COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2087 **Cir. Ct. No. 2011CV862**

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

THOMAS P. DREIFUERST,

PETITIONER-RESPONDENT,

V.

WISCONSIN MOVERS SUPPLY COMPANY, INC., FOX CITIES STORAGE LLC, DA BOYS LLC, DUFRANE MOVING AND STORAGE, INC. AND PRINCE INVESTMENTS LLC,

RESPONDENTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Wisconsin Movers Supply Company, Inc., Fox Cities Storage LLC, Da Boys LLC, DuFrane Moving and Storage, Inc., and Prince Investments LLC (collectively, the Companies) appeal a money judgment in favor

of Thomas P. Dreifuerst.[1] The judgment imposed $140,000 in aggregated contempt sanctions, plus costs and attorney's fees. The Companies challenge the contempt sanctions. For the reasons discussed below, we affirm.

BACKGROUND

¶2 The contempt sanctions at issue in this case are the culmination of a long saga that began in June 2011 with a letter from Dreifuerst's accountant to the accountant for the Companies requesting certain financial documents.[2] The requested documents were not produced and in November 2011, Dreifuerst petitioned the circuit court for an order to compel the Companies to produce the requested documents, and to award Dreifuerst costs and reasonable attorney's fees. On December 23, 2011,[3] the circuit court entered an order requiring the Companies to produce all of the requested documents, except for the dissolution paper, by January 23, 2012. Dreifuerst was ordered to pay all of the costs of inspection and copying, and the court denied his request for costs for the action. On October 16, 2012, Dreifuerst again petitioned the circuit court, seeking to compel the production of a number of documents that he claimed the Companies

[1] Thomas Dreifuerst and his two brothers equally owned each entity comprising the Companies.

[2] Dreifuerst's accountant requested the following documents for each company: all tax returns from 2005 - 2010; all bank statements from January 1, 2006 to present, with deposit tickets and cancelled checks; and all financial statements and supporting general ledgers for the years ended 2005 - 2010. In addition, Dreifuerst's accountant requested the dissolution papers for Wisconsin Movers Supply Company, Inc., lease contracts in place from 2005 to the date of request for Fox Cities Storage LLC, and the lease contract with DuFrane Moving and Storage, Inc. for Da Boys LLC.

[3] The order was signed by the circuit court on December 21, 2011, and the court consistently referred to the order as the December 21, 2011 order. We refer to the order by its date of entry, December 23, 2011.

had failed to produce. On February 15, 2013, the circuit court entered an order finding the Companies to be in contempt for failing to comply with the December 23, 2011 order. The court gave the Companies until March 1, 2013, to fully comply with the December 23, 2011 order and to produce the documentation requested in Dreifuerst's October 16, 2012 petition. In addition, the court awarded Dreifuerst costs and reasonable attorney's fees and imposed contempt penalties of $1,000 per day, unless the Companies' contempt was purged by March 1, 2013. A status conference was set for March 21, 2013 to determine whether the Companies had fully complied.

¶3 Neither the order of December 23, 2011, nor the order of February 15, 2013, was appealed.

¶4 In a July 25, 2013 judgment, the circuit court found that the Companies' contempt had not been purged as required by the February 15, 2013 order. The court entered judgment in favor of Dreifuerst for the contempt penalties accrued through July 19, 2013, in the amount of $140,000,[4] together with costs and reasonable attorney's fees, for an aggregate judgment total of $165,151.64. The court ordered that contempt penalties would continue to accrue at $1,000 for each day that any of the Companies continued not to comply with the December 23, 2011 order. The Companies appeal.

[4] The circuit court later altered its judgment to make the $140,000 payable to a trust for the court to later direct disposition.

