

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2011

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 Nos. 2010AP1640,
2010AP2630**

Cir. Ct. No. 2007CV462

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HOWARD C. NELSON,

PLAINTIFF,

v.

**NANCY FURRER, REMOTE CONTROL SHOCKS, INC., DIGITAL
SUSPENSION, INC. AND PACIFIC RIM SOURCES, INC.,**

DEFENDANTS,

**FREDERICK J. FURRER A/K/A FREDERICK JAMES FURRER A/K/A
FRED FURRER, HYRAD CORPORATION AND LEADER CORPORATION,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

v.

INGMAR NELSON,

THIRD-PARTY DEFENDANT-RESPONDENT,

NELSON MARKETING, INC.,

THIRD-PARTY DEFENDANT.

APPEAL from judgments and an order of the circuit court for Columbia County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ This appeal concerns remedial sanctions against Frederick Furrer and two interrelated business entities, Hyrad Corporation and Leader Corporation. Furrer and Hyrad brought a third-party claim against Ingmar Nelson, a former Hyrad director. That claim was dismissed, and the circuit court ordered that Hyrad indemnify Nelson for his expenses in defending the claim. After Hyrad failed to comply with the order, the circuit court found Furrer, Hyrad, and Leader in contempt of court and imposed remedial sanctions. On appeal, Furrer, Hyrad, and Leader argue that the sanctions were improper. I disagree and, accordingly, affirm the circuit court.

Background

¶2 A minority shareholder of Hyrad Corporation brought claims against Hyrad Corporation, Leader Corporation, which is an entity that manages Hyrad, and Frederick Furrer, who is the majority shareholder of Hyrad and also owns Leader. Furrer and Hyrad then brought a third-party claim against Ingmar Nelson, who was a former Hyrad director and officer. The third-party complaint alleged that Nelson had breached his fiduciary duties.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 For reasons that need not be discussed here, the third-party claim against Nelson was dismissed. In addition, the circuit court granted Nelson summary judgment on his counterclaim for indemnification, and ordered that Hyrad reimburse Nelson approximately \$43,992 for his expenses and attorney's fees incurred defending the third-party claim. The court ordered that Hyrad pay that amount within 30 days of an order entered in August 2009.

¶4 After Hyrad failed to comply with the indemnification order, Nelson moved the circuit court to find Furrer, Hyrad, and Leader in contempt and to impose remedial sanctions. In December 2009, the circuit court found Hyrad and Leader in contempt. The court ordered a remedial sanction requiring Hyrad and Leader to pay Nelson the \$43,992 indemnification award and interest on that award. The court also ordered Hyrad and Leader to pay Nelson's attorney's fees and expenses incurred in obtaining the contempt order. The sanction required that Hyrad and Leader make quarterly payments of at least \$7,500 until the balance owed was paid.

¶5 In May 2010, after Hyrad and Leader failed to comply with the contempt order, the circuit court found that Hyrad, Leader, and Furrer were in contempt of the indemnification and contempt orders. The court again imposed remedial sanctions and explained that those sanctions replaced the previous sanctions. Consistent with its previous order, the court ordered that a judgment be issued for the \$43,992 indemnification amount. The court also ordered that a judgment be issued for Nelson's costs, including attorney's fees, relating to Nelson's efforts to enforce the indemnification order. The order then stated that "[s]atisfaction of [these] judgments shall purge the parties' contempts of court." The court entered a judgment for the indemnification amount in May 2010, and Nelson filed a notice of entry of that judgment in June 2010. A separate judgment

that included the contempt-related attorney's fees and expenses, approximately \$30,392, was entered in October 2010.

¶6 Furrer, Hyrad, and Leader jointly appeal the contempt order and judgments.² For convenience, in the following discussion I refer to the arguments made by all three parties as being made by Furrer.

Discussion

A. Contempt Proceedings

¶7 Furrer challenges three aspects of the contempt proceedings. I address and reject each in turn.

