STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

LEONARD POZNER,

Plaintiff-Respondent,

v.

JAMES FETZER,

Defendant-Appellant.

APPEAL NO. 2022AP001751
Dane County Case No. 18CV3122
Hon. Frank D. Remington, presiding

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RESPONSE TO STATEMENT OF ISSUES

Issue 1: Pozner cannot take Fetzer's intangible intellectual property directly without assignment of rights and appointment of receiver to manage or sell the properties.

Response to Issue 1: The circuit court did not abuse its discretion in not reconsidering its finding that Dr. Fetzer's intellectual property could be turned over to partially satisfy a judgment without the appointment of a receiver.

Issue 2: Pozner is judicially estopped from reducing the money judgment debt with the taking order's intangible property.

Response to Issue 2: The circuit court did not abuse its discretion in not reconsidering the turnover order when Dr. Fetzer had no factual basis for his judicial estoppel argument and first raised that argument in the motion to reconsider.

Issue 3: Taking order & lawsuit are abuse of process.

Response to Issue 3: The circuit court did not abuse its discretion in when it did not reconsider the turnover order in response to a new legal argument Dr. Fetzer raised that somehow the tort of abuse of process prohibits Mr. Pozner from partially collecting on this judgment.

1. STATEMENT ON ORAL ARGUMENT

Appellee does not believe this case is appropriate for oral argument as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

STATEMENT ON PUBLICATION

Appellee does not believe this case is appropriate for publication as the court's decision is unlikely to have any significant value as precedent.

SUMMARY OF THE FACTS

On December 12, 2019, the circuit court entered judgment in this matter against Dr. Fetzer in the amount of $457,395.13. (Record 355 at 3 (hereafter all citations to documents in the record will be referenced as "R.".) As of April 26, 2022, Dr. Fetzer had not paid off any part of the $457,395.13 judgment. On that day, Mr. Pozner moved to turnover Dr. Fetzer's interest in non-exempt, unregistered works to apply to satisfy the judgment. (R. 491.) Specifically, Mr. Pozner sought the turnover of copyrights to four editions of the book, "Nobody Died at Sandy Hook" as

well as some internet domain names used by Dr. Fetzer (the "Property"). (R. 491, Exhibit 1.)

Dr. Fetzer had testified that he owned or held an interest in the Property in a supplemental examination. (R. 491.) He recanted this sworn testimony, in opposition to the motion to turnover property, submitting an affidavit stating that he did not own the Property. (R. 500, ¶¶ 10, 11-14, 20.) At the hearing on the motion to reconsider, he changed his position again, arguing that he owned the Property. (R. 526 at 7:25-8:1.)

Acknowledging that Dr. Fetzer contradicted himself, the circuit court ordered him to turnover his interests in the Property. (R. 510.) The circuit court explained, "I've always viewed the question for me to decide not to be that I should determine definitively the nature and extent of your ownership interest, but much like a quitclaim deed, all we were doing was whatever your interest is—either it's nothing, it could be worth less, or it could be worth something—whatever your interest is, it was now Mr. Pozner's property." (R. 526 at 8:10-16.)

The circuit court found that Mr. Pozner valued the Property at $100,000 and gave Dr. Fetzer the opportunity to accept or reject this valuation. (R. 510). If Dr. Fetzer wanted to reject this valuation, he was

required to, "submit an expert appraisal of the Personal Property within 60 days from June 24, 2022." (R. 510.) Dr. Fetzer informed the Court he rejected the valuation, but did not submit an expert appraisal. (R. 508.)

Dr. Fetzer moved the circuit court to stay the turnover order and, separately, reconsider it. (R. 514; R. 515.) He argued that Mr. Pozner should not be allowed to execute the taking order while he sought review of the underlying judgment from the United States Supreme Court. (R. 515.) The circuit court denied the motion to stay. (R. 528.)

