COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1111

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

IN RE THE MARRIAGE OF:

DANIEL A. LADWIG,

Petitioner-Appellant,

v.

CHERYL LADWIG,

Respondent-Respondent.

APPEAL from orders of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Daniel A. Ladwig, M.D. appeals from two trial court orders: denying his motion to open a judgment of divorce and denying his alternative motion to reduce his child support obligations. Ladwig contends the trial court erroneously exercised its discretion in denying his motions. Because the trial court did not erroneously exercise its discretion, we affirm.

I. BACKGROUND

Ladwig filed for divorce on July 26, 1990. At the time, he had just completed his medical residency as an orthopedic surgeon and commenced his career with a base salary of $72,000 plus 50% of all net income he billed over $160,000. At the time of the final hearing, the parties had two children. Because the parties anticipated significant increases in Dr. Ladwig's income, child support was vigorously contested. Mrs. Ladwig asked for application of the statutory percentage guideline (25% of Dr. Ladwig's income), while he sought to deviate from the statutory guidelines and limit his support liability. After lengthy negotiations before and on the day of trial, the parties agreed on a structured child support payment formula which essentially applied a 13% limitation on Dr. Ladwig's anticipated income.[1] The structured formula was included in the judgment of divorce. Ladwig did not appeal from the judgment.

On September 17, 1993, Ladwig filed a motion to reopen, vacate and set aside the judgment as to the order of child support, alternatively claiming he was coerced when he stipulated to the support payment formula or seeking to modify the child support under § 762.32, STATS., because of a change in circumstances. After hearing testimony for three days, the trial court concluded the trial court's stipulation had been entered into freely, willingly, equitably, and although there had been a change in circumstances as to

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[1] The formula provided that petitioner would pay child support to respondent as a stepped-percentage of gross income as follows:

> 25% of the first $115,000 of gross income;
> 0% of the next $35,000 of gross income;
> 17% of the next $50,000 of gross income;
> 10% of the next $25,000 of gross income;
> 0% of the next $75,000 of gross income.
>
> No child support was to accrue on gross income greater than $300,000, however, the parties agreed that, commencing on September 1, 1996, petitioner would pay five hundred dollars ($500) per month or thirty percent (30%) of each net dollar he earned in excess of $300,000, whichever would be greater, into an educational trust fund for the children.

Ladwig's income, no change in the structured formula was warranted. Ladwig now appeals.

II. DISCUSSION

A. Motion to Open and Vacate Judgment.

Ladwig moved the trial court to open and vacate his divorce judgment based on "mistake, inadvertence, surprise or excusable neglect", and "any other reason justifying relief from the operation of the judgment." Section 806.07(1), STATS.[2] Ladwig failed to develop the former argument at the trial court level or in his argument to this court. Therefore, we deem it waived. *See* ***W. H. Pugh Coal Co. v. State***, 157 Wis.2d 620, 634, 460 N.W.2d 787, 792 (Ct. App. 1990) (an appellate court may decline to consider issue that is undeveloped in the briefs or that is not supported by citation to legal authority);

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[2] Section 806.07(1), STATS., provides in full:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Reiman Assocs. v. R/A Advertising, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n. 1 (Ct. App. 1981) (issue raised but not specifically briefed or argued is deemed to be abandoned); *see also* § 809.19(1)(e), STATS.

Since, however, Ladwig alleged coercion at the trial court level and claims involuntariness and undue pressure in his briefs, we presume he proceeds under § 806.07(1)(h), STATS., alone, and shall address his claim of error in that context.

ANALYSIS

Section 806.07(1), STATS., gives the trial court broad discretionary power to review judgments and orders and invokes the pure equity power of the trial court. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 541, 363 N.W.2d 419, 422 (1985). A party who claims the trial court erroneously exercised its discretion has the burden of showing a misuse of discretion, and an appellate court will not reverse unless the erroneous exercise is clearly shown. ***Colby v. Colby***, 102 Wis.2d 198, 207-08, 306 N.W.2d 57, 62 (1981). After examining the determination made by the trial court in the instant case, we conclude there is a reasonable basis for the trial court's denial of Ladwig's motion to open and vacate the judgment.

Ladwig's motion to open is premised on the contention that his consent to the structured child support formula was coerced by undue pressure from the trial court with a generous assist from his trial counsel. He argues that he had no other option but to agree to the stipulation. The record belies this contention.

