

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 16, 2010**

A. John Voelker  
Acting 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. 2009AP2628**

**Cir. Ct. No. 2007FA520**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**DOUGLAS K. RADIX,**

**PETITIONER-RESPONDENT,**

**V.**

**HEIDI J. RADIX N/K/A HEIDI J. HAUGEN,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Jefferson County:  
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIUM. Heidi Haugen appeals from a divorce judgment dividing marital property and setting maintenance. Haugen argues that the trial

court erroneously exercised its discretion in: (1) valuing the business property awarded to Douglas Radix by allowing depreciation for repairs and the market downturn, while not reducing the value of residential property awarded to Haugen; (2) granting Radix's motion to exclude Haugen's expert valuation of the family auto business at a continued hearing due to tardy disclosure by Haugen of her expert's report rather than allowing Haugen a further continuance; (3) ordering Haugen to reimburse Radix for a mortgage payment on the residential property that Radix made while the divorce was pending; and (4) setting maintenance based on the allegedly erroneous divisions of property summarized above. We reject each of these contentions, and affirm.

### *Background*

¶2 Radix and Haugen were married in 1978. Radix filed this divorce action in 2007. While the divorce was pending, the parties stipulated to a temporary order providing that the family auto business would grant Radix a weekly salary of \$3000, with \$1700 of that amount awarded to Haugen, and that Haugen would also receive a weekly salary of \$500 from the business. The temporary order also stated that Haugen was to pay all family bills and expenses aside from Radix's personal expenses. The parties disputed property division and maintenance, and the trial court set those issues for trial.

¶3 The parties jointly retained Moegenburg Research, Inc., to appraise their real estate. In a report dated August 5, 2008, Moegenburg appraised the parties' business real estate at \$700,000, and their residential real estate at \$600,000.

¶4 The parties jointly retained Dr. William Taylor to value their family auto business. Dr. Taylor initially indicated that he believed the business to be

worth between \$600,000 and \$660,000. In a report dated February 10, 2009, Taylor valued the business at \$157,082.

¶5 Trial commenced on February 16, 2009. Radix testified regarding the parties' marriage and finances, and a vocational expert testified as to the parties' earning capacities.

¶6 On the second day of trial, February 17, 2009, the trial court addressed Haugen's motion for a continuance of the trial. Haugen argued that Taylor's final report was drastically different from what she had expected and that she therefore needed to retain an independent evaluator to value the business, which required more than the few days between the report and trial. Radix opposed the motion, arguing that the final figures were within a range anticipated by the parties. Radix also stated that if the court allowed Haugen to retain an independent evaluator, he needed one also. The court determined that the parties would be allowed one additional day of trial to present their independent valuations of the business, but that the trial would otherwise proceed as scheduled.

¶7 During the February 2009 portion of the trial, Radix presented evidence that the business property was worth less than the \$700,000 stated in Moegenburg's report. Radix testified that the roof of the business building needed repairs, decreasing its value. Both parties requested permission to conduct independent evaluations of the cost of necessary repairs, which the court granted.

¶8 The trial court scheduled and convened one additional day of trial on May 12, 2009, for the parties to present evidence as to the valuation of the family auto business and the cost of necessary roof repairs for the business real estate. Radix introduced testimony as to auto business sales in 2008 and 2009. Haugen offered to introduce testimony by Dennis Mahoney as to the valuation of the auto

business, but Radix objected, asserting he had just received Mahoney's report, just after 5:00 p.m. the evening before trial was to resume. Haugen explained that she was delayed in obtaining the report because of financing difficulties, and requested a further continuance. The court declined to grant another continuance, instead excluding the evidence because Radix lacked a sufficient opportunity to respond. Both parties introduced expert testimony as to the cost of repairing the roof on the business building; Radix's expert testified the cost would be \$102,730 and Haugen's expert testified it would be \$48,550.

¶9 On August 27, 2009, the trial court entered a divorce judgment resolving the parties' disputes. The court valued the business real estate at \$700,000, less \$70,000 for market decline and \$48,550 for necessary roof repairs. It valued the residential property at \$600,000. It valued the auto business at \$148,000. It also ordered Haugen to reimburse Radix for one residential mortgage payment Radix made while the divorce was pending. The court awarded Haugen maintenance of \$2750 per month for an indefinite term.

