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**DISTRICT I**

December 27, 2019

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

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2018AP1988

Kohner Mann & Kailas SC v. Metallurgical Associates, Inc.  
(L.C. # 2015CV6012)

Before Brash, P.J., Kessler and Fitzpatrick, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Robert J. Hutchinson, *pro se*, appeals from a trial court order that: (1) denied his WIS. STAT. § 806.07 (2017-18)<sup>1</sup> motion for relief from judgment; and (2) ordered monetary and non-monetary sanctions against Hutchinson.<sup>2</sup> On appeal, Hutchinson challenges both of those decisions.<sup>3</sup> 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. We summarily affirm. In addition, because we conclude that Hutchinson’s entire appeal is frivolous, we grant the respondent’s motion for costs and reasonable attorney fees incurred in this appeal, *see* WIS. STAT. RULE 809.25(3), and we remand this case to the trial court to determine the proper amount thereof.

At the outset, we note that the record in this case is voluminous, and that many motions have been filed at the trial court and on appeal. We include only the most relevant procedural history in this decision. In addition, we do not discuss the other circuit court cases and appeals that have been filed by Hutchinson, including two appeals that are still pending.<sup>4</sup>

In 2015, the law firm of Kohner, Mann & Kailas, S.C. (“KMK”) filed a lawsuit against Hutchinson, his wife Karen L. Hutchinson (“Karen”), and a company called Metallurgical

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> The order also denied a motion for contempt brought by Hutchinson and allowed another party to withdraw its motion to enforce a settlement agreement. Those components of the order are not at issue on appeal and will not be discussed.

<sup>3</sup> Hutchinson has raised a host of issues and sub-issues in his appellate briefs. Any arguments that we do not explicitly address are deemed denied. *See Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (holding that an appellate court need not discuss arguments that lack “sufficient merit to warrant individual attention”).

<sup>4</sup> *See, e.g.*, Nos. 2017AP1071, 2019AP458, and 2019AP1130.

Associates, Inc. (“MAI”).<sup>5</sup> The suit alleged that KMK provided legal services to Hutchinson, Karen, and MAI, and that they owed the firm nearly \$120,000 in attorney fees. Hutchinson, Karen, and MAI filed a counterclaim against KMK, alleging that KMK performed negligently, but MAI later withdrew from the counterclaim. In February 2016, the trial court dismissed the counterclaim without prejudice, and the Hutchinsons filed an amended counterclaim against KMK. Subsequently, the North River Insurance Company (“North River”), which provided professional liability insurance to KMK, was made a party to the case.<sup>6</sup>

In 2016, there were numerous discovery and expert disputes between the parties, which the trial court addressed at several hearings. Ultimately, after the Hutchinsons failed to adequately respond to certain discovery requests, the trial court issued an order precluding the Hutchinsons from testifying in the case.<sup>7</sup>

Meanwhile, KMK moved for summary judgment. KMK asked the trial court to grant summary judgment for the outstanding legal fees and to dismiss the amended counterclaim. In response, the Hutchinsons offered numerous arguments in opposition to the motion for summary judgment, including reasons why they believed KMK performed deficiently when it provided legal services. One assertion especially relevant to this appeal was that “KMK withheld material evidence from the Hutchinsons and then denied that it was in possession of the evidence when,

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<sup>5</sup> MAI is the company that Hutchinson started with his business partner. Hutchinson, Karen, and MAI hired KMK to represent them in a dispute with Hutchinson’s business partner concerning MAI. After KMK filed its lawsuit seeking payment for legal services, MAI entered receivership.

<sup>6</sup> Hutchinson has raised a concern with North River’s participation in the case. We will briefly address that concern later in this decision.

<sup>7</sup> The Honorable Dennis P. Moroney issued the orders concerning the discovery disputes and later granted summary judgment against Hutchinson and Karen.

in fact, KMK had received it eight months earlier.” The Hutchinsons were referencing a forensic analysis of a cell phone that had belonged to Hutchinson’s business partner. They asserted that the forensic analysis yielded 14,700 pages of data, including “200 pages of customer contact and meeting records,” and that the withholding of that data negatively impacted their litigation with Hutchinson’s former business partner.