¶8 Furrer first argues that the circuit court's initial December 2009 order, finding Hyrad and Leader in contempt, was not supported by the necessary findings of fact. More specifically, Furrer argues that the court did not make the finding that Hyrad and Leader were able to pay the entire indemnification amount that was ordered. According to Furrer, without this finding, the court lacked authority to impose a sanction then and, correspondingly, lacked authority to impose the sanction in the final order being appealed. I disagree.

¶9 “A person may be held in contempt if he or she refuses to abide by an order made by a competent court having personal and subject matter jurisdiction.” *State v. Rose*, 171 Wis. 2d 617, 622, 492 N.W.2d 350 (Ct. App. 1992). In particular:

² Furrer, Hyrad, and Leader filed two notices of appeal, one in June 2010 and the second following the entry of the October 2010 judgment. We ordered these appeals consolidated for purposes of briefing and disposition.

A finding of contempt rests on the trial court's factual findings regarding the person's ability to pay. The critical findings are that the defendant is able to pay and the refusal to pay is willful and with intent to avoid payment. A trial court's findings that a person has committed a contempt of court will not be reversed by a reviewing court unless they are clearly erroneous. Because this is a remedial, or civil, contempt, [the person in violation of the court order] has the burden of showing [he or] she is not in contempt.

Id. at 623 (citations omitted).

¶10 Here, the circuit court specifically found that Hyrad and Leader were able to comply *in part* with the indemnification order, but willfully chose not to comply. That is, after reviewing the evidence, the court found that Hyrad and Leader “could have paid something” on the amount owed, but paid nothing. The court relied on evidence that Hyrad had money available in that Hyrad, or Leader on Hyrad's behalf, made substantial payments to other entities during the pendency of the indemnification order, which the court determined was money that could have instead been used toward the indemnification. For essentially the same reasons—that some funds were available, but were intentionally used for other purposes—the court found the failure to comply was “willful.” Evidence presented at the hearing supports these findings and, accordingly, I defer to them.

¶11 Furrer nonetheless argues that the circuit court's findings were insufficient. To this end, Furrer highlights the court's additional observation that “it doesn't appear to me [that Hyrad and Leader] could have made the *entire* payment ... within 30 days” (emphasis added). Furrer's view is that, if Hyrad and Leader were unable to comply *in full* with the court order within 30 days, then the circuit court was not allowed to find Hyrad and Leader in contempt for failure to comply with that order. Furrer, however, offers no support for this view. Nor

does Furrer provide a logical reason why his proposition makes sense. Thus, his argument fails.

¶12 Furrer's second challenge to the contempt order is his argument that the contempt sanctions imposed are not justified because Nelson suffered no loss or injury from the contempt. Furrer's reasoning on this point is unclear. Regardless, it is sufficient to observe that, pursuant to WIS. STAT. § 785.04(1), a court may impose remedial sanctions for contempt that include "[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court" and, in addition, may craft "[a]n order designed to ensure compliance with a prior order of the court." WIS. STAT. § 785.04(1)(a) and (d). Here, Nelson was not paid the indemnification amount ordered and, as a result, he incurred additional expenses when seeking compliance. Furrer does not adequately explain why the sanctions that were imposed were inappropriate.

¶13 Third, Furrer argues that, based on their finances, Hyrad and Leader could not have feasibly complied with the December 2009 purge conditions requiring \$7,500 quarterly payments. Furrer argues that, accordingly, the contempt sanction was invalid. I am not persuaded.

¶14 Although Furrer focuses on the time frame for the \$7,500 quarterly payment, he fails to show why this time frame, regardless whether it was feasible, matters. That is because, at the May 2010 hearing regarding compliance with the December 2009 purge conditions, the circuit court made clear that it was disregarding this time frame. Instead, the court made its contempt determination based on the fact that "not a ... cent [had] been paid."

