COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-0712
02-2723

Cir. Ct. No. 99-PA-117

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

IN RE THE PATERNITY OF ALYSSA D.E.:

MICHAEL S. E.,

APPELLANT,

V.

SHAWN B. S.,

RESPONDENT.

APPEALS from orders of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Michael S.E. appeals pro se[1] from three orders disposing of motions to have Shawn B.S. found in contempt and denying him costs. He argues that the circuit court judge should have recused herself, that he proved Shawn had violated a court order, that he is entitled to costs for any finding of contempt, and that because he is indigent, he could not be required to pay any portion of guardian ad litem (GAL) fees. We reject his claims and affirm the orders of the circuit court.

¶2 This case has a long history. Michael and Shawn have a child together. The child resides with Shawn. Michael is incarcerated. A November 8, 2001 order required Shawn to provide Michael with school and medical reports, drawings by the child on a quarterly basis, a letter verifying receipt of any gift to the child within one week of receiving the gift, and a picture of the child ten days in advance of any scheduled visit with Michael.

¶3 On November 12, 2001, Michael filed a motion alleging that Shawn was in contempt of the requirement that she provide him with medical records within ten days of the circuit court's October 19, 2001 oral ruling. A hearing was set but postponed for reasons not relevant to this appeal. As a result of judicial rotation and a substitution request, the case was eventually assigned to Waukesha County Circuit Court Judge Kathryn Foster.

¶4 Michael moved Judge Foster to recuse herself on the grounds that she was biased against him as a result of rulings and appeals taken in three small

[1] Michael was also pro se for all proceedings in the circuit court. Shawn B.S. is also pro se.

claims actions against Shawn over which Judge Foster presided. The request for recusal was denied by Judge Foster on February 14, 2002.

¶5 A hearing was held on Michael's November 2001 contempt motion on March 5, 2002. The resulting order entered on March 8, 2002, concluded that Shawn was not in contempt because there was no requirement that medical records be provided within ten days and the medical information was in fact provided to Michael. Michael filed a notice of appeal on March 8, 2002.

¶6 While the November 2001 contempt motion was pending, on February 11, 2002, Michael filed another contempt motion which he requested be set for hearing before Waukesha County Circuit Court Judge Robert Mawdsley. The motion alleged that Shawn had failed to provide Michael with quarterly reports about the child, that Shawn failed to acknowledge receipt of birthday gifts presented to the child and to purchase a hamster as a gift for the child, that Shawn interfered in a phone conversation with the child, that Shawn failed to provide the required December 26, 2001 visit and instead scheduled the visit for December 29, 2001, and that a photo of the child was not timely supplied to Michael before a February 16, 2002 visit. The motion was not docketed because Judge Mawdsley was not assigned to the case as a result of Michael's request for substitution after judicial rotation. On April 2, 2002, Judge Foster entered an order denying the motion for contempt without a hearing, concluding that the motion was a repeat of allegations ruled on by the court at the March 5, 2002 hearing and that even if the

allegations were true, they did not form a basis for a contempt finding.[2] Michael filed a notice of appeal from this order on May 6, 2002.[3]

¶7 At the end of April 2002, Michael filed a new contempt motion alleging that Shawn had failed to verify receipt of Easter gifts sent to the child in March 2002. A hearing was set for May 14, 2002. At that hearing Shawn admitted that she had not sent a letter verifying receipt of the gifts and had simply forgotten to do so because of a new baby in the household. The circuit court ruled that Shawn had purged herself of contempt with respect to the verification.[4]

¶8 After the May 14, 2002 hearing, Michael filed a motion for "out-of-pocket" costs related to the filing of contempt motions in March and April 2002.

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[2] At a hearing held on May 14, 2002, the circuit court acknowledged that it had overlooked the requirement in the October 19, 2001 ruling that a photo be supplied ten days before any visit. On reconsideration, the court made an oral ruling that Shawn was in contempt for not timely supplying the photograph before the visit but that she had purged the contempt by supplying the photo after the visit.

