COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 No. 2009AP331 **Cir. Ct. No. 2007SC1608**

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

IN RE THE AWARD OF ATTORNEY FEES AND COSTS IN PARKLAND PLAZA VETERINARY CLINIC S.C. V. ANNE GERARD:

PARKLAND PLAZA VETERINARY CLINIC S.C.,

PLAINTIFF-RESPONDENT,

V.

ANNE GERARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] This is a review of frivolous costs and fees determined by the circuit court pursuant to a remand directive by this court in ***Parkland Plaza Veterinary Clinic, S.C. v. Gerard***, 2008 WI App 160, 314 Wis. 2d 507, 758 N.W.2d 225, *review denied*, 2009 WI 5, 315 Wis. 2d 57, 759 N.W.2d 772. In that opinion, this court noted that, even though the case against Anne Gerard had been dismissed in her favor, she nonetheless appealed. ***Parkland Plaza***, 314 Wis. 2d 507, ¶1. The court determined that Gerard "should have known that a judgment in her favor with prejudice and on the merits, where no counterclaims were brought, would provide no basis in law or equity for an appeal and that she could not in good faith argue that the law should be changed to allow such an appeal." ***Id.***, ¶17. Now, on appeal from the circuit court's findings on frivolous fees and costs, Gerard reiterates many of her prior claims, accuses the remand court of denying her constitutional and legal rights and objects to the sufficiency of the evidence. We affirm.

¶2 To begin, this court will not revisit any of the issues relating to the proceedings before the Honorable Paul F. Reilly. This court's prior opinion is the law of the case. The law of the case doctrine has been defined as a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 224 (1989). Further, to the extent that Gerard raises any new issues which were not asserted the first time regarding those proceedings, they are waived. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 The only issues we will entertain on appeal relate to the remand proceeding where frivolous costs and fees were determined. As far as we can determine, the issues are as follows: (1) The circuit court failed to comply with the Americans with Disabilities Act (ADA), ignored Gerard's motion regarding the act, and gave short shrift to a letter from a physician saying she could not appear either in person or by telephone due to the mental effects of taking medication; (2) There were procedural errors, thus violating Gerard's due process rights; (3) The circuit court violated Gerard's privacy rights under the Health Insurance Portability and Accountability Act (HIPAA); (4) The circuit court "maligned and assassinated the character of [Gerard's] physician," and ordered her to violate her doctor's orders, recommendations and instruction; (5) The circuit court threatened Gerard by stating that if she filed any paper which the court believed to be frivolous, it would sanction her; (6) The circuit court was biased, filled with animosity and cruelty toward Gerard and perpetuated falsehoods against her, colluded against her and manipulated her; (7) Parkland's attorney's fees and costs were excessive, inflated, unsubstantiated and dishonest. We will address each of these issues in turn.

(1) ADA Issue.

¶4 We deem it unnecessary to relate and answer each of Gerard's contentions with regard to this issue. This is because she misunderstands the very nature of the ADA and that misunderstanding dooms her claim. Gerard did not want to appear in any shape or form at this hearing on fees and costs. To that end, she submitted a letter to the court from a physician, which stated in pertinent part:

> While Anne Gerard is under treatment she is unable to participate in any proceedings by telephone or in person due to medications that leave her mentally and physically compromised, suffering severe headaches, fatigue and

> feeling very ill. She has difficulty retaining and recalling information, and her attention span and concentration are diminished by medication.

¶5 By her October 24, 2008 motion, Gerard informed the court that she would not appear at the December 15, 2008 hearing, either by telephone or in person and that she was unable to hire counsel. She claims that the court's order that she appear in person, by telephone or by counsel violated the ADA.

¶6 The purpose of Title II of the ADA is to direct governmental entities that they must provide a "reasonable accommodation" so that a person *can participate* in a program (such as a court proceeding). ***Tennessee v. Lane***, 541 U.S. 509, 537 (2004). As our United States Supreme Court wrote: "The Court … is … faithful to the Act's demand for reasonable accommodation to *secure access* and *avoid exclusion*. ***Id***. (emphasis added). It follows that, if the Act was designed as a sword to avoid exclusion, it cannot have likewise been designed as a shield to dodge participation. If Gerard were right, the law would insulate her from any and all judicial proceedings because she is disabled. But, as we have seen, that is not the intent of the law.

