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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 III

July 2, 2024

To:

Hon. Gregory B. Huber
Reserve Judge

Hon. Rick T. Cveykus
Circuit Court Judge
Electronic Notice

Kelly Schremp
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

John H. Bradley
Electronic Notice

R. Rick Resch
Electronic Notice

David F. Rietz Jr.
221 Lavina Drive
Wausau, WI 54401

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

2023AP185 Robert S. Omelina v. David F. Rietz, Jr.
(L. C. No. 2019CV737)

Before Stark, P.J., Hruz and Gill, 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 S. Omelina appeals an order that granted, in part, a motion for reconsideration filed by David F. Rietz, Jr. Specifically, the circuit court granted reconsideration of a prior ruling allowing the deposition testimony of Omelina's handwriting expert to be admitted at trial. As a result of its decision on reconsideration, the court amended a judgment in Omelina's favor to award him $523,397.17, rather than $2,537,265.92.

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 (2021-22).[1] For the reasons explained below, we summarily reverse that portion of the circuit court's order granting Rietz's motion for reconsideration as to the handwriting expert's testimony, and we remand with directions for the court to vacate the amended judgment in favor of Omelina and reinstate the original judgment.

Beginning in 2005, Omelina repeatedly loaned money to Rietz for Rietz's landscaping business. The loans were eventually memorialized in a series of promissory notes. Rietz's business ultimately failed, and Rietz never made any payments on the notes.

In November 2019, Omelina filed the instant lawsuit against Rietz, seeking to collect the amounts that Rietz allegedly owed him under five promissory notes. The case was assigned to the Honorable Gregory B. Huber. In March 2021, the parties stipulated to the dismissal of Omelina's claim regarding one of the promissory notes, apparently on statute of limitations grounds, leaving four notes at issue for trial. This appeal involves only one of those notes, which was dated March 20, 2009, and had a principal amount of $813,000. Rietz claimed that he did not sign the March 2009 note, and a major issue at trial was the validity of his purported signatures on that note.

A bench trial on Omelina's claims was delayed and rescheduled multiple times. Then, in October 2021, Rietz's attorney moved to withdraw, causing additional delay. By October 24, 2021, Omelina had disclosed his expert witness—Curt Baggett, a handwriting expert—and had

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

filed a copy of Baggett's report. On December 6, 2021, the circuit court entered a scheduling order that required Rietz to file any expert witness reports by December 23, 2021, and gave the parties until January 17, 2022, to depose each other's experts. Based on the record, it does not appear that Rietz filed any expert witness reports or deposed Baggett by the deadlines set forth in the scheduling order.

At a final pretrial conference on January 18, 2022, the circuit court provided the parties with potential trial dates in February, April, and May 2022. The court told the parties that the February and April dates were "backing up other trials," but it was "possible" that the case would go to trial on those dates.

Omelina subsequently moved to take a trial deposition of Baggett on the February trial date, if the matter did not proceed to trial that day. In the motion, Omelina asserted that Baggett was prepared and ready to testify, but that it was "unduly expensive for [Omelina] to retain Mr. Baggett to be available for all three proposed trial dates, and that it would be far more cost effective to allow Mr. Baggett to either testify at trial or to take his trial deposition" on the February trial date. Rietz did not respond to Omelina's motion. The circuit court granted the motion during a hearing on February 1, 2022, at which Rietz failed to appear. Omelina mailed Rietz a notice of the deposition, and Rietz did not respond.

The case did not go to trial on the February trial date. However, Baggett experienced a medical emergency, and his trial deposition was therefore rescheduled to March 8, 2022. Once again, Omelina mailed Rietz a notice of the deposition, which specifically stated that if Rietz chose not to participate in the deposition, he would be waiving his right to cross-examine Baggett. Rietz did not respond to the notice and did not appear for the March 8 deposition.

The circuit court held another final pretrial conference on March 18, 2022. During the final pretrial, Omelina and the court discussed the technical details of playing a recording of Baggett's deposition at trial. Rietz did not object to Omelina playing the recording at trial and did not raise any argument regarding Baggett's qualifications.