[3] Michael's notice of appeal incorrectly states that the appeal is taken from a judgment entered on March 15, 2002. The defect as to the date of entry is not fatal since the notice of appeal identifies that he appeals from the order refusing to schedule and hear his contempt motion. *See* ***Rhyner v. Sauk County***, 118 Wis. 2d 324, 326, 348 N.W.2d 588 (Ct. App. 1984). Because of the proximity in filing and reference to the earlier ruling, the notice of appeal was docketed as an additional notice of appeal in the already docketed appeal (No. 02-0712).

[4] No written order was entered as a result of this hearing and the rulings made at that hearing are not reviewable in this appeal. An oral ruling must be reduced to writing for appellate jurisdiction to exist. ***Ramsthal Adver. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979). The ruling was final as to those matters then in litigation and the subsequent appeal does not bring the ruling before this court. *Cf.* ***State v. Drake***, 184 Wis. 2d 396, 400, 515 N.W.2d 923 (Ct. App. 1994). *See* WIS. STAT. § 809.10(4) (2001-02) ("[a]n appeal from a final judgment or final order brings before the court all prior *nonfinal* judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceedings not previously appealed and ruled upon"). (Emphasis added.) All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The circuit court denied his motion by an order entered July 3, 2002. Michael moved for reconsideration of the denial.

¶9 By an affidavit dated June 3, 2002, Michael filed yet another motion for contempt. A letter and affidavit dated June 6, 2002, set forth additional conduct he believed to violate court orders. An order to show cause was issued reflecting that a hearing would be held on October 8, 2002. In August 2002, Michael brought a motion to vacate an earlier order requiring him to pay one-half of the GAL fees.

¶10 At the October 8, 2002 hearing, Michael complained that Shawn was continually late for visits between him and the child at the prison and this resulted in insufficient visiting time. He questioned why Shawn would have the child wear an outfit that she knew would not clear the metal detectors, resulting in a late arrival (because new clothes had to be obtained before the prison would allow the child in). He also questioned the appropriateness of the outfit for the time of year. He generally accused Shawn of "playing games" regarding visitation and acting like a child during the visits. He asked the court whether some other person could bring the child for visits since he did not want Shawn present. He also complained that certain gifts had not been acknowledged and that the child called him "Mike" rather than "Dad."

¶11 The court found Michael's complaints meritless. Although the court found that timely acknowledgment of Easter gifts had not been made, it found that the situation was rectified and no actionable contempt existed. It denied Michael's motion to vacate the requirement that he pay one-half of the GAL fees. Concluding that Michael had not demonstrated that he incurred items of statutory costs, it denied his motion for reconsideration of costs. Michael filed a notice of

appeal on October 14, 2002, to effectuate an appeal from the order entered as a result of the hearing.[5]

¶12 We first address Michael's claim that Judge Foster should have recused herself from this case because of her previous rulings against Michael in the small claims actions. Largely the claim is inadequately briefed and consists of nothing more than Michael's complaint that Judge Foster ignored various motions he filed and allowed Shawn to communicate ex parte with the court. We will not address arguments inadequately briefed and which lack citation to proper legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶13 It is sufficient to note that there is a presumption that a judge is free of bias and prejudice. ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is prejudiced or biased. ***Id.*** at 415. The question of judicial bias has a subjective and objective component.[6] ***Id.*** The subjective component is based on the judge's own determination that he or she can act impartially. ***Id.*** We presume that Judge Foster believed she could act impartially because she concluded there was no legal basis for recusal. *See* ***id.*** Under the objective test, Michael must show by

[5] The order was not entered until December 6, 2002. However, because the record included the order, the notice of appeal was deemed filed on the date of entry. WIS. STAT. § 808.04(8).

[6] WISCONSIN STAT. § 757.19(2) provides seven situations where it is mandatory for judges to disqualify themselves. Six are fact specific situations, the existence of which can be determined objectively, and one is a general subjective situation which is based solely on the judge's state of mind. ***State v. Harrell***, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996). Michael's claim is that Judge Foster was subjectively biased.

objective facts that the "trial judge in fact treated him unfairly." *See* ***id.*** at 416. Michael has not met his burden of proof.