¶7 Maybe Gerard is actually arguing that the medication she was taking rendered her incompetent to participate in any proceedings only during the course of treatment. If that is her argument, she should have sought a reasonable accommodation under the ADA by explaining to the court how long the treatment would be, providing proof as to the course of treatment and when it was slated to end, and asking for an adjournment until that time. Then, the court could have made an assessment about whether the requested accommodation was a reasonable one. Or, Gerard could have made the claim that she was incompetent to assist in her own defense while taking the prescribed medication. She did neither. Rather,

she simply claimed that she was entitled to an indefinite adjournment because the ADA says so. That is not the law.

¶8 This court notes that the fact finding hearing on this matter was originally scheduled to commence on October 7, 2008. Even though the court was not convinced of the soundness of Gerard's ADA claims, it nevertheless gave an adjournment to her of over sixty days and set the hearing for December 15, 2008. During that time, Gerard well could have moved for the indefinite adjournment on incompetency grounds or sought a hearing to map out for the court her course of treatment and had her doctor testify to that effect. But she did not do this either. While it is true that Gerard asked the court for another adjournment, it was because she claimed she had not received certain requested documents and that the circuit court had not complied with the ADA. As we have stated, that will not do. We conclude that her ADA issue is without merit.

(2) Alleged Procedural Errors.

¶9 Gerard complains that there were several procedural errors. They are as follows. First, she states that the circuit court violated the Waukesha County Circuit Court Rule 2.7 and Wisconsin civil procedure such that a draft of the proposed order in a case must be submitted to the opposing party for review, five days before signing. Gerard contends that she was not provided with a copy until after the order was signed. She contends that her due process rights were violated. Second, she contends that she did not receive a copy of the signed November 18, 2008 order until February 18, 2009, in violation of WIS. STAT. § 806.06(5). Third, she claims that the submission of the orders to the circuit court by Parkland were done ex parte, thus violating both the state and ABA judicial codes of ethics. And fourth, she asserts that she was not notified of a judicial

transfer to Judge Ralph Ramirez after remand and thus was denied the right to file for substitution of judge, in violation of WIS. STAT. § 801.58.

¶10 With respect to the first three claims, Gerard has not explained how these purported errors prejudiced her. Only errors that affect an appellant's substantial rights will support reversal of a trial court decision. WISCONSIN STAT. § 805.18(2) forbids us from reversing a judgment unless the error affects the substantial rights of the party seeking reversal. Our supreme court has explained that an error only affects "substantial rights" when there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. The court further explained that "[a] reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** (citation omitted). Here, what Gerard must realize is that there is a difference between error (assuming, for the sake of argument only, that there was error) and reversible error. Since she has not told us how her substantial rights are affected, we will address these issues no further.

¶11 Regarding the substitution of judge issue, Gerard does not cite any part of the record showing where she asked the Chief Judge to substitute another judge for Judge Ramirez or any order by the Chief Judge denying her request. If it is there, we cannot locate it. We will not sift the record to locate support for a party's contention. ***Keplin v. Hardware Mut. Casualty Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). Nor is there any record of Gerard having objected to not receiving notice. From what we have read of the record, it appears that she moved forward by filing motions for Judge Ramirez to decide, without first having objected to his presiding. The law is clear that once a party asks the presiding judge to resolve a preliminarily contested matter, that party has given up any right

to substitution of judge that may be otherwise available. ***DeWiit Ross & Stevens, S.C. v. Galaxy Gaming and Racing Ltd. P'ship***, 2003 WI App 190, ¶¶33-36, 267 Wis. 2d 233, 670 N.W.2d 74, *reversed in part on other grounds*, 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839. We conclude that the substitution of judge issue has no merit.

(3) Alleged HIPAA Violation.

¶12 Gerard claims that the circuit court violated HIPAA by improperly disclosing protected health information. She does not tell us what information she claims the court disclosed, but we can only surmise that it is the doctor's letter to the court explaining why she could not come to court or appear by telephone. This issue is a non-starter. To begin, the letter from the doctor is not a protected, individualized, identifiable health record. Rather, it is a letter sent at the request of and for judicial proceedings. So, HIPAA does not even apply in such an instance. Further, even if it were a health record, Gerard obviously allowed disclosure to the opposing party here for, without it, Gerard could not have entertained her motion. Finally, as observed by the circuit court in its decision, she sets forth no provision which says that she can authorize disclosure, even self-disclosure to the court, ask the court to consider her health information and yet forbid the court to rule on it. That makes no sense. This whole issue makes no sense. We reject it.

