**COURT OF APPEALS DECISION DATED AND FILED**

**November 15, 2012**

**Diane M. Fremgen**
**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 Nos. 2011AP623**
**2011AP2617**

**Cir. Ct. No. 2009FA331**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**RONALD A. SYMDON,**

**PETITIONER-APPELLANT,**

**V.**

**PEGGY S. SYMDON,**

**RESPONDENT-RESPONDENT.**

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APPEALS from a judgment and an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. Ron Symdon appeals the circuit court judgment divorcing him from Peggy Symdon.[1] The judgment incorporated an arbitration award that addressed all contested issues, including property division, family support, and attorney's fees. Ron separately appeals a post-divorce order in which the circuit court denied Ron's motion to modify family support and found Ron in contempt for failing to pay additional attorney's fees that the court had ordered.[2] Ron purports to present arguments on eight issues relating to the divorce judgment and three issues relating to the post-divorce order. However, we conclude that many of these arguments are undeveloped or underdeveloped, and that none of the arguments that are sufficiently developed for consideration are persuasive. Therefore, we affirm.

## BACKGROUND

¶2 The parties were married for approximately fifteen years and have three minor children. The primary source of income to the Symdons during the marriage was generated by Ron's ownership interests in entities associated with automobile dealerships and from Ron's salary as an employee of the dealerships.

¶3 The net value of the parties' divisible assets was approximately $2.3 million. Much of the value consisted of Ron's ownership interests in dealership entities, including more than $830,000 in dealership real estate for one of the dealerships.

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[1] The parties refer to themselves as "Ron" and "Peggy." We will do the same.

[2] This court on its own motion now orders the appeal from the divorce judgment and the appeal from the post-divorce order consolidated.

¶4 Ron and Peggy entered into a stipulation and order under which they agreed to binding arbitration. The arbitrator issued a series of written decisions pertaining to property division, support, and custody and placement. We sometimes refer to these decisions collectively as the arbitrator's or arbitration "award."

¶5 The assets assigned to Ron under the arbitrator's award included Ron's interests in the dealership entities. The assets assigned to Peggy included the marital residence. The award required Ron to pay Peggy $3,055 per month in family support for an unlimited term, although the rate would initially be $4,500 per month, until Peggy was able to sell the residence.[3] In addition, the award required Ron to contribute $70,000 toward Peggy's attorney's fees.

¶6 Over Ron's objection, the circuit court "confirmed" the arbitrator's award pursuant to WIS. STAT. § 802.12(3) (2009-10),[4] and incorporated it into the final divorce judgment. Ron appealed the judgment. He also moved to modify the support award, approximately six weeks after the judgment was entered, based on a substantial change in circumstances.

¶7 Separately, Peggy sought $25,000 in additional attorney's fees for the cost of defending against Ron's appeal from the judgment. The circuit court

[3] The arbitrator found that Peggy would have significantly increased living expenses until she was able to sell the marital residence. In addition, the arbitrator determined that Ron would pay additional family support to Peggy equal to fifty percent of any distributions he received from the dealership entities. We include these facts only for purposes of completeness; they are not material to our decision.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

ordered Ron to pay the $25,000 in appellate attorney's fees. Ron failed to pay the $25,000 in attorney's fees, prompting Peggy to move for contempt.

¶8 The circuit court denied Ron's motion to modify support and found Ron in contempt for failure to pay the $25,000 in fees. Ron appealed the resulting order.

¶9 We reference additional facts as needed below in reference to particular issues.

## DISCUSSION

¶10 We first address the eight issues Ron raises in connection with his appeal from the divorce judgment. We then turn to the three issues Ron raises in connection with the post-divorce order.

### *A. Appeal from Divorce Judgment*

¶11 Before proceeding with our analysis of the eight issues Ron presents in his first appeal, we make two observations regarding Ron's arguments in that appeal. The point of these observations is to explain why Ron cannot reasonably complain if this court fails to discern or fully address one or more of his intended arguments.

¶12 First, Ron's arguments are generally disorganized and difficult to follow, as we note in some of the discussion below. Second, with limited exceptions, Ron fails to frame his arguments in terms of WIS. STAT. § 802.12(3), which contains standards for judicial review of an arbitration award in the divorce

context.[5] This is highly counterproductive, because the statute contains specific direction regarding judicial review standards that are elemental to our review of the type of issues that Ron seems to be raising. Ron's failure to frame the bulk of his arguments in terms of § 802.12 makes it difficult in many instances to determine whether and on what basis Ron is challenging the circuit court decision or the arbitrator's decision (or both) on a given point, and whether Ron's arguments contemplate proper standards of review.