¶14 Early in the litigation Judge Foster acknowledged her familiarity with Michael's relentless and harassing litigation tactics as demonstrated in the small claims actions. Yet she still found that Michael pursued his earlier contempt motion with the intention of getting appropriate information from Shawn and not with the intent of harassment. It was not until Michael continued to file contempt motions on a multitude of perceived slights that Judge Foster found his conduct to be a continuation of a pattern of abuse of process and intended harassment of Shawn. Judge Foster demonstrated fairness in each hearing. The conduct Michael complains of with respect to refusing to schedule hearings or resolving disputes by writings was within the court's inherent discretion to control disposition of causes on its docket with economy of time and effort. *See* ***Latham v. Casey & King Corp.***, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964). This is particularly true when dealing with two pro se litigants each with a limited ability to appear before the court.[7] While Michael contends that Judge Foster used each contempt proceeding to reduce his contact with the child, it was within the court's discretion to remedy what Michael demonstrated to be an inability to work within the parameters of the original order.[8] *Cf.* ***Wiederholt v. Fischer***, 169 Wis. 2d 524,

[7] Michael's incarceration made it more difficult for court appearances, even telephonically. The record also demonstrates that Shawn's pregnancy and need to care for young children made repeated court appearances a hardship.

[8] At the hearing on May 14, 2002, the circuit court expressed a desire to promote the best interests of the child by clarifying previous orders with respect to timing to prevent continuous litigation. At the hearing on October 8, 2002, the court spoke to the need to "work on fine tuning the order."

535, 485 N.W.2d 442 (Ct. App. 1992). We conclude there was no basis for Judge Foster to recuse herself.

¶15 Michael argues that Shawn should have been found in contempt for numerous violations of the court's order requiring her to provide him information, notices and pictures and regarding visitation. In a remedial contempt proceeding, the movant must make a prima facie showing of a violation of a court order. ***Noack v. Noack***, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989). It is then the alleged contemnor's burden to demonstrate that his or her conduct was not contemptuous. ***Id.*** We review the circuit court's use of its contempt power to determine if it properly exercised its discretion. ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996). The circuit court's findings of fact are conclusive unless clearly erroneous. ***Id.***

¶16 Contempt requires intentional disobedience of a court order. *See* WIS. STAT. § 785.01(1)(b). "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." ***Shepard v. Outagamie County Circuit Court***, 189 Wis. 2d 279, 287, 525 N.W.2d 764 (Ct. App. 1994) (emphasis omitted). Thus, even though Shawn may have acknowledged on some occasions that she did not comply with the requirements of the court's order, a finding of contempt is not necessarily mandated. "'The question of whether or not the act is contumacious is one which the trial court has far better opportunity to determine than this court.' ***Staples v. Staples***, 87 Wis. 592, 596, 58 N.W. 1036 (1894). This is old but still valid law." ***Schroeder v. Schroeder***, 100 Wis. 2d 625, 640, 302 N.W.2d 475 (1981).

¶17 Here the circuit court found that Shawn had reasonable excuses for what Michael alleged to be contemptuous conduct with respect to timely notice that certain gifts had been received, required photos and drawings, and even the timely arrival for visitation. The court's findings are not clearly erroneous and are based on its credibility determination, a matter wholly within the province of the circuit court acting as the trier of fact. *See* ***Wiederholt***, 169 Wis. 2d at 533. We are not persuaded that the circuit court erroneously exercised its discretion in refusing to find Shawn in contempt for every slight infraction Michael perceived. Simply put, the circuit court was not required to become a sideline coach in Michael's harassment game against Shawn.[9] *See* ***Weichman v. Weichman***, 50 Wis. 2d 731, 736, 184 N.W.2d 882 (1971) (recognizing sad results when parents "allow the desire to nurture their personal animosities to overshadow the welfare of the child" such that the "child seems to be more of a football in the game of life than a player").

