

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 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 No. 2010AP2168

Cir. Ct. No. 2007FA2183

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

DIANNE K. FURNEY,

PETITIONER-APPELLANT,

v.

MICHAEL J. FURNEY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GOULEE, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Dianne and Michael Furney were divorced on April 23, 2009, and a judgment to that effect was entered on August 20, 2009.

Several months later, Dianne, proceeding *pro se*, filed multiple motions with the trial court, purportedly asking the court to clarify its August 20 judgment and to enforce the judgment accordingly. The trial court denied Dianne's motions in a written order. Dianne now appeals from that order.¹ We affirm.

BACKGROUND

¶2 Dianne and Michael were married on April 7, 2005. On April 4, 2007, Dianne filed a petition for divorce. Both parties were represented by counsel. A four-day trial was held between May 2, 2008, and April 23, 2009. The court granted the parties' divorce in an oral decision on April 23, 2009.

¶3 On June 22, 2009, the trial court held a hearing, setting forth its findings of fact and conclusions of law, based upon the evidence admitted at trial. On August 20, 2009, the trial court entered its written findings of fact and conclusions of law, memorializing its oral pronouncements on June 22, and entered the divorce judgment. The parties did not appeal from that judgment; however, several of the trial court's findings are the subject of Dianne's claims on appeal. While the trial court made seventeen pages worth of findings, we address only those relevant to the issues before us.

Tax Obligations

¶4 With regard to the parties' tax obligations while they were married, the trial court found that Dianne and Michael owed both state and federal taxes for

¹ Both parties are proceeding *pro se* on appeal.

2005, 2006, and 2007. The trial court faulted Dianne for unilaterally filing income taxes in 2006 and 2007, in opposition to a family court commissioner's order, which required that the parties work together to file their taxes jointly, and for failing to inform the court commissioner of her actions. The trial court concluded that, as a result of her unilateral filing, Dianne "received tax refunds and used payments for estimated taxes for her sole benefit," and noted that Dianne "indicated by email that she refused to cooperate with Michael in preparing the taxes."

¶5 Because the trial court found that Dianne's failure to follow the court commissioner's order was intentional, the trial court held that it was therefore "appropriate to require [Dianne] to share in the expense of preparing the returns now, and paying her share of the late fees, penalties and any interest on the 2006 and 2007 income tax returns." However, the trial court ultimately concluded that both parties had "unclean hands" because Michael did not make appropriate efforts to pay the taxes or otherwise "get the situation in order." Ultimately, the trial court ordered the parties to:

refile the 2005, 2006 and 2007 state and federal income taxes as joint tax returns and share the resulting income taxes, interest and penalties equally, except as stated in this paragraph. Both parties shall suffer the consequences of their actions by payment of the taxes, fees and penalties.... Dianne shall pay an amount of the tax penalties greater than the amount Michael pays, which amount paid by Dianne shall be equal to the income tax refunds that she received in years 2005, 2006 and 2007.

Wrongful Termination Lawsuit

¶6 While the parties' divorce was pending, Michael filed a wrongful termination lawsuit against his former employer in federal district court. *See Furney v. First Capital Surety Group, Inc.*, Case No. 2008CV00851-LA (E.D.

Wis. 2008). The divorce court was aware of Michael's pending wrongful-termination lawsuit and made the following findings regarding the lawsuit in its August 20 findings of fact and conclusions of law:

The possible proceeds from [the wrongful-termination] suit have a marital component in that some of the recovery will be lost wages from this marriage. The possible proceeds from [the] suit have a nonmarital component in that some of the recovery will be lost wages subsequent to this marriage and for pain, suffering and other losses that are not marital in nature under *Weberg v. Weberg*, 158 Wis. 2d 540, 549, 463 N.W.2d 382, 386 (Ct. App. 1990).

Given the loss of income to the marriage due to Michael's termination, it is appropriate to divide that portion of the recovery that is due to Michael's lost wages from the period from June 2005 until March 31, 2007 when the parties separated equally after deducting from Dianne's share a *pro rata* share of the attorneys fees or costs for the entire lawsuit. Michael shall receive the remainder of any recovery.

Each of the parties must first use any funds from the recovery in Michael Furney v. First Capital Surety Group, Inc., et. al., Case No. 2008CV00851-LA in the Eastern District of Wisconsin to pay their obligations hereunder. The parties shall pay first the obligations to the state and federal taxing authorities including interest, penalties or other costs and other obligations under this Judgment, second any amounts owed for credit cards that one party owes, but that is in the name of the other party. The attorneys in this action shall be responsible for ensuring that any funds received by the parties in this lawsuit are used to pay the debts as stated herein.

¶7 Sometime after the divorce judgment was entered, Michael settled with his former employer. One-third of the settlement was allocated for lost wages, with the other two-thirds being allocated for compensatory damages.

¶8 Following the wrongful-termination settlement, Dianne (now proceeding *pro se*) filed a Motion for Clarification of Distribution of Proceeds of Settlement and a Motion to Compel Opposing Counsel to Pay Taxing Authorities.