¶15 Related to this, Furrer asserts that the findings underlying the May 2010 contempt determination were insufficient. This argument is essentially the same argument that Furrer raises in the context of the December 2009 contempt determination. At the May 2010 hearing, the circuit court found Hyrad, Leader, and Furrer in contempt of the December 2009 order because they could have complied with that order *in part*, but instead chose to pay nothing. Furrer again seems to think that this ability-to-pay-in-part-but-failure-to-do-so finding is insufficient to support contempt, but again provides no support for his view.

B. Attorney's Fees

¶16 As described above, the circuit court ordered two contempt sanctions: (1) a sanction compensating Nelson for the original indemnification order, and (2) a sanction for additional attorney's fees and expenses accrued during the contempt proceedings. Each of these sanctions was entered several months apart in separate judgments. Furrer argues that Nelson forfeited the second sanction for two reasons. First, Furrer contends that a statute addressing the perfection of judgments applies in a way that required the second sanction to be inserted into the first sanction's judgment within 30 days. Second, Furrer argues that Nelson expressly waived the second sanction. I am not persuaded.

¶17 Furrer first argues that WIS. STAT. § 806.06(4) pertaining to the perfection of judgments is applicable. That section provides:

A judgment may be rendered and entered at the instance of any party either before or after perfection. If the party in whose favor the judgment is rendered causes it to be entered, *the party shall perfect the judgment within 30 days of entry or forfeit the right to recover costs.* If the party against whom the judgment is rendered causes it to be entered, the party in whose favor the judgment is rendered shall perfect it within 30 days of service of notice of entry of judgment or forfeit the right to recover costs.

Id. (emphasis added). Elsewhere in § 806.06, it is explained that “[a] judgment is perfected by the taxation of costs and the insertion of the amount thereof in the judgment.” WIS. STAT. § 806.06(1)(c).

¶18 Furrer’s argument directed at WIS. STAT. § 806.06(4) lacks coherent development. He merely asserts that § 806.06(4)’s 30-day deadline was applicable to the second sanction, requiring the second sanction to be inserted into the first sanction’s judgment within 30 days. However, Furrer does not explain why this makes sense.

¶19 As Nelson observes, WIS. STAT. § 806.06(4), on its face, does not address the topic of remedial sanctions. Furrer seems to think that, because some cases apply § 806.06(4)’s deadline to attorney fees in certain circumstances, that it should be true that *all* attorney fees, no matter what form they take, are subject to the deadline. But the cases that Furrer cites do not contain this broad proposition nor do they otherwise address remedial sanctions. See *Hartman v. Winnebago Cnty.*, 216 Wis. 2d 419, 425-26 & n.6, 438, 574 N.W.2d 222 (1998) (applying § 806.06(4)’s deadline to a party’s request for attorney fees pursuant to 42 U.S.C. § 1988(b), which allows a prevailing party in certain federal claims to seek reasonable attorney fees as part of the costs); *Purdy v. Cap Gemini Am., Inc.*, 2001 WI App 270, ¶¶2-4, 20, 248 Wis. 2d 804, 637 N.W.2d 763 (applying § 806.06(4)’s deadline to a party’s request for attorney fees pursuant to a contract provision providing that a prevailing party in disputes over the contract may seek reasonable attorney fees). Lacking a fully developed argument, I move on.

¶20 Furrer’s second argument is that Nelson expressly waived the second sanction. This argument is based on a document filed by Nelson titled “Waiver of Entitlement To Costs,” which states: “Pursuant to WIS. STAT. § 806.06(4), Ingmar

Nelson hereby waives any entitlement to costs he may have in relation to the Money Judgment entered by the Court on May 14, 2010.” The money judgment on May 14, 2010, was the \$43,992 indemnification amount. This argument by Furrer fails for the same reason as Furrer’s first argument. Furrer fails to show that the sanctions were costs under WIS. STAT. § 806.06(4), and the waiver only purports to waive § 806.06(4) costs.

Conclusion

¶21 For the reasons discussed, I affirm the circuit court.

By the Court.—Judgments and order affirmed.

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