DISCUSSION

A. Jurisdiction

¶5 Before we address the Companies' contentions, we must first address whether two of the issues raised by the Companies in their appellate brief are properly before us. Dreifuerst argues that we do not have jurisdiction to address these issues because the Companies did not timely appeal the December 23, 2011 or February 15, 2013 orders. For clarity, we quote those two issues as set forth in the Statement of Issues in the Companies' brief:

> 1. Did the circuit court's orders for the corporate and LLC respondents-appellants to produce records for inspection and copying under the applicable provisions of Chapter 180 and Chapter 183 of the Wisconsin Statutes justify the imposition of sanctions for these entities' failure to provide Chapter 804 type discovery productions to the person who was and is a custodian of those records?
>
> ….
>
> 4. Is the respondent-appellant, DuFrane Moving and Storage, Inc., required to produce records under Chapter 180 of the Wisconsin Statutes to a person who is a shareholder and a former officer, director and key employee of such corporate entity and who is openly and overtly engaged in direct competition with such corporate entity without any restrictions on the use or distribution of those records?

¶6 In their argument on the first issue in the Companies' appellants brief, they begin by stating:

> The crux of this dispute centers upon the rights of Thomas P. Dreifuerst to inspect and copy records of the corporation and LLC entities and the obligations of DuFrane, Da Boys, Fox Cities Storage, and Prince Investments to produce records under the provisions of Chapter 180 and Chapter 183 of the Wisconsin Statutes for inspection and copying.

This statement is simply not true, and, as we shall detail in the following three paragraphs, the Companies have been told by both the circuit court and this court that the right to inspect and copy these records and their obligation to produce them are no longer disputable.

¶7 In the December 23, 2011 order, the circuit court ordered the Companies to produce the records at issue. In the February 15, 2013 order, the circuit court again ordered the Companies to produce the records at issue and imposed contempt penalties in the amount of $1,000 per day unless the contempt was purged by March 1, 2013. The Companies did not appeal either of those orders.

¶8 At a hearing held on November 16, 2012, the circuit court expressly stated that it had "analyzed this legal issue [the rights of Thomas P. Dreifuerst to inspect and copy records of the corporation and LLC entities and the obligations of DuFrane, Da Boys, Fox Cities Storage and Prince Investments to produce them] thoroughly back last December. If ... you disagreed with the analysis[,] you had an option of appealing. But that not having taken place, that analysis is going to be applied …."

¶9 In a July 8, 2014 order, we determined that the December 23, 2011 and February 15, 2013 orders were final orders for purposes of appeal. We further determined that we lack jurisdiction to consider issues raised that were disposed of by those orders and we struck the first appellants' brief submitted by the Companies. In a subsequent order dated October 3, 2014, we rejected Dreifuerst's request and declined to strike the Companies' replacement appellants' brief, but expressly invited Dreifuerst to raise the issue in his respondent's brief, which Dreifuerst has done.

¶10 The Companies attempt to recast the issue of Dreifuerst's entitlement to the documents as a question of whether the circuit court erroneously construed and applied the December 23, 2011 and February 15, 2013 orders. We are not persuaded that this is anything other than an attempt to reargue the underlying merits of the orders. The law is clear that "[a] matter once litigated may not be relitigated in a subsequent [] proceeding no matter how artfully the [litigant] may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶11 The question of jurisdiction over the fourth issue raised in the appellants' Statement of the Issues is much more simply and directly addressed. It begins: "Is the respondent-appellant, DuFrane Moving and Storage, Inc., required to produce records …." In our July 8, 2014 order, we concluded that question is exactly what we have previously determined is beyond the scope of this appeal. However, the formulation of this issue in the body of the brief is somewhat different from that in the Statement of Issues, and we will address that formulation in due course.

¶12 With respect to the first issue quoted above, and in light of our discussion thus far, the question is what remains of the Companies' supporting arguments. As best we can discern, the Companies' briefing raises three arguments that do not challenge the underlying orders, but rather challenge the imposition of sanctions. We address these next.

B. The Circuit Court had Authority to Impose Sanctions for Contempt

¶13 First, as best we can discern, the Companies very generally suggest that the circuit court lacked authority to impose sanctions on the Companies for not producing documents.

