COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1225 **Cir. Ct. No. 00-SC-2643**

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

RUDY TREML, D/B/A TREML SALES AND SERVICE,

PLAINTIFF-APPELLANT,

V.

MICHAEL KRIPPNER, ANNE MARIE KRIPPNER AND PAUL GALLAGHER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed and cause remanded with directions.*

¶1 BROWN, J.[1] Rudy Treml, d/b/a Treml Sales and Service, appeals from a judgment dismissing his claim that a neighbor damaged trees growing on his property. He also challenges the trial court's finding that his complaint was commenced, used and continued in bad faith, solely for the purpose of harassing

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All other references to the Wisconsin Statutes are to the 1999-2000 version.

the defendants. We hold that his complaint was properly dismissed because he did not show up for trial, through no one's fault but his own, and therefore failed to prosecute his claim on the date of trial. We further uphold the trial court's finding that Treml commenced this action in bad faith and that his continued prosecution of the claim was vexatious. Additionally, we hold that this appeal is frivolous and remand with directions that the trial court hear evidence relating to the costs of this appeal.

¶2 It is rare that an opinion of this court presents the procedural history of a case in any great detail. Most of the time it is simply not relevant to the issues being decided. Here, however, the procedural history weaves its own story and tells why Treml's case was frivolously commenced and conducted with the intent to harass. We therefore relate the case history in chronological fashion.

¶3 Rudy Treml, d/b/a Treml Sales and Service, filed a small claims summons and complaint on June 12, 2000. The complaint named three defendants, Michael Krippner, Anne Marie Krippner and Paul Gallagher. Treml did not thereafter explain in his complaint which defendant was accused of doing what. He only generally asserted that during the month of July 1999, a "Defendant" encroached on his property without permission and cut six young trees belonging to him. He further asserted that during May 2000, the "Defendant" removed an "Arborvite" [sic] tree without permission and in violation of a restraining order by Treml's tenant against Michael. As a second cause of action, Treml asserted that the "Defendant" had filed false and harassing complaints with town officials. Treml asked for $1000 in damages.

¶4 The Krippners filed an answer on June 30 denying the allegations and raising various affirmative defenses. In particular, as it relates to this case, the

Krippners alleged that Treml Sales and Service lacked "the capacity to sue." Gallagher filed his answer on July 26, one day late. On July 27, Treml obtained a default judgment against Gallagher for $1000 plus costs from Court Commissioner Thomas J. Pieper. The case against the Krippners was set for a pretrial conference.

¶5 At this point, Brian Treml, Rudy's son, wrote on Rudy's behalf.[2] He asked for and received an adjournment of the pretrial conference until September 1. On August 3, Gallagher, represented by counsel, moved to reopen the default judgment. After some correspondence, and despite Brian Treml's objection, Commissioner Pieper agreed to hear the motion before the scheduling conference. The matter was heard on September 1, 2000, as scheduled. The Krippners, represented by counsel, were allowed to be absent from this proceeding, per Commissioner Pieper's order.

¶6 Gallagher's motion was thereafter successful. An order, prepared by Brian Treml, and signed by Commissioner Pieper, memorialized Commissioner Pieper's oral ruling allowing the default judgment against Gallagher to be reopened. The order also stated: "That Brian Treml is allowed to appear as the Plaintiff Rudy Treml/DBA Treml Sales and Service." The order also denied Treml costs. Gallagher filed an amended answer on the same date, denying the claims. In particular, he also claimed that Treml, d/b/a Treml Sales and Service, lacked the capacity to sue.

[2] For clarity's sake, Rudy Treml will be referred to as either "Treml" or "Rudy Treml" throughout this opinion. Brian Treml will be referred to as "Brian" or "Brian Treml."

¶7 On October 12, Treml filed a "Notice and Demand for DeNovo Review" of Commissioner Pieper's decision to deny costs. That same date, Judge Kathryn Foster was assigned to hear this matter. No one filed any objection to Judge Foster hearing this matter. On November 27, Judge Foster heard Treml's motion. The court asked for the appearances and Brian Treml said: "Brian Treml for Treml Sales and Rudy Treml." The court responded: "Mr. Brian Treml where is Rudy Treml today?" Brian replied: "I am appearing for Rudy Treml." The court asked: "Are you an attorney, sir[?]" Brian replied: "No, no, I'm not. I work for Treml Sales." Gallagher, now representing himself, objected at this point. Because what follows is integral to the issues on appeal, we set forth pertinent portions in great detail:

> MR. GALLAGHER: I would like to make an objection to Mr. Brian Treml. He's not a proper party to this action. They have yet to supply any information that he should be allowed to represent Mr. Treml. When it was first allowed in September, it was under the assumption that Treml Sales and Service was a proper party to the action. Treml Sales and Service is not the owner of the property in dispute here and Brian Treml has no right to be here. I want that on the record.
>
> THE COURT: All right. The objection is noted.… [T]hat does appear to be an issue that has to be addressed here.
>
> [BRIAN] TREML: I believe if you look at the order that was signed by Commissioner Pieper it was addressed--comes under the small claims statute….
>
> MR. GALLAGHER: Yes, the order was under consideration. He was going to supply information that he was.
>
> ….
>
> [BRIAN] TREML: And that's been covered and I think if you go back through case history I have appeared in many cases through my father and it set precedence in Waukesha County court.

> THE COURT: Well, I'm not bound by any precedent in our Waukesha County courts, sir. I am only bound by precedent in appellate courts in this state and by the statute so—and I know that by reviewing the file in anticipation of the hearing there has been dispute whether this involves your father personally. He's the plaintiff. I know he indicates that he's doing business as Treml Sales and Service, and I agree with the law, the statute for small claims does allow a representative of a business entity to appear at hearing…. [B]ut it does appear to be an issue as to whether or not-- this is nothing to do with Treml Sales and Service and therefore you cannot appear on your father's behalf and that would render your appearance in effect meaningless and inappropriate and potentially under [sic] authorized practice of law. That's another factor here….

¶8 As the hearing proceeded, Gallagher accused Brian Treml of misrepresenting the record before Commissioner Pieper. Gallagher contended that the issue of whether Brian Treml could appear for his father was actually subject to further discovery. Brian Treml responded that he had a private reporter at the hearing, that a transcript had been prepared and that the transcript did not bear out what Gallagher contended.[3] Gallagher also reported to the court that he had sent Treml a list of interrogatories asking questions about Brian Treml's business relationship to his father and about the relationship of Treml Sales and Service to the property issue in dispute. Gallagher alleged that Treml had failed to answer

[3] As it turns out, there is no full transcript of the September 1, 2000 proceeding before Commissioner Pieper. The appellate record shows that there is an "excerpt of [the] hearing commissioner's order" which was prepared by a reporter. The excerpt only covers that part of Commissioner Pieper's ruling reopening the default judgment as to Gallagher and denying Treml costs. It does not touch upon whether Brian Treml was allowed to represent the interests of his father in this case. This court is satisfied that Brian Treml lied to the trial court when he said: "I presented that transcript taken of that particular hearing just on a hunch this would come up as an issue and that transcript is available" and "I … obtained the transcript that says I am allowed to appear in the case." While, as we point out later in this opinion, the de novo review of this case makes what occurred in front of the court commissioner totally irrelevant, we do want to point out Brian Treml's dishonesty at this juncture.

the interrogatories. Brian Treml replied that the interrogatories had been answered. Brian Treml also presented his arguments as to why he felt that Gallagher owed him $50 costs for reopening the default judgment. The hearing concluded with the court denying Treml his request for $50 costs for the reopening of the default judgment. The court also ordered Treml to mail the answers to Gallagher's interrogatories by the end of the week.

¶9 On November 27, Gallagher filed a counterclaim against Treml. In pertinent part, Gallagher alleged that Treml's complaint against him was "filed out of malice, with no reasonable basis in law and equity, and with no relevant evidence to support any of the claims referenced in the complaint." He further alleged that Treml knew or should have known that the required elements to prove his claim could not be produced. He additionally alleged that Treml filed the complaint as a follow-up to a "threat" made to Gallagher on a prior occasion. Gallagher also alleged that Treml "has demonstrated a pattern of harassing his neighbors with lawsuits and threatening letters." He asserted that Treml's lawsuit was frivolous and claimed damages of $3000 for "emotional distress."

¶10 On November 28, Treml answered and denied the counterclaim and asserted that the counterclaim was frivolous.