¶13 We recognize that WIS. STAT. § 802.12, when considered with statutes providing for judicial review of arbitration awards more generally (WIS. STAT. §§ 788.10 and 788.11), and with the standards of review that apply to non-arbitration divorce cases, may create questions as to what standard of review applies to certain issues in an arbitrated divorce such as this one. This is all the more reason, however, that it is incumbent on the parties, in particular on the appellant, to provide meaningful assistance to this court in applying the correct standards.

¶14 In short, Ron's lack of organization and his inattention to WIS. STAT. § 802.12(3) have made it difficult in many instances to determine precisely, and in some instances to determine at all, what issues Ron intends to present and whether, if he had argued them in terms of the proper standards of review, they would have any merit. Nonetheless, we have made considerable efforts to understand and address what we perceive to be Ron's intended arguments.

[5] We set forth pertinent provisions from WIS. STAT. § 802.12(3) in footnotes below.

### *1. Agreement to Arbitrate Under Alleged Threat of Contempt*

¶15 Ron first argues that the entire arbitration process was invalid because, while Ron was trying to change attorneys, the circuit court "forced" Ron to sign what Ron refers to as "the arbitration agreement" under threat of contempt. Peggy responds that the record shows that Ron freely entered into a stipulation and order to arbitrate, and that the circuit court cautioned Ron that he was in peril of a contempt finding only after Ron subsequently indicated that he might refuse to move forward with arbitration as planned.

¶16 Our review of the record shows that Peggy is correct. The "arbitration agreement" that Ron asserts he was coerced to sign under threat of contempt was not the stipulation to arbitrate but instead a subsequent agreement with the arbitrator that the parties needed to sign for arbitration to proceed. In his reply brief, Ron concedes as much, asserting that he "changed his mind" after agreeing to the stipulation and order. The record and Ron's concession make clear that the circuit court did not force Ron to agree to arbitration.

¶17 If Ron means to argue that the circuit court erroneously exercised its discretion in refusing to delay arbitration proceedings so that Ron had more time to change attorneys, Ron's argument is insufficiently developed and we address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address inadequately developed arguments). The circuit court provided thorough reasoning on this topic, and Ron fails to address that reasoning.

*2. Ron's "Rejection" of Arbitration Award*

¶18 Ron argues that, under ***Franke v. Franke***, 2004 WI 8, 268 Wis. 2d 360, 674 N.W.2d 832, the circuit court could not incorporate the arbitration award into the divorce judgment because Ron "rejected" the award. More specifically, Ron argues as follows:

> ***Franke*** holds that an arbitration award is an agreement of the parties and may be rejected by a party (or the court) prior to the entry of judgment. The arbitration award may only be enforced as an agreement of the parties, and absent agreement, may not be made the judgment of the court.

It is unclear to what extent Ron intends this "rejection" argument to be separate from his meritless argument above that the court coerced him into arbitration. To the extent Ron is making a separate argument, we will address what we understand that argument to be.

¶19 Ron seems to be arguing that, under ***Franke***, a divorce litigant is not bound by an arbitrator's award if the litigant objects to the award before the court incorporates the award into the divorce judgment. This argument misconstrues ***Franke***.

¶20 As an initial matter, we note that ***Franke*** does not apply to all categories of arbitration awards in the divorce context. Rather, ***Franke*** is limited to arbitration awards for property division. *See* ***Franke***, 268 Wis. 2d 360, ¶50 ("We limit our holding to property divisions in divorce judgments incorporating a confirmed arbitral award."). Thus, we consider Ron's arguments under ***Franke*** as relevant only to the property division portions of the arbitration award here.

¶21 The pertinent issue in ***Franke*** is whether a circuit court may open the property division provisions of a divorce judgment under WIS. STAT. § 806.07, the relief from judgments statute, when property division has been arbitrated. *See* ***Franke***, 268 Wis. 2d 360, ¶17. ***Franke*** establishes that it may. ***Id.***, ¶50. In reaching this decision, the court examined the interplay of several statutes, including § 806.07, WIS. STAT. § 802.12(3)(c) (addressing binding arbitration of property division issues in divorce actions), WIS. STAT. ch. 788 (governing arbitration more generally), and WIS. STAT. § 767.61(3)(L) (making any agreement between the parties concerning property division binding on the court, except where the agreement is inequitable, and requiring that the court presume such agreements are equitable). *See* ***Franke***, 268 Wis. 2d 360, ¶¶17-18, 51.[6]

¶22 In addressing the interplay of those statutes, the ***Franke*** court concluded that the generally "very limited" oversight role of circuit courts in

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[6] At the time relevant in ***Franke v. Franke***, 2004 WI 8, 268 Wis. 2d 360, 674 N.W.2d 832, WIS. STAT. § 767.61(3)(L) was numbered WIS. STAT. § 767.255(3)(L) (2001-02). *See* ***Franke***, 268 Wis. 2d 360, ¶1 n.1, ¶35 & n.18.