In his motion for reconsideration, Dr. Fetzer changed positions. He admitted that the Property was his, whereas he had originally opposed the turnover motion claiming he was not the owner. (*Compare* R. 526 at 7:7-23, *with* R. 500, ¶¶ 10, 18.) Now that he argued he was the owner, Dr. Fetzer claimed that the Property had immense value to him, suggesting he could redact the defamatory statements and sell the redacted version. (R. 526 at 4:18-7:10.). Dr. Fetzer explained, "[f]or [Mr. Pozner] they have no value. For me, they would have great value." (R. 526 at 7:7-9.) Dr. Fetzer did not provide an expert appraisal to support this argument. (R. 514).

In his motion for reconsideration, Dr. Fetzer also raised two legal arguments he did not raise in his original opposition. (*Compare* R. 499, *with* R. 514.) Dr. Fetzer argued that the doctrine of judicial estoppel and the tort of abuse of process somehow prevented the circuit court from granting the turnover order. (R. 514.)

The circuit court held that it had already ordered the turnover of the property and all that was left was to place a value on it. (R. 526 at 20:6-26:9.) The circuit court gave Dr. Fetzer a process to provide an expert appraisal of the value, which Dr. Fetzer chose not to provide. Instead, he wanted the circuit court to appoint a receiver, "to undertake a bid if it were to be done in a proper way." (R. 526 at 12:18-20.) He did not provide any evidence to support his argument that a bid "done in a proper way" would result in a higher value of the Property than provided by the Court. (R. 526.)

In the end, the circuit court did not reconsider its turnover order. (R. 528.) The circuit court had given Mr. Pozner whatever interest Dr. Fetzer may have had in property Dr. Fetzer originally told the circuit court he did not own. (R. 510.) The circuit court accepted Mr. Pozner's generous $100,000 valuation of the Property after Dr. Fetzer failed to bring forth an appraisal as to the value of the Property. (R. 528.) Dr.

Fetzer brings this appeal, protesting the fact that he received a $100,000 credit to his judgment in exchange for the turnover of property he claimed was not his.

STANDARD OF REVIEW

This Court reviews a circuit court's decision on a motion to reconsider using the erroneous exercise of discretion standard of review. *Koepsell's Olde Popcorn Wagon's Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.,* 2004 WI App 129, ¶ 6, 275 Wis. 2d 397, 685 N.W.2d 853. Under this standard, this Court will affirm a discretionary decision as long as the circuit court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion. *Franke v. Franke,* 2004 WI 8, ¶ 54, 268 Wis. 2d 360, 674 N.W.2d 832.

ARGUMENT

The circuit court denied Dr. Fetzer's motion to reconsider because he did not present either newly discovered evidence or establish a manifest error of law or fact. Dr. Fetzer took a two-pronged approach in his motion to reconsider. First, he tried for a second bite at the apple at arguments he had already raised and lost. Second, he raised two, new legal arguments. None of these arguments have merit.

First, Dr. Fetzer argues that the law does not allow his intellectual property to be used to satisfy the judgment and that the circuit court should have appointed a receiver. He supports his argument with out-of-state and out-of-date authority. Wisconsin law allows any property, not subject to an exemption to be used to satisfy a judgment. Dr. Fetzer believes having a receiver would confirm his position that the Property has no value, but that is not a reason for appointing a receiver over which the circuit court has discretion to appoint. The circuit court gave Dr. Fetzer the chance to bring forward evidence to challenge the valuation of the Property. He chose not to do so and thus waived his ability to challenge the valuation of the Property.

Second, Dr. Fetzer cannot succeed on a motion for reconsideration by raising new legal arguments and thus his judicial estoppel and abuse of process arguments fail. Even ignoring the fact that he raised his judicial estoppel argument for the first time on a motion to reconsider, Dr. Fetzer has no factual support for this argument. Mr. Pozner did not base any argument on a finding that the Property had no value. Similarly, with respect to his abuse of process argument, the circuit court was not required to assume, as Dr. Fetzer did, that if Mr.

Pozner did not use the Property as Dr. Fetzer would like it to be used, that Mr. Pozner was misusing the process.

I. The Circuit Court Correctly Denied the Motion to Reconsider with Respect to the Legal Arguments Raised for the Second Time.

