

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 20, 2006**

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 No. 2005AP2617**

**Cir. Ct. No. 2004GN26**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE GUARDIANSHIP OF LUCILLE M.:**

**RON M.,**

**APPELLANT-CROSS-RESPONDENT,**

**V.**

**KEITH M.,**

**RESPONDENT-CROSS-APPELLANT.**

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APPEAL from an order of the circuit court for Kenosha County:  
MARY KAY WAGNER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Ron M. appeals from the order that found a motion he had filed to be frivolous and awarded attorneys' fees and costs to the

respondent, Keith M. Because we conclude that the circuit court properly determined that the motion was frivolous, we affirm. Keith M. cross-appeals from the order awarding attorney's fees arguing that the fees should be assessed against Ron M.'s counsel as well. Because Ron M.'s counsel is not a party to this appeal, we dismiss the cross-appeal.

¶2 Ron M. moved the circuit court for modification of the protective placement of his mother, Lucille M. Keith M., Ron's brother, had previously been named Lucille's guardian. Ron M. had resisted this appointment and the two had disputes about their mother's care. Lucille M. resides at Carey Manor. Ron M. asked the court to change her placement, citing violations that Carey Manor had received. He also objected to the requirement that he give Carey Manor twenty-four hours notice before he came to visit his mother.

¶3 The court held two hearings on Ron M.'s motion. At the first, the court asked Ron M. if his mother was being abused or in any danger, and said that if she was, the court would take immediate corrective action. Ron M. did not offer any proof that Lucille had been abused or was in danger, but cited notices of deficiencies that Carey Manor had received. The guardian ad litem testified that she did not believe that Lucille was in any danger, and that she believed that the current placement, as well as the requirements for Ron M.'s visits, benefited Lucille. Part way through the first hearing, Keith M.'s counsel suggested that the issues Ron M. was raising before the court had been raised previously during the guardianship hearing. At this point, the court directed Keith M. to file an affidavit that addressed what had been decided at the previous hearing. The court then allowed Ron M. to testify. During his testimony, Ron M. admitted that he had not been to visit his mother in Carey Manor since Keith M. had been appointed her guardian. Ron M. also testified that he had not given Carey Manor the required

twenty-four notice of his visits.<sup>1</sup> The court then concluded that Ron M. had not been prohibited from visiting his mother, but had not been willing to comply with the conditions of these visits. The court continued the protective placement, ordered Ron M. to file an amended motion, and adjourned the hearing to a later date. Before the second hearing, Keith M. filed a motion asserting that Ron M.'s motion was frivolous.

¶4 At the second hearing, the court determined that the motion was frivolous. The court found that Ron M. had not offered any evidence that his mother was being mistreated, and that he was attempting to have the placement and guardianship changed. The court stated that it did not have the authority to regulate the nursing home or the guardian as long as neither was violating their duties. The court further found that no one was prohibiting Ron M. from visiting with his mother. Rather, Ron M. was objecting to the conditions placed on his visits by the nursing home and the guardian. The court again stated that it had no authority to regulate these. The court also stated at one point that Ron M. did not have standing to raise these issues. The court found the motion to be frivolous and ordered that Ron M. pay fees and costs of Keith M.'s counsel as well as those of the guardian *ad litem*.

¶5 The court then held a hearing on the fees and costs. At this hearing, Ron M. stipulated to the reasonableness of the hours, rates, and costs submitted by Keith M.'s attorney. Ron M. argued instead that the motion was not frivolous. Keith M. argued that Ron M.'s attorney should also be liable for the fees. The

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<sup>1</sup> The guardian and the nursing home required Ron to give twenty-four hours notice. This condition was imposed after he went to visit his mother, disrobed her, and took pictures of bruises she had.

court found that Ron M.'s motion was frivolous because there was nothing in its allegations that suggested that his mother was being mistreated in "any respect." The court further found that given the allegations he raised, he should have raised the issues with the State as licensure violations. Further, the court found that it had been Ron M.'s decision not to comply with the conditions of his visits with his mother. The court ordered Ron M. to pay fees and costs to Keith M. within ninety days.

¶6 Ron M. argues to this court that the circuit court erred when it determined that his motion was frivolous. Ron M. argues that the court determined that he did not have standing to bring the motion, and that this determination was wrong under WIS. STAT. § 55.01(4) (2003-04).<sup>2</sup> After reviewing the record, we conclude that Ron M. is overstating the circuit court's remarks about his standing. The court was not finding that he did not have standing to bring any motion. Under the statute, he is an interested person.

¶7 Instead, the circuit court made the comment in the context of the proper role of the appointed guardian in making decisions about Lucille M.'s well-being. The court was explaining that the appointed guardian had certain responsibilities to Lucille M. and the court was not going to second-guess his decisions, absent some sort of malfeasance by the guardian. The court also was explaining to Ron M. that he had brought his concerns about the deficiency notices that Carey Manor received to the wrong forum. The court stated that Ron M. should have raised these concerns to the State and allowed the administrative

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

process to run its course. The record shows that the court accorded Ron M. standing. At the first hearing the court asked Ron M. to testify about his concerns about Carey Manor. If the court had found that he did not have standing to bring a motion, it would not have allowed this testimony.

¶8 The court dismissed Ron M.'s motion for the same reason it ultimately concluded that the motion was frivolous: because he failed in his proof, not because he did not have standing. The record shows that Ron M. did not provide any evidence that Lucille M. was being mistreated or that the conditions on his visits were unwarranted.<sup>3</sup> Further, his statements that he was not allowed to visit his mother were disingenuous – he could visit as much as he wanted as long as he followed the conditions established by the nursing home and the guardian.<sup>4</sup> We agree with the circuit court that the motion was frivolous, and affirm the order of the circuit court.<sup>5</sup>

¶9 Keith M. filed a cross-appeal in which he alleges that the fees should be awarded against Ron M.'s attorney as well as Ron M. We agree that Ron M.'s

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<sup>3</sup> Ron M.'s attorney did not include copies of any of the hearing transcripts in the appendix to his brief. He should have done so. The court appreciates that the respondent provided the transcripts in his appendix.

<sup>4</sup> In his brief to this court, Ron M. again shows this disingenuousness when he states that there was a dispute between the parties as to whether he was “actually prohibited and/or hindered” from seeing his mother.

<sup>5</sup> The statute that allows for sanctions contains a safe harbor provision. *See* WIS. STAT. § 802.05(3)(a)1. This provides a twenty-one day period during which the offending party may withdraw the offensive pleading and avoid sanctions. *See Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998), and *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 549, 597 N.W.2d 744 (1999). Ron M. argues that he did not receive the benefit of the safe harbor provision. We conclude, however, that since Ron M. did not object to this in the circuit court, apparently because he wanted to have the hearing on the issue of sanctions, he waived the issue and cannot raise it now.

counsel may be equally culpable in the filing of the frivolous motion. The issue, however, was not litigated in the circuit court and Ron M.'s attorney has not been made a party to this appeal. For the reasons stated, we affirm the order awarding fees and costs against Ron M., and we dismiss the cross-appeal.

*By the Court.*—Order affirmed.

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