WISCONSIN STAT. § 802.12 provides, in relevant part, as follows:

> **Alternative dispute resolution.**
>
> ….
>
> **(3)** ACTIONS AFFECTING THE FAMILY. In actions affecting the family under ch. 767, all of the following apply:
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> ….
>
> (c) If the parties agree to binding arbitration, the court shall, subject to ss. 788.10 and 788.11 [judicial review of arbitration awards], confirm the arbitrator's award and incorporate the award into the judgment or postjudgment modification order with respect to all of the following:
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> 1. Property division under s. 767.61

arbitration is less deferential in the context of an arbitration for property division. ***Franke***, 268 Wis. 2d 360, ¶¶40, 47. The ***Franke*** court also concluded that the circuit court has an obligation under WIS. STAT. § 767.61(3)(L) to review an arbitration award involving property division to ensure that the award is equitable. ***Franke***, 268 Wis. 2d 360, ¶¶38, 41-42, 50. However, the ***Franke*** court did not hold or imply that *a party's* unilateral "rejection" of (or objection to) an arbitration award regarding property division compels a circuit court to refrain from incorporating the award into the divorce judgment. If that were the case, there obviously would be greatly diminished value in arbitrating property divisions.

¶23 Ron also relies on ***Hottenroth v. Hetsko***, 2006 WI App 249, 298 Wis. 2d 200, 727 N.W.2d 38, arguing that this case gives family law litigants the "right to withdraw" from an arbitration award up to the time the circuit court confirms the award. We disagree. ***Hottenroth*** addresses the question of when a party's right to withdraw from a stipulation for property division under WIS. STAT. § 767.10(1) (2003-04) ends, concluding that the party's right does not end until the court decides to approve the stipulation.[7] *See* ***Hottenroth***, 298 Wis. 2d 200, ¶¶22-23, 26-30. The ***Hottenroth*** case does not address arbitration. If Ron intends to argue that there is some reason why arbitration awards involving property division under WIS. STAT. § 802.12(3)(c) should be treated the same as stipulations for

[7] WISCONSIN STAT. § 767.10(1) (2003-04) provides as follows:

> The parties in an action for an annulment, divorce or legal separation may, subject to the approval of the court, stipulate for a division of property, for maintenance payments, for the support of children, for periodic family support payments under s. 767.261 or for legal custody and physical placement, in case a divorce or legal separation is granted or a marriage annulled.

property division under § 767.10(1) (2003-04) for purposes of a right to withdraw, he has not sufficiently developed that argument for us to address it. *See* ***Pettit***, 171 Wis. 2d at 646-47.

*3. Court's Obligation to Review Award*

¶24 Ron next seems to argue that the circuit court refused to consider the merits of his motion objecting to the arbitration award and failed to recognize and exercise its obligation to review the arbitration award as required by ***Franke***. We disagree.

¶25 The record shows that the circuit court recognized and exercised its obligation under ***Franke***. Specifically, the court stated as follows, during the hearing at which the court orally granted the parties a divorce:[8]

> I do find that under rule 802.12(3) the awards are confirmed in their entirety. They're fair and reasonable in all respects. They are by no means inequitable, and in fact represent a very careful balancing of the appropriate considerations. They are in conformity with Chapter 767, and I reach that after what I regard as an independent and, I hope, substantive review. I spent a lot of time reviewing, reading, these [arbitration] decisions, and I do have some background with the facts as well from the hearings that were held prior to the arbitration, as well as since [the time of the arbitration], for that matter.

[8] We do not find a transcript of this hearing in the record. However, Peggy's appendix includes a copy of what appears to be the relevant portion of the transcript. Ron does not object to Peggy's appendix, and we therefore take it as undisputed that Peggy's appendix accurately reflects what occurred at the hearing. Regardless, it was Ron's responsibility to ensure that the record contains a copy of any transcript necessary to decide the issues he raises. Lacking such a transcript, we would have assumed that the missing transcript supports the circuit court's ruling. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

Similarly, at a subsequent hearing, in response to Ron's motion, the court reiterated that it had exercised its obligations to review the arbitration award, including its obligation under ***Franke***. The court said, "I should say that I did review all of the arbitrator's decisions. I did apply my understanding of the ***Franke*** case and what I need to do pursuant to the ***Franke*** case ...."