Omelina and the circuit court were prepared to try the case on the next scheduled trial date in April 2022. That morning, however, Rietz informed the court by phone that he could not proceed to trial because he and his daughter were sick. Omelina then moved for a default judgment. The court stated that it would grant a default judgment unless Rietz provided a positive COVID test. In support of that ruling, the court referenced the many delays in the case, which the court attributed solely to Rietz, and the fact that Rietz had failed to appear for Baggett's deposition. Again, Rietz did not raise any arguments regarding Baggett's qualifications or the admissibility of Baggett's deposition testimony.

During a subsequent status conference on April 11, 2022, the circuit court declined to enter a default judgment against Rietz. Once again, during that conference, Rietz did not raise any arguments regarding Baggett's qualifications or the admissibility of his deposition testimony.

The case finally proceeded to trial in May 2022. At trial, Rietz admitted signing some of the promissory notes, but he denied signing the March 2009 note. The video recording of Baggett's deposition was played at trial, and Baggett's report was admitted into evidence. Baggett opined that Rietz "did indeed sign his own signature and initials" on the March 2009 note.

After Baggett's video deposition was played at trial, Rietz objected, asserting that he "was told" before his prior attorney withdrew "that Mr. Baggett was blacklisted." The circuit court responded, "Well, I have no idea, but you could have shown up at that deposition to question him

about that." Rietz replied, "Again, this wasn't until afterwards that I found out. So I—anything that [prior counsel] has, I can still get access to; right? That could be brought to you at some point?" The court responded, "Well, no. The trial ends today …. This matter is closed as of today."

The circuit court ultimately concluded that Omelina had met his burden of proof with respect to all four of the promissory notes that were at issue at trial. The court therefore entered a final judgment awarding Omelina $2,537,265.92, plus postjudgment interest.[2]

Rietz subsequently obtained counsel and filed a motion for reconsideration or for a new trial. As relevant to this appeal, Rietz argued that Baggett's testimony was inadmissible because it "did not comply with the ***Daubert***[3] expert standard adopted in WIS. STAT. § 907.02." Rietz also asserted that there was insufficient evidence to support a finding that he had signed the March 2009 note.

Following Judge Huber's retirement, this case was assigned to the Honorable Rick T. Cveykus. Judge Cveykus granted Rietz's motion for reconsideration with respect to the admission of Baggett's testimony.[4] Judge Cveykus stated that Baggett's "qualifications are suspect at best" and that Baggett "has been excluded as an expert witness in multiple cases, including at least one that he listed on his 'Summary of Cases' intended to demonstrate his expertise." Judge Cveykus further concluded that Rietz—who was self-represented at trial—had adequately preserved his

[2] The award of $2,537,265.92 included both the principal amount of $813,000 and the interest due under the March 2009 note.

[3] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

[4] Judge Cveykus rejected all of the other arguments raised in Rietz's motion for reconsideration. None of those additional arguments are at issue in this appeal.

objection to Baggett's qualifications by asserting that his former attorney told him Baggett had been "blacklisted." Judge Cveykus reasoned:

> [R]ather than addressing those qualifications, Judge Huber responded that Rietz "could have shown up at [Baggett's] deposition to question him about that." In effect, that ruling retroactively imposed a requirement for Rietz to challenge Baggett's qualifications before trial rather than at trial. It was also contrary to the court's role as gatekeeper, to ensure that the evidence is reliable enough to be considered by the finder of fact.

(Citations omitted; second alteration in original.)

Judge Cveykus then concluded that "given what the Court now knows about Baggett's qualifications, … admitting the Baggett deposition into evidence was a mistake. It should have been excluded, and it should not have formed the basis for any findings of fact." Judge Cveykus further concluded that without Baggett's testimony, there was "insufficient evidence to support judgment with respect to the contested [March 2009] note." Judge Cveykus therefore amended the judgment against Rietz "to remove the amount attributed to the [March 2009] note." The amended judgment awarded Omelina $523,397.17, rather than $2,537,265.92.

Omelina now appeals, arguing that Judge Cveykus erred by granting Rietz's motion for reconsideration. Rietz has not filed a respondent's brief on appeal. We could reverse the order granting reconsideration on that basis alone. *See* WIS. STAT. RULE 809.83(2); *see also* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments may be deemed conceded). Regardless, we agree with Omelina that Judge Cveykus erroneously exercised his discretion by granting the motion for reconsideration with respect to Baggett's testimony. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853 ("We

review a [circuit] court's decision on a motion for reconsideration under the erroneous exercise of discretion standard.").

