order noted, failure to file a respondent's brief implicitly concedes error. See *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993). Here, Cassie Hoerig's failure to file a brief constitutes a concession that the circuit court erroneously exercised its discretion. Whether a circuit court erroneously exercised its discretion is a question of law. *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). We are not bound by a party's concession of law. *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶50, 284 Wis. 2d 573, 701 N.W.2d 440. As discussed in the text of our opinion, Hoerig fails to offer any basis for holding that the circuit court erroneously exercised its discretion. Accepting a contrary concession would not serve justice. Further, accepting an erroneous concession of law in this case would undermine important interests of judicial economy. Resolving Hoerig's claims against his wife in the context of the pending divorce avoids multiple lawsuits with the accompanying potential for inconsistent outcomes and permits a single, cohesive determination of issues related to the Hoerigs' marriage and finances.