*4. Ron's "Substantive Rights" and the Standard of Review*

¶26 Ron argues that "there are clear violations of his substantive rights when there is an attempt to enforce an arbitration decision which he rejected prior to confirmation in the divorce judgment, unless he receives proper discretionary determinations by the trial court and appropriate review by the appellate court." By "substantive rights," Ron appears to be referring to statutory standards in WIS. STAT. ch. 767 governing divorce actions and court decision-making in such actions. He also cites WIS. STAT. § 751.12(1), which requires that rules promulgated by the supreme court, such as WIS. STAT. § 802.12(3), "shall not abridge, enlarge, or modify the substantive rights of any litigant." In this same section of his briefing, Ron further asserts that, "[u]nder ***Franke***, because Ron rejected the arbitration agreement, this appeal should be decided under the normal standards of review for divorce judgments."

¶27 We have difficulty understanding exactly what Ron means to argue in this section of his brief.[9] To the extent his "substantive rights" argument

[9] This is an example of a general problem we note above regarding Ron's briefing. On this topic, Ron has repeated an assertion, made elsewhere in his brief, without making clear whether and how the assertion contributes to what he appears to advance as a distinct argument. Instead, by repeating the assertion without clear explanation, Ron contributes to the problem of seemingly overlapping and muddled arguments.

depends on his previous arguments that the circuit court coerced him into arbitration or that Ron "rejected" the arbitration award, Ron is simply repeating arguments that we have already concluded are meritless.

¶28 If Ron means to argue that, under ***Franke***, divorce litigants have the right to independent discretionary decisions by circuit courts on all contested issues, even though there has been arbitration, his argument lacks merit. ***Franke*** does not support such an argument. Indeed, ***Franke*** rejects such an argument, at least in the property division context to which ***Franke*** was limited. *See* ***Franke***, 268 Wis. 2d 360, ¶47 ("Circuit courts must give greater deference to an arbiter's award of a property division under Rule 802.13(3)(c) than they would to other types of agreements between parties.").

¶29 Finally, if Ron means to argue that WIS. STAT. § 802.12(3), as promulgated by the supreme court, conflicts with or violates WIS. STAT. § 751.12(1) because § 802.12(3) allows binding arbitration in the divorce context or limits circuit court discretion in arbitrated divorce issues, his argument is too undeveloped for us to address. *See* ***Pettit***, 171 Wis. 2d at 646-47.

*5. Family Support Award*

¶30 Ron next challenges the family support award. We reject this challenge for the reasons explained below.

¶31 Family support is a combined award of child support and maintenance used to take advantage of tax rules allowing the parties to shift taxable income from the payer to the payee. ***Vlies v. Brookman***, 2005 WI App 158, ¶¶9-10, 285 Wis. 2d 411, 701 N.W.2d 642. In ***Vlies***, this court concluded that, when a circuit court intends to award family support, it must separately

calculate child support and maintenance using the relevant standards for each, then "express these two components as a family support obligation in order to provide the parties with the associated tax benefits." ***Id.***, ¶¶14-15.[10]

¶32 Ron argues that the arbitrator, the circuit court, or both (it is not clear from Ron's argument which) erred in making the family support award by failing to adequately consider certain maintenance factors and by double counting. Ron

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[10] More specifically, this court in ***Vlies v. Brookman***, 2005 WI App 158, 285 Wis. 2d 411, 701 N.W.2d 642, imposed the following obligations on circuit courts:

> A circuit court should use the factors presented in WIS. STAT. § 767.25 (child support) and the support percentage guidelines provided in WIS. ADMIN. CODE § DWD ch. 40 (Dec. 2003), together with WIS. STAT. § 767.26 (maintenance), when ordering family support. More specifically, a court must calculate child support according to the percentage guidelines or provide a rationale for deviating from the guidelines. *See* § 767.25(1j), (1n). Next, the court must determine the amount of maintenance, keeping in mind two objectives: (1) to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective), and (2) to ensure a fair and equitable financial arrangement between the parties (the fairness objective). ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). The circuit court must then express these two components as a family support obligation in order to provide the parties with the associated tax benefits.
>
> If the circuit court applies the percentage guidelines when setting child support, it must set family support at an amount that results in a net payment, after state and federal taxes are paid, of no less than the child support as calculated under the guidelines. WIS. ADMIN. CODE § DWD 40.03(7). At a minimum, the court must increase the amount of family support to ensure that the recipient spouse receives as much total income as would have been available from a nontaxable award of child support. Of course, courts retain the discretion to deviate from the percentage guidelines, provided they demonstrate a fact-based rationale for doing so. *See* WIS. STAT. § 767.25(1m), (1n).

