

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 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. 2017AP581

Cir. Ct. No. 2016CV006628

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CITY OF MILWAUKEE MUNICIPAL COURT,

PLAINTIFF-RESPONDENT,

v.

WILL J. SHERARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
GLENN H. YAMAHIRO, Judge. *Affirmed.*

¶1 DUGAN, J.¹ Defendant Will J. Sherard appeals a circuit court order denying his motion to set aside the City of Milwaukee Municipal Court’s order for payment of the money judgments against him for building code violation fines.

¶2 On appeal, Sherard contends that the Municipal Court erroneously exercised its discretion because the evidence showed that he was unable to pay the amounts as ordered and that the Municipal Court failed to consider other economic factors in Sherard’s finances.² He also asserts, in essence, that the Municipal Court erred as a matter of law because the order is based, in part, on assets that are not his; rather, they are the assets of a separate business entity, Morocco Investments, LLC.

¶3 The Municipal Court maintains that Sherard has failed to show that it erroneously exercised its discretion by denying Sherard’s request for an extension on the payments of the money judgments—which, it asserts, is the sole issue Sherard raised before the circuit court. It also maintains that Sherard has raised new issues for the first time on appeal which is prohibited and that, even if considered, the new issues fail.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The parties actually argue whether the Municipal Court’s order was an “abuse of its discretion.” However, our supreme court’s 1992 *Milwaukee Metropolitan Sewerage District* decision directs that the term “erroneous exercise of discretion” should be used in order to dispense with “unjustified negative connotations” associated with the term “abuse of discretion.” See *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992). As our supreme court explained the standard of review is unchanged; it is simply a change in “the locution.” See *id.* Thus, throughout this opinion, we have used the term “erroneous exercise of discretion.”

¶4 In reply, Sherard contends that he can raise new issues because it appears from the record that the real controversy has not been tried.

¶5 We conclude that the Municipal Court's denial of Sherard's request for further extensions in the payment of the money judgments was a proper exercise of discretion. Additionally, we conclude that Sherard forfeited the other issues he raises on appeal³ and he has not established that the real controversy was not tried. Therefore, we affirm the circuit court's order.

BACKGROUND

¶6 This appeal involves nineteen municipal court cases⁴ that the City filed against Sherard to collect unpaid fines for building code violations at rental properties that he owns. Based on those proceedings, the Municipal Court imposed fines and entered money judgments against Sherard. Relevant to this case, Sherard owed \$39,728 for seven judgments from 2009 and 2010, and \$24,822 for the remaining judgments.

¶7 The Municipal Court has a general practice where defendants have the ability to "walk-in" to the Municipal Court and make payments towards an outstanding judgment. "Typically," defendants make the "walk-in" payments ex parte; that is, without the presence of the City of Milwaukee's attorney.

³ The other issues Sherard raise on appeal are that the Municipal Court (1) erred by piercing Morocco's corporate veil and (2) erroneously exercised its discretion to determine Sherard's ability to pay by piercing Morocco's corporate veil and failing to taking into account other economic factors in Sherard's finances.

⁴ There is a discrepancy in the nineteen municipal case numbers listed by the parties. Sherard includes Case No. 1200717 whereas the City includes Case No. 12007107. The latter case number Case No. 12007107, which appears on the City's motion and the transcript, is the correct case number.

¶8 Beginning in 2011 until mid-May 2016, Sherard asked the Municipal Court for extensions of time to pay the judgments in full and offered partial payments. During this time, the Municipal Court accepted Sherard's partial payments and, between October 2013 and February 2016, it granted Sherard ten extensions of time to pay the full judgments.

¶9 On May 18, 2016, in all nineteen cases, the City filed motions acknowledging that the Municipal Court had the statutory authority to authorize installment payments⁵ for defendants who requested additional time to satisfy a forfeiture payment, but asserting that Sherard had exceeded a reasonable time to satisfy the forfeiture judgments.⁶ The motions stated that the City objected to any extensions and requested that the Municipal Court (1) notify the City of any request by Sherard to extend payment dates and/or to allow partial payments on any of the judgments, and (2) allow the City to be heard during any hearing involving any such request by Sherard.

¶10 On May 23, 2016, Sherard made a "walk-in" appearance in Municipal Court. The Municipal Court changed the judgment due dates to June 3, 2016, and scheduled a June 3, 2016, evidentiary hearing to determine whether Sherard was able to pay the judgments in full.