Lengthy discussions took place between Ladwig and his counsel concerning the advantages and disadvantages of agreeing to a stipulated structured child support payment formula or alternatively going to trial on the issue of child support with the possibility of paying 25% of his income. Eventually Ladwig agreed to a stipulated support formula. In a colloquy between his counsel, the original trial court and himself, Ladwig considered the contents of the stipulation, stated he agreed to it voluntarily and had no questions about his obligations.

The reviewing trial court, on the motion to open the judgment, heard testimony from both Ladwig and his wife concerning the circumstances leading up to the stipulated support payment agreement. Contrary to her husband, Mrs. Ladwig felt no coercion had been exerted by the trial court and did not believe that her ex-husband was being coerced. The reviewing trial court, as the final arbiter of the witnesses' credibility, was free to afford Mrs. Ladwig's testimony greater weight than her husband and it appears it did just that when it concluded "I do believe under the circumstances there is no credible evidence indicating coercion." ***Kastelic v. Kastelic***, 119 Wis.2d 280, 350 N.W.2d 714 (Ct. App. 1984). Because the reviewing trial court's ruling was the product of a reasoned and rational mental process applying a correct standard of law to the evidentiary facts, and because we owe deference to the trial court's evaluation regarding weight and credibility, we affirm its order not to open the judgment.

B. Motion to Modify Child Support Pursuant to § 767.32, STATS.

Whether to modify an award of child support is left to the discretion of the trial court and will not be reversed absent an erroneous exercise of discretion. ***Burger v. Burger***, 144 Wis.2d 514, 523, 424 N.W.2d 691, 695 (1988). Discretion is properly exercised in this context when the trial court has considered the needs of the custodial parent, the children, and the ability of the noncustodial parent to pay. ***Id.*** at 523-24, 424 N.W.2d at 695. "A material change in circumstances of the parties, while a necessary condition for modification, is not in itself sufficient" to warrant a modification of support. ***Kritzik v. Kritzik***, 21 Wis.2d 442, 448, 124 N.W.2d 581, 585 (1963). Despite a change of circumstances, a trial court is not duty bound to modify support. *See* ***Tozer v. Tozer***, 121 Wis.2d 187, 189, 358 N.W.2d 537, 539 (Ct. App. 1984). Here the reviewing trial court did not erroneously exercise its discretion by denying a reduction in support payments.

Before reviewing the evidence, the trial court stated the following:

> The threshold questions on modification of child support, the way the Court understands it, are, if there is a substantial change of circumstances, as to whether a substantial change of circumstances

> warrants modification, whether it should be revisited as to the child support.
>
> The Court needs to consider the children's basic needs, the fairness and reasonableness of the formula. The Court, in considering support, the general rule is needs, ability to pay of the parent who does not have the custody.
>
> The standard of living of the children of the first marriage is to be equal to that which they would have enjoyed had the Ladwigs remained married.

The reviewing trial court then examined the evidence. It considered the negotiating process that took place in order to deviate from the statutory guidelines for support, i.e., 25%. It observed that both parties understood the support situation and agreed that it was fair. The trial court concluded there had been a material change of circumstances for three reasons: (1) Dr. Ladwig's income had increased from $72,000 to $300,000; (2) he had remarried; and (3) he had another child by his second wife. The trial court reasoned that the change in circumstances did not warrant a reduction in support payments because all three changes were either anticipated by the parties in stipulating to the original structured support formula or were totally controlled by Dr. Ladwig, i.e., he was planning a second marriage at the time of the final hearing, and expecting a third child by his prospective second wife at the time of the final hearing. Because the trial court applied the correct legal standard to the facts of record and demonstrated a rational mental process on arriving at its conclusion, we must affirm its decision.[3]

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[3] Ladwig further claims the trial court erroneously exercised its discretion when it ignored the statutory rebuttable presumption of a substantial change in circumstances to justify a review of support as created in § 767.32(1)(b)(7), STATS. Ladwig's reliance on this statutory presumption is misplaced because as is stated in this opinion, the reviewing trial court found that a substantial change in circumstances actually occurred. Thus, we deem this claim moot.

