

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2017

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 No. 2015AP2335

Cir. Ct. No. 2010FA665

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ANNA MARIE CARTER F/K/A ANNA MARIE HALEY,

PETITIONER-RESPONDENT,

V.

PATRICK LEE HALEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. This cases arises from the reopening of a divorce judgment. In addition to their Marital Settlement Agreement (MSA) dividing their

marital assets, Patrick Haley and his former wife, Anna Carter f/k/a Anna Haley, negotiated a Supplemental Business Agreement (SBA) as a means to divide the assets and ownership of their jointly owned marital business. Patrick appeals the order denying his motion to reconsider the circuit court's decision in regard to the SBA and a patent awarded to him. Anna alleges a frivolous appeal and requests costs and attorneys' fees pursuant to WIS. STAT. RULE 809.25(3) (2015-16).¹ We affirm the order and deny the motion for costs and fees.

¶2 Patrick and Anna married in 1998. The couple owned and operated IPS-CareFree Enzymes, Inc., a distributor of enzyme products. In 2007, IPS-CareFree Enzymes granted a company called APi the exclusive right to market and sell a particular IPS-CareFree product ("the Product"), subject only to IPS-CareFree's right to continue to sell the Product to four members of an entity called the Sparco Group.

¶3 During the marriage, Patrick invented a method of removing phosphates from pools and spas using a hose-mounted sprayer. He received a patent for the method in 2009.² The patented method covers only the Product.

¹ Shortly after Patrick filed his brief, Anna moved to dismiss his appeal as frivolous and for fees and costs. Because we denied her motion to dismiss, we also denied her motion for sanctions. We advised her that "[i]f [she] intends to seek WIS. STAT. RULE 809.25(3) fees and costs, [she] may file a motion seeking such relief no later than the filing of her respondent's brief." Anna simply made the request in her brief, however. That is insufficient. A party wishing to raise frivolousness must do so by separate motion to the court. *Howell v. Denomie*, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. Since we are denying Anna's request on the merits, we will call her request a "motion," although it is not.

All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

² The patent is for the method, the idea, not the sprayer.

¶4 Anna filed for divorce in June 2010. The parties began operating IPS-CareFree Enzymes in a divided manner: Patrick continued to use the name IPS-CareFree Enzymes, Inc., and Anna incorporated her share of the business under the name Auraco, Inc. Anna sold products under both the IPS-CareFree and Auraco brands for a time, but gradually phased out selling IPS-CareFree products.

¶5 In October 2011, Auraco and APi entered into a “Master Distributor Agreement.” The agreement acknowledged APi’s exclusive rights to resell and distribute the Product, subject only to Auraco’s sale of the Product to the Sparco Group, and provided that Auraco or APi could terminate the agreement on specified terms. The agreement expressly stated that it “supersedes all prior and contemporaneous written and oral agreements, arrangements and understanding[s] related to the subject matter hereof,” including, it would appear, the 2007 arrangement between APi and IPS–CareFree Enzymes.

¶6 The parties were divorced in May 2011 and the MSA was incorporated into the judgment. In November, the parties advised the court that certain matters relating to the business remained unresolved. They continued negotiating the SBA and, in January 2012, finalized it. The SBA provided a mutual/general release; divided up the parties’ approximately 500 customers, with APi and the Sparco Group going to Anna; prohibited cross-solicitation of customers; allocated the parties’ debts and 2010 personal income tax; and determined a business equalization payment from Patrick to Anna. Section VI of the SBA awarded Patrick the patent and made him solely responsible for associated fees and licensing and renewal costs. On January 5, 2012, the parties signed the SBA and the court amended the judgment, incorporating the MSA and SBA into it.

¶7 Despite the 2011 agreement with Auraco, in late 2012 or early 2013, APi's CEO contacted Patrick to renegotiate the terms of its 2007 arrangement so as to obtain a full license under the patent and to clarify that APi could source the Product as it chose. Patrick granted APi an exclusive license and the right for it or a third party to manufacture the Product, with Patrick to collect royalties on Product APi manufactured. APi then terminated its relationship with Auraco.

¶8 A year later, Auraco began advertising a product to the pool and spa industry that could be used with the patented method. At APi's request, Patrick's patent counsel sent Anna a letter demanding that Auraco stop marketing such products, even though what was patented was the method of applying them.

¶9 In 2014, Patrick moved to reopen the divorce judgment under WIS. STAT. § 806.07. He sought an order declaring that, due to the parties' now separate businesses, Sections II and III of the SBA created anticompetitive effects, among them that Section III foreclosed him from marketing IPS-CareFree products to Anna's customers but did not prevent her from marketing Auraco products to his.³ The court, the Honorable Timothy D. Boyle, reopened the judgment of divorce solely to review those sections. The court granted Patrick's motion and declared Sections II and III per se illegal, void, and unenforceable restraints of trade.

³ Section II allocated the parties' customers. Section III provided:

III. NON-SOLICITATION OF CUSTOMERS

Each party agrees to not solicit CareFree Enzymes products to a customer awarded to the other. Each party agrees to not accept commercial orders of CareFree Enzymes products from any customer awarded to the other party. Each party agrees to not defame the character, or business, of the other.

¶10 Anna moved for clarification. She contended that the SBA split the jointly owned business the parties built during the marriage and, by its nature, implicitly allowed each of them to continue to sell IPS-CareFree Enzymes and like products, however labeled.⁴ The award of the patent to Patrick, she asserted, in no way voided her and Auraco's implied right to continue to sell those products.

