

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 7, 2007**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2006AP960  
2006AP1357**

**Cir. Ct. No. 2004FA1143**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**DEBBIE V. QUAIL,**

**PETITIONER-APPELLANT,**

**V.**

**JOHN J. QUAIL,**

**RESPONDENT-RESPONDENT.**

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APPEALS from orders of the circuit court for Waukesha County:  
LINDA M. VAN DE WATER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Debbie Quail appeals from an order discharging a receiver and an order denying her motion under WIS. STAT. § 806.07 (2003-04)<sup>1</sup> to reopen the property division in the judgment divorcing her from John Quail. She argues that the property division stipulation was based on a mutual mistake concerning the proceeds available from the sale of John's business by the receiver. She also contends it was error for the circuit court to discharge the receiver, require the payment of disputed attorney fees without a hearing, and enter written orders not pronounced from the bench. We affirm the orders.

¶2 Debbie and John Quail were divorced September 1, 2005. While the divorce was pending, in May 2005, the parties stipulated to the appointment of a receiver to conduct the business of Quail & Company, LLC, d/b/a Milwaukee Street Traders, which was operating a coffee shop and café in Delafield. The business was at risk to close and suffer severe losses. The business was sold August 31, 2005, the day before the parties entered into a stipulated property division. We set out fully the stipulation regarding the sales proceeds:

[The receiver] is in possession of the sale proceeds from the sale of Milwaukee Street Traders. He is anticipating that the net proceeds are \$120,000. However, they may be more and they may be less.

Those proceeds are being awarded to Debbie subject to the following. There are two promissory notes owing to [John] in the amount of \$28,000, those will be paid to [John]. There are two debts owing to Landmark Credit Union, which as of today's date are \$12,253, and \$26,675. There will be some interest that accrues, but those monies will be paid out of those proceeds. The then balance will be paid to Debbie with the understanding that any and all of the tax

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

as a result of the closing sale gain on that asset is her sole responsibility to pay.

¶3 Upon acknowledging that the receiver was holding \$35,000 in escrow as required by the buyer to cover any cleanup bills and liabilities of the business, the stipulation continued: “In the event Debbie receiving [sic] less than \$120,000, we’ll use the \$35,000 escrow to bring her up to 120. Any proceeds in excess of 120 including the escrow will be divided equally.” Later during Debbie’s testimony she agreed that she was awarded most of the marital property less certain debts and that she expected to receive approximately \$120,000 from the sale of John’s business.

¶4 Upon the payment of business debts and the approval and payment of the receiver’s fees and expenses of \$37,628.50, there were no sale proceeds to disburse to Debbie.<sup>2</sup> Debbie questioned the receiver’s discharge statement and undertook discovery. The circuit court ordered her to pay any additional fees incurred by the receiver as a result of her discovery efforts. Debbie moved to reopen the property division under WIS. STAT. § 806.07.<sup>3</sup> She argued that the parties’ stipulated property division was based on a mutual mistake about how much would be remaining in proceeds from the sale of the business, that there was a misrepresentation of what the net sale proceeds would be, that the receiver’s discharge statement was new evidence entitling her to a trial, and that it was no

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<sup>2</sup> Debbie’s statement of facts indicates that the receiver “filed a motion seeking to modify the judgment of divorce so as to have all but approximately \$600 of the remaining proceeds paid over to himself instead of Debbie Quail as ordered.” This is a gross misstatement. At no time did the receiver move to modify the judgment of divorce. At all times the receivership was treated by the parties as ancillary to the divorce.

<sup>3</sup> The docket entries reflect that on January 4, 2006 a motion to vacate the judgment of divorce was filed. The motion and supporting affidavit are not in the record.

longer equitable that the judgment stand because she would be required to pay capital gains tax on money she never received. *See* § 806.07(1)(a), (b), (c), and (g). She also claimed that relief from judgment was justified because there were extraordinary circumstances the parties didn't anticipate at the time the property division stipulation was entered into and that she was not in a position to become aware of those circumstances until after making the stipulation. *See* § 806.07(1)(h).