⁵ The record does not include any evidence that prior to June 3, 2016, the Municipal Court set an installment payment schedule for Sherard's payment of any of the money judgments against him.

⁶ Comparison of the municipal case numbers listed by the parties reveals that Sherard includes Case No. 1200717 whereas the City includes Case No. 12007107. Case No. 12007107 appears on the City's motion and the transcript and is the correct case number.

¶11 At the June 3, evidentiary hearing, the Municipal Court emphasized that the sole issue for its consideration was Sherard's financial ability to make payments on the judgments. The City asked the Municipal Court to require Sherard to immediately pay judgments of \$39,728 that he owed as the result of seven 2009 and 2010 cases. It also requested that the Municipal Court order Sherard to pay the \$24,822 of remaining judgments by making "monthly installments" payments that would end "within one year." The City emphasized that it was Sherard's burden to show that he did not have the financial means to pay the judgments.

¶12 Sherard argued that he had been making a good faith effort to pay the forfeitures and he had cooperated with the Municipal Court by obtaining discretionary extensions. Sherard stated that "we're all struggling to make payments" and asked for "something that he could live with" pointing out that he owed nearly \$40,000 to various City departments, including those responsible for property taxes and water service.

¶13 During the hearing, the City introduced documentary evidence in the form of thirty-two deeds showing that Sherard acquired thirty-six properties through the Milwaukee County Sheriff's foreclosure sales; a June 2, 2016 affidavit from the City assessor's office with an attached exhibit listing the current assessed values of Sherard's properties which totaled \$1.41 million;⁷ and a Milwaukee County Circuit Court docket sheet showing that in March 2016, Sherard paid nearly \$120,000 to satisfy an October 2015 judgment.

⁷ The City explained that the valuation figure that it had provided from the exhibit to the City assessor's affidavit was limited to properties owned solely by Sherard and that the City had not included one or two properties listed on the exhibit that Sherard co-owned with someone else.

¶14 The City’s first argument at the hearing regarding Sherard’s ability to pay the judgments focused on the requirements established by WIS. STAT. § 846.167 for those who buy properties at sheriff’s sale. Specifically, the City pointed out that, under § 846.167, each sheriff’s sale property purchase required that Sherard (1) immediately pay ten percent of the property’s sale price by cash or cashier’s check, and (2) pay for the property in full within ten days of its purchase. The City contended that, as the owner of thirty-six properties purchased at sheriff’s sales who was also continually buying properties at such sales, Sherard must have had the liquidated assets to comply with the statutory mandates. The City asserted that, on such basis, Sherard also would have the ability to pay the judgments.

¶15 The City also relied upon the monthly rent Sherard collected from his properties, noting that he had conceded receiving monthly rental payments of at least \$1,000. Further, the City relied upon the \$1.41 million assessed value of Sherard’s properties, owned individually, which did not include any Morocco properties. Additionally, the City asserted that, in March 2016, Sherard paid a \$120,000 judgment in full. The City argued that the evidence, including Sherard’s personal assets and the satisfied judgment, established that Sherard was able to pay more toward the judgments.

¶16 Sherard countered that the City’s evidence was insufficient. First, Sherard attempted to introduce his own property tax bills as well as Morocco’s into evidence⁸ arguing that the property taxes and fees were “exorbitant” and that

⁸ Although the property tax bills were not admitted into evidence, we will consider the argument to the extent that the hearing transcript includes testimony about the tax bills.

he needed to pay thousands of dollars in property taxes the following week.⁹ Sherard also said that he was not trying to work the system, but that he needed the flexibility to cover all his expenses so he could sustain his business.

¶17 Further, Sherard argued that the process by which one purchases a sheriff's sale property is different than the City implied because he could use the property as collateral to obtain financing to purchase other properties. He asserted that, since he could not use the purchased properties as collateral to obtain financing to pay the Municipal Court judgments against him, that evidence was irrelevant.

¶18 The Municipal Court considered Sherard's income, considerable assets,¹⁰ and property purchases and concluded that Sherard could pay the judgments. The Municipal Court also found that Sherard lacked credibility on the stand and lacked candor regarding the profitability of his properties.

¶19 Relying on those findings, the Municipal Court found that Sherard's requests for extensions to pay the judgments were "a disingenuous way to get around paying the City the money that [was] rightfully owed for violations that were properly adjudicated in the courts." Acknowledging its discretion and flexibility in creating lenient installment plans, the Municipal Court stated that it was convinced by the City's proof that Sherard could pay.