#### *Standard of Review*

¶10 We review a trial court's division of marital property for an erroneous exercise of discretion. *Covelli v. Covelli*, 2006 WI App 121, ¶13, 293 Wis. 2d 707, 718 N.W.2d 260. Thus, we will uphold the court's division of property if it reflects a reasoned and reasonable decision, even if we would have reached a different decision on the evidence before us. *Vier v. Vier*, 62 Wis. 2d 636, 641, 215 N.W.2d 432 (1974). Moreover, we will search the record for reasons to uphold the trial court's decision even if those reasons are not clearly articulated by the court. *Id.* at 639-40. The value of a marital asset is a question of fact, which we will uphold unless clearly erroneous. *Covelli*, 293 Wis. 2d 707,

¶15; *Rodak v. Rodak*, 150 Wis. 2d 624, 633, 442 N.W.2d 489 (Ct. App. 1989). More specifically, we will uphold a trial court's factual finding as to the value of marital property if it is supported by credible evidence. See *Rodak*, 150 Wis. 2d at 633; *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

¶11 We review a court's decision to exclude expert testimony for an erroneous exercise of discretion. *State v. Walters*, 2004 WI 18, ¶13, 269 Wis. 2d 142, 675 N.W.2d 778.

#### *Discussion*

¶12 Haugen argues that the trial court erroneously exercised its discretion in dividing the marital estate, excluding testimony by Haugen's expert witness as to the value of the auto business rather than allowing a continuance, requiring Haugen to reimburse Radix for a mortgage payment he made on her behalf, and setting maintenance. We disagree, and conclude that the record supports each of the court's decisions.

¶13 Haugen argues first that the trial court erred by valuing the residential property awarded to Haugen at the full appraised value of \$600,000 while discounting the appraised value of the business property awarded to Radix by ten percent for market decline and \$48,550 for necessary roof repairs. Haugen contends that the court's decision to reduce the appraised value of the business property based on a market downturn was arbitrary and unsupported by any evidence. She also contends that there was no basis for the trial court to consider Radix's claim of necessary repairs to the business property's roof, because there

were no changed circumstances between the time of the appraisal and trial.<sup>1</sup> Finally, Haugen contends that the trial court was required to apply the same standards to both properties, and thus if it discounted the value of the business property for the market downturn and for necessary repairs, it was required to do the same for the residential property.<sup>2</sup>

¶14 The Moegenburg appraisal of the parties' property assessed the properties' value as of June 25, 2008. At trial, the parties disputed the necessary costs to repair the business property's roof. Radix argued in his written closing argument, filed June 5, 2009, that the market decline had reduced the value of the business property by ten percent, and that the roof repairs would cost \$102,730, reducing the value of the business property to \$580,000. Haugen argued in her written closing argument that the value of the business property was \$700,000, and that if the court discounted that value for necessary roof repairs, the discount should be limited to \$48,550. She also argued that the value of the residential property was \$600,000. The court valued the business property at \$700,000, less

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<sup>1</sup> Haugen contends that the parties stipulated to the value of the business property as \$700,000, as stated in Moegenburg's report, and that Radix was therefore precluded from contesting that value. Yet, Haugen did not argue in the trial court that the value of the business property was stipulated, but rather argued the issue on the merits, and we therefore will not consider this factual assertion for the first time on appeal. See *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (other approach "may result in hardship to one of the parties and deprives the appellate court of the benefit of informed thinking of the trial judge").

<sup>2</sup> In her reply brief, Haugen also argues that any testimony in contrast to the values in the Moegenburg appraisal were barred by Rule 6.04 of the Jefferson County Family Practice Rules, which states that the parties may jointly select an appraiser and call the appraiser at trial, but that parties may not use additional appraisal reports at trial unless they provide the report to opposing counsel thirty days before trial. First, we generally do not consider arguments raised for the first time in reply briefs. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). In any event, Haugen's argument is unpersuasive. Here, the parties jointly retained Moegenburg, and he testified at trial. Haugen does not point to any additional appraisal reports used by Radix.

ten percent for market decline and \$48,550 for repairs, and valued the residential property at \$600,000.