¶18 Michael claims that he was entitled to costs for the motions which resulted in Shawn being found in contempt. We recognize that WIS. STAT. § 785.04(1)(a) authorizes the circuit court to award attorney fees and other litigation costs as part of a sanction imposed against a party found in contempt. ***Town of Seymour v. City of Eau Claire***, 112 Wis. 2d 313, 320, 332 N.W.2d 821 (Ct. App. 1983). However, the matter is committed to the circuit court's discretion in formulating the contempt remedy. (The same is true under WIS. STAT. § 767.262(1)(a), which Michael cites as authorizing an award of costs.)

[9] In ***E[.] v. S[.]***, Nos. 02-0081, 02-0082 and 02-0083, unpublished slip op. at ¶22 (WI App June 11, 2003), this court concluded that the record in those actions supported the circuit court's determination that Michael's litigation against Shawn is caused by spite and fueled by lies.

¶19 Although the circuit court recognized on two occasions that Shawn was "in contempt" for not strictly complying with the prior court orders, it found that the contempt was purged and no sanction was imposed. There was no sanction to add costs to. Further, the circuit court only had authority to award allowable statutory costs under WIS. STAT. § 814.04(2) and such costs are not synonymous with the expense of litigation. ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis. 2d 138, 147, 549 N.W.2d 714 (1996). Photocopy expenses cannot be taxed against a party pursuant to the costs statute. ***Id.*** at 148. As the circuit court noted, service and motion fees were waived.[10] With the exception of postage, the circuit court correctly determined that Michael had not incurred any allowable costs. At best, Michael could only have recovered postage, a de minimus sum which does not require further discussion. *See* ***Preiss v. Preiss***, 2000 WI App 185, ¶23, 238 Wis. 2d 368, 617 N.W.2d 514 (court need not address argument in detail which results in a de minimus change even if error found).

¶20 We turn to the final issue in the appeal—whether the circuit court erred in denying Michael's motion to vacate the requirement that he pay one-half of the GAL fees. Citing ***Olmsted v. Circuit Court for Dane County***, 2000 WI App 261, 240 Wis. 2d 197, 622 N.W.2d 29, Michael argues that as an indigent litigant he cannot be required to pay GAL fees.

¶21 Michael was first ordered to pay one-half of the GAL fees at the hearing held in February 2001, as embodied by an order entered on May 10, 2001.

[10] Michael attempted to recover the $150 filing fee for the appeal taken from the April 2, 2002 order which was "corrected" on reconsideration at the May 14, 2002 hearing. Michael did not dismiss his appeal. Whether the filing fee can be taxed as a cost is determined by WIS. STAT. RULE 809.25(1)(a), when the appeal is terminated.

Michael did not object or suggest to the court that he was indigent. He waived his right to challenge the order. *See* ***id.***, ¶12 (objection should have been made). Also, that Michael was found to be indigent for purposes of waiver of filing, service, and transcript fees does not mean he was indigent for the purpose of contributing toward GAL fees. That finding does not necessarily govern his obligation to reimburse the county for GAL fees. Courts make determinations of indigency for various purposes. The determination in each instance depends on the specific facts presented to the decision maker. While Michael applied for a waiver of filing and other court fees under WIS. STAT. § 814.25(1), that section does not relate to the payment of GAL fees. *See* ***Olmsted***, 240 Wis. 2d 197, ¶3 n.3. Michael never asked the court to make an indigency determination with respect to his obligation to pay GAL fees.

¶22 Michael's claim is based entirely on a misreading of ***Olmsted***. ***Olmsted*** holds that WIS. STAT. § 767.045(6) does not authorize the circuit court to require an indigent party to pay GAL fees "at the inception or during the pendency of an action." ***Olmsted***, 240 Wis. 2d 197, ¶10. Michael was not required to pay GAL fees during the action. ***Olmsted*** recognizes that under § 767.045(6), if the county is ordered to pay the GAL fees, there may be an order or judgment for reimbursement by the parties of the fees paid by the county. That is exactly what happened here. The May 10, 2001 order required the GAL fees to be advanced by the county with each party paying one-half commensurate with his or her ability to pay at some future time. The order was in compliance with § 767.045(6) and there was no reason for the circuit court to vacate it.

By the Court.—Orders affirmed.

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