***Vlies***, 285 Wis. 2d 411, ¶¶15-16.

also argues that "the methodology that was dictated by ***Vlies*** was not followed." We are not persuaded.

¶33 Ron fails to frame any of his family support arguments in terms of pertinent judicial review standards in WIS. STAT. § 802.12(3), which, as we note above, is a significant defect in a number of Ron's arguments.[11] Rather, Ron

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[11] The pertinent WIS. STAT. § 802.12 standards for purposes of family support are as follows:

> **(3)** ACTIONS AFFECTING THE FAMILY**.** In actions affecting the family under ch. 767, all of the following apply:
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> ….
>
> (c) If the parties agree to binding arbitration, the court shall, subject to ss. 788.10 and 788.11 [judicial review of arbitration awards], confirm the arbitrator's award and incorporate the award into the judgment or postjudgment modification order with respect to all of the following:
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> ….
>
> 2. Maintenance under s. 767.56.
>
> ….
>
> (d) The parties, including any guardian ad litem for their child, may agree to resolve any of the following issues through binding arbitration:
>
> ….
>
> 3. Child support under s. 767.511, 767.805(4), 767.863(3) or 767.89(3).
>
> ….
>
> (e) The court may not confirm the arbitrator's award under par. (d) and incorporate the award into the judgment or postjudgment modification order unless all of the following apply:
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> 1. The arbitrator's award sets forth detailed findings of fact.

(continued)

appears to assume that we must review both the arbitrator's family support award and the circuit court's approval of that award using the same standards we would apply to a circuit court decision awarding family support in a case that was not arbitrated. Ron supplies no authority and develops no argument supporting his assumption. We consider Ron's family support arguments to be insufficiently undeveloped on this potentially complex topic. We reject them on this basis. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶34 We choose to observe further that Ron's family support arguments do not appear to be winning arguments, even assuming without deciding that we should review either the arbitrator's or the circuit court's decision using the same standards of review we would ordinarily apply to a circuit court decision in a non-arbitration case.

¶35 For example, Ron argues, in apparent reliance on the support and fairness objectives of maintenance, that the family support award of $4,500 per month "takes virtually all of Ron's disposable after-tax income, thus leaving him with insufficient funds to meet his reasonable budget, or any budget whatsoever." However, without more explanation tied to the facts, this argument does not

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2. The arbitrator certifies that all applicable statutory requirements have been satisfied.

3. The court finds that custody and physical placement have been determined in the manner required under ss. 767.405, 767.407 and 767.41.

4. The court finds that visitation rights have been determined in the manner required under ss. 767.405, 767.407 and 767.43.

5. The court finds that child support has been determined in the manner required under s. 767.511 or 767.89.

demonstrate that the family support award was unreasonable. It fails to address the arbitrator's findings that: Ron had the ability to take distributions from his company in addition to his annual salary of $90,269 and rental income of $8,591; Ron had previously taken significant distributions in addition to his base salary; Ron had at least once failed to disclose a $55,000 distribution to Peggy; and the timing of a significant reduction in Ron's income was "suspicious."

¶36 As another example, Ron asserts that the family support award resulted in double counting. However, the family support award included a significant child support component, and Ron fails to address case law stating that the "'double-counting' rule does not apply in the context of child support." *See* ***Cook v. Cook***, 208 Wis. 2d 166, 180, 560 N.W.2d 246 (1997); *see also* ***McReath v. McReath***, 2011 WI 66, ¶¶54, 60, 335 Wis. 2d 643, 800 N.W.2d 399 (explaining that the rule against double counting "is advisory and not absolute" and that "the focus should be on fairness, not rigid double-counting rules").

¶37 As to Ron's ***Vlies*** argument, ***Vlies*** does not address whether an arbitrator must be held to the same standards we impose on circuit courts. In any case, apparently seeking to err on the safe side, the arbitrator here rested his decision regarding the family support award "on the family support analysis required by the case of ***Vlies***." In addition, the arbitrator's award included detailed findings and conclusions relating to child support standards and maintenance factors. Thus, even assuming without deciding that ***Vlies*** applies in the arbitration context, Ron does not persuade us that the arbitrator failed to comply with ***Vlies***.

¶38 Separately, Ron asserts that both the circuit court and counsel for Peggy "admitted" during a December 7, 2010 hearing that "[t]here is nothing in the record to demonstrate the appropriateness of the family support award."