¶15 The court was required to find the value of the properties as of the time of entry of the judgment of divorce. *See Preuss v. Preuss*, 195 Wis. 2d 95, 107, 536 N.W.2d 101 (1995). The court relied on the lapse of time between the appraisal and the divorce judgment, as well as expert testimony that the economy had generally declined, to find that the appraised value of the business property had depreciated by ten percent. We cannot conclude that the trial court's determination that the lapse in time caused a ten percent decline in the value of the business property was clearly erroneous. Haugen argues that if the value of the business property declined by ten percent, the same is true for the residential property. This is not necessarily the case, and in any event, Haugen did not argue this to the trial court. We will not consider that argument for the first time on appeal. *See State v. Hanna*, 163 Wis. 2d 193, 202-03, 471 N.W.2d 238 (Ct. App. 1991).

¶16 Turning to the issue of value of repairs to the properties, the trial court agreed with Haugen's expert that the cost of roof repairs to the business should be limited to \$48,550. The court also specifically disallowed any depreciation of the residential property based on costs of repairs, as the court's temporary order had required Haugen to pay for necessary family expenses. Because the trial court's factual findings as to the value of the parties' real estate are reasoned and reasonable, we will not overturn them.

¶17 Next, Haugen argues that the trial court erroneously exercised its discretion in excluding Haugen's expert testimony at the additional day of trial in

May 2009. Haugen argues that the trial court denied her the substantial right to present her independent evaluation of the value of the auto business.

¶18 The problem here is that Haugen did not provide a copy of her expert's appraisal to Radix until just after 5:00 p.m. the evening before the long-scheduled reconvened trial, and the court excluded the evidence because it would be unfair to Radix to deprive him of the opportunity to evaluate and react to this report and it would cause undue delay to postpone the trial once again. Haugen contends that she was delayed in obtaining the report by financial constraints, and that the court should have utilized the lesser remedy of granting a further continuance to allow Radix to respond. The trial court explained that it would not require Radix to respond to the report on such short notice, and that it would not allow a further delay, as it had already continued the trial for three months on Haugen's request. *See* WIS. STAT. § 904.03 (2007-08)<sup>3</sup> (relevant evidence may be excluded if it would result in undue delay). The court's decision was a rational decision based on the circumstances, which would have involved unfair prejudice to Radix if Haugen had been allowed to use unrebutted testimony because of the very tardy disclosure of the expert report. This was not an erroneous exercise of discretion by the trial court.

¶19 Haugen next argues that the trial court erroneously exercised its discretion in determining that Haugen must reimburse Radix for a mortgage payment Radix made for the residential property while the divorce was pending. Haugen contends that because Radix sold automobile parts to pay for necessary

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

living expenses as allowed under WIS. STAT. § 767.117(1)(b), part of those living expenses was necessarily the mortgage payment, and thus there is no basis to require her to reimburse Radix. The problem with that argument is that the court's temporary order expressly required Haugen to pay for all family expenses while the divorce was pending. The court found that Radix sold the automobiles to pay for "marital purposes," which we interpret to mean "living expenses," consistent with Radix's testimony at trial. Radix's living expenses included only Radix's personal expenses under the temporary order, not the residential mortgage.<sup>4</sup>

¶20 Finally, because we conclude that the trial court did not erroneously exercise its discretion in dividing the marital property, we need not reach Haugen's argument that a reversal of the court's property decision requires reevaluation of its maintenance determination. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

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

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<sup>4</sup> Haugen also contends that the trial court ignored the fact that she had not been reimbursed by her former attorney's trust account for repairs the parties agreed would be paid from the trust account. Radix disputes that the court did not consider the lack of payment, and notes that the court stated in its memorandum decision that any shortfall of payment to Haugen was compensated by Radix's full financial support of their minor child during that time. Haugen does not attempt to refute this point in her reply brief, and we therefore deem it conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

