

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP2531

Cir. Ct. No. 2010CV4324

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CHAD GEBHARDT,

PLAINTIFF-RESPONDENT,

JOHN WIRTH,

OTHER PARTY-RESPONDENT,

v.

BRUCE R. BOSBEN,

DEFENDANT-APPELLANT,

**MFP HOLDINGS, LLC P/K/A MAIN FIRE PROTECTION, LLC,
P/K/A FIRE PROTECTION ACQUISITION, LLC,**

DEFENDANT,

**APEX PROPERTY MANAGEMENT, INC.,
APEX ENTERPRISES, INC., STANDARD MECHANICAL, LLC,
DAVID D. JONES AND BMO HARRIS BANK,**

GARNISHEES.

APPEAL from a judgment of the circuit court for Dane County:
JOHN D. HYLAND, Judge. *Affirmed.*

Before Sherman, Blanchard, and Fitzpatrick, JJ.

¶1 BLANCHARD, J. This case involves Bruce Bosben’s transfers of property interests to his wife, Gwen Bosben, and to an LLC owned solely by Bruce and Gwen at a time when a creditor was attempting to satisfy a money judgment against Bruce.¹ We refer collectively to all rights, titles, interests, and assets in all of the entities and properties that Bruce transferred to Gwen and the LLC as the “transferred interests.” Bruce appeals a revised judgment of the circuit court denying Bruce’s claims that the transferred interests should be exempt from execution to satisfy the money judgment under WIS. STAT. § 815.18 (2015-16).² On appeal, Bruce challenges the portion of the revised judgment determining that the transferred interests are not exempt from execution because Bruce transferred the interests “with the intention of defrauding creditors.” *See* § 815.18(10). As a result of this exemption determination, the transferred interests could potentially be applied to satisfy the judgment. We reject the arguments made by Bruce, identified below, and, accordingly, affirm the revised judgment of the circuit court.³

¹ For the sake of simplicity, we refer to Bruce Bosben and Gwen Bosben by their first names.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

³ The Hon. C. William Foust presided over the original proceedings in this judgment action and issued the underlying judgment in the supplemental proceeding arising from the judgment action. After Judge Foust retired, the Hon. John D. Hyland presided over the post-judgment proceedings that are the subject of this appeal.

BACKGROUND

¶2 The following pertinent facts have been stipulated to by the parties or are otherwise undisputed. In 2011, Chad Gebhardt obtained a money judgment against Bruce, in the amount of \$610,896.55, in the action that underlies this appeal. The details of the underlying action do not matter to any issue raised on appeal. This appeal arises from Gebhardt's subsequent attempts to collect on the judgment through a supplemental proceeding. This included four supplemental examinations under oath of Bruce, and one of Gwen, between 2011 and 2014.⁴

¶3 In December 2014, Bruce transferred to Gwen his interests in three real estate holding entities in three transactions, receiving in exchange \$10 for each transfer.⁵

¶4 Shortly after Bruce transferred these interests, Gebhardt moved the circuit court in this action to appoint a supplemental receiver to attempt collection on the money judgment, pursuant to WIS. STAT. § 816.04, and sought to enjoin Bruce from transferring any properties that were not exempt from execution. In February 2015, the circuit court appointed attorney John Wirth as receiver and enjoined Bruce from "transferring, encumbering or otherwise disposing of any non-exempt property or assets he owns."

⁴ WISCONSIN STAT. ch. 816 provides judgment creditors with "remedies supplementary to execution" to assist them in collecting on judgments, including subjecting debtors and others to examinations under oath. See WIS. STAT. §§ 816.03 and .06; *Courtyard Condo. Ass'n., Inc. v. Draper*, 2001 WI App 115, 224 Wis. 2d 153, 629 N.W.2d 38.

⁵ To be specific, Bruce transferred to Gwen his interests in Apex Real Estate Holdings, LLC, Bosben Properties, LLC, and Apex Enterprises, Inc. At all times pertinent to this appeal, including after the transfers to Gwen, Bruce was the manager of Apex Real Estate Holdings, LLC and Bosben Properties, LLC, and was an officer and sole director of Apex Enterprises, Inc.

¶5 About one month later, Bruce organized B&G Bosben LLC, a limited liability company in which Bruce and Gwen were the only members (“B&G”). On the same day that Bruce organized B&G, Bruce transferred to B&G his interest in one parcel of real estate of which he was the sole owner, located on East Washington Avenue, Madison.