⁹ Sherard initially stated that, the Monday after the hearing, he needed to pay taxes of \$35,000 to \$40,000. He later cited a \$23,000 figure for the taxes. For purposes of this decision, we have considered the \$40,000 amount as correct.

¹⁰ After Sherard sought to admit evidence of the tax bills for properties that he owned and for properties that Morocco owned, the City introduced evidence of Morocco's total assets.

¶20 The Municipal Court ordered that, within sixty-days of the June 3, 2016 hearing, Sherard must pay the \$39,728 in judgments from the 2009 and 2010 cases and that, following that payment, Sherard must pay the remaining \$24,822 in judgments by making twelve evenly-divided monthly payments. The Municipal Court emphasized that, under its order, the full balance of the outstanding judgments would be paid in fourteen months, and that there would be “no extensions on this whatsoever” so “the full amount of what is owed ... will be paid in [fourteen months].” The Municipal Court also stated that, if the full amount was not paid in fourteen months, “there [would] be a warrant sworn out for [Sherard’s] arrest.”

¶21 Sherard appealed the order to the Milwaukee County Circuit Court. There, Sherard argued that (1) he was not provided notice of the June 3, 2016 hearing, (2) the Municipal Court violated due process and engaged in selective enforcement of the laws, (3) there had been *ex parte* communication between the City and the Municipal Court in violation of ethics rules, (4) the Municipal Court did not have good cause under WIS. STAT. § 806.23 to modify his payment plan, and (5) the Municipal Court acted outside the authority afforded by WIS. STAT. § 800.095(4). The circuit court rejected Sherard’s arguments, specifically found that the Municipal Court was well within its authority, and affirmed the Municipal Court’s order.

¶22 This appeal followed.

DISCUSSION

¶23 Sherard contends that the Municipal Court erred in exercising its discretion when it denied his request for further extensions of time to pay the judgments and ordered that he make immediate large payments because the

evidence showed he was unable to pay that amount. The Municipal Court maintains that it properly exercised its discretion in denying Sherard's requests for extensions because the City's evidence showed that Sherard had the ability to pay the judgments as ordered.

The Standard of Review

¶24 In reviewing the Municipal Court's decision, we review the municipal court transcript and apply the same standard of review as the circuit court. *See Village of Williams Bay v. Metzl*, 124 Wis. 2d 356, 362, 369 N.W.2d 186 (Ct. App. 1985). We will not set aside the municipal court's findings of fact unless they are clearly erroneous. *See id.* We also must give due regard to the opportunity of the municipal court to determine the credibility of the witnesses. *See id.* We search the record for facts to support the municipal court's findings of fact. *See id.* However, we review questions of law *de novo*. *See id.* at 360.

The Municipal Court Properly Exercised its Discretion.

¶25 A municipal court erroneously exercises its discretion when it "makes an error of law or neglects to base its decision upon facts in the record." *See King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999) (defining the standards for discretionary action review in the context of a circuit court decision). Here, in his initial brief, Sherard asserts that the Municipal Court erroneously exercised its discretion when it modified his installment payments pursuant to

WIS. STAT. § 800.095(4)¹¹ because the Municipal Court did not have evidence showing that he was able to pay the judgments as ordered.

¶26 To properly address this appeal, we note that Sherard’s use of the term “installment payments” is inaccurate. The record does not contain any evidence that prior to June 3, 2016, Sherard was ordered to or allowed to make installment payments on the Municipal Court judgments. Rather, the record establishes that Sherard made repeated “walk-in” requests for extensions of the time to pay the judgments. The Municipal Court granted those requests and, generally, accepted partial payments from Sherard on the judgments.

¶27 After the evidence was presented at the June 3, 2016, evidentiary hearing, the Municipal Court found that Sherard had not established that he was financially unable to make the payments and ordered him to pay the \$39,728 in judgments from the 2009 and 2010 cases within sixty days, and, following that payment, ordered him to pay the remaining \$24,822 in judgments by making twelve evenly-divided monthly payments.

¶28 Without further analysis, we could decline to address Sherard’s argument that the Municipal Court erroneously exercised its discretion because the City’s response brief disposes of Sherard’s assertions and Sherard failed to counter the City’s arguments in his reply brief. *See United Co-op. v. Frontier FS Co-op.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that the failure to refute a proposition asserted in a response brief may be taken as a concession).