¶11 After a May 12, 2015 hearing on Anna's motion, the court agreed. The resulting order, filed May 29, ordered Patrick to refrain from asserting that Anna or Auraco infringed on the patent. Anna again began selling the Product.

¶12 On June 18, Patrick moved for reconsideration of the May 29 order on grounds that the court erred in finding that Anna had a "broad implied license." On October 7, 2015, the Honorable Allan B. Torhorst, to whom the case was transferred upon Judge Boyle's recusal, affirmed the decision. Patrick filed a notice of appeal on November 16, 2015.

¶13 As a threshold matter, Anna contends Patrick's appeal is untimely, depriving this court of jurisdiction. *See* WIS. STAT. RULE 809.10(1)(e). She argues that the deadline to appeal the May 29 order passed months before he filed his notice of appeal, that his June 18 reconsideration motion was automatically

⁴ To illustrate, the preface to the SBA provides:

This agreement is between Anna M. Haley, Petitioner, and Patrick L. Haley, Respondent. It is the intention of the parties to have this agreement incorporated into the judgment of divorce in this matter. The parties were the sole owners/operators of IPS-CareFree Enzymes, Inc. at the time this action for divorce initiated. As part of the divorce the parties have divided their business into two distinct commercial entities. The Respondent is the exclusive owner/operator of IPS-CareFree Enzymes, Inc. and the Petitioner is the exclusive owner/operator of Auraco, Inc.

denied when the circuit court did not decide it within ninety days of the May 29 order, *see* WIS. STAT. § 805.17(3), and that the deadline to appeal the automatic denial expired August 28, 2015.

¶14 WISCONSIN STAT. § 805.17(3) is not controlling. The decision on Patrick's motion for reconsideration was delayed, and the time limits tolled, when the matter was reassigned to Judge Torhorst. Patrick's November 16, 2015 notice of appeal, filed forty days after the October 7 denial of his motion for reconsideration, was timely. *See* WIS. STAT. § 808.04(1).

¶15 Thus, Patrick's appeal is before us on the denial of his motion for reconsideration, which we review for an erroneous exercise of discretion. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Successor judges are afforded the same discretion when, as here, reconsideration does not require the successor judge to reweigh the credibility of the evidence. *See Starke v. Village of Pewaukee*, 85 Wis. 2d 272, 282-83, 270 N.W.2d 219 (1978). To prevail, the movant must present newly discovered evidence or establish a manifest error of law or fact. *Koepsell*, 275 Wis. 2d 397, ¶44.

¶16 As for newly discovered evidence, Patrick produced an unsworn declaration in support of his June 18, 2015 motion to reconsider. In it, he asserts that Anna knew full well he never intended to grant her any rights under the patent because, while negotiating the SBA, he expressly rejected a version of Section VI that would have granted her the broad license she insists now is hers. Patrick contends the evidence is new, as Judge Boyle was unaware of the prior version of Section VI. Patrick asserts that he did not speak up at the May 12 hearing because

he was unsure if his recollection of the negotiations was sound and he had no documents with him to prove what he thought he recalled.

¶17 This is not newly discovered evidence. A foggy memory does not excuse a party's effort to use a motion for reconsideration to introduce new evidence that could have been presented earlier. *See id.*, ¶46.

¶18 Patrick also suggests that addressing the SBA in the context of property division rather than contract is a manifest error of law. That is curious, as it was he who sought to reopen the divorce judgment in family court instead of filing the matter as a contract action in civil court. The family court cannot be faulted for following Patrick's lead in his choice of a dance. Further, this ground has been plowed and replowed. However well-argued, his latest effort did not persuade us, as it did not sway either circuit court judge, to confine the analysis to a de novo review of a contract, *see, e.g., Rosplock v. Rosplock*, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998), rather than another look at property division.

¶19 At the hearing on Anna's motion for clarification of the order severing Sections II and III, Judge Boyle addressed the SBA's treatment of the patent. The court found that the parties' intent at divorce was that each get fifty percent of what had been IPS-CareFree Enzymes, that Section VI of the SBA says only that both parties had held the patent, that at divorce the patent and responsibility for it were awarded solely to Patrick, that the SBA put no further restrictions on the division of the business beyond allocating customers, and that each party's fifty percent "included everything that had to do with IPS and what IPS could do. And in this case IPS at the time could sell products that use this head sprayer." The SBA also expressly stated the parties' intention to incorporate the SBA into the judgment of divorce. Judge Torhorst agreed.

¶20 This court likewise agrees. The SBA was thoroughly negotiated; the motions and hearings were fully briefed and vigorously argued. The parties agreed in the SBA that they were the sole owners/operators of IPS-CareFree Enzymes, Inc. at the time the divorce action was initiated and that as part of the divorce they divided the business into two distinct commercial entities. We also note that the parties did not include the patent when they valued their marital estate. By not valuing this asset and allocating ownership, they impliedly allowed the patent to remain marital property, such that at divorce they each owned an equal, undivided interest in it. Thus, the business the parties created and operated during their marriage was divided per the parties' stated intent in the SBA. The court did not err in denying the motion to reconsider.

¶21 Finally, Anna seeks costs and attorneys' fees on grounds that Patrick's appeal is frivolous. *See* WIS. STAT. RULE 809.25(3). It is not. Indeed, we found in Patrick's favor on the timeliness issue. While the rest of his contentions did not persuade us, we cannot conclude that they were made without reasonable basis in law or equity or that the appeal was taken in bad faith to harass or maliciously injure Anna. *See* RULE 809.25(3)(c). We deny the motion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

