COURT OF APPEALS
DECISION
DATED AND FILED

September 14 , 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 04-0346-FT
04-0347-FT

Cir. Ct. Nos. 00FA000131
00FA000131

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

NO. 04-0346-FT

IN RE THE MARRIAGE OF:

RENE FAYE ZASTROW,

PETITIONER-APPELLANT,

V.

NEAL ALAN ZASTROW,

RESPONDENT-RESPONDENT.

NO. 04-0347-FT

IN THE MATTER OF COSTS AND FEES IN RENE F. ZASTROW V. NEAL A. ZASTROW:

KEITH K. KOST,

APPELLANT,

V.

NEAL ALAN ZASTROW,

RESPONDENT.

APPEALS from orders of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed; motion denied.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Rene Zastrow and her attorney, Keith Kost, appeal orders entered against them in this divorce action between Rene and her former husband Neal.[1] Rene was held in contempt for failing to pay a debt the divorce judgment assigned to her and was ordered to pay the debt. Kost was sanctioned for failing to appear at a scheduled hearing and for maintaining on Rene's behalf a frivolous defense to the contempt charge. Neal has filed a motion for costs for a frivolous appeal. We conclude that the contempt order against Rene and the sanctions against Kost were appropriate and affirm the orders. However, the appeal has at least colorable merit, so we deny the motion for costs on appeal.

Background

¶2 Underlying this appeal is the divorce between Rene and Neal. As part of the divorce decree, Rene was to pay $7,000 to Neal's sister-in-law Evelyn

[1] These are expedited appeals under WIS. STAT. RULE 809.17. By court order of August 9, 2004, these appeals were consolidated. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

when the marital home was sold. The home was sold but Rene did not pay Evelyn. Neal filed a contempt motion against Rene.

¶3 The motion was scheduled to be heard in October 2003, but rescheduled at Kost's request for November 7 at 3 p.m. At 2:06 p.m. that day, Kost's secretary called the court and informed it that Kost was still in Forest County, where a three-day trial had gone into its fourth day. Kost was waiting for the jury to return a verdict. The secretary then called Neal's attorney, Kirk Reese.

¶4 The court convened as scheduled, noting that it had not received Kost's message until about 2:30 p.m. because it was hearing another matter. It noted that Neal, his attorney, and a witness under subpoena had appeared. It observed that the date and time had been scheduled at Kost's request and that the hearing could not proceed because Rene had not appeared in person or by Kost. The court ordered that Kost would pay the costs and fees associated with convening the hearing.

¶5 The hearing was rescheduled for November 25. Rene challenged Neal's standing to enforce the debt. The court determined that Neal's standing was sufficient for him to seek enforcement. At one point during Rene's testimony, she stated that she never denied that she owed the debt to Evelyn. Shortly thereafter, the court determined that her defense was frivolous because she really had no defense. It ordered that Rene pay Evelyn within twenty days of the hearing, and ordered Kost to pay approximately $275 in costs for the hearing. Rene and Kost appeal.

Discussion

I. Whether Neal Has Standing

¶6 On appeal, Rene renews the argument she made in the circuit court: Neal has no standing to enforce the debt assigned to Rene in the divorce decree. If we agree, we would render the contempt finding baseless. Whether a party has standing presents us with a question of law that we review de novo. ***Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland***, 2002 WI App 301, ¶13, 259 Wis. 2d 107, 655 N.W.2d 189.

¶7 Because we are dealing with enforcement of a property division, the appropriate contempt statute is WIS. STAT. § 767.305, which provides in relevant part:

> In all cases where a party has incurred a financial obligation under … [WIS. STAT. §] 767.255 [property division], and has failed within a reasonable time or as ordered by the court to satisfy such obligation … the court may on its own initiative, and shall on the application of the *receiving party*, issue an order requiring the payer to show cause … why he or she should not be punished for such misconduct as provided in ch. 785. (Emphasis added.)

¶8 Rene contends that Evelyn, not Neal, is the "receiving party" under the statute, so only Evelyn could seek to enforce the debt. When interpreting a statute, we must first examine its plain language. ***State v. Lombard***, 2004 WI 95, ¶19, 684 N.W.2d 103. If the language is clear and unambiguous, we apply that language to the present case. ***Id.*** A statute is ambiguous when reasonable persons can interpret it in multiple ways. ***Id.***

¶9 "Receiving party" is not defined in the statute. Under Rene's construction, the receiving party is the party to whom the debt is owed. This

definition, if accepted, would provide a defense to the contempt motion by stripping Neal of standing.