¹¹ Sherard’s brief cites WIS. STAT. § 800.95(4), which does not exist. We infer that Sherard intended to cite WIS. STAT. § 800.095(4). We have corrected the error.

However, we also conclude that Sherard’s argument fails on the merits because the Municipal Court did not erroneously exercise its discretion.

¶29 Pursuant to WIS. STAT. § 800.095(4), the City Municipal Court grants payment extensions to defendants based on the defendant’s ability to pay. WISCONSIN STAT. § 800.095(4) states as follows: “The court may, *at any time*, authorize payment of the monetary judgment by installment payments, or may modify, suspend, or permanently stay the monetary judgment, or order that the judgment be satisfied by community service.” (Emphasis added.) First, it is clear from its language that § 800.095(4) does not create a right to the extension of time to make payment on a money judgment. Rather, it gives the municipal court broad discretion to authorize payment of a money judgment in a variety of ways—it does not require a municipal court to permit extensions for payment of money judgments. Second, as is clear from its language, the statute vests the municipal court with broad discretion to “modify, suspend, or permanently stay the monetary judgment,” at any time.

¶30 Thirdly, the statute contains no reference to ability to pay. The plain words of WIS. STAT. § 800.095(4) do not require that an ability to pay be established before the municipal court may deny a request to extend the time for payment of a money judgment. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110 (“[W]e have repeatedly held that statutory interpretation ‘begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.’”). In addition, we note that Sherard cites no other legal authority in support of his contention. *See State v. Pettit*, 171 Wis. 2d 633, 646, 492 N.W.2d 633 (Ct. App. 1992) (“[a]rguments unsupported by references to legal authority will not be considered.”). In other words, nothing before this court establishes that the statute

requires proof of an ability to pay before a municipal court may deny a request for an extension of time to pay a money judgment.

¶31 Although we could reject for lack of support from any legal authority Sherard's contention that no evidence at the evidentiary hearing showed he was capable of paying the judgment as ordered by the Municipal Court, the contention also lacks support in the record. We begin by noting that Sherard has incorrectly placed the burden of proof on the City. As noted above, WIS. STAT. § 800.09(4) does not create a right to an extension on payment of a money judgment. Rather, the party owing the money judgment must request an extension from the Municipal Court and prove why the extension should be granted. It was Sherard who made such a request in this case. Therefore, as the movant, Sherard was required to present evidence that an extension of time to pay the judgments was needed.

¶32 At the hearing, Sherard discussed the property taxes on properties that he owned individually and properties that Morocco owned. However, his focus with respect to those taxes was that they were excessive given the values of the properties owned. Sherard also asserted that he had to pay \$40,000 to the City by the following Monday.

¶33 However, Sherard did not testify or present any evidence showing that he was actually unable to pay the money judgments. As the Municipal Court observed, Sherard was evasive regarding the profitability of the rental properties that he owned. He only admitted to receiving \$1,000 each month for more than thirty rental properties—a minimal amount. Furthermore, he did not attempt to present evidence showing the overall expenses that he incurred compared to his business income. Sherard did not establish that he is not able to pay the money

judgments in this case. Noting that Sherard had the burden of proof, the Municipal Court found that Sherard had failed to show he was unable to pay the judgments.

¶34 Additionally, although Sherard challenges the adequacy of the evidence of his ability to pay, the evidence supports the Municipal Court's conclusion that Sherard could pay the judgment and that his failure to do so while acquiring new properties was "highly irresponsible." The Municipal Court based its determination on (1) Sherard's purchase of properties at sheriff's sales which required available funds, (2) the rental income from the properties owned by Sherard and Morocco, and (3) the assessed value of Sherard's properties. The Municipal Court found that based on the evidence presented, the rental income from Morocco's properties was also an income source for Sherard. Additionally, the fact that Sherard recently paid a \$120,000 judgment in full provides support for the Municipal Court's order.

¶35 We conclude that, in addition to failing to prove that he was not able to pay the money judgments, the evidence presented provides a sufficient basis for the Municipal Court's denial of any further extensions for the payment of the judgments against Sherard and its order for payment of the judgments.