¶11 In a letter filed December 4 in the circuit court, Gallagher wrote to the small claims clerk noting that the matter was scheduled to be tried before Commissioner Pieper on December 8, 2000, and asserted that "this case has evolved beyond the authority of a Court Commissioner, due to the actions of the Plaintiff, and must therefore be tried in front of a Judge." Gallagher noted that he had alleged that Treml's case was frivolous and, according to state statutes, "a Court Commissioner lacks the authority to award such costs." A note, written in

the margin of the letter by Commissioner Pieper and signed by him on December 4 said: "He's right. Judge want to take matter from here—or stay at commissioner level[?]" Judge Kathryn Foster took over the matter again and set the matter for a scheduling conference on January 29, 2001.

¶12 On December 5, Treml requested a substitution of judge. Brian Treml followed this up with a letter to Judge Foster filed with the circuit court on December 7, 2000. In that letter, Brian Treml argued against Judge Foster taking over the matter. In his view, "this case has not evolved beyond the authority of the Small Claims Court." He thought that, since no claim exceeded $5000—even Gallagher's claim that the lawsuit was frivolous—the statutes demanded that the claim stay before the "appointed Commissioner" who "does have the Authority to hear and decide any and all matters of this case." He further alleged that the "court does [not] have the authority under Due Process to move this matter to Civil Court based on the written statements of Paul Gallagher under any current statutory law or local rule." In Brian Treml's view, the court commissioner had the authority to decide whether a case was frivolous. Brian Treml also underscored his belief that Judge Foster had no authority to act because the court has no authority to remove a case from "small claims" to "civil court."

¶13 On the same date, Gallagher responded with a letter of his own and filed it with the court. In that letter, Gallagher wrote: "I must once again strenuously object to Mr. Brian Treml's involvement in this case. He is not a licensed attorney, and is in no way a party to this action."

¶14 In response, on December 8, Judge Foster noted the recent correspondence of the parties and ordered a hearing to air the various legal and factual arguments contained in the correspondence. The date set for the hearing

was January 8, 2001. Significantly, Judge Foster ordered the following: "That the Plaintiff, Rudy Treml, must appear at all scheduled court matters until resolution of the issue pertaining to who is the Plaintiff in this matter. His failure to appear will result in dismissal of the case."

¶15 Also, on December 8, Brian Treml wrote Commissioner Pieper, advising him that the "Arborvitae Tree" allegation was being withdrawn.

¶16 On December 11, Rudy Treml wrote to Judge Foster, asserting that no actions were pending before her as far as he was concerned and that the small claims matter that was in her court was, therefore, an error. He asked Judge Foster to "rectif[y]" the matter and then wished Judge Foster "a very pleasant holiday."

¶17 On December 18, Brian Treml wrote the Wisconsin Judicial Commission, complaining about Judge Foster. In that letter, Brian complained that Judge Foster had no authority to sit on the case, that she was biased against Rudy Treml and against Brian based upon the proceedings that occurred at the November 27 hearing and that she had no authority to order Rudy to be present at the scheduling conference or risk dismissal.

¶18 On December 19, Judge Foster denied the substitution request as untimely.

¶19 On January 8, 2001, Judge Foster began the hearing with a call for appearances. Significantly, Brian Treml said: "Brian Treml for Rudy Treml, d/b/a Treml Sales and Service." Judge Foster then said that the court had received a fax from someone on behalf of Rudy Treml indicating that he was ill with the flu and was unable to attend. Judge Foster then outlined the state of the record up to

January 8 and the issues she felt were before her for resolution. In pertinent part, this is what Judge Foster said:

> Now, as I indicated, there were several matters that the Court wanted to address today. And I would note that there has been a wealth of correspondence, if you will, between the parties and also directed to the Court as to in effect, first of all, why this matter is here at all before me today as I had previously ruled on a preliminary matter and then had, in effect, sent the matter back to Commissioner Pieper, who was originally assigned to hear this case and a matter that he … subsequently requested because of additional filings be returned to this Court for anticipated final resolution. And subsequent to that, there was a request for substitution of Judge, directed towards myself, as opposed to Mr. Pieper, filed by the plaintiff in this matter but denied by the Court and directed that this matter would be addressed here today.
>
> In addition to that, we have Mr. Gallagher's … continued challenge to this Court of Brian Treml's appearance here today and representation of Rudy Treml since it is alleged by the defendant that Treml Sales and Service is not a proper party to this action and, therefore, Brian Treml could not appear to represent, otherwise effectively practicing law without a license, if in fact that is the case. And with those averments in mind, the Court also directed specifically that Rudy Treml appear here today or face possible dismissal of his lawsuit, at least the plaintiff's portion of the lawsuit.

