COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0752 **Cir. Ct. No. 98FA000945**

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

IN RE THE FINDING OF CONTEMPT IN RE THE MARRIAGE OF JODI LYNN EHRKE V. DUWAYNE THOMAS EHRKE:

GARY A. MILLER,

APPELLANT,

V.

JODI LYNN EHRKE,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Gary A. Miller appeals an order of the circuit court finding him in contempt and ordering him to pay $7,329 plus 5% interest to Jodi Lynn Ehrke, and reasonable attorneys' fees in the amount of $7,434 to Ron Niesen and Walter Stewart.

¶2 On appeal, Miller claims that he did not disobey an order because the court's oral statement about paying Jodi out of the trust account was not contained in the judgment of divorce. Miller also argues that the circuit court misused its discretion when awarding remedial damages by not properly taking into account DuWayne's bankruptcy proceedings and Jodi's failure to take steps to mitigate her damages. Finally, Miller contends that the attorneys' fees portion of the damage award was error because the fees were unreasonable. We disagree with each of these arguments and affirm.

Background

¶3 Appellant, Attorney Gary A. Miller, represented DuWayne Ehrke in a contested divorce action. Jodi Ehrke, the respondent in this action, was the petitioner in the divorce proceedings. The divorce action was heard on July 11 and July 18, 2000, before Judge Gerald Nichol. One of the issues before the court was the question of the division of a cash settlement, held by Miller in a trust account, that DuWayne received from a personal injury suit. At the July 18 hearing, the circuit court found that Jodi was entitled to $7,329 of the cash settlement and, in reference to that amount, the court stated: "So I'm saying [Jodi] gets what's in his trust account, ... and then I'm awarding out of your trust account

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the 73 ….” Miller responded: “Okay. All right.” Consistent with this oral directive, the judgment of divorce awarded Jodi, in part, a cash settlement payment of $7,329.

¶4 Attorney Miller, however, did not give Jodi any money from the trust account. Instead, Miller paid himself $2,400 and gave the remainder in the account, $4,929, to DuWayne. Jodi moved for a remedial contempt order against Attorney Miller. The circuit court found Miller in contempt, concluding that Miller had violated SCR 20:1.15 and had acted contrary to the court’s direction. The court ordered Miller to pay Jodi the $7,329 plus interest, and to reimburse her for her reasonable attorneys’ fees and costs relating to the litigation of the contempt issue. After a subsequent hearing on attorney fees, the court reaffirmed its prior decision and ordered Miller to pay Jodi $7,329 plus 5% interest from March 30, 2001, and further ordered Miller to pay attorneys’ fees to Ron Niesen in the amount of $6,244 and to Walter Stewart in the amount of $1,190.

Discussion

¶5 We review a circuit court’s use of its contempt power to determine whether the court properly exercised its discretion. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). “Remedial contempt seeks to procure present and future compliance with court orders, but the sanction must be purgeable through compliance with the order from which the contempt arose.” ***Id.*** at 309. The mere failure to comply with a court order is an insufficient basis for a contempt finding. *See* ***id.*** The party must have been able to comply with the order and his or her refusal must be willful and intentional. *See* ***id.*** at 309-10. It is within the circuit court’s discretion to decide what type of remedial sanctions to impose for contempt. ***Id***. at 308 (citing WIS. STAT. §§ 785.02 and 785.04(1)). A

decision to award attorney fees under § 785.04 is a discretionary act. ***Benn***, 230 Wis. 2d at 308.

¶6 Miller does not contend that the court did not have the power to order him to pay money to Jodi from the trust account. Rather, Miller claims that he was only obligated to comply with the written judgment of divorce because a written final order supersedes prior orders. Miller relies on ***Gordon v. Gordon***, 270 Wis. 332, 348, 71 N.W.2d 386 (1955), for the proposition that a written judgment supersedes other decisions and holdings in the litigation. ***Gordon***, however, is inapposite. In ***Gordon***, the court determined that a written judgment superseded an earlier memorandum order because a clear written judgment supersedes an inconsistent statement in an earlier memorandum. ***Id.*** There is no inconsistency in this case.

¶7 Miller's reliance on ***Jackson v. Gray***, 212 Wis. 2d 436, 569 N.W.2d 467 (Ct. App. 1997), is similarly misplaced. In ***Jackson***, we addressed the situation where there is a clear written judgment and a silent or ambiguous earlier oral pronouncement. ***Id.*** at 441-44. Once again, that is not the situation here.

¶8 The language of the judgment of divorce does not conflict with the prior oral order of the court. Nor was there any need for the drafter of the judgment to be specific as to the source of the $7,329. Our review of the record indicates that the court clearly directed Miller to pay Jodi out of the trust account fund. At the July 18, 2000, hearing, the circuit court told Miller: "I'm saying she gets what's in his trust account, … I'm awarding out of your trust account the 73 …." In context, the term "73" was a plain reference to the $7,329 owed to Jodi and just as plainly was a directive to Attorney Miller that he pay the amount out of the trust account. Indeed, we find no place in Miller's appellate brief where he

argues to the contrary and, although he testified below, Miller points to no place in the record where he asserted he did not understand the court's meaning at the July 18, 2000, hearing.

¶9 Accordingly, Attorney Miller entirely fails to support his main argument, namely, that he was not required to obey the oral directive of the circuit court. He provides not a single source of authority for the proposition that a written judgment supersedes a prior consistent and more specific oral court order.