¶5 The circuit court found that there was nothing in the property stipulation or on the record establishing that the \$120,000 to Debbie was guaranteed. It found that to the extent there was a mutual mistake, it was caused by the parties' neglect in not ascertaining what debts, expenses and receiver fees needed to be paid from sale proceeds. The court commented that both parties took a risk assuming that \$120,000 was going to be there. It concluded that there was nothing preventing the parties from earlier discovering the evidence about the debts, expenses and receiver fees and that there was no misrepresentation. In the court's opinion the judgment was not inequitable because there was no guarantee of the \$120,000 to Debbie and John also did not get the benefit of what he bargained for since there were inadequate funds to pay the Landmark Credit Union debts. The court rejected the argument that other reasons existed to grant relief from judgment.

¶6 A motion for relief from judgment under WIS. STAT. § 806.07 is addressed to the sound discretion of the circuit court. *Hutjens v. Hutjens*, 2002 WI App 162, ¶27, 256 Wis. 2d 255, 647 N.W.2d 448. We will not reverse the circuit court's discretionary determination if the record shows that discretion was in fact exercised and a reasonable basis exists for the decision. *Id.*

¶7 Debbie first argues that the circuit court erroneously exercised its discretion because it mistakenly believed that if her motion for relief from judgment was granted, the court would have to vacate the entire judgment of divorce. We need not linger on this contention. There is nothing in the circuit court’s decision suggesting that it denied Debbie’s motion because it did not want to vacate the entire judgment of divorce.<sup>4</sup> Further, contrary to Debbie’s argument, the circuit court did not find that the property division was rendered inequitable. Rather it found that both parties bore the burden of their assumption about the amount of the sale proceeds and therefore, the property division remained fair.

¶8 Debbie next asserts that because the circuit court found a mutual mistake, it was obligated to grant relief from the judgment. WISCONSIN STAT. § 806.07(1) provides that the circuit court “may” relieve a party from a judgment or stipulation. Nothing mandates affording relief when a mistake is found. *See Johnson v. Johnson*, 157 Wis. 2d 490, 497-98, 460 N.W.2d 166 (Ct. App. 1990) (“A finding that there are grounds to reopen the judgment does not necessitate reopening it.”). The matter remains within the discretion of the court balancing factors that would militate against granting relief. *Id.*

¶9 The circuit court determined that relief from the judgment was not justified because there was nothing suggesting that Debbie was guaranteed \$120,000 in the property division. The court’s finding concerning the stipulation is not clearly erroneous. *See* WIS. STAT. § 805.17(2). The stipulation

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<sup>4</sup> Essentially once the business was placed in receivership, it was removed from the marital estate and treated separately. Nothing in the stipulated property division ties the sum Debbie was to receive from the receivership to any other part of the property division. It was not a sum used to balance the property division. Contrary to Debbie’s assertions, the receiver was not bound by the judgment of divorce when it came to paying the debts and expenses of the business.

acknowledged that the net proceeds were anticipated to be \$120,000 but that they may be more and they may be less. As the circuit court found, both parties knew the business was insolvent and nobody knew where the bottom line was. Yet Debbie elected to enter into the stipulation without requesting documentation establishing the debts and expenses of the business. Her election to do so is telling because just two days before entering into the stipulated property division, at the hearing on the receiver's motion to sell the business, Debbie asserted that she had not been provided with a list of business creditors that would be paid. She wanted an opportunity to be provided that information with an opportunity to object. At that time Debbie also explained that a dispute existed over whether John had infused the business with inherited money that he was entitled to have returned to him. The stipulation concerning the disbursement of the business sale proceeds was a compromise and, as the circuit court found, an assumption of risk by both parties without asking for the relevant information. This militates against granting relief despite the mutual mistake. Further, no excusable neglect exists since Debbie elected to proceed without the information. For the same reason, the receiver's discharge statement was not new evidence. The circuit court properly exercised its discretion in denying Debbie's motion to vacate the property division.<sup>5</sup>

¶10 Debbie argues that the circuit court erred by making her unilaterally responsible for all the receivership costs and fees. Her argument is simply a