However, Ron fails to point to any specific portion of the 115-page transcript of that hearing to support his assertion. *See* WIS. STAT. RULE 809.19(1)(e) (argument must contain citations to the parts of the record relied on). We reject his argument on this basis. In any event, it is clear from the circuit court's written decision that the court concluded that the record supported the arbitrator's family support award, contrary to Ron's assertion.

### *6. Arbitrator's Award of Attorney's Fees to Peggy*

¶39 Ron argues that the arbitrator erred in ordering him to contribute $70,000 toward Peggy's attorney's fees. Ron does not dispute that the issue of attorney's fees was within the arbitrator's power to arbitrate. Rather, citing ***Johnson v. Johnson***, 199 Wis. 2d 367, 545 N.W.2d 239 (Ct. App. 1996), Ron argues that the arbitrator erred by failing to determine the total amount of Peggy's fees and the reasonableness of those fees.

¶40 While it is clear that, under ***Johnson*** a *circuit court* must determine the reasonableness of attorney's fees before making an award of fees, *see* ***id.*** at 377-78, it is not clear whether ***Johnson*** imposes the same requirement on an arbitrator. On this topic, Ron again fails to frame his argument in terms of the standards under WIS. STAT. § 802.12(3).[12] Instead, he assumes that we should use

[12] WISCONSIN STAT. § 802.12(3) provides, in pertinent part, as follows:

> (c) If the parties agree to binding arbitration, the court shall, subject to ss. 788.10 and 788.11 [judicial review of arbitration awards], confirm the arbitrator's award and incorporate the award into the judgment or postjudgment modification order with respect to all of the following:
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> ….
>
> 3. Attorney fees under s. 767.241.

the same standards we would apply to a circuit court decision awarding attorney's fees in a non-arbitration context. Ron again supplies no authority supporting his assumption, and we again consider Ron's argument based on a questionable assumption to be insufficiently developed. *Cf.* ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988) ("Because arbitration is what the parties have contracted for, the parties get the arbitrator's award, whether that award is correct or incorrect as a matter of fact or of law.").

*7. Valuation of Dealership Real Estate*

¶41 Ron next challenges the arbitrator's award based on the arbitrator's valuation of dealership real estate awarded to Ron in the property division. Ron's challenge is based on evidence of the sale of an allegedly comparable property that Ron proffered to the circuit court *after* the arbitrator's property division award. Ron asserts that this evidence shows a sale price of $23,000 per acre for the alleged comparable property, in contrast with the arbitrator's valuation of the dealership property at $218,000 per acre.

¶42 Ron's argument is poorly developed but seems to be that this was newly discovered evidence that required the court to grant Ron a new trial. The circuit court's ultimate decision on this issue is discretionary. *See* ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).[13]

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[13] The standards for a new trial based on newly discovered evidence are contained in WIS. STAT. § 805.15(3):

> **(3)** Except as provided in ss. 974.07(10)(b) and 980.101(2)(b), a new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

(continued)

¶43 In rejecting Ron's arguments below, the circuit court found that Ron had previously supplied information about the allegedly comparable property to the arbitrator, including the property's list price of $1.5 million. The arbitrator rejected Ron's expert's position that the property was comparable, crediting Peggy's expert instead. The only new information was that the allegedly comparable property subsequently sold for $1.1 million instead of its list price of $1.5 million. The court reasoned that this difference was not "particularly unusual" in the real estate market, and did not undercut the arbitrator's findings as to credibility or comparability. The court therefore concluded that the new information regarding the $1.1 million sale price was not material or likely to lead to a different result if there was a new trial.[14]

¶44 Ron does not address any of the above circuit court findings or the court's reasoning. The findings and reasoning appear reasonable on their face. Ron notes in his reply brief that the allegedly comparable property is located across the street from the dealership property. However, this fact does not by

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> (a) The evidence has come to the moving party's notice after trial; and
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> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

[14] Here again, we do not find a transcript of the pertinent hearing in the record. And again, Peggy's appendix includes a copy of what appears to be the relevant portion of the transcript, and Ron does not object. Therefore, we take it as undisputed that Peggy's appendix accurately reflects what occurred at the hearing. We again point out that it was Ron's responsibility to ensure that the record contains a copy of any transcript necessary to decide the issues he raises, and that we would have been free to assume that a missing transcript supports the circuit court's ruling. *See* ***Fiumefreddo***, 174 Wis. 2d at 26-27.

itself demonstrate clear error in fact finding as to the comparability of the two properties. Accordingly, we see insufficient reason to overturn the circuit court's discretionary determination that Ron was not entitled to a new trial based on newly discovered evidence.