¶20 The first issue taken up was the authority of Brian Treml to appear. Brian Treml reasoned that it was proper for him to appear based on the following rationale:

> Rudy Treml is the plaintiff in this lawsuit. Treml Sales and Service is Rudy Treml. It is not a corporation. It is not a separate entity. They are one and the same. Myself, Brian Treml, is here representing Rudy Treml under the statutory law, [WIS. STAT. §] 799.06, which allows me to be here. It is only in small claims cases that's allowed. This is not a civil case; therefore, I'm allowed to be here…. I am an employee of his. And even if I'm not an employee of Treml Sales, I can be an employee of Rudy Treml, the

> person, and be here to represent Rudy Treml, the person, and that is who I am here representing.

¶21 Judge Foster replied that there were two errors in Brian Treml's reasoning. First, she said that the only way Brian Treml could represent Rudy personally was if he was employed by Rudy as an attorney licensed to practice law in this state. Second, she pointed out that while it is true that this case was a small claims matter, this did not mean that it was not also a civil matter. This case, said Judge Foster, was a civil case and many of the Rules of Civil Procedure governed by WIS. STAT. ch. 800 applied here.

¶22 Judge Foster then went on to address the substitution of judge issue. Again, Judge Foster explained to Brian Treml that she was first assigned to this case on October 12, 2000, and that her assignment was not objected to at that time. She did hear the contested matter relating to Rudy Treml's motion for costs and she also heard Gallagher's objection to Brian appearing on the case. Judge Foster, citing WIS. STAT. § 801.58(1), found that there had been a contested matter heard by her well before the request for substitution and denied the request on that basis. Again, she—patiently it appears—explained to Brian Treml that simply because this was a small claims matter did not mean that it was not a civil matter and that WIS. STAT. ch. 800 did not apply.

¶23 Judge Foster then turned to whether Rudy Treml's business, Treml Sales and Service, was the proper plaintiff in this case. The judge reiterated that this issue was the reason why she wanted Rudy Treml to appear and noted that this issue had been raised in Gallagher's pleadings. (It was also raised in the Krippners' pleadings.) Regarding this issue, Judge Foster reminded the parties that she had directed Treml to provide documentation on that issue. The parties then debated whether the documentation had been provided as ordered. Brian

Treml objected to Judge Foster ordering his father to be present. He reiterated his view that he had a right to represent his father, that his father was a real person and that was all that was necessary to move forward. Judge Foster held that the question of whether Treml Sales and Service is the proper party was a valid issue and that it was incumbent upon the court to resolve the issue. Judge Foster also commented that the issue would not be resolved at this hearing because Rudy Treml was not present in court. Judge Foster was not, however, fully convinced that Rudy Treml was really sick and ordered that Rudy Treml file with the court, in the next ten days, a doctor's excuse that he was physically incapacitated with the flu so that he could not attend the hearing that day. Judge Foster dismissed the complaint with the proviso that if Rudy Treml provided a licensed medical physician's excuse within the next ten days, the court would reconsider. The court also ordered that the counterclaim would survive. The proceedings then concluded.

¶24 On January 10, 2001, Rudy Treml faxed a medical excuse about why he could not attend the hearing. The excuse was a "certificate to return to work" form and said that Rudy Treml had been under the care of Dr. Nezih Z. Hasanoglu, D.O. on January 8. On the same date, Judge Foster faxed Rudy Treml, advising him that the certificate was not a "medical excuse." It did not indicate an inability to appear in court on January 8 and a medical doctor did not sign it. Judge Foster gave Rudy Treml until January 22 to provide a proper medical excuse. Pointedly, the faxed letter then stated: "Please be further advised that you must personally appear at the January 29, 2001, 2:00 p.m. Scheduling Conference or a default judgment may be taken against you at that time."

¶25 On January 15, Rudy Treml filed a motion that Judge Foster be removed from the case because she was prejudiced against him. He complained

about many things, but one of them stands out. He complained that it was impossible for him to comply with getting a medical excuse because he was not under a doctor's care when he had the common flu. He complained that Judge Foster's order was proof of her bias against him.

¶26 Also on January 15, Rudy Treml filed a motion asking for de novo review of Judge Foster's January 8 decision. He also wrote a letter to Judge Foster on January 18, saying he had several issues "which needed to be clarified," taking issue with