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<sup>5</sup> Debbie characterizes the escrow fund as having been awarded to her. The parties stipulated to the disposition of the sale proceeds. We summarily reject Debbie's contention that the circuit court erred when it concluded the judgment of divorce did not award the \$35,000 escrow directly to her. The stipulation sets forth what debts were to be paid from the sale proceeds. The \$35,000 escrow was part of the sale proceeds.

departure from the realities of the situation. As we have already observed, the business receivership was treated separately. When funds are available, it is appropriate to pay the costs and fees of the receivership from the available sale proceeds. See *First Nat'l Bank of Neenah v. Clark & Lund Boat Co.*, 68 Wis. 2d 738, 742, 229 N.W.2d 221 (1975) (liability of some party other than the receiver exists only when there is an insufficiency of funds and some other special circumstances which make it equitable that such other party should meet the expenses of the receivership). Debbie was not directly awarded any portion of the sale proceeds and only the net proceeds after payment of the costs and fees of the receivership were brought back into the marital estate. It is simply an obfuscation to state, as Debbie does, that the circuit court modified the judgment of divorce in allowing the payment of the receiver's fees and costs from the sale proceeds.

¶11 Debbie contends it was error for the circuit court to order payment of the receiver's attorney fees and costs when the amount was disputed. However, with the exception of \$5,000 paid for special secretarial time, there is no indication in the record that the amount of the receiver's attorney fees was in dispute or contested. At the start of the hearing where the receiver sought to be discharged, Debbie expressed her desire to do discovery on how the sale proceeds had dissipated so rapidly. When pressed by the circuit court on whether she really contested that the receiver's fees be paid, Debbie replied, "I agree fees should be paid. ... outside of the \$5,000 I agree fees should be paid." At the conclusion of the hearing Debbie agreed that the receiver's fees, less \$5,000, should be paid. Even at the second hearing for discharge of the receiver, Debbie's examination of the receiver did not touch on the reasonableness of the receiver's fees except for the \$5,000 billed for secretarial time. Debbie's closing argument at that hearing stated that there was no objection to the receiver's legal fees and that the only

objection was to the \$5,000 for secretarial time. Debbie's claims on appeal that the circuit court failed to take evidence on or analyze the reasonableness of the receivers' legal fees, that it made no findings or inquiry regarding the "bizarre hourly rate" (\$252.39) charged by the receiver, and that it did not make findings on the receiver's qualifications or effectiveness are raised for the first time on appeal. We do not address them. See *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). We properly decline to review an issue on appeal when the appellant has failed to give the circuit court fair notice that it is raising a particular issue and seeks a particular ruling. See *State v. Salter*, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984).

¶12 Regarding the \$5,000 fee for secretarial time, the circuit court found that the secretary performed daily tasks related to the business operations which did not have to be performed by an attorney or paralegal but if performed by an attorney or paralegal would have resulted in \$10,000 to \$20,000 more in fees charged to the receivership. It found the day to day tasks a necessary expense of the receivership. It concluded the \$5,000 charge was not excessive. The circuit court's findings are not clearly erroneous in light of the receiver's testimony about the need to monitor the daily cash receipts of the business and daily disbursements. The business was insolvent when the receiver took it over. Any cost-saving measure was a benefit to the parties in providing funds sufficient to pay liabilities generated by the business. The receiver explained how the fee was calculated based on daily tasks. The \$5,000 secretarial charge was a reasonable expense of the receivership.

¶13 When Debbie expressed a desire to conduct discovery on the receiver's discharge statement and the amount of fees, the circuit court ordered that any additional fees incurred by the receiver by Debbie's discovery efforts



would be Debbie's responsibility. Debbie was ordered to pay \$6,450.50 for the receiver's legal fees incurred after the approval of his discharge statement. Debbie claims the amount is error because it includes legal fees the receiver incurred in appearing in a separate legal action arising out of the business against the Quails and not solely for her discovery efforts. Because Debbie's argument is not developed beyond that assertion, we summarily address it.

¶14 The circuit court concluded that it was not irrelevant or unreasonable to assess the expenses to the party that created the extra expenses. The circuit court told Debbie that she would be responsible for the additional involvement of the receiver. The receiver testified that upon discharge he would be dismissed as a party to the action against the Quails. When discharge was delayed because of Debbie's desire to pursue discovery, the receiver incurred additional expenses in the separate action that he still remained a party to. The receiver further testified that the depositions taken in the separate action actually related to his receiver's discharge statement and Debbie's desire to challenge the statement. Thus, the record supports the order that Debbie pay the additional fees generated by her discovery.