¶14 The Companies do not directly address this issue on appeal, although they did raise the issue before the circuit court. Regardless, it appears to us that a challenge to the circuit court's general authority to impose sanctions for the discovery violations is plainly without merit. WISCONSIN STAT. § 785.01(1)(b) (2013-14)[5] defines contempt as "[d]isobedience, resistance or obstruction of the authority, process or order of a court," and § 785.01(1)(d) defines contempt as the "[r]efusal to produce a record, document or other object." WISCONSIN STAT. § 785.02 provides that a "court of record may impose a remedial or punitive sanction for contempt of court under this chapter." Because the Companies have not presented this court with a developed argument that, despite § 785.02, the circuit court lacked authority to impose contempt penalties against them, we do not address this further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are inadequately briefed).

¶15 The Companies also assert in summary fashion that the circuit court erroneously exercised its discretion, but this issue is not fully developed, nor have the Companies supported their argument by citation to legal authority. Accordingly we do not address this assertion either. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (generally, this court does not consider conclusory assertions and undeveloped arguments).

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

C. The Sanction Imposed was Remedial

¶16 Second, the Companies argue that the $140,000 contempt judgment against them was a punitive sanction rather than a remedial sanction. The Companies argue that the circuit court could not have imposed a punitive sanction without following different procedures from those that it did follow and such a punitive sanction would be improperly imposed and subject to reversal on appeal. We disagree that the sanction was punitive.

¶17 In the February 15, 2013 order, the circuit court found the Companies to be in contempt for failing to comply with the December 23, 2011 order, and the court ordered the Companies to purge their contempt by March 1, 2013 by producing the documents requested. The court ordered that if the Companies failed to do so, contempt penalties would accrue at the rate of $1,000 per day. The Companies did not purge their contempt as required by the February 15 order, and on July 25, 2013, the circuit court entered a judgment against them in the amount of $140,000 for the contempt penalties accrued through July 19, 2013.

¶18 We will begin by reviewing, as relevant, the circuit court's powers to impose sanctions for contempt of court.

¶19 WISCONSIN STAT. § 785.02 gives a court authority to impose remedial or punitive sanctions for contempt of court. A remedial sanction is "imposed for the purpose of terminating a continuing contempt of court." WIS. STAT. § 785.01(3). A remedial sanction may be imposed directly by the court upon motion and after notice and a hearing, and may consist of one or more of five

specified sanctions.[6] WIS. STAT. §§ 785.03(1) and 785.04(1). Relevant here is § 785.04(1)(c), which authorizes a circuit court to impose "[a] forfeiture not to exceed $2,000 for each day the contempt of court continues." Section 785.04(1)(c).

¶20 A punitive sanction is "imposed to punish a past contempt of court." WIS. STAT. § 785.01(2). A punitive sanction can be imposed by either a summary procedure or a nonsummary procedure. *See* WIS. STAT. § 785.03(1) and (2). A punitive sanction imposed by summary procedure must be imposed for a contempt committed in the presence of a judge, and the sanction must be imposed immediately. Section 785.03(2). A punitive sanction imposed by summary procedure is limited to a $500 fine and 30 days in the county jail, or both, for each separate contempt. WIS. STAT. § 785.04(2)(b). A punitive sanction may also be

[6] WISCONSIN STAT. § 785.04(1) provides:

> (1) REMEDIAL SANCTION. A court may impose one or more of the following remedial sanctions:
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> (a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.
>
> (b) Imprisonment if the contempt of court is of a type included in [§] 785.01(1)(b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.
>
> (c) A forfeiture not to exceed $2,000 for each day the contempt of court continues.
>
> (d) An order designed to ensure compliance with a prior order of the court.
>
> (e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

imposed by a non-summary procedure upon the complaint of a district attorney, attorney general or special prosecutor, who may file the complaint upon the prosecutor's own motion, or upon the request of a party or judge. Section 785.03(1)(b). The procedures involved in processing the complaint are those for criminal proceedings and sentencing. ***Id***. If these procedures are used, the imposition of penalties in a nonsummary procedure can be up to $5,000 or 1 year in jail, or both, for each separate contempt. Section 785.04(2)(a).

¶21 The Companies offer several arguments to support their claim that the sanctions imposed by the circuit court were punitive, rather than remedial, all of which are without merit.