The trial court heard oral argument on the summary judgment motion on December 9, 2016. It granted KMK’s motion for summary judgment on its legal services claim after concluding that there were no disputed issues of material fact concerning the legal fees that were incurred. With respect to the Hutchinsons’ counterclaim, the trial court concluded that they lacked standing to bring the claim because it was “a derivative action on behalf of the corporation,” MAI.

In January 2017, the trial court entered a written order granting summary judgment in favor of KMK and dismissing the counterclaim, and it also entered a final judgment. The Hutchinsons appealed. Ultimately, we dismissed the appeal for lack of jurisdiction, concluding that the appeal had not been timely filed. *See Kohner Mann & Kailas SC v. Metallurgical Assoc.*, No. 2017AP611, unpublished slip op. and order at 1 (WI App June 30, 2017). The Hutchinsons filed a petition for review in the Wisconsin Supreme Court, which was denied on October 9, 2017.

Throughout the aforementioned litigation, Hutchinson was represented by counsel. In June 2018, Hutchinson began proceeding *pro se*, filing the WIS. STAT. § 806.07 motion for relief

from judgment that is at issue in this appeal.<sup>8</sup> Hutchinson sought relief from the January 2017 judgment based on § 806.07(1)(a), (c), (g), and (h).<sup>9</sup> His motion centered on the allegation that he previously made in response to the motion for summary judgment: that KMK failed to timely give the Hutchinsons the results of the forensic analysis of the cell phone. Hutchinson’s motion asserted that KMK’s alleged failure “to disclose the data ... extracted from the cell phone” was a “mistake” or “misrepresentation and misconduct.” Accordingly, Hutchinson argued that he was entitled to relief from judgment under § 806.07(1)(a) (“[m]istake”) or (1)(c) (“[f]raud, misrepresentation, or other misconduct of an adverse party”). In the alternative, Hutchinson

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<sup>8</sup> Karen was not named as a movant and does not appear to have been involved in the 2018 litigation. She did not appeal the order at issue in this appeal.

<sup>9</sup> WISCONSIN STAT. § 806.07 provides in relevant part:

**(1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

**(a)** Mistake, inadvertence, surprise, or excusable neglect;

....

**(c)** Fraud, misrepresentation, or other misconduct of an adverse party;

....

**(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.

**(2)** The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made.... This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

argued that he was entitled to relief under § 806.07(1)(g) (“It is no longer equitable that the judgment should have prospective application”) or § 806.07(1)(h) (“Any other reasons justifying relief from the operation of the judgment”).

KMK opposed the motion on grounds that it was not timely and that relief was not warranted. KMK also filed a motion for sanctions against Hutchinson, alleging that his motion was frivolous. *See* WIS. STAT. § 802.05(3).<sup>10</sup>

The trial court conducted a motion hearing and denied Hutchinson’s motion.<sup>11</sup> The trial court was not persuaded that the motion was untimely,<sup>12</sup> but it concluded that there was no basis for relief from judgment. The trial court explained that the mistake, fraud, misrepresentation,

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<sup>10</sup> WISCONSIN STAT. § 802.05 provides in relevant part:

**(3) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the ... parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

....

**(b) Nature of sanction; limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. ... the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

<sup>11</sup> The Honorable Ellen R. Brostrom presided over the motion hearing and entered the order at issue on appeal.

<sup>12</sup> Although motions seeking relief pursuant to WIS. STAT. § 806.07(1)(a) and (c) must be filed within a year after entry of the judgment, *see* § 806.07(2), the trial court said that because an amended judgment was later entered, it believed the motions were timely. For purposes of this appeal, we will accept this conclusion and will not address KMK’s argument that the motion was untimely.

and other misconduct Hutchinson was alleging related to KMK's actions before the lawsuit was filed, not to events that occurred in the trial court. The trial court rejected Hutchinson's suggestion that the judgment was obtained by mistake, fraud, misrepresentation, or other misconduct.