¶6 In June 2015, Wirth filed in the circuit court a fraudulent transfer action against Bruce, Gwen, and B&G, under WIS. STAT. ch. 242. The fraudulent transfer action is separate from this judgment action and its related supplemental proceeding. The fraudulent transfer action was assigned to a different branch of the Dane County circuit court. The existence of the fraudulent transfer action is a major element of the first argument by Bruce that we address below.

¶7 In September 2015, Wirth filed a motion to consolidate the fraudulent transfer action with the supplemental proceeding, which involved attempts to collect on the judgment against Bruce alone. Bruce opposed the motion to consolidate, arguing that the issues in the judgment action “are dissimilar and unrelated to the issues in the [fraudulent transfer a]ction.” The circuit court denied the motion to consolidate.

¶8 Continuing with the progression of events in the supplemental proceeding that is the subject of this appeal, in March 2016 Wirth filed a “turnover” motion. This motion sought an order applying Bruce’s interests in various business entities to satisfy the judgment against Bruce, including the transferred interests. The circuit court held a hearing on Wirth’s turnover motion, and then issued its original judgment in this action, which ordered the following relief: (1) Bruce is to provide Wirth with copies of all documents related to the entities and properties transferred by Bruce to Gwen and B&G; (2) the transfers

that Bruce made to Gwen and B&G are “avoided,” meaning that the transfers are invalidated; (3) Bruce is to surrender to Wirth all rights, titles, interests, and assets in all of the entities and properties that Bruce transferred to Gwen and B&G; (4) Wirth is entitled to levy against, and have a supplemental receiver’s lien against, all of the transferred interests; (5) Wirth shall apply the value or proceeds of the transferred interests to satisfy the judgment in Gebhardt’s favor; and (6) pursuant to WIS. STAT. § 815.18(10), Bruce has no right to claim any exemptions in connection with the transferred interests.⁶

¶9 In determining that Bruce is not entitled to claim exemptions, the circuit court made the following findings and reached the following conclusions:

The earmarks of a fraudulent transfer are present here. [Bruce] was indebted to Gebhardt. He transferred property worth a gross value of roughly \$49,000,000 to his wife for \$30. He admits he did it for the benefit of his wife and children. He is still the manager of two entities and an officer and sole director of the third. There appears to be little other property of [Bruce]’s. The transfer has rendered him insolvent. One cannot look at these facts and conclude anything other than that [Bruce]’s transfer of the properties

⁶ WISCONSIN STAT. § 815.18(10) provides:

FRAUDULENT TRANSFERS. A conveyance or transfer of wholly exempt property shall not be considered a fraudulent conveyance or transfer. Property that is not totally exempt in value under this section may be subject to a fraudulent transfer action under ch. 242 to set aside that transfer to the extent that the property’s value is not exempt under this section. If a court is required to satisfy the claim of a creditor and if that relief is demanded, the court may determine the manner of dividing fraudulently transferred property into exempt and nonexempt portions, or may order the sale of the whole property and an accounting of the exempt portion. Any or all of the exemptions granted by this section may be denied if, in the discretion of the court having jurisdiction, the debtor procured, concealed or transferred assets with the intention of defrauding creditors.

is a fraudulent scheme to prevent Mr. Gebhardt from attaching the property to collect his judgment.

¶10 Bruce filed a motion that the circuit court construed as a motion for relief from judgment under WIS. STAT. § 806.07(1)(h). In response, the court issued a revised judgment reversing all of the relief ordered in the original judgment, set forth above, except that the court left intact the determination denying Bruce the right to claim any exemptions in the transferred interests pursuant to WIS. STAT. § 815.18(10), on the ground that Bruce had attempted to defraud Gebhardt through the transfers. Bruce appeals only the denial of his exemption claims and does not challenge any other of the circuit court's findings or determinations as set forth in the revised judgment.

DISCUSSION

¶11 Bruce asks that we reverse the portion of the revised judgment denying his exemption claims in the transferred interests and remand to the circuit court with directions that it dismiss all claims for relief in Wirth's turnover motion. Bruce argues that we should reverse the court's decision to deny his exemption claims for the following reasons: (1) the court lacked authority in the supplemental proceeding to determine whether the transferred interests were exempt from execution, because exemption determinations were under the exclusive or primary authority of the circuit court in the fraudulent transfer action filed by Wirth; (2) the court erred in making exemption determinations as to Bruce, because Bruce had lost all pertinent interests when he transferred his interests to Gwen and B&G; and (3) the court erred at the turnover motion hearing in purportedly concluding that Bruce was "required ... to assert exemption claims in the transferred interests" at that time and in purportedly placing on Bruce "the burden of proving the value of the transferred interests."