¶10 In the context of property division and divorce, however, the spouse to whom the debt is *not* allocated might also be considered a receiving party as the opposite of the obligated party. In that sense, WIS. STAT. § 767.305 is ambiguous.

¶11 Unlike the situation where there is a third person as a beneficiary, the non-obligated spouse is, in the language of WIS. STAT. § 767.305, a "party" to the underlying action. Further, the third person to whom the debt is owed would have standing to initiate his or her own civil suit even without § 767.305. Moreover, the non-obligated spouse receives the benefit of being relieved of the debt, provided the obligated spouse actually pays the debt. To prevent being pursued by creditors or otherwise held liable, particularly in the event of an acrimonious divorce, it is reasonable that the non-obligated spouse should be considered a "receiving party" with the ability to seek enforcement of the obligation through contempt proceedings. We therefore conclude the non-obligated spouse may be considered a "receiving party" under the statute for purposes of bringing a contempt motion and thus, Neal has standing.

II. Whether Rene is in Contempt for Failing to Pay an "Invalid" Debt

¶12 Rene complains that the debt to Evelyn is invalid and unenforceable because at the time of the divorce judgment, the statute of limitations had expired. She argues the court erred because it failed to consider this "defense" at her contempt hearing.

¶13 We are troubled by Rene's representation of the divorce judgment. In her brief, she states: "This is simply a case where the judgment addressed

potential debts and how they should be paid if due." She argues the judgment only attributes debts; it does not compel their payment. She further argues she did not promise to pay this obligation.

¶14 However, the property division agreement, incorporated into the divorce judgment, states in relevant part:

> each party at closing [of the sale of the marital home] *must pay in full* from his or her own one-half share the following *debts each has agreed herein to be solely responsible and liable for* the payment thereof:
>
> PETITIONER [Rene]:
>
> ….
>
> To Evelyn Zastrow- the amount of $7,000. (Emphasis added.)

¶15 The stipulation and judgment clearly state that Rene *must* pay the $7,000 debt to Evelyn upon sale of the marital home and that Rene *agreed* to do so. Contrary to Rene's interpretation, this divorce judgment was not a suggestion on how to divide the marital estate. It is a lawful court order to which she stipulated and with which she must comply.

¶16 The court did not err by failing to consider the validity of the debt as a defense to the contempt motion because Rene is attempting to do indirectly what she failed to do directly—challenge the inclusion of the debt in the divorce decree. If she believed the debt was invalid, she should not have agreed to incorporating it into the property division, or at least have made a record of her objection to preserve the issue for direct appeal. Without the direct appeal, we may presume the underlying judgment is valid. *See* ***Wisconsin Employment Rel. Bd. v. Mews Ready Mix Corp.***, 29 Wis. 2d 44, 48-49, 138 N.W.2d 147 (1965), *overruled on*

other grounds by ***State v. King***, 82 Wis. 2d 124, 262 N.W.2d 80 (1978). In other words, we may presume here that the judgment is based on allocation of a valid debt.

¶17 Even without ***Mews*** and with a purportedly expired statute of limitations,[2] Rene nonetheless agreed to be responsible for the debt, effectively reaffirming it. Indeed, at the contempt hearing, she volunteered the following information to the court:

> I never ever said I wouldn't pay … the only one that asked me for the money was Neal ….
>
> ….
>
> I never said I wouldn't, and I just wanted to make it clear that I'm not arguing about paying Evelyn the 7,000 because I know I signed it already.

¶18 For this reason, the court concluded Rene failed to present a defense and was effectively in contempt. We agree. Rene reaffirmed the debt by agreeing to the property division, then failed to make the payment in accord with the divorce decree. The court properly found her in contempt and ordered her to pay the debt.

III. Whether the Court Properly Sanctioned Kost for Nonappearance

¶19 The court ordered $535 in sanctions against Kost, whose secretary called less than an hour before the scheduled start of the November 7 contempt hearing to inform the court that Kost was in another county awaiting a jury

[2] The parties dispute the applicable statute of limitations. For purposes of our discussion we will assume that, whichever applies, it has expired.

verdict. Kost argues the sanctions are "unjust, unreasonable, and an erroneous exercise of discretion."