The trial court also concluded that WIS. STAT. § 806.07(1)(g) did not apply because the underlying action was an action at law, rather than an action in equity. Finally, the trial court concluded that there were not requisite "extraordinary or unique facts justifying relief" under the "catch-all provisions" of § 806.07(1)(h). *See Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶10, 282 Wis. 2d 46, 698 N.W.2d 610 (recognizing that facts warranting relief under § 806.07(1)(h) must be "extraordinary or unique").

The trial court also granted KMK's motion for sanctions pursuant to WIS. STAT. § 802.05(3). Specifically, the trial court ordered Hutchinson to pay KMK a monetary sanction of \$5000, and it further ordered that Hutchinson and Karen "may not cause to be filed in any Circuit Court in the State of Wisconsin any suit, action, proceeding or motion against KMK, its employees, or shareholders arising from KMK's representation of Karen Hutchinson, Robert Hutchinson, or Metallurgical Associates, Inc. without first obtaining leave of court." The trial court's written order further outlined the bases for the sanctions:

KMK served its motion for sanctions on Robert Hutchinson and Karen Hutchinson on June 22, 2018 and filed its motion for

sanctions on July 25, 2018, providing the required “safe harbor” period pursuant to [WIS. STAT. §] 802.05.[<sup>13</sup>]

Hutchinson presented the Court with at least two outright lies during the course of the August 30, 2018 hearing alone.

More generally, Hutchinson’s misrepresentations make it difficult and costly for the Court and the parties to address his submissions.

Hutchinson brought before the Court non-meritorious arguments.

Hutchinson has engaged in a troubling pattern of improper litigation, as evidenced by the sanctions previously issued in Milwaukee County Circuit Court Case No. 15-CV-6012, Waukesha County Circuit Court Case No. 12-CV-3673, and Waukesha County Circuit Court Case No. 15-CV-2187.

Hutchinson’s pattern of behavior warrants a monetary sanction.

A monetary sanction alone will not deter Hutchinson from further vexatious litigation.

(Paragraph numbering omitted.) This appeal follows.

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<sup>13</sup> The trial court’s use of the term “safe harbor” was in reference to WIS. STAT. § 802.05(3)(a)1., which requires a movant to provide a copy of the motion for sanctions to the opponent and wait twenty-one days before filing the motion, which gives the opponent an opportunity to withdraw or correct its actions. Here, it was undisputed that KMK sent a copy of the motion to Hutchinson and waited more than twenty-one days to file it in the trial court. However, KMK and Hutchinson disagreed whether KMK had included a cover letter. On appeal, Hutchinson asserts that the trial court’s finding that KMK included a cover letter was clearly erroneous. KMK disagrees, but it also asserts that even if there was no cover letter, the statute was still satisfied because the statute “does not require the moving party to provide a cover letter warning the opponent of the 21 day safe harbor.” Hutchinson did not respond to this argument in his reply brief, and he has not provided any authority for the proposition that a cover letter is required. Therefore, we reject his suggestion that § 802.05(3)(a)1. was not satisfied. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (holding that the appellate court may take as a concession the failure to refute in a reply brief a proposition that was asserted in a response brief); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”).



We consider three issues: (1) the denial of Hutchinson’s WIS. STAT. § 806.07 motion; (2) the imposition of monetary and non-monetary sanctions against Hutchinson; and (3) KMK’s motion for sanctions related to this appeal.