¶22 First, the Companies argue that the circuit court imposed the $140,000 penalty "for what the court stated as past contempt from March 2, 2013 to July 19, 2013." The record does not support this argument. On February 15, 2013, the Companies were found to be in contempt and a $1,000 per day penalty was imposed, which accrued from the date of the February 15 order forward if the contempt was not purged by March 1, 2013. Thus, not only did the penalty contemplate only future conduct, but a fifteen-day period was allowed for the Companies to purge their contempt and avoid the penalty entirely. By the time the judgment of contempt penalties was entered for penalties accrued up to that point, $140,000, the contempt had remained unpurged for 140 days. The accrual of penalties could have stopped at any time if the Companies had purged their contempt. Thus, the purpose was clearly to obtain compliance, rather than to punish past conduct.

¶23 The Companies next argue that the penalty is punitive because it "bear[s] no relationship whatsoever to any loss or injury suffered by" Dreifuerst.

In support of this argument, the Companies cite only to WIS. STAT. § 785.04(1). However, that subsection, which is quoted above in footnote 5, provides for five separate penalties that the circuit court is authorized to impose *for a remedial sanction*. While one of those possible penalties does indeed relate to compensation for the loss suffered by a party, *see* § 785.04(1)(a), that is not the penalty that the circuit court chose here. The circuit court chose to impose forfeiture under § 785.04(1)(c), which bears no requirement that the penalty relate to the amount of loss suffered by a party. In fact, while the maximum penalty available to the court under § 785.04(1)(c) is $2,000 per day, the court imposed only half of that amount. The Companies' attempt to argue that the circuit court imposed a punitive sanction by imposing one of the statutorily listed remedial sanctions is unsupported by any authority.

¶24 The Companies attempt to persuade us that the circuit court itself considered the sanction it imposed to be punitive. The Companies argue that because the circuit court initially ordered that the judgment imposing contempt penalties be in favor of Dreifuerst, but later made the amount payable into a trust for the court to dispose of at a later time, the court recognized that it had imposed a punitive sanction in error. We fail to see any logic or merit to this argument. The Companies rely on one case from 1906, ***Emerson v. Huss***, 127 Wis. 215, 106 N.W.2d 518, 521 (1906), which generally supports the authority of a court to impose fines and imprisonment for contempt, notwithstanding the need to indemnify the injured party. We find nothing in this case supporting the Companies' argument and note that it precedes the current statutory scheme by more than 70 years.[7] The Companies make no attempt to explain how the

[7] *See* 1979 Wis. Laws, ch. 257.

statutory language in effect in 1906 compares with the statutory language enacted in 1979, or how the holding of ***Huss*** can be relevant to understanding the current statutes. The balance of their argument on this point is composed of unsupported conclusory statements. Thus, we deem this argument undeveloped and will consider it no further. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶25 In summary, the circuit court imposed a remedial sanction that was specifically authorized by statute for the clear purpose of compelling compliance with its orders. Nothing presented by the Companies causes us to interpret this sanction as anything other than a remedial sanction.

D. The Purge Conditions were Reasonable

¶26 Third, the Companies argue that the circuit court did not attempt to determine whether the documents that the court demanded that the Companies make available to Dreifuerst were actually in the Companies' possession. In the Companies' view, if the documents were not in their possession, then compliance with the court's order was impossible. We do not find this argument meritorious.

¶27 To begin with, the record does not support the Companies' claim that the circuit court never considered whether the documents demanded were available. At a hearing of January 30, 2013, the circuit court was prepared to specifically address the issue, but the Companies were not prepared to go forward with witnesses:

> Well, first of all, I think since there's a request to have the defendants found in contempt due to non-production, I guess—like I said, I assumed that somebody would be here to testify that this is what happened to these documents versus you just saying there was a flood or they were lost in a move or something else because I don't know if that's true or not.

In other words, there was an opportunity to bring these issues before the court, but the Companies did not take that opportunity. The circuit court later treated that issue as having been forfeited:

> [T]he burden is on the defendant, where the claim is contempt, to in effect establish that he made every effort to comply with the court order and that the failure to comply was not an intentional refusal to comply with the order but rather was beyond his control. And there aren't any witnesses here on behalf of the Defense this afternoon.
>
> So, based on the lack of any testimony on the part of any representative of the defendants … I don't think this is even really a close case. I'm going to find that the defendant entities are in contempt of court for their intentional refusal to comply fully with what the Court ordered back over a year ago.