**Sherard Forfeited the Other Issues Regarding the Municipal Court's
(1) Consideration of Morocco's Assets and (2) the Failure to Take into
Account Other Economic Factors**

¶36 Sherard also argues that the Municipal Court erroneously exercised its discretion because its determination involved piercing Morocco's corporate veil and erroneously exercised its discretion to determine Sherard's ability to pay by piercing Morocco's corporate veil and failing to taking into account other economic factors in Sherard's finances. The Municipal Court asserts that these

issues were waived on appeal because they were not raised before the circuit court.¹²

¶37 Here, by failing to raise the issues in circuit court, Sherard forfeited his arguments concerning piercing of the corporate veil and the Municipal Court’s erroneous exercise of discretion because it determined Sherard’s ability to pay by piercing Morocco’s corporate veil and failed to take into account other economic factors in Sherard’s finances. Therefore, we agree that the issues were not preserved for appeal, and decline to address these arguments.¹³

¶38 Moreover, if this court were to consider Sherard’s piercing the corporate veil argument, we agree with the circuit court’s succinct analysis of the Morocco evidence that, given that Sherard is Morocco’s sole shareholder, “it’s logical to conclude that any rents flowing from these [sixty-six] properties or other properties are being returned to ... Sherard and, therefore, could be used to satisfy the judgments.” We also note that the Municipal Court explained that by using the

¹² The Wisconsin Supreme Court has explained that there is a distinction between forfeiture and waiver. See *In re Ambac Assur. Corp.*, 2012 WI 22, ¶8 n.10, 339 Wis. 2d 48, 810 N.W.2d 450. An issue is “waived” when a party “affirmatively and deliberately relinquish[es] a right.” *Id.* In contrast, “forfeiture” occurs when a party “fail[s] to raise and preserve an issue before the circuit court.” *Id.*

¹³ While the City used the term “waived” in its brief to assert that piercing the veil was *forfeited* by failure to assert it before the circuit court, Sherard also forfeited the issue before the Municipal Court. There, as demonstrated by the following colloquy, Sherard presented tax bills, including those of Morocco:

[The Court]: So ... Sherard, I think what the City Attorney is saying is that Morocco... is not a part of this.

[Sherard]: I want them to go together.

By stating that he wanted the tax bills to “go together,” Sherard forfeited any objection to the Municipal Court’s consideration of evidence regarding Morocco’s assets.

phrase “piercing the corporate veil” it did not mean that it was finding that Morocco was responsible for the money judgments, stating “I do believe that the veil has been pierced as far as income purposes as far as the property being an income source of [Sherard], yes.” However, the Municipal Court further explained, “Further piercing of the veil, ... would have to be done through [c]ircuit [c]ourt. We’re here just for ... [Sherard] and his ability to pay, so this in no way, shape or form reflects on Morocco[’s] ... ability to pay any outstanding fines. They’re not part of this proceedings.”

¶39 Therefore, if this court were to consider Sherard’s piercing the corporate veil argument, we would not conclude that the Municipal Court erred in considering the rental income Sherard obtained from the Morocco properties.

Sherard Has Not Established the Need for a New Trial in Interest of Justice

¶40 Sherard also relies on WIS. STAT. § 752.35 contending that a litigant can raise new issues on appeal if the real controversy is not fully tried or justice is miscarried. Sherard urges that, because the City failed to prove an ability to pay, justice was miscarried. However, Sherard was requesting an extension to pay money judgments and he had the burden to prove that the Municipal Court should have granted him such a extension. He failed to meet that burden.

¶41 WISCONSIN STAT. § 752.35 affords this court discretion to “reverse the judgment or order appealed from” and “direct the entry of the proper judgment or remit the case to the trial court . . . as are necessary to accomplish the ends of justice.” See WIS. STAT. § 752.35. A miscarriage of justice may be found when there is “a probability of a different result on retrial such that a new trial in the interest of justice is warranted.” See *State v. Kucharski*, 2015 WI 64, ¶46, 363 Wis. 2d 658, 866 N.W.2d 697. Here, we are not convinced that the real

controversy was not tried or that there was a miscarriage of justice; therefore, we reject this argument and affirm the Municipal Court's order. *See id.* *See also, In re Commitment of Sugden*, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456, *review denied*, 2011 WI 15, 331 Wis. 2d 47, 794 N.W.2d 900.

CONCLUSION

¶42 In sum, we conclude that the Municipal Court properly exercised its discretion in denying Sherard's request to extend the time of payment of the money judgments against him. The other contentions Sherard raises have been forfeited and/or do not provide a basis for relief. Therefore, we affirm the circuit court's order.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE
809.23(1)(b)(4).