We begin with Hutchinson’s WIS. STAT. § 806.07 motion. We review a trial court’s decision denying relief under § 806.07 for an erroneous exercise of discretion. *Thoma v. Village of Slinger*, 2018 WI 45, ¶11, 381 Wis. 2d 311, 912 N.W.2d 56. A trial court’s exercise of discretion will be upheld if the trial court “based its decision on the pertinent facts in the record, applied the correct legal standard, and reached a reasonable determination.” *Id.*

Hutchinson continues to assert that KMK’s alleged failure to turn over the forensic analysis of the cell phone data was relevant to KMK’s lawsuit and that the judgment entered against him was therefore “fraudulent, mistaken, or in error.” We are not persuaded that the trial court erroneously exercised its discretion when it rejected this argument. Hutchinson argued in his response to the motion for summary judgment that there was fraud, mistake, or error in KMK’s handling of the forensic analysis of the cell phone. That allegation did not demonstrate fraud, mistake, or error in the trial court’s entry of summary judgment in the current lawsuit. There is no basis to disturb the trial court’s decision to deny Hutchinson relief under WIS. STAT. § 806.07(1)(a) and (c).

Similarly, we are not persuaded that the trial court erred when it concluded that Hutchinson’s allegations about the cell phone analysis did not provide the “extraordinary or unique” facts that justify relief under WIS. STAT. § 806.07(1)(h). *See Sukala*, 282 Wis. 2d 46, ¶10.

Finally, Hutchinson did not respond to—much less rebut—KMK’s assertion (and the trial court’s conclusion) that relief under WIS. STAT. § 806.07(1)(g) is available only if the underlying action was an equitable action. See *Nelson v. Taff*, 175 Wis. 2d 178, 188, 499 N.W.2d 685 (Ct. App. 1993) (holding that § 806.07(1)(g) relief was not available where the judgment was entered in an action at law); see also *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure to refute in a reply brief a proposition that was asserted in a response brief). Accordingly, Hutchinson is not entitled to relief.

Next, we turn to the sanctions ordered by the trial court after it found that Hutchinson’s motion was frivolous. A claim is frivolous when a “party or attorney knew or should have known that the claim was without any reasonable basis in law or equity.” *Howell v. Denomie*, 2005 WI 81, ¶8, 282 Wis. 2d 130, 698 N.W.2d 621 (citations, brackets and internal quotation marks omitted). Whether to impose sanctions is within a trial court’s discretion, and we will uphold discretionary decisions if the trial court examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898.

Hutchinson does not challenge the amount of the monetary sanction that was awarded. Rather, he presents other challenges to the sanctions. First, he argues that his motion for relief pursuant to WIS. STAT. § 806.07 was not frivolous. We are not persuaded. Hutchinson’s underlying claim that KMK’s treatment of the forensic analysis of the cell phone data constituted a mistake, fraud, or misrepresentation in the trial court’s summary judgment analysis was without a basis in law. Further, Hutchinson has not shown that there was a basis for relief under

§ 806.07(1)(g) because KMK's lawsuit was not brought in equity. Finally, Hutchinson did not provide an adequate basis to seek relief under § 806.07(1)(h).

Hutchinson's second challenge to the sanctions award is that KMK's counsel said at the motion hearing that KMK was seeking sanctions "to put an end to the litigation." Hutchinson argues, without citation to authority, that it was improper for KMK to seek sanctions in order to end the litigation. We need not consider legal arguments that are undeveloped and lack legal citations. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Third, Hutchinson challenges the non-monetary restriction that he claims bars him "from access to judicial process." Hutchinson asserts that the restriction was unnecessary because he "foresees no circumstance necessitating litigation not already in motion." He also complains that the trial court's decision was based in part on litigation in Georgia, where Hutchinson lived, and he asserts that KMK made misrepresentations about the litigation in Georgia. Hutchinson has not persuaded us that the trial court's sanction requiring prior approval to file a motion was improper. See *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 748, 468 N.W.2d 760 (Ct. App. 1991) ("A court faced with a litigant engaged in a pattern of frivolous litigation has the authority to implement a remedy that may include restrictions on that litigant's access to the court." (citation and internal quotation marks omitted)). We also note that the trial court's order did not bar Hutchinson from the judicial process. Rather, the trial court's order required Hutchinson to seek leave of the trial court before filing additional motions. We discern no erroneous exercise of discretion.