¶45 We recognize that Ron may be making a separate argument that the new information regarding the allegedly comparable property required the circuit court to exercise its oversight function under ***Franke*** to conclude that the arbitrator's property division award was inequitable. However, Ron does not show that he raised this argument in the circuit court. Regardless, the argument is not persuasive, because the circuit court's reasoning in rejecting Ron's newly discovered evidence argument provides a rational basis for concluding that the new information did not make the arbitrator's property division award inequitable.

*8. New Trial in the Interest of Justice*

¶46 Finally, Ron seeks a new trial in the interest of justice. His supporting arguments are either arguments we have already rejected or undeveloped assertions that take isolated aspects of the arbitrator's award out of context and ignore the award's overall structure and reasoning. Ron therefore does not persuade us that he should receive a new trial in the interest of justice.

***B. Appeal from Post-Divorce Order***

¶47 We now turn to Ron's second appeal, from the post-divorce order. Ron's arguments in this appeal raise three issues: (1) whether the circuit court erred in refusing to modify the family support award based on a substantial change in circumstances; (2) whether the court erred in awarding Peggy $25,000 in additional attorney's fees to defend against Ron's first appeal; and (3) whether the

court erred in finding Ron in contempt for failing to pay the $25,000 in appellate attorney's fees and ordering payment of those fees as a purge condition. We resolve each of these issues against Ron.

*1. Substantial Change in Circumstances*

¶48 Ron argues that the circuit court erred by refusing to modify the family support award based on a substantial change in circumstances. The party seeking to modify a support award has the burden to show a substantial change in circumstances. ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶30, 269 Wis. 2d 598, 676 N.W.2d 452. The circuit court declined to modify the award, after concluding that Ron failed to meet this burden.

¶49 "The trial court's findings of fact regarding the parties' circumstances 'before' and 'after' the divorce and whether a change has occurred will not be disturbed unless clearly erroneous. However, whether the change is substantial is a question of law which we review de novo." ***Dahlke v. Dahlke***, 2002 WI App 282, ¶8, 258 Wis. 2d 764, 654 N.W.2d 73 (citations omitted).

¶50 Ron focuses on the question of whether the change in circumstances he alleged was a substantial one, the de novo part of our standard of review. Ron asserts that the court overlooked or failed to take into account evidence that the financial fallout from the divorce forced him to sell his business interests in the dealership entities to his father, depriving Ron of access to dealership profits or rental income. Ron also asserts that, contrary to the circuit court's finding, his annual salary decreased from $90,269 to $78,000. In Ron's view, this evidence shows a "substantial" change in circumstances.

¶51 We are not persuaded by Ron's arguments. The circuit court correctly concluded, based on the court's explicit and implicit fact findings, that Ron did not show a substantial change in circumstances.

¶52 In particular, the court found, at least implicitly, that Ron manipulated his business income, as reflected in the arbitrator's findings, and that Ron's sale of his business interests to his father immediately following the divorce was not likely to change his business income. Ron does not demonstrate that this was a clearly erroneous fact finding. Similarly, it is apparent that the court found, based on the arbitrator's decision and other evidence, that Ron was not credible in asserting that the sale of his business interests cut off his access to dealership profits. It is not this court's role to second-guess the circuit court's credibility determinations. ***Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 800, 519 N.W.2d 674 (Ct. App. 1994).

¶53 We also see no error regarding Ron's purported change in salary from $90,269 to $78,000. The court concluded that this alleged change was not significant based on the following fact findings: Ron claimed the same $78,000 base salary at the time of arbitration; the arbitrator acknowledged Ron's claim but found Ron's annual salary to be $90,269, based on Ron's tax return; and the two figures could be reconciled by considering the benefits Ron received from the dealership at both the time of the divorce and at the time he sought support modification. Those benefits included the use of a $35,000 vehicle, payment for meals, and a cell phone. Ron fails to demonstrate, with pertinent record cites, that any of the findings is clearly erroneous.

*2. $25,000 Attorney's Fees for Appeal*

¶54 After Ron filed the first of the two appeals now before us, Peggy filed a motion in the circuit court requesting that the court order Ron to pay $25,000 in attorney's fees for Peggy to defend against Ron's first appeal. Peggy alleged, among other things, that she lacked sufficient funds to defend the appeal because Ron failed to make a cash equalization payment and a transfer of pension funds, and because Ron engaged in a strategy of delay and needless litigation, calculating that Peggy could not afford to keep litigating. After a hearing on Peggy's motion, the court ordered Ron to pay $25,000 in fees.