Ladwig further argues that child support should be limited to that amount necessary to adequately meet the child's needs based on government averages. We disagree. Dr. Ladwig's ability to pay the amounts required by the structured support formula has not been questioned. Nor, for that matter, has his ability to provide support for both of his families been questioned. As set

Ladwig next contends the trial court erroneously exercised its discretion by excluding from evidence as irrelevant, exhibits Nos. 4 through 20.[4] Ladwig asserts that these exhibits depicted the course of events prior to trial, indicating the factors of settlement efforts and repeated adjournments and were relevant to the issue of the voluntariness of his assent to the support formula stipulation.

"'Relevant evidence'" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence. Section 904.01, STATS.

A trial court's decision as to the relevance of proffered evidence is discretionary. ***Chart v. General Motors Corporation***, 80 Wis.2d 91, 102, 258

(..continued)

forth earlier in this opinion, Dr. Ladwig did not appeal the reasonableness nor fairness of the child support formula stipulation as approved by the original trial court. In denying a modification of support, the reviewing trial court correctly stated: "the standard of living of the children of the first marriage is to be equal to that which they would have enjoyed had the Ladwigs remained married."

In ***Hubert v. Hubert***, 159 Wis.2d 803, 816, 465 N.W.2d 252, 257 (Ct. App. 1990) we reiterated:

> Child support payments ... are designed to maintain children, insofar as possible at the economic level they would have enjoyed had there been no divorce. That the noncustodial parent has an obligation to share with his minor children the fruits of post-divorce economic improvements there can be little doubt.

The reviewing court did not err in this regard.

[4] Exhibits 4-7 were letters between the trial court and respective counsels concerning the setting of trial dates. Exhibits 8-10 were letters between counsels relating to negotiations and the availability of expert witnesses for the purposes of testimony. Exhibits 11-12 were motion papers and orders for adjournment. Exhibits 13-15 were communications demonstrating continuing negotiation between the parties. Exhibit 16 was a statement for services rendered by Mrs. Ladwig's attorney noting reference to an adjourned date. Exhibit 17 was a copy of docket entries in the trial court relating to the court's calendar. Exhibit 18 was photostatic copy of a *Daily Reporter* depicting the calendar for the trial court on June 3, 1992. Exhibit 19 was a photocopy of a bill for legal services sent to Mrs. Ladwig. Exhibit 20 was a memo from the trial court indicating that the Ladwig case was scheduled as case number one on September 4-5, 1991.

N.W.2d 680, 684 (1977). We review a discretionary decision only to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 321 N.W.2d 175, 184 (1986). The question is not whether we agree with the trial court's decision but whether appropriate discretion was exercised. In reviewing discretionary decisions, we shall look for reasons to sustain the trial court. ***Loomans v. Milwaukee Mutual Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968) and may independently review the record to do so. ***State v. Pharr***, 115 Wis.2d 334, 345, 340 N.W.2d 498, 503 (1983).

In the attempt to gain admission of exhibits 4-20, Dr. Ludwig's counsel made an offer of proof. In response, the trial court ruled:

> I will state the prior negotiations of settlement, prior trial dates, prior adjournments, prior matters such as these are entirely irrelevant as to what happened on June 3, 1992. The issue is was the doctor coerced into settling at the final hearing date by the actions of the judge and counsel. All the prior negotiations, all the prior trial dates are irrelevant. Your offer of proof is on the record and it's denied.

Our review of the record reveals the following. Exhibits 4-20 fall into two categories demonstrating: (1) the trial court's calendar was very busy necessitating adjournments to accommodate not only the court and the parties, but also witnesses; and (2) the complexity of pretrial settlement negotiations and the lack of success by counsel to reach a mutually satisfactory conclusion prior to the trial date of June 3, 1992.

The basic thrust of Dr. Ladwig's motion was that he was put under duress caused by the actions of the original trial court and the advice given by his trial counsel on or preceding the trial date. Crowded calendars and frequent adjournments are a fact of litigation life in Milwaukee County's court system of which we may take judicial notice. *See* ***Lumby v. Lumby***, 116 Wis.2d 347, 349, 341 N.W.2d 725, 726 (Ct. App. 1983). It is not unreasonable to observe that such a condition can be an advantage or a disadvantage to the respective parties, depending upon the circumstances of the case. To conclude, however, that such

a condition, absent additional linking factors, tended to show duress exerted on Dr. Ladwig by the trial court and his counsel is a *non sequitur*. The trial court declared "in a city as large as Milwaukee, the calendar of cases cannot be considered to be duress." We agree.