She argued that all of the settlement constituted income, and therefore, the entire settlement was marital property that should be divided equally; and she asked the trial court to order Michael's counsel to use all of the funds from the settlement agreement to pay off the parties' tax obligations as she believed the trial court's comments at the June 22, 2009 hearing required.

¶9 The trial court held a hearing on Dianne's motions on June 18, 2010. During the hearing, the trial court adopted as fact, with no objection by Dianne, a spreadsheet submitted by Michael that set forth the money received in the settlement and how it was being allocated, to wit, that one-third was designated for lost wages and two-thirds was designated for compensatory damages. The spreadsheet further broke down that portion of the settlement designated for wages that were lost while Dianne and Michael were married, and apportioned out Dianne's *pro rata* share of the fees and expenses for the litigation.

¶10 In an order filed on July 16, 2010, after the postjudgment hearing, the trial court upheld its prior divorce judgment. The July 16 order entitled Dianne "to 50% of the lost wage claim, attributable to the period of time from June 2005 until March 2007," with the remainder of the settlement to go to Michael. The court also ordered that Dianne "shall use her share of the settlement from lost wages ... to pay her share of the tax liability under ... the Divorce Judgment, which amount shall be paid to the taxing authorities by [Michael's counsel] who is holding the funds in her trust account." Similarly, the trial court reiterated that Michael "shall use his share of the ... settlement ... to pay his share of the tax liability remaining, if any, under ... the Divorce Judgment. Any portion of [Michael's] share of the settlement proceeds remaining after paying his share of the tax liability ... shall be distributed ... to him." Dianne appeals.

DISCUSSION

¶11 On appeal, Dianne argues that the trial court erred by: (1) failing to award Dianne one-half of the entirety of the wrongful-termination settlement, as opposed to only one-half of that portion allocated for wages lost during the marriage; (2) issuing contradictory orders with respect to the parties' tax obligations; and (3) erroneously exercising its discretion when allocating certain debts during the June 22, 2009 hearing. We address each argument in turn.

I. Wrongful-Termination Settlement Proceeds

¶12 Dianne first argues that the trial court erred in its July 16, 2010 postjudgment order for failing to award her one-half of the entire settlement Michael received from his wrongful-termination lawsuit. Dianne submits that both the wages and compensatory damages Michael received under the settlement are marital property subject to the presumption of equal division. We disagree.

¶13 Generally, we review the property division in a divorce judgment for an erroneous exercise of discretion. *Mack v. Mack*, 108 Wis. 2d 604, 607, 323 N.W.2d 153 (Ct. App. 1982). Here, however, Dianne does not appeal from the divorce judgment, but from the trial court's application of that judgment in its postjudgment order. When we review legal issues, like the construction of a divorce judgment, our review is *de novo*. *Waters v. Waters*, 2007 WI App 40, ¶6, 300 Wis. 2d 224, 730 N.W.2d 655. We will accept the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2009-10).²

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶14 The divorce judgment, which neither party appealed, explicitly limits Dianne's recovery from the settlement proceeds to wages lost during the marriage:

Given the loss of income to the marriage due to Michael's termination, it is appropriate to divide that portion of the recovery that is due to Michael's lost wages from the period from June 2005 until March 31, 2007 when the parties separated equally after deducting from Dianne's share a *pro rata* share of the attorneys fees or costs for the entire lawsuit. Michael shall receive the remainder of any recovery.

The trial court found, and Dianne does not dispute, that the settlement was structured so that one-third of the settlement was to be allocated to lost wages and two-thirds was to be allocated to compensatory damages. That finding is not clearly erroneous. By the plain language of the divorce judgment, Dianne is only entitled to one-half of wages lost during the marriage and no more.

¶15 To the extent that Dianne is attempting to challenge the trial court's divorce judgment, her opportunity to do so has passed. The divorce judgment was entered on August 20, 2009, thereby requiring Dianne to file a notice of appeal from the judgment by November 18, 2009. *See* WIS. STAT. § 808.04(1) (requiring an appeal to be initiated within ninety days of the entry of a final judgment or order if notice of entry is not given); WIS. STAT. RULE 809.10(1)(a) ("A person shall initiate an appeal by filing a notice of appeal with the clerk of the circuit court."); RULE 809.10(1)(e) ("The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal."). Her notice of appeal in this case was not filed until August 27, 2010, long after the deadline to challenge the

divorce judgment had passed; therefore, the trial court's divorce judgment stands as written.³

II. Use of Settlement Proceeds to Satisfy Tax Obligations

¶16 Next, Dianne claims that the trial court contradicted itself during hearings before and after entry of the divorce judgment when discussing the use of the settlement to pay off the parties' tax obligations. While Dianne's argument is not entirely clear, it appears that she contends that, during the June 22, 2009 hearing prior to the entry of judgment, the trial court stated that the parties were jointly liable for their tax obligations and that neither would receive any money from the wrongful-termination settlement until all of the tax obligations were paid off in full. In contrast, she finds fault with the trial court's comments during the June 18, 2010 postjudgment hearing, in that she claims that the trial court stated that Michael could receive any portion of the settlement remaining after he paid off his portion of the tax obligations, even though Dianne's tax obligations were not paid off in full.⁴ We disagree and conclude that the trial court's comments were not contradictory.