¶55 Ron argues that the circuit court erroneously exercised its discretion in awarding the $25,000 in fees because the court failed to make required findings, including findings that Peggy was unable to pay her attorney's fees and that Ron had a greater ability to pay than Peggy. We reject this argument because we find no transcript of the pertinent hearing in the record. We assume that the missing transcript supports the circuit court's ruling. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). We therefore assume the transcript would show that the court made the required findings and that those findings were supported by credible evidence.[15]

[15] The record contains minutes of the hearing showing that the hearing was evidentiary and that Peggy testified and submitted an exhibit. The court's written order awarding the fees states that the court made the award "[b]ased on the reasons set forth on the record" at the hearing.

*3. Contempt*

¶56 The circuit court found Ron in contempt for failing to pay the $25,000 in appellate attorney's fees and set Ron's payment of the fees as a condition to purge his contempt. Ron argues that the circuit court's contempt order was erroneous.

¶57 Peggy responds by arguing, in part, that the contempt issue is moot because Ron later paid the ordered fees and purged his contempt. Ron fails to reply to Peggy's mootness argument. We could take this failure as a concession and end our analysis here. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (court may take failure to reply to respondent's argument as a concession).

¶58 However, even if we assume for the sake of argument that the contempt issue is not moot, Ron's arguments do not persuade us for the following reasons.

¶59 We review a circuit court contempt finding for an erroneous exercise of discretion. ***Frisch v. Henrichs***, 2007 WI 102, ¶29 n.13, 304 Wis. 2d 1, 736 N.W.2d 85. Thus, we will uphold the court's contempt finding unless Ron can show that the court misconstrued the law or the facts or otherwise reached an unreasonable conclusion.[16] *See* ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999).

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[16] We are uncertain if Ron suggests on appeal that the standard of review on the contempt issue presented here is de novo. If so, he is wrong. *See* ***Frisch v. Henrichs***, 2007 WI 102, ¶29 n.13, 304 Wis. 2d 1, 736 N.W.2d 85. It is true that our review is de novo when the question is whether a circuit court has statutory authority to find contempt in a given circumstance. *See* ***id.***, ¶29 & n.13. However, Ron's arguments do not raise that type of question.

(continued)

¶60 Ron argues that the circuit court should not have found him in contempt because the evidence showed that he did not have a greater ability than Peggy to pay the $25,000 in appellate attorney's fees and that it was therefore unfair to make him use a portion of the property division awarded to him to pay for Peggy's attorney's fees. However, so far as we can discern, this argument is largely a rehash of Ron's argument that the court failed to make required findings regarding ability to pay when the court first ordered Ron to pay the fees. For the reasons already explained regarding Ron's failure to provide the pertinent transcript, we will consider that argument no further.

¶61 Ron develops no argument regarding any material change in his ability to pay between the time the court first ordered him to pay the fees and the time the court found him in contempt. Instead, he asserts that the circuit court's contempt finding and purge condition put him in a "Catch-22," because the court previously ordered him not to liquidate funds from his retirement account, but then assumed at the contempt hearing that Ron could pay the $25,000 in attorney's fees from that account. "It follows," Ron argues, "that Ron was not in contempt, because he had no ability to make the payment [of the $25,000 in attorney's fees], except from funds he was prohibited from using."

¶62 We conclude that Ron forfeited this argument. When the circuit court suggested that Ron's retirement account was a source from which Ron could pay the $25,000 in attorney's fees, Ron failed to object or make any argument like the one he makes now. On the contrary, Ron seemed to agree through

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Ron does not argue that a circuit court lacks statutory authority to find contempt for a failure to pay attorney's fees that the court has ordered to be paid.

acquiescence to the court's suggestion that he could access his retirement account to pay the $25,000 in fees. If Ron would have instead brought his "Catch-22" argument to the court's attention, the court could have addressed any asserted inconsistency or considered a different approach.

¶63 We further observe that, even if Ron had not forfeited his argument, we would not be persuaded by Ron's limited argument that the court's contempt finding and purge condition were unreasonable. The court's contempt finding and purge condition did not appear to necessarily depend on the court's belief that Ron could use his retirement account to pay the attorney's fees. Rather, in making its discretionary decision, the court appeared to rely, at least in part if not entirely, on its findings, both explicit and implicit, that Ron's asserted inability to pay was not credible and that Ron had shown in the past that he would avoid his financial obligations to Peggy until he faced a meaningful sanction such as contempt. Ron points to nothing to persuade us that these findings lacked support in the evidence or that the court's view was otherwise unreasonable.

## CONCLUSION

¶64 In sum, we affirm the divorce judgment confirming and incorporating the arbitrator's award and the post-divorce order denying Ron's motion to modify family support and finding him in contempt.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.