(4) Alleged Maligning of her physician.

¶13 This is another issue that is a non-starter. Gerard has no standing to complain about the circuit court's alleged maligning of her physician's integrity. If anyone has that standing, it would be the good doctor himself. Moreover, the circuit court's duty is to determine credibility. And that is what the circuit court was doing. Now, whether the circuit court erred in doubting the physician is

something this court need not decide because it relates back to the ADA issue and we rejected that issue at the beginning of the opinion. We will discuss this issue no further.

(5) Alleged Threat by the Trial Court Regarding Gerard's Frivolous Filings.

¶14 Gerard objects to that part of a November 18, 2008 order by the circuit court stating: "But if the Defendant files any other paper with the Court that it views as violative of [WIS. STAT. §] 802.05(2), the Court will at once enter an order pursuant to section 802.05(3)(a)(2). The Defendant is so warned." Gerard asserts that "a citizen cannot and must not suffer sanctions and/or penalty for instituting their [sic] constitutional rights." She has not indicated that there was such an order carried out and that, as a result, some substantial right was therefore affected. This issue fails.

(6) Alleged Bias Against her by the Circuit Court.

¶15 Gerard next raises what she claims to be several instances where the circuit court exhibited bias against her. She cites several instances where the circuit court criticized her for abusing the judicial system with a myriad of filings and rudeness to others. A circuit court has "inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency." ***Jacobson v. Avestruz***, 81 Wis. 2d 240, 245, 260 N.W.2d 267 (1977) (citation omitted). In addition, although there is a due process right of access to the courts, ***Piper v. Popp***, 167 Wis. 2d 633, 644, 482 N.W.2d 353 (1992), that right is not absolute and may be curtailed where a litigant abuses the system. *See* ***Support Sys. Int'l Inc. v. Mack***, 45 F.3d 185, 186 (7th Cir. 1995) (prohibiting prodigious litigator from filing noncriminal motions). Here, the circuit court did

not prohibit, but instead let Gerard file her motions and make her arguments. The circuit court also responded to those arguments in an even-handed and neutral manner. Only at the end did the court make an observation about Gerard's overly litigious nature. The court properly exercised its inherent discretion in doing so, especially since nothing that the court recounted had anything to do with the issues that the court resolved. Just because the court issued rulings adverse to Gerard does not mean that it was biased. A difference in views does not indicate any personal interest in the outcome of the case. *See* ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

(7) Sufficiency of Evidence.

¶16 Finally, Gerard takes issue with the attorney's fees and costs awarded. Parkland submitted its bill for fees and costs. Gerard objected in writing. We will take at face value her claim that she submitted this objection in a timely manner, on November 13, 2008—even though it was made after the date set forth by the circuit court and after the original hearing was adjourned. With the claim for fees and the objection both before the court, the issue was joined for the December 15, 2008 hearing. The hearing took place as scheduled. Gerard did not appear for the reasons outlined by Gerard's ADA claim which we earlier discussed. She either should have been there or appeared by phone or she should have moved the court for an adjournment on grounds that she was mentally incompetent to participate at that time. She did not appear. We do not know what went on at the hearing because Gerard has not seen fit to provide us with a transcript. When there is no transcript, we can only review those parts of the record available to us. ***Jocius v. Jocius***, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998). The order indicates that the court "listened to sworn testimony from [Parkland's attorney]" and based on that testimony, found the costs and fees

to be reasonably incurred as a result of Gerard's frivolous appeal in the sum of $2,538.82. Absent a transcript, every fact essential to sustain the circuit court's exercise of discretion is assumed to be supported by the record. ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). We therefore assume that the attorney's fees and costs were necessary and reasonable.

¶17 We recognize that there may be some issues left which we did not address. We consider them to be so without merit that they do not bear mentioning. As the court quoted in her previous appeal, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). To the extent that we have not addressed these other arguments, they are rejected.

By the Court.—Order affirmed.

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