¶20 We will sustain a circuit court's orders imposing sanctions unless the court erroneously exercised its discretion. ***Anderson v. Circuit Ct. for Milwaukee Cty.***, 219 Wis. 2d 1, 9, 578 N.W.2d 633 (1998). A discretionary determination will not be overturned if the court examined all the relevant facts, applied the proper legal standard, and used a demonstrated and rational process to arrive at a conclusion a reasonable judge could reach. ***Id.*** The court should make a record of the reasoning for imposing sanctions, including the disruptive impact of the behavior on the court calendar, the reasonableness of the attorney's explanation, and the severity of the sanctions. ***Id.*** at 10.

¶21 The contempt hearing was scheduled for November 7 at 3 p.m. The court first read into the record a letter it had sent to Kost and Neal's attorney, Reese. This letter noted that the original hearing date was October 6, but that Kost had called the court to inform it of a conflict with that date. Kost specifically asked for the meeting to be rescheduled for the November date and time. After reading the letter, the court noted that it had received a message around 2:30 p.m. on November 7 that Kost was still in another county and would not be able to make the hearing.

¶22 The court stated that Kost had made a "belated request for rescheduling, and it is especially troublesome since the matter was rescheduled at the request of Mr. Kost earlier and set for this particular date and time at his suggestion." It ordered Kost to pay Reese's fees for the day, plus the fee that witness Melinda Olsen, an attorney, was charging Neal for coming to Rhinelander from Elcho under subpoena. Neal argues that the court failed to address the

factors indicated in ***Anderson*** and that he is effectively being sanctioned for awaiting a jury verdict. We disagree; although the court's reasoning is succinct, it is sufficient.

¶23 Under ***Anderson***, when imposing sanctions, the court should make a record explaining the disruptive impact of the behavior on the court calendar, the reasonableness of the attorney's explanation, and the severity of the sanctions. ***Id.*** In addition, just as we will consider a sentencing court's explanation of its sentence during postconviction proceedings,[3] so too will we consider the court's rationale for sanctions set forth in its written decisions.[4]

A. Disruptiveness

¶24 At the contempt hearing, the court noted it would be impossible to proceed; not only had Kost failed to show, but Rene had not appeared in person for that hearing. It is self-evident that the court's resources are wasted when a specifically requested date and time go unused, since some other matter could have been scheduled for that time. *See* ***id.*** at 6 ("[C]ourts are pressed with heavy dockets and complex cases.").

¶25 Kost could not simply assume that because he had called that the court would cancel the hearing. Indeed, the court did not receive the message until approximately 2:30 p.m. and the message it received contained no mention of the jury trial. In correspondence after the hearing, the court noted "it was simply

[3] *See, e.g.,* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

[4] Here, this includes the order initially imposing sanctions as well as the correspondence sent following a motion for reconsideration.

inherently hazardous to unilaterally adjourn a proceeding within one hour of the commencement of the proceeding." We agree.

¶26 Kost maintains the disruptiveness is minimal because his secretary called at 2:06 p.m.—enough time for Neal to call off his witness since she was only twenty minutes away in Elcho. This implicitly assumes that witness Olsen would still be in her office at 2:06 p.m. to receive a cancellation notice. Kost has made no showing that this is the case. In any event, Olsen—like the court—would have had to clear her calendar for that specific time, preventing her from scheduling meetings with her own clients or making her own court appearances.

B. Reasonableness

¶27 Kost was in Forest County, where a three-day jury trial had extended into a fourth day because of jury deliberations. Kost maintains this was a reasonable explanation for his delay, since courts and lawyers are aware that jury trials may run longer than anticipated. The circuit court disagreed with Kost's assessment of his reasonableness, as do we.[5]

¶28 The court considered Kost's notice

> so late as to have been insufficient. Either Mr. Kost should have called Mr. Reese the night before (when he learned his Forest County case was going into Friday, and when Mr. Reese could have called off his witness), or,

[5] Kost also complains that he was not allowed to explain his delay. We reject this suggestion because although he was not present to do so at the November 7 hearing, he explained his absence in subsequent correspondence to the court in the context of his reconsideration motion.

> alternatively, he could have one of the four other attorneys in his office cover the appearance in this case. …[6]
>
> I also certainly recognize the unpredictability of jury trials, and their length, but that should be universally known.

