OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

August 24, 2016

To:

Hon. Joseph W. Voiland
Circuit Court Judge
1201 S. Spring St.
Port Washington, WI 53074

Joseph Cincotta
Kerkman & Dunn
757 N. Broadway, Ste. 300
Milwaukee, WI 53202

Marylou Mueller
Clerk of Circuit Court
Ozaukee County Circuit Court
1201 S. Spring St.
Port Washington, WI 53074-0994

K. Scott Wagner
Wagner Law Group
839 N. Jefferson St., Ste. 400
Milwaukee, WI 53202

Eugene N. Bulso
Leader, Bulso & Nolan, PLC
414 Union St., Ste. 1740
Nashville, TN 37219

Kenneth E. Nelson
100 Muir Valley Rd.
Delafield, WI 53018

You are hereby notified that the Court has entered the following opinion and order:

2015AP2297 Orlando Residence, Ltd. v. Kenneth E. Nelson (L.C. #2013FJ9)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Kenneth E. Nelson appeals pro se from orders authorizing Orlando Residence, Ltd. ("ORL") to garnish twenty percent of his earning from his employer and denying his motion for reconsideration. Nelson indicates in his brief that Susan Nelson (a.k.a. Susan Soerens) joins in this appeal, however, she did not appeal the circuit court's order, and therefore any claims she may have are not before this court. Nelson contends the circuit court erred in finding that a June 21, 1986 marital property agreement between Nelson and Soerens that was made in contemplation of divorce and which he recently found was not "newly-discovered evidence." Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the orders.

The background facts were recently summarized in ***Orlando Residence, Ltd. v. Nelson***, No. 2014AP2155, unpublished slip op. ¶¶2-10 (WI App Sept. 24, 2015). As is relevant here, ORL has been trying to collect on a $4 million judgment the federal district court for the District of South Carolina entered against Nelson. On August 18, 2014, the circuit court entered an order permitting ORL to garnish twenty percent of Nelson's earnings. *See* WIS. STAT. § 812.34(2)(a). Nelson did not appeal that order.

ORL thereafter served an earnings garnishment notice on Nelson. Nelson answered that any earnings garnishment was limited to less than twenty percent as the obligation had not been incurred for the benefit of the marriage or the family under WIS. STAT. § 766.55(2). Nelson moved for relief from the judgment under WIS. STAT. § 806.07(1)(b), claiming that the circuit court should set aside its August 18, 2014 order on the basis of "newly-discovered evidence," to wit, a June 21, 1986 marital property agreement made in contemplation of divorce that he claims was "misplaced."

In order to be entitled to relief based on newly discovered evidence under WIS. STAT. § 806.07(1)(b), the court must determine that

> (a) The evidence has come to the moving party's notice after trial; and
>
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(c) The evidence is material and not cumulative; and

(d) The new evidence would probably change the result.

WIS. STAT. § 805.15(3). We review a circuit court's decision regarding whether to grant or deny a new trial based on newly discovered evidence under a discretionary standard. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. "We affirm a discretionary decision if the court applied the correct law to the facts of record and reached a reasonable result." ***State v. Sugden***, 2010 WI App 166, ¶16, 330 Wis. 2d 628, 795 N.W.2d 456.

Nelson asserts that at the time he incurred the 1986 obligation, he and Soerens had filed for divorce and were living separately and that the 1986 agreement fixed the amount of assets Soerens would receive. Nelson claims that, despite searching diligently, the 1986 agreement did not surface until February 2015, making it newly discovered evidence and giving the prior judgment no preclusive effect. The circuit court found that the 1986 agreement did not constitute newly discovered evidence, the August 18, 2014 order controlled the issue of whether the underlying judgment was a marital obligation, and claim preclusion and issue preclusion barred any new claims or defenses by Nelson. Nelson now appeals.

We agree with the circuit court's discretionary decision that the 1986 agreement does not constitute newly discovered evidence under WIS. STAT. § 806.07(1)(b). Nelson was well aware of the June 21, 1986 agreement as he executed it with Soerens; thus, it was both known to Nelson and in his possession, although misplaced. Misplaced evidence is not "newly-discovered" as the party would have "notice" of the evidence prior to trial, despite its unavailability, under WIS. STAT. § 805.15(3)(a). *See* ***State v. Vennemann***, 180 Wis. 2d 81, 98, 508 N.W.2d 404 (1993) (finding that exculpatory statements from codefendants did not come to

defendant's attention *after* trial as the evidence "always existed and the defendant was always aware of its existence" (citation omitted)); *see also* ***Longden v. Sunderman***, 979 F.2d 1095, 1103 (5th Cir. 1992) (newly produced evidence is not newly discovered evidence); ***Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.***, 833 F.2d 208, 212 (9th Cir. 1987) ("Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence."); ***Taylor v. Texgas Corp.***, 831 F.2d 255, 259 (11th Cir. 1987) ("[E]vidence cannot be 'newly discovered' under [Fed. R. Civ. P. 60] if it is in the possession of the moving party or that party's attorney prior to the entry of judgment.").

As we determine that the 1986 agreement is not newly discovered evidence, we need not reach the issue of whether issue preclusion or claim preclusion bar Nelson's arguments pertaining to the 1986 agreement. Therefore,

IT IS ORDERED that the orders of the circuit court are summarily affirmed, pursuant to WIS. STAT. § 809.21.

Diane M. Fremgen
Clerk of Court of Appeals