¶10 Miller's brief is not entirely clear, but to the extent he may be arguing that the bankruptcy proceeding is relevant to the question whether he was properly found in contempt, we disagree. The order which Miller disobeyed was the July 18, 2000, oral order to pay Jodi $7,329 out of trust account funds. Miller did not give Jodi $7,329 from the trust account or from any other source. Instead, on March 30, 2001, Miller took the $7,329 that was left in the trust account and dispersed $4,929 to DuWayne and $2,400 to himself. We fail to see how a bankruptcy proceeding that commenced in May of 2001, ten months after the court's oral order, affected Miller's failure to comply with the court's directive.

¶11 Miller next argues that the circuit court misused its discretion when ordering him to pay Jodi $7,329 by failing to properly consider Jodi's failure to mitigate her damages. In effect, Miller seems to be arguing that Jodi might have recovered some of this money if she had engaged a lawyer (or perhaps, acted pro se) and taken advantage of various opportunities available to her in DuWayne's bankruptcy proceeding. We disagree. An injured party has a duty to minimize or avoid damages, but not to the extent that "the effort, risk, sacrifice or expense which the injured person must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline to incur it."

Kuhlman, Inc. v. G. Heileman Brewing Co., 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978); *see also* ***Langreck v. Wisconsin Lawyers Mut. Ins. Co.,*** 226 Wis. 2d 520, 594 N.W.2d 818 (Ct. App. 1999) (not reasonable to require a plaintiff seeking damages from an attorney, whose malpractice caused the foreclosure of the plaintiff's home, to attempt to mitigate the damages by contesting the foreclosure against the advice of a second attorney).

¶12 Apart from Miller's bankruptcy arguments, he argues that the circuit court misused its discretion when awarding damages by not acknowledging that Jodi received and kept tax refunds that had been awarded to DuWayne. The full extent of this argument in DuWayne's brief-in-chief is as follows:

> At the hearing on Ms. Ehrke's motion, evidence was presented by Attorney Miller that the tax refunds awarded to Mr. Ehrke were paid over to Ms. Ehrke. Although she was in the courtroom and present as a party, she failed to testify or to in any way rebut that evidence. Unfortunately there are only estimates as to how much she received and kept. The reasonable estimates range from about $3,800.00 to about $5,700.00. (A. Ap. pp. 99-100) If she were to be paid an additional $7,329.00 she would receive a windfall certainly not contemplated in the Judgment of Divorce or permissible within the trial court's contempt powers. Wis. Stat. § 785.04(1)(a) (2001-02), State ex rel. N.A., supra. The trial court referred to the damages awarded as a penalty. (A. Ap. p. 64) Ms. Ehrke is simply not entitled to recover more than she lost. Novo Industrial Corp., supra, Foregger v. Foregger, 40 Wis. 2d 632, 164 N.W.2d 226 (1969), State ex rel. N.A., supra.

¶13 This argument fails on several levels. We will discuss two. First, it lacks supporting record cites. The only cite supporting the alleged set-off amount is a letter from DuWayne's attorney, Andrew Bryant. This letter, however, does not support the assertion that Jodi received "$3,800.00 to about $5,700.00" in tax refund money that should have gone to DuWayne. Second, the argument fails to provide context. Miller does not explain the divorce judgment or how the record

clearly shows Jodi received more than she was entitled to under the divorce judgment. For that matter, we cannot be sure that Miller is saying that Jodi received more than she should have under the divorce judgment. This is precisely the sort of poorly developed argument which courts have routinely and justly rejected. *See* ***United States v. Dunkel***, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs, hunting for truffles buried in briefs.").

¶14 Miller next contends that the circuit court erred when it calculated the attorneys' fees. In this respect, the only legal argument Miller makes has no merit. Miller contends, relying on ***Pierce v. Norwick***, 202 Wis. 2d 587, 550 N.W.2d 451 (Ct. App. 1996), that "[t]estimony or evidence is required … to establish a record showing the client's agreement …." Miller later says that an "examination of the record and the affidavits of Attorney[s] Niesen and Stewart will demonstrate a lack of any fee agreement …." However, we agree with Jodi that nothing in ***Pierce*** requires specific testimony about a fee agreement.

¶15 Miller argues that the circuit court misused its discretion when awarding attorneys' fees. However, Miller has failed to demonstrate any misuse of discretion. Attorney Miller essentially presents the generalized argument that Attorneys Niesen and Stewart billed too much. "[A] circuit court is permitted to impose the payment of money sufficient to compensate a party for the loss suffered as a result of the contempt of court, as a sanction." ***Benn***, 230 Wis. 2d at 315. Here, a hearing was held on the matter, during which the court clearly exercised its discretion by looking over the billing statements, considering the particular circumstances, and specifically addressing Miller's concerns. We agree with Jodi that the court "carefully and rationally determined what the reasonable

attorney's fees should be" and "considered all of the appropriate factors in making its ruling"; thus, discretion was properly exercised.

¶16 Jodi requests that we impose additional sanctions under WIS. STAT. § 785.04 and award her attorney's fees to cover the cost of this appeal. We deny this request. Miller's appeal is weak to be sure. But in order to award attorney's fees under § 785.04, something rarely done by the court of appeals, we must be confident that each and every argument made on appeal is frivolous. Simply stated, we lack that confidence. In particular, we cannot say with assurance that Miller's argument that the circuit court misused its discretion by failing to consider Jodi's decision not to attempt mitigation in the bankruptcy proceeding is frivolous.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.