"To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. Dr. Fetzer needs to show more than disappointment. He has to show the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Koepsell's Olde Popcorn Wagons, Inc.,* 2004 WI App 129, ¶ 44 (*quoting Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).

The circuit court correctly denied the motion to reconsider with respect to the two legal arguments Dr. Fetzer had already argued and lost. First, Wisconsin law allows intellectual property to be used to satisfy a judgment. Second, the circuit court did not abuse its discretion in deciding not to appoint a receiver.

A. Wisconsin Law Allows Intellectual Property to Be Applied to a Judgment.

The circuit court did not abuse its discretion in denying the motion to reconsider because Wisconsin law allows Intellectual Property to be turned over to satisfy a money judgment.

Dr. Fetzer relies on out-of-date and out-of-state authority to support his argument that Intellectual Property cannot be used to satisfy a money judgment. (Appellant Brief at 15-25). Federal law controls the assignment of a copyright. 17 U.S.C. § 201(e). While the United States Supreme Court once held that intellectual property was exempt from execution in 1881, that case was based on then-existing law that has since changed. *Ager v. Murray,* 105 U.S. 126 (1881), *see also Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 996 (9th Cir. 2014) (describing changes to federal law after *Ager*). These days, Federal Rule of Civil Procedure 69 controls execution of federal judgments (and, of course, this case involves a state judgment) and requires the procedure on execution to, "accord with the procedure of the state where the court is located." *See, e.g., Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 996 (9th Cir. 2014).

Courts have allowed judgment creditors to execute on a judgment debtor's intellectual property to satisfy a judgment. *Id.; see also*

Skycam, LLC v. Bennett, 62 F. Supp. 3d 1261, 1264 (N.D. Okla. 2014). While there are some restrictions on the involuntary transfer of copyrights, those restrictions do not apply when, like here, "the exclusive rights under a copyright . . .[have] previously been transferred voluntarily by that individual author [owner]." 17 U.S.C. 201(e); *see also Hendricks & Lewis, PLLC,* 766 F.3d at 996. Dr. Fetzer has already voluntarily granted third-parties one or more of his exclusive copyrights to each of his books, *i.e.*, by granting his publishers others the right to print and sell the books. (R. 501 at 6.)

Under Wisconsin law, "[t]he court or judge may order any property of the judgment debtor or due to the judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment." Wis. Stat. § 816.08. Intellectual property is not exempt. The Wisconsin Legislature removed the only exemption for intellectual property (limited to an inventor's interest in a patented invention) in 1989. *See* 1989 Act 278; *see also* Wisconsin Legislative Counsel Staff, May 1, 1990 at 8-10. It did not add an exemption for copyrights or any other kinds of intellectual property.

And, in Wisconsin judgment creditors are allowed to execute on a judgment debtor's intangible property. After all, intangible property

includes, "certificates of stocks, bonds, promissory notes, copyrights, and franchises." *Matter of Estate of Larson*, 196 Wis. 2d 231, 235, 538 N.W.2d 802 (Ct. App. 1995) (quoting Black's Law Dictionary 1456 (6th Ed. 1990)). There is no explicit restriction in Wisconsin law for executing on a judgment debtor's intangible property. Thus, the Circuit Court did not abuse its discretion by determining that Dr. Fetzer's intellectual property could be used to partially satisfy the judgment.

B. The Circuit Court Did Not Need to Appoint a Receiver.

As a preliminary matter, even if the Circuit Court had exercised its discretion to appoint a receiver, there is no evidence that the result would be any different; Mr. Pozner would own the Property and Dr. Fetzer would have a credit against his judgment. Dr. Fetzer seems to assume that a public auction would result in no bids and allow him to keep the Property. In reality, Mr. Pozner would be able to credit bid his judgment at such an auction.