¶15 Debbie contends that on two points, the circuit court's written order from the first hearing on the receiver's discharge statement did not conform with the oral rulings made at the hearing. She claims the circuit court only ordered her to pay for the deposition of the receiver. She contrasts that ruling to the provision in the resulting written order that "all future legal fees incurred by the Receiver shall be paid by Debbie V. Quail subject to any future order of the Court." Debbie manufactures an alleged inconsistency by selectively citing a wee portion of the motion hearing. From our reading of the entire motion transcript we conclude it was the circuit court's intent that Debbie be responsible for anything related to the

discovery to challenge receiver's discharge statement and supporting documents, including multiple depositions. It expressed that intention several times in the hearing remarking that Debbie would be paying for a deposition, that if Debbie wanted to go fishing, she fishes on her own time, and urging Debbie to consider the expenses to be incurred and the cost/benefit analysis of it. Moreover, even if an inconsistency exists between the oral and written order, the written order controls. *See Jackson v. Gray*, 212 Wis. 2d 436, 442, 569 N.W.2d 467 (Ct. App. 1997).

¶16 Debbie also claims that the circuit court never ordered that the escrow money be paid to John in satisfaction of the Landmark Credit Union debts. The written order provided that "the remaining assets be disbursed by the Receiver upon the close of escrow on December 31, 2005 to John J. Quail in full or partial satisfaction of the Landmark Credit Union notes...." During the hearing the receiver indicated that he intended to use the escrow money for that purpose. John explained how the debts had been paid to avoid continued delinquencies and asked that the receiver be allowed to pay the remaining proceeds to him. When the circuit court asked the parties for comments about paying the debts, Debbie replied, "I have no problem scheduling a very quick hearing in mid January so we can have that decided at that point. We're not going to contest anything. He is going to be distributed money any way." Although the circuit court never uttered the words that the escrow money could be paid to John, at best, Debbie interposed an ambiguous objection to the payment of the escrow funds to John. The circuit court signed the written order over Debbie's objection and it controls. *See id.* In any event, Debbie was not prejudiced by the inconsistency. As we have held, the stipulation required payment of those debts from the sale proceeds. The inclusion

in the order of the approval to pay the escrow funds to John was merely execution on the judgment already made and not appealed.

¶17 Debbie’s final argument is that the circuit court erred in discharging the receiver without proof that the receiver complied with statutory obligations and when a suit was pending against the receiver in the separate action. The approval of a receiver’s actions and discharge is reviewed as a discretionary decision. *See Community National Bank v. Medical Benefit Adm’rs, LLC*, 2001 WI App 98, ¶5, 242 Wis. 2d 626, 626 N.W.2d 340. Debbie asserts that the circuit court proceeded on an incorrect legal standard because discharge was made under WIS. STAT. ch 128 even though the receiver was appointed under WIS. STAT. § 813.16. She faults the receiver for not demonstrating what efforts he made to garner assets of the business and to increase revenues.

¶18 We first question whether Debbie raised these arguments in the circuit court. She did not specifically object to the discharge of the receiver because of the pending action against the Quails. She did not complain to the circuit court that the receiver failed to discharge his statutory duties. Indeed, even on appeal, Debbie does not outline what those statutory duties are. Instead she makes a bald assertion that she was entitled to priority payment over unsecured creditors under WIS. STAT. § 813.23, a statute with no application here because it pertains to a receiver appointed for an “absentee.” While John argued provisions in WIS. STAT. ch. 128, pertaining to receivers for insolvent individuals, as guidelines, the circuit court never relied on a single provision in that chapter. The controlling fact here is that the sale of the business was approved. After that the receivership was responsible for payments of debts, expenses and fees. There is no evidence in the record of any payment not properly made. Therefore, discharge of the receiver was an appropriate exercise of the circuit court’s discretion.

*By the Court.*—Orders affirmed.

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