¶17 At the June 22, 2009 hearing, the trial court set forth its findings of fact and conclusions of law that it would later memorialize and file with the

³ Dianne did file a timely notice of appeal from the divorce judgment on October 5, 2009. However, Dianne filed a notice of voluntary dismissal on March 29, 2010, and we ordered her appeal dismissed pursuant to WIS. STAT. RULE 809.18.

⁴ Dianne's portion of the wrongful-termination settlement was not enough to satisfy her portion of the unpaid taxes.

divorce judgment on August 20, 2009. With respect to the settlement and the parties' tax obligations, the trial court stated during the hearing that:

Whatever moneys [Dianne and Michael] do get [from the wrongful-termination lawsuit], they should try to solve some of their problems. Let it go towards the liabilities each of them have. Don't go out and spend it on something else, buying a car or doing something. That money should be held in a trust someplace, in either one of your trusts. I think it should probably be in [Michael's counsel's] trust, and sort it out and start making the payments, the penalties of the tax people that are his, her, if there is. This is really speculative whether there is going to be any money and pay it out, and maybe they will get nothing after we sort [out] that. But don't just give them that money, and we are sitting here at postjudgment trying to figure out where we will get the money to pay for things I have ordered.

The trial court did not comment on how the parties' tax obligations would be divided.

¶18 However, in the August 20, 2009 divorce judgment that followed, the trial court explicitly stated that: (1) "the parties shall first use any funds from the recovery in [the wrongful-termination lawsuit] to pay their obligations hereunder;" and (2) "Dianne shall pay an amount of the tax penalties greater than the amount Michael pays, which amount paid by Dianne shall be equal to the income tax refunds that she received in years 2005, 2006 and 2007." In other words, the trial court explicitly stated that Dianne and Michael would each be responsible for their own portion of the unpaid taxes and resulting penalties.

¶19 On June 18, 2010, at the postjudgment hearing, the trial court stated:

I made my findings as to how the money would be distributed [in the divorce judgment]. We now know what the money is. ... If there is nothing there, or it's going to be absorbed by the taxing authorities, so be it. I said that. I didn't want them to run away and spend that money and act, not fiscally responsible like they did before. That that money would be paid towards a joint problem with taxes.

Now who's responsible will be determined by the taxing people. I am ordering that the moneys[,] that [Dianne's] share, ... be paid towards the tax liability.

Now you mentioned something that I guess I wasn't too aware of. There are some other moneys in [Michael's attorney's] trust account? ... Whatever moneys are available from the settlement or in the trust account that are available for payment towards these taxes, joint responsibility for these taxes is to be paid.

While the trial court did make reference to the parties' "joint problem with taxes" and to "joint responsibility," that does not mean that the trial court was concluding, in contradiction to the divorce judgment, that the parties were jointly liable for the 2005, 2006, and 2007 tax obligations. Rather, the court was merely referring to the fact that both Dianne and Michael had tax obligations that needed to be satisfied. The trial court made its intentions clear in its subsequent July 16, 2010 order, in which it explicitly stated that Dianne "shall use her share of the settlement ... to pay her share of the tax liability under ... the Divorce Judgment" and Michael "shall use his share of the ... settlement ... to pay his share of the tax liability ... under ... the Divorce Judgment." The trial court's statements were not contradictory.

III. Allocation of Debt

¶20 Finally, Dianne argues that the trial court erroneously exercised its discretion on June 22, 2009, when it: (1) allocated a portion of the tax liability accrued from withdrawals from Michael's IRA to Dianne; and (2) allocated the entirety of Dianne's \$12,000 credit card debt to Dianne. In other words, Dianne is attempting to challenge the trial court's divorce judgment. As we set forth above, Dianne's opportunity to challenge that judgment has passed. *See* WIS. STAT. § 808.04(1) (requiring an appeal to be initiated within ninety days of the entry of a

final judgment or order if notice of entry is not given). Consequently, we do not have jurisdiction over Dianne's final claim.⁵ See WIS. STAT. § 809.10(1)(e).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁵ We also note that Dianne fails to cite to that portion of the June 22, 2009 transcript where the trial court discusses the allocation of the debts Dianne challenges. Such a failure is a clear violation of WIS. STAT. RULE 809.19(1)(e), which requires an appellant to cite to those portions of the record he or she relies on. An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record. *Meyer v. Fronimades*, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). This court is not required to sift through the record for facts. *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). In short, we cannot review the trial court's decision and its reasoning because Dianne has failed to tell us where in the record that information is located.