Dr. Fetzer argues that the circuit court was required to appoint a receiver. He believes the failure to do so represents a wholesale disregard of Wisconsin law. He is wrong. As Dr. Fetzer explained to the circuit court at the hearing on his motion to reconsider, "I know of no changes in the law or new evidence, but a clear error of law in my

judgment violating the prescriptions for how financial judgments are only settled by financial means." (R. 526 at 12: 14-18.) Dr. Fetzer explained that he believed that under the law, "a receiver ought to have been appointed [to] undertake a bid if it were to be done in a proper way." (R. 526 at 12:18-20.)

Dr. Fetzer ignores the fact that the decision to appoint a receiver is a discretionary one. He does not address any factors that weigh in favor of appointing a receiver. *See* Wis. Stat. § 813.16. He provides only one reason for appointing a receiver, because property is being converted to money. (App. Brief at 15). But, the law does not require a receiver to be appointed just because property is being converted to money.

Dr. Fetzer raises concerns about the value of the Property, but fail to provide evidence to support his concerns. (R. 508; R. 509 at 42:6-10; R. 514). Moreover, he received a $100,000 offset of his judgment in exchange for the Property. Rather than provide evidence, he told the circuit court, "for [Pozner] [it] ha[s] no value. For me, [the Property] would have great value, you Honor." (R. 526 at 7:7-8). Dr. Fetzer explained that he could redact the statements in the Property found to be defamatory and continue to sell the writings that made up the

Property to others. He did not explain why he had not done so in the years since the judgment was entered and he offered no evidence, other than his own guess, as to the value of the future sales he predicted.

In the end, Dr. Fetzer did not show that the circuit court disregarded or misapplied the applicable law and admittedly did not provide new evidence. Dr. Fetzer argued out-of-state and out-of-date law and failed to bring forth any evidence of the value of the Property. He complains that the Property has no value to Mr. Pozner, but that is factually unsupportable: Mr. Pozner provided Dr. Fetzer a $100,000 credit towards the judgment for the Property.

II. The Circuit Court Did Not Need to Consider New Legal Arguments In Denying The Motion To Reconsider.

Dr. Fetzer cannot receive a second bite at the apple by raising new legal arguments. In opposition to the motion for turnover, Dr. Fetzer argued that the Property was exempt from execution because it was intellectual property, that he did not own the Property, and that the Property had no monetary value. He did not raise either judicial estoppel or argue that Mr. Pozner was essentially committing the tort of abuse of process. The circuit court did not need to entertain either new legal argument in denying his motion for reconsideration. Even

ignoring the fact that both of these arguments were first raised on the motion to reconsider, both would fail.

Courts across the country have long held that, "a motion for reconsideration is an improper vehicle to introduce evidence previously available or to tender new legal theories." *Bally Export Corp. v. Balicar, Ltd.,* 804 F.2d 398, 404 (7th Cir. 1986). Here, Dr. Fetzer could have raised both judicial estoppel and the impact of the tort of abuse of process when the circuit court was considering the turnover motion. He chose not to do so and cannot succeed on a motion to reconsider based on arguments he did not bring to the circuit court originally.

Moreover, even if Dr. Fetzer had raised these arguments, the circuit court would have had good reason to reject them. Dr. Fetzer bases his judicial estoppel argument on the assumption that Mr. Pozner alleged—and proved—that the Property was not worth anything. Dr. Fetzer offers not one cite to the voluminous record in this litigation to support this argument. He cannot.

Nor would Dr. Fetzer have succeeded on his abuse of process claim. Dr. Fetzer assumes, without support, that the only proper use of a process for taking the Property is for the new owner to use the Property in the way Dr. Fetzer would like the Property to be used. He

has no legal or factual support for his position that Mr. Pozner misused the process by doing whatever Mr. Pozner wants to do (or not to do) with the Property.

CONCLUSION

This Court should uphold the circuit court's decision not to reconsider the turnover order.

January 26, 2023 Respectfully submitted,

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief produced with a proportional serif font. The length of this brief, including footnotes, is 2,756 words.

January 26, 2023 Quarles & Brady

Electronically signed by Emily M. Feinstein

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

January 26, 2023 Quarles & Brady

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CERTIFICATION OF MAILING

I hereby certify that on this 26th day of JANUARY, 2023, I caused this Brief to be sent via U.S. Mail to:

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