¶29 The court properly considered that Kost knew on the evening of November 6 that his trial was running long. While he undoubtedly hoped the jury would return its verdict in the morning, it would have been wise to at least have notified Reese, allowing him to perhaps advise Olsen that she might get a last-minute call that she would not need to appear. Alternatively, he could have checked the court calendar to see if a later time in the afternoon would be available in the event the jury took longer than anticipated. In any event, it was unreasonable for Kost to assume that less than an hour's notice would not be problematic, particularly when, as the court noted, he had ample opportunity to provide notice much earlier than he did.

C. Severity of the Sanctions

¶30 The court noted Olsen would be charging Neal for her appearance and it stated those costs should be born by Kost, as should Neal's attorney's fees for the day. The court stated it would review the submissions for reasonableness. When it signed the order, it noted that the fees were reasonable and the costs necessarily incurred.

¶31 Implicitly, the court determined that Kost's actions were not severe enough to warrant "punitive" sanctions. Instead, it believed Kost should simply

[6] Kost does not take issue with the court's statement that other colleagues were available to represent Rene at the hearing.

bear the out-of-pocket costs that would otherwise be charged to Neal. Kost offers no explanation as to why this is unduly severe or why imposing only actual costs constitutes an erroneous exercise of discretion.

IV. Frivolousness of Rene's Defense

¶32 Shortly after Rene stated that she never said she would not pay Evelyn, the court determined she had no valid defense, determined her defense to be frivolous, and sanctioned Kost $275 for the cost of the hearing. The circuit court may award costs and fees to the prevailing party if a defense is determined to be frivolous. Under WIS. STAT. § 814.025(3), for a defense to be considered frivolous, the court must find either:

> (a) The … defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another. [Or,]
>
> (b) The party or the party's attorney knew, or should have known, that the … defense or cross complaint 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.

¶33 Our standard of review involves a mixed question of fact and law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). Factual findings are not disturbed unless clearly erroneous. ***Id.*** Whether the facts fulfill the legal standard of frivolousness is a question of law. ***Id.*** A reasonable reading of WIS. STAT. § 814.025(3) requires circuit courts to separately consider the frivolousness of the various claims constituting an action or, as here, defense. ***Hoey Outdoor Adver., Inc. v. Ricci***, 2002 WI App 231, ¶31, 256 Wis. 2d 347, 653 N.W.2d 763.

¶34 It is evident that although the court's written order refers only to "Rene's defense," the court was cognizant of two distinct elements of that defense and considered only the second to be frivolous. First, Rene raised the issue of Neal's standing. The court considered this argument, ruled on it, and then proceeded with the hearing without any comment on frivolousness.

¶35 For an hour, then, it heard testimony regarding the validity of the debt to Evelyn when, in the middle of her testimony, Rene stated that she never said she would not pay the debt and knew she had signed the property division agreement. The court determined Rene had, for strategic reasons in the divorce, agreed to assume payment for the debt and then effectively admitted this obligation on the stand. This meant Rene had no real defense. The court's commentary allows us to determine the court concluded Rene and Kost knew or should have known there was no basis in law or equity for her position that the debt to Evelyn was invalid. *See* WIS. STAT. § 814.025(3)(b); *see also* ***Sommer v. Carr***, 99 Wis. 2d 789, 792, 299 N.W.2d 856 (1981).

¶36 We agree with the court's determination that this portion of Rene's defense was frivolous. While purporting to contest the debt's validity, Rene nonetheless stated "I'm not arguing about paying Evelyn the 7,000." The positions are inherently contradictory. We conclude sanctions were issued for this portion of the defense only and not the standing argument, and were properly assessed.

V. Costs on Appeal

¶37 Neal has made a motion asking us to find the appeal frivolous. For an appeal to be frivolous, all issues in the appeal must be frivolous. While

affirming the circuit court's determination of frivolousness generally renders an appeal frivolous per se, *see* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990), it is also a rule that the entire appeal must be frivolous. The circuit court did not determine the standing issue to be frivolous, nor do we. If we interpreted WIS. STAT. § 767.305 as Rene argues, we would have to reverse. This bestows at least colorable merit to the standing argument on appeal. Because there is some merit to one of the issues on appeal, we cannot consider the entire appeal frivolous. *See* ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14.

By the Court.—Orders affirmed; motion for costs denied.

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