To prevail on a motion for reconsideration, the movant must either present newly discovered evidence or establish a manifest error of law or fact. ***Id.***, ¶44. A manifest error refers to a "self-evident" mistake due to "oversight, omission, or miscalculation," which tends to "immediately reveal itself as such to reasonable legal minds." ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988). A manifest error "does not, and should not, embrace those kinds of alleged errors which lend themselves to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." ***Id.*** at 93. Thus, establishing a manifest error of law requires showing a wholesale disregard, misapplication, or failure to recognize controlling precedent. ***Koepsell's Olde Popcorn Wagons***, 275 Wis. 2d 397, ¶44.

Here, Rietz's motion for reconsideration failed to show that Judge Huber made a manifest error of law by admitting Baggett's testimony.[5] Although Rietz objected to the admission of this evidence at trial, apparently challenging Baggett's qualifications, it was clear that Rietz was not prepared to litigate that issue. Instead, Rietz sought permission to "get access to" materials supporting his claim so that he could argue the issue "at some point." In effect, Rietz sought a continuance to allow him to prepare and present an argument regarding Baggett's qualifications. Judge Huber denied that request, noting that "[t]he trial ends today" and that Rietz "had plenty of time" to prepare a challenge to Baggett's qualifications.

[5] Rietz's motion for reconsideration did not submit any newly discovered evidence regarding this issue or argue that Judge Huber's ruling was based on a manifest error of fact. We therefore confine our analysis to whether Judge Huber made a manifest error of law by admitting Baggett's testimony.

"It is well established in Wisconsin that a continuance is not a matter of right." ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496 (citation omitted). Instead, the decision to grant or deny a continuance is committed to the circuit court's discretion. ***Id.*** In this case, Judge Huber's refusal to grant Rietz a continuance to prepare a challenge to Baggett's qualifications was not an erroneous exercise of discretion, given that: (1) Rietz did not depose Baggett by the deadline set forth in the scheduling order or attend Baggett's trial deposition, either of which would have given him the opportunity to question Baggett regarding his qualifications; (2) Rietz never raised any issue regarding Baggett's qualifications prior to trial; (3) Rietz never requested a ***Daubert*** hearing; and (4) although the trial was delayed multiple times, Rietz was still unprepared to challenge Baggett's qualifications when the case finally proceeded to trial in May 2022. Under these circumstances, Judge Huber made a reasonable decision not to grant Rietz additional time to develop an argument that Baggett's testimony should be excluded.

In his decision on reconsideration, Judge Cveykus concluded that Judge Huber "retroactively imposed a requirement for Rietz to challenge Baggett's qualifications before trial rather than at trial" and failed to perform his "role as gatekeeper, to ensure that the evidence is reliable enough to be considered by the finder of fact." This reasoning, however, ignored the fact that Rietz was not prepared to challenge Baggett's qualifications at trial and effectively sought a continuance in order to do so. As explained above, Judge Huber's decision not to grant a continuance was not an erroneous exercise of discretion. Without a continuance, there was no evidence in the record to support excluding Baggett's testimony based on Rietz's vague and undeveloped challenge to Baggett's qualifications.

Under these circumstances, Rietz failed to show that Judge Huber made a manifest error of law by admitting Baggett's testimony. Consequently, Judge Cveykus erred by granting Rietz's

motion for reconsideration as to that issue and by amending the judgment to exclude the amounts due under the March 2009 note.[6]

Therefore,

IT IS ORDERED that the order is summarily reversed in part and the cause is remanded for the circuit court to vacate the amended judgment against Rietz and reinstate the original judgment awarding Omelina $2,537,265.92, plus postjudgment interest.

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

Samuel A. Christensen
Clerk of Court of Appeals

[6] On appeal, Omelina also argues that "even if Baggett's opinions are excised from the record, there was sufficient evidence that Rietz signed the disputed promissory note." Additionally, Omelina argues that "Rietz's late ***Daubert*** challenge was barred by laches." Because we reverse on other grounds, we need not address these alternative arguments. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).