Next, Hutchinson argues that the sanctions award was "duplicative." As best we can tell, Hutchinson is arguing that it was unnecessary to impose both a \$5000 penalty and also require

him to seek leave of the trial court before filing future motions. He has not adequately explained or supported his argument, and we decline to abandon our neutrality and attempt to develop an argument for Hutchinson. See *Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. We are not persuaded that the trial court erroneously exercised its discretion by ordering both a monetary sanction and a non-monetary sanction.

For the foregoing reasons, we reject Hutchinson's challenge to the trial court's order denying his motion for relief pursuant to WIS. STAT. § 806.07 and imposing sanctions against him. Before turning to KMK's motion for sanctions against Hutchinson for filing a frivolous appeal, we will briefly address two additional assertions that Hutchinson has made.

First, Hutchinson claims that the law firm representing KMK has "falsely represented" that it represents North River which was designated a third-party defendant at the trial court. Hutchinson also raised this issue in a motion he filed in this court during the appellate briefing process. We are not persuaded that the law firm's past or present representation of, or interaction with, North River is relevant to the matter before the court: whether to affirm the trial court's order that denied Hutchinson's WIS. STAT. § 806.07 motion and imposed sanctions. We decline to further address Hutchinson's argument.

Second, Hutchinson asserts that the trial court "acted with bias and discriminated against Hutchinson based on his *pro se* status." (Bolding and some uppercasing omitted.) He also argues that the trial court refused to accept his arguments because he was proceeding *pro se*. We are not persuaded that the trial court discriminated against Hutchinson. The hearing transcript reveals that the trial court gave Hutchinson numerous opportunities to present his arguments

during a hearing that lasted more than an hour. To the extent the trial court evaluated Hutchinson’s credibility and made factual findings, we defer to those determinations. *See Dickman v. Vollmer*, 2007 WI App 141, ¶¶14-17, 303 Wis. 2d 241, 736 N.W.2d 202 (credibility determinations are left to the factfinder unless inherently or patently unreliable, and factual findings will be affirmed unless clearly erroneous). Again, we discern no erroneous exercise of discretion.

Finally, we turn to KMK’s motion for sanctions on appeal. KMK seeks sanctions on two bases. First, KMK asserts that Hutchinson is “pursu[ing] this frivolous appeal for the sole purpose of harassing and maligning KMK when he knows or should know that his appeal is without a reasonable basis in fact and law.” *See* WIS. STAT. RULE 809.25(3)(c).<sup>14</sup> Second, KMK argues that sanctions are appropriate because “Hutchinson’s brief is lacking in record cites and citation to legal authority in support of his position.” *See* WIS. STAT. RULE 809.83.<sup>15</sup>

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<sup>14</sup> WISCONSIN STAT. RULE 809.25(3) provides in relevant part:

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party’s attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

<sup>15</sup> WISCONSIN STAT. RULE 809.83(2) provides:

(continued)

Hutchinson did not file a response to the motion for sanctions on appeal, and he does not address KMK's motion in his appellate briefs. We conclude that Hutchinson's appeal was frivolous because he "knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *See* WIS. STAT. RULE 809.25(3)(c)2.<sup>16</sup> There was not a reasonable basis to appeal the denial of Hutchinson's motion for relief from judgment or the trial court's sanctions against him. Because we conclude that Hutchinson's entire appeal is frivolous, we grant the motion for costs and reasonable attorney fees incurred in this appeal, and we remand this case to the trial court to determine the proper amount thereof.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the respondent's WIS. STAT. RULE 809.25 motion for costs and reasonable attorney fees incurred in this appeal is granted, and we remand to the trial court to determine the proper amount thereof.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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NONCOMPLIANCE WITH RULES. Failure of a person to comply with a court order or with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

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<sup>16</sup> Because we conclude that the appeal is frivolous on this basis, we decline to address whether it was also frivolous based on WIS. STAT. RULE 809.25(3)(c)1., or whether sanctions are also warranted based on WIS. STAT. RULE 809.83(2) due to noncompliance with appellate rules.

*Sheila T. Reiff*  
*Clerk of Court of Appeals*