COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP309 **Cir. Ct. No. 2003CV306**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DEBRA MARKWARDT AND THE ESTATE OF JUDITH A. MARKWARDT, BY SPECIAL ADMINISTRATOR DEBRA MARKWARDT,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

JOHN VALCQ,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Snyder, P.J., Brown, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Debra Markwardt and the estate of her deceased sister, Judith Markwardt, appeal from a summary judgment dismissing their complaint to enforce an agreement whereby John Valcq agreed to pay Debra 75% of life insurance proceeds he is entitled to receive as Judith's beneficiary. The circuit court held that the agreement is not supported by consideration and is unenforceable. John cross-appeals the denial of his motion for attorney fees and costs. We reject the respective arguments on appeal and affirm the judgment.

¶2 Judith and John, a married man, were intimate friends. Despite a November 2002 agreement with Debra to name each other the beneficiary of their estates and life insurance policies, Judith maintained John as the beneficiary of certain life insurance policies. Judith died on March 31, 2003. On April 4, 2003, John wrote out and signed a promise to pay Debra 75% of the life insurance proceeds. Debra also signed the handwritten agreement. Four days later, John's attorney sent Debra a letter repudiating the April 4, 2003 agreement on the ground that it was coerced by Debra's threat to expose John's relationship with Judith.

¶3 In his answer to Debra's complaint to enforce the agreement, John asserted that the agreement was coerced and lacked consideration. John moved for summary judgment based on coercion and Debra's deposition testimony that the agreement was supported by her assumption of the duty to pay funeral and estate expenses. In opposition to John's motion for summary judgment, Debra filed an affidavit detailing her relationship with Judith, their agreement to mutually name each other the beneficiaries of life insurance, and her conversations with John in which she expressed her entitlement to the life insurance proceeds and indicated to John that if she pursued the money through legal action, his relationship with Judith would come to the forefront and negatively impact him. In reply, John argued that Debra's affidavit contradicted her earlier deposition

testimony that she asked John for the insurance money to relieve him of the obligation to pay Judith's funeral expenses and other debts and as compensation for taking care of Judith's estate in John's place.

¶4 The circuit court held that because neither John nor Debra had any obligation to pay Judith's funeral expenses or other debts, Debra's promise to assume that responsibility upon payment of a portion of the life insurance proceeds was illusory and did not provide consideration for the April 4, 2003 agreement.[1] The agreement was declared unenforceable and the action dismissed.

¶5 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***

¶6 Debra argues on appeal that the April 4, 2003 agreement was based on her forbearance from bringing a lawsuit against John asserting her entitlement to the life insurance proceeds under her 2002 agreement with her sister. She contends this was adequate consideration making John's promise enforceable. Her claim rests on the affidavit she filed in opposition to the motion for summary judgment. However, that affidavit contradicted her earlier deposition testimony

[1] The circuit court found that disputed issues of material fact existed as to whether the agreement was the product of coercion by Debra's threat to expose John's relationship with Judith.

that she had made the agreement with John for the purpose of resolving who would pay Judith's funeral expenses and debts and handle Judith's estate.

¶7 We conclude the "sham affidavit" rule applies. An affidavit that directly contradicts prior deposition testimony of the same witness generally is insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102.

> To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.

Id.

¶8 Debra's deposition testimony indicated that her motivation for asking John for a portion of the life insurance monies was to assume responsibility for Judith's funeral expenses, debts, and estate. She indicated that she did not care about the money as long as it was used to pay Judith's estate expenses. In contrast, her affidavit suggested that the agreement was supported by her forbearance from litigating her entitlement to the life insurance proceeds. There

was no explanation for the contradictory affidavit. The affidavit is not entitled to consideration. *See* ***id.***, ¶23.[2]

¶9 In her reply brief, Debra argues that John, via the letter from his attorney, merely repudiated the April 4, 2003 agreement and did not elect the remedy of rescission based on a lack of consideration. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). It is sufficient to observe that the attorney's letter did not constitute a binding election of remedies and in this action John asserted the lack of consideration as a defense.

¶10 The circuit court correctly held that there was no consideration supporting the April 4, 2003 agreement between Debra and John.[3] John had no legal obligation to pay Judith's funeral expenses or estate debts. Debra's promise to take care of those things upon receipt of a portion of the insurance money was an empty promise of no value to John. Summary judgment dismissing the contract claim was appropriate.

¶11 John's cross-appeal challenges the circuit court's refusal to award John attorney fees and costs under WIS. STAT. §§ 802.05 and 814.025(3)(a)

[2] We note that the circuit court did not expressly use the "sham affidavit" rule. We may affirm for reasons other than those the circuit court used. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

[3] The circuit court also found that the November 2002 agreement between Debra and Judith was unenforceable and that Debra had no claim against John based on that agreement. We need not address this finding since we do not consider Debra's affidavit asserting forbearance from suit as consideration for the April 4, 2003 agreement with John.

(2003-04).[4] John contends that the lawsuit was not supported by a reasonable basis in law or fact and that it was maintained solely for the purpose of harassing or maliciously injuring him. He focuses on causes of action that Debra ultimately dismissed and argues that he was entitled to an evidentiary hearing and specific findings as to the frivolousness of each cause of action asserted against him.

¶12 We first observe that John made no objection when Debra stated on the record her reasons for dismissing her claim of undue influence. John never let the circuit court know that he disputed Debra's stated reasons such that an evidentiary hearing was necessary. We properly decline to review an issue where a party has failed to give the circuit court fair notice that he or she objects to a particular issue. *See* ***State v. Gilles***, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992). The circuit court accepted Debra's explanation. When a party fails to object to a circuit court's characterization of the underlying facts, that party has waived the right to argue the issue on appeal. ***First Interstate Bank v. Heritage Bank & Trust***, 166 Wis. 2d 948, 954, 480 N.W.2d 555 (Ct. App. 1992).

¶13 Further, we consider John's argument on appeal to be undeveloped and need not consider it.[5] *See* ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999). John makes the broad assertion that Debra's dismissal of certain claims is strong indicia of frivolous pleading and intent to harass. At best, John's argument is, as it was before the circuit court, that because

[4] Supreme Court Order 03-06 repealed and recreated WIS. STAT. § 802.05 and repealed WIS. STAT. § 814.025. S. CT. ORDER, 2005 WI 86 (eff. July 1, 2005). All references to the Wisconsin Statutes in this opinion, however, are to the 2003-04 version unless otherwise noted.

[5] John's argument is more developed in his reply brief. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

he prevailed and because Debra's suit had the effect of embarrassing him and ruining his marriage, he is entitled to a finding that the action was for an improper purpose. "A claim is not frivolous merely because there was a failure of proof or because a claim was later shown to be incorrect. Nor are sanctions appropriate merely because the allegations were disproved at some point during the course of litigation." ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 551, 597 N.W.2d 744 (1999) (citation omitted). John's argument does not approach the requisite showing that the lawsuit was solely intended for the purpose of harassment. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 239 n.6, 517 N.W.2d 658 (1994) (use of the word "solely" in WIS. STAT. § 814.025(3)(b) is intended to erect a high standard).

¶14 No costs to either party.

By the Court.—Judgment affirmed.

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