¶12 We are required to decide whether the circuit court had authority to determine whether the transferred interests were exempt from execution and to interpret various statutes relating to circuit court authority in the context of supplemental proceedings. The issue of the circuit court's authority is a question of law that this court reviews de novo. See *State v. McClaren*, 2009 WI 69, ¶14, 318 Wis. 2d 739, 767 N.W.2d 550. Likewise, the interpretation of a statute is a question of law that this court reviews de novo. *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶18, 319 Wis. 2d 274, 767 N.W.2d 898. Thus, we review de novo each of the issues Bruce raises as set forth above. We now address and reject each of Bruce's arguments in turn below.

Whether The Circuit Court Had Authority to Make The Challenged Exemption Determinations

¶13 In this appeal, Bruce does not challenge on their merits the circuit court's ultimate exemption determinations. Instead, he argues that the court lacked authority in the supplemental hearing to address the exemptions issue, or that it was otherwise improper for the court to do so. Bruce argues that the court could not address, or should not have addressed, Bruce's exemption claims in the supplemental proceeding, because such determinations could affect the rights of Gwen and B&G in the transferred interests. That is, because Gwen and B&G are not parties to the supplemental proceeding they lacked the ability to litigate in that proceeding any of *their* rights. For this reason, the argument appears to proceed, the issue of the exemptions was the exclusive province of the court in the fraudulent transfer action, where Gwen and B&G could defend their rights. We reject this argument, because Bruce fails to provide legal authority to support the proposition that a court presiding over a supplemental proceeding cannot or should not resolve potential exemptions from execution for the judgment debtor when

there is a related pending or imminent fraudulent transfer action involving the judgment debtor and other parties, and also fails to persuade us that there was anything about the circumstances presented in the supplemental proceeding here that obligated the court to refrain from addressing Bruce's exemption claims.

¶14 As an initial matter, we observe that Bruce's first argument appears to be barred by the doctrine of judicial estoppel. This is because on appeal Bruce appears to take a position inconsistent with one that he advanced in the circuit court and that he convinced the court to accept. *See Feerick v. Matrix Moving Sys., Inc.*, 2007 WI App 143, ¶¶16-17, 302 Wis. 2d 464, 736 N.W.2d 172 (quoting *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996)) ("Judicial estoppel is an equitable doctrine intended 'to protect against a litigant playing 'fast and loose' with the courts by asserting inconsistent positions'" and applies when (1) "the later position must be clearly inconsistent with the earlier position"; (2) "the facts at issue should be the same in both instances"; and (3) "the party to be estopped must have convinced the first court to adopt its position.") As set forth above, Bruce opposed the consolidation of the judgment action and the fraudulent transfer action on the grounds that the issues in the one action had no relation to the issues in the other and that neither the court in the judgment action nor the court in the fraudulent transfer action "have any particular knowledge regarding the asset transfers at issue" such that it would be preferable for one court to make the asset determinations over the other. The position that Bruce convinced the circuit court to adopt appears to be wholly inconsistent with the argument he now advances on appeal. However, Wirth does not argue that Bruce is estopped from making this argument, and, as a result, we choose to address the issue on its merits.

¶15 Setting aside the judicial estoppel issue, aspects of Bruce’s argument are unclear, but he purports to rely on WIS. STAT. § 816.08, which provides in pertinent part that if “any person alleged to have property of the judgment debtor” “claims an adverse interest in the property” that claimed adverse interest “shall be recoverable only *in an action against such person* by the receiver” (Emphasis added.) Bruce also purports to rely on *Department of Rev. v. Milwaukee Mack Truck Sales, Inc.*, 91 Wis. 2d 1, 280 N.W.2d 274 (1979), in which our supreme court interprets § 816.08 to hold that “no issue can be tried” in a supplemental proceeding “between the receiver (or judgment creditor) and a third person as to any interest or right such third person asserts in property allegedly belonging to the defendant.” *Mack Truck Sales*, 91 Wis. 2d at 8 (citation omitted).