We further note as per the testimony of Dr. Ladwig, that the negotiations between him and his wife, up to the date of trial, had been unsuccessful and he no longer wanted to continue the negotiations. Dr. Ladwig asserts relevancy of this latter category of exhibits, but fails to either develop his argument or tell us why the trial court erred. We are not obligated to entertain undeveloped contentions or claims unsupported by authority. We will not decide issues that are not, or inadequately, briefed. *See* ***W. H. Pugh Coal Co.***, 157 Wis.2d at 634, 460 N.W.2d at 792 (an appellate court may decline to consider issue that is undeveloped in the briefs or that is not supported by citation to legal authority).

We conclude that the trial court did not erroneously exercise its discretion in excluding the exhibits as irrelevant. The trial court's reasoning supports its conclusion and the record warrants a similar result.

Lastly, Ludwig claims the trial court erroneously exercised its discretion in admitting into evidence the affidavit of his former attorney, Paul Piaskowski. He argues that the affidavit had been procured by his wife without his knowledge or consent at a time when Piaskowski was no longer representing him. Ladwig objected to the admission of the affidavit because it was an ex-parte communication procured outside of a formal discovery proceeding in violation of his attorney-client privilege. *See* ***Steinberg v. Jensen***, 194 Wis.2d 440, 534 N.W.2d 361 (1995).

Section 905.03, STATS., provides that a person who obtains professional legal service from an attorney has a privilege to prevent the attorney from disclosing confidential communications made for the purpose of rendering those services. The privilege, however, may be waived by its holder, if the holder voluntarily discloses any significant part of the communication, § 905.11, STATS.

In September 1993, when Ladwig filed his motion to open the judgment, he attached an affidavit in which he disclosed conversations he had with his counsel, Piaskowski, relating to the factors that were being considered in determining whether to settle or go to trial. In his deposition in March 1994, he described the same considerations and in the evidentiary hearings on this motion to open and vacate judgment he repeated parts of the same conversations. Based upon these voluntary disclosures, we conclude that Ladwig waived his privilege.

Ladwig also asserts that the Piaskowski affidavit is inadmissible hearsay violating his right to confront a witness. The affidavit in question consisted of three and one-half pages of declarations by Ladwig's former counsel, Piaskowski, explaining the circumstances of arriving at a structured support stipulation. The trial court ruled that the "affidavit is not being offered for the proof of the matters asserted ... it's being offered for the determination of whether there was coercion ...."[5] From our review of the affidavit, one can only conclude its purpose was to explain how Piaskowski was properly representing Ladwig and that Ladwig understood the purpose of the support formula and that there was no indication that Ladwig was coerced into accepting the settlement stipulation. Thus, in fact, the affidavit was admitted for ascertaining the matters asserted within the affidavit, i.e., lack of coercion. We therefore conclude that the trial court erred in its admission. The error, however, while one of law, was evidentiary. "Evidentiary error does not necessarily require reversal. We may not reverse or order a new trial on the ground of improper admission of evidence unless the error has affected the substantial rights of the party seeking relief on appeal." ***Heggy v. Grutzner***, 156 Wis.2d 186, 196, 456 N.W.2d 845, 850 (Ct. App. 1990); § 805.18(2), STATS.

Under § 805.18(2), STATS., we apply the harmless error test, i.e., whether there is any reasonable possibility that the error contributed to the final result. In applying this test to the trial court error, we note from the transcript of the evidentiary hearing on the motion to open the judgment that the trial court made no mention of the contents of the Piaskowski affidavit and arrived

[5] The trial court further explained its ruling by indicating an offer to allow the parties to order Piaskowski to testify, but no one availed himself of the opportunity, thus suggesting another possible reason for the admission of the affidavit as waiver. We have carefully reviewed the transcripts for both December 12 and 13, 1994, the days upon which evidence was taken on the motion to vacate and we are unable to find any further elucidation on this point.

at its ruling solely by assessing the weight and credibility of Dr. Ladwig's testimony versus his wife's. It found no credible evidence of coercion. Because the evidentiary error did not affect Dr. Ladwig's substantial rights, we are enjoined from reversing the order not to open and vacate the divorce judgment.

By the Court. – Orders affirmed.

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