¶28 The circuit court reiterated that the Companies had passed up the opportunity to demonstrate that they could not purge contempt as the result of conditions beyond their control when the court reaffirmed its earlier rulings in a hearing on a motion by the Companies for reconsideration of the court's previous orders.

> [At the January 30, 2013 hearing], the Court noted that the burden was on the respondents when contempt is claimed to establish that there was no intentional refusal to comply with the Court's order but rather that non-compliance was beyond their control. But no witnesses were present to testify on behalf of the respondents.

Later in the same hearing, the circuit court added:

> Attorney Sager argues that the Court never should have found the respondents in contempt. He argues that the inability of the respondents to comply would preclude a contempt finding. In effect, they can't be found in contempt for records that were destroyed in a flood or which were lost in a move that they don't have or aren't available, et cetera.

> The legal proposition that he cites is indeed true. One cannot be found in contempt for an inability to comply. The problem is that at no point did the respondents timely establish any of those things. That's what the Court was waiting for—witnesses as far as what was there, what wasn't there.

In other words, the circuit court did not fail to consider the issue, but rather, the court afforded the Companies an opportunity to demonstrate that it was not possible to comply and the Companies failed to bring forth evidence to support that contention.[8]

¶29 Further, the Companies have never claimed that it would be impossible or even difficult for them to obtain copies of any documents that they claimed were lost or destroyed. Instead, they have taken the position that documents not currently in their possession were impossible to produce. This not only ignores the possibility that replacing those documents might be well within their power through reasonable effort, but it also ignores the statutory obligation of corporations and LLC's to keep certain documents at their principal place of business. *See* WIS. STAT. § 180.1601(2) ("[a] corporation shall maintain appropriate accounting records"), and WIS. STAT. § 183.0405(1) ("[a] limited liability company shall keep at its principal place of business all of the following

[8] The companies claim that they submitted affidavits to show that the documents sought were unavailable. The circuit court did address the affidavits, finding that they were not timely. Referring to the conference held on March 21, 2013, the court at the reconsideration hearing summarized:

> Attorney Duimstra noted that the affidavits of Paul and James Dreifuerst and bookkeeper Tracy Lindgren ["]articulates some of the history that may have been lacking to the Court previously.["] On page five, the Court indicated that to the extent that the affidavits went toward the original issues, it was too little, too late. The contempt hearing was held previously and Attorney Duimstra did not have any witnesses there.

…"). The Companies have never argued, let alone demonstrated, that they were not able to comply with this statutory mandate, or that if they had, the records would not have been in their possession for compliance with the court's order.

¶30 In summary, the Companies have not demonstrated to us, any more than to the circuit court, that compliance with the purge conditions was not possible and that the purge conditions were therefore not reasonable.

E. The Protective Order

¶31 Finally, the Companies argue that the circuit court erred by not granting them a protective order that they sought. This issue is undeveloped. While the Companies do cite WIS. STAT. § 180.1604(3), that statute provides: "If the court orders inspection and copying of the records demanded, it *may* impose reasonable restrictions on the use or distribution of the records by the demanding shareholder." (Emphasis added.)

¶32 WISCONSIN STAT. § 180.1604(3) calls for an exercise of discretion by the circuit court. *See* ***West Capitol, Inc. v. Village of Sister Bay****,* 2014 WI App 52, ¶51, 354 Wis. 2d 130, 848 N.W.2d 875 ("[i]n a statute, the word 'may' typically indicates a grant of discretion"). The Companies do not argue otherwise, and do not explain in what manner the circuit court erroneously exercised its discretion, nor do they provide any authority that the court did so in this fact situation. Accordingly, we decline to address this issue any further. *See* ***Associates Fin. Servs. Co. of Wis., Inc.***, 258 Wis. 2d 915, ¶4 n.3 (generally, this court does not consider conclusory assertions and undeveloped arguments).

CONCLUSION

¶33 For all of the foregoing reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.