¶16 Citing this as authority, Bruce argues that exemption claims by a judgment debtor must be determined by courts in fraudulent transfer actions, or perhaps that, at a minimum, fraudulent transfer actions must proceed to their conclusions before a circuit court is authorized to make any exemption determinations in a supplemental proceeding. For reasons we now explain, we conclude that Bruce’s arguments based on WIS. STAT. § 816.08 and *Mack Truck Sales* miss the mark because the court here addressed only whether *Bruce*, and not Gwen or B&G, was entitled to claim exemptions in the transferred interests under WIS. STAT. § 815.18(10).

¶17 We start by noting that both WIS. STAT. § 816.08 and *Mack Truck Sales* stand for the proposition that the court in this supplemental proceeding lacked authority to determine *Gwen’s or B&G’s rights* in the transferred interests. However, Bruce points to nothing in the text of § 816.08, or for that matter nothing in the text of WIS. STAT. § 815.18(10), and no language in *Mack Truck Sales*, that gives courts in fraudulent transfer actions exclusive or primary

jurisdiction to address exemption claims of judgment debtors such as Bruce. Section 816.08 addresses *remedies* supplementary to execution and not *exemption* issues, which are addressed in chapter 815.

¶18 Moreover, the premise of Bruce’s argument is meritless. Nothing about the court’s determinations here with respect to *Bruce’s* interests impaired the rights of *Gwen or B&G*, who are parties to the fraudulent transfer action. Gwen and B&G are free in that adversary proceeding to litigate their rights, including “with summons, pleadings, pre-trial procedures, trial judgment and execution on the judgment.” See *Mack Truck Sales*, 91 Wis. 2d at 10.

¶19 Further, as we now explain in more detail, WIS. STAT. § 815.18(10) gave the circuit court the authority to address *Bruce’s* potential rights to exemptions. As reflected in the statutory language quoted above, a court that is “required to satisfy the claim of a creditor” may deny “[a]ny or all” exemptions to a debtor “if, in the discretion of the court having jurisdiction, the debtor procured, concealed or transferred assets with the intention of defrauding creditors.” *Id.* (emphasis added). Thus, the circuit court in the supplemental proceeding was charged under the terms of § 815.18(10) with attempting to satisfy (“required to satisfy”) Gebhardt’s judgment against Bruce. In the process, the court was “required to” determine whether any of the property that might otherwise go toward satisfying the judgment was exempt from execution. Thus, the court was correct in concluding that, given the circumstances here, the court was obligated to determine Bruce’s interests or exemptions, if any, in the transferred interests.

¶20 It was a proper exercise of discretion for the circuit court in the supplemental proceeding to address Bruce’s exemption claims rather than to wait for the court in the fraudulent transfer action to address them. In the turnover

motion, Wirth not only asked the court to rule on exemptions claims by Bruce, he also requested relief that included the turnover of records related to the transferred interests. Wirth also alleged, as part of his basis for the relief requested, that Bruce transferred the interests in contempt of the order not to transfer any non-exempt interests in the supplemental proceeding.

¶21 In sum, the issue of *Bruce's* exemption claims in the supplemental proceeding was between Bruce and Wirth, not between Gwen/B&G and Wirth. And, nothing in the statutes requires the fraudulent transfer action to proceed to its conclusion before a court can address exemption claims of a judgment debtor in a supplemental proceeding. Bruce makes the unobjectionable point that determinations in a supplemental proceeding are likely to affect later determinations in a related fraudulent transfer action. It is equally true that determinations in a fraudulent transfer action are likely to affect later determinations in a related supplemental proceeding. However, Bruce points to no statute or reported decision that even suggests that exemption-related decisions in one type of action must precede exemption-related decisions in the other type. For these reasons, we conclude that the court in the supplemental proceeding had authority to rule on Bruce's exemption rights in order to "satisfy the claim[s]." *See* WIS. STAT. § 815.18(10).

Whether Bruce Was Entitled to Claim Exemptions In The Transferred Interests

¶22 Bruce argues that the circuit court erred in considering whether Bruce was entitled to claim exemptions in the transferred interests because the court failed to recognize that he no longer possessed any interest in them as a result of the completed transfers to Gwen and B&G. That is, according to Bruce, because Gwen and B&G had become the owners of the transferred interests by the

time the court considered his exemption claims, the court’s exemption determinations “constitute an unauthorized, advisory opinion that is based on an uncertain and contingent situation.”

¶23 We reject this argument because it is unsupported by adequate references to pertinent legal authority and does not constitute a reasoned legal argument. *See State v. McMorris*, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (we may choose not to consider arguments that are unsupported by references to pertinent legal authority, that do not reflect legal reasoning, or that lack proper citations to the record). Moreover, it does not appear from the record that Bruce clearly presented this “advisory opinion” argument to the circuit court, and, therefore, he failed to preserve it for appeal.

¶24 We further observe that, as best we can determine, we would reject whatever argument Bruce intends to make because it appears to rely on circular reasoning, namely, that the circuit court cannot consider whether a debtor can be denied exemptions due to a fraudulent transfer of a property interest because the debtor has already made the transfer. As Wirth points out, Wisconsin courts have determined whether a debtor can claim an exemption from execution in property that the debtor has already transferred. *See Carhart v. Harshaw*, 45 Wis. 340 (1878); *Dreutzer v. Bell*, 11 Wis. 114 (1860). Bruce does not seriously challenge the proposition that courts are allowed to consider whether a transfer is wrongful.

*Whether The Circuit Court Erred In Requiring Bruce to Assert Exemption Claims
At The Turnover Motion Hearing And Placing The Burden On Bruce To Prove
The Value of Transferred Interests*

¶25 Bruce argues that it was improper for the circuit court to “require” Bruce to claim exemptions in the transferred interests at the time of the turnover

motion hearing and therefore improper to place on Bruce “the burden of proving the value of the transferred interests.” We struggle to understand what Bruce precisely means to argue in this regard. However, addressing the argument as best we understand it, we reject it for the following reasons.

¶26 First, our review of the record reveals that Bruce had asserted exemption rights in the transferred interests prior to the turnover motion hearing, making it entirely reasonable for the court to take evidence regarding Bruce’s exemptions at the hearing. Bruce transferred the East Washington Avenue property in apparent reliance on an exemption, because he made the transfer after the circuit court enjoined Bruce from transferring any *non-exempt* properties. If Bruce did not believe that the property was exempt, then he obviously would have been in contempt of the court’s order enjoining Bruce “from transferring, encumbering or otherwise disposing of any non-exempt property or assets he owns.” The order was entered more than one month before Bruce transferred it and nearly one year before Wirth filed the turnover motion. Moreover, Bruce claimed exemptions as a defense in his answer to the fraudulent transfer action, filed seven months before the turnover motion, asserting that “[o]ne or more of the interests transferred were exempt assets.”

¶27 Given these positions by Bruce, it made sense for Wirth to seek, and for the court to consider, a determination as to whether the transferred properties were exempt from execution, for at least the reason that it would allow Wirth to make an informed decision as to whether a fraudulent transfer action was worth pursuing. See *Carhart*, 45 Wis. 340 (the owner of property exempt from forced sale may transfer the property and, once transferred, the property is not subject to execution for the former owner’s debts).

¶28 Second, Bruce effectively mischaracterizes the proceedings in arguing that the circuit court erred in “concluding that Bruce” “bore [the] burden of proving” the values of the transferred interests. The court did not rely on the purported values of any of the transferred interests in making its exemption determinations. It is true that, regarding values that were not stipulated to, the court took valuation evidence from both parties, consistent with the directive in WIS. STAT. § 815.18(7) (valuation of property subject to exemption “shall be determined by agreement of the parties or by a commercially reasonable manner”). However, the values of the transferred interests played no role in the circuit court’s ultimate determination that Bruce is not entitled to claim exemptions from execution in the transferred interests. The court specifically indicated that it had “no comfort level with making any finding regarding net values of the properties at issue here” and instead based its exemption determinations on Bruce’s conduct and intentions surrounding the transfers.⁷

CONCLUSION

¶29 For these reasons, we conclude that the circuit court had authority to make determinations pursuant to WIS. STAT. § 815.18(10) with respect to Bruce’s

⁷ Bruce argues that we must reverse the circuit court’s finding that the East Washington Avenue property was not wholly exempt at the time that Bruce transferred the property to B&G because the net value of the property was low enough to render it exempt. We reject this argument because it is insufficiently developed in that it contains neither citations to pertinent legal authority nor any developed legal argument. Moreover, as explained above, the circuit court acted within its authority in denying Bruce’s exemption claims in *all* of the transferred interests, including the East Washington Avenue property, pursuant to WIS. STAT. § 815.18(10). Thus, the court concluded that the actual values of the individual properties do not matter because, even if the properties would otherwise be exempt from execution as to Bruce, those exemptions should be denied because of Bruce’s intent to defraud creditors in making the transfers.

exemption claims and properly exercised its discretion in doing so. Accordingly, we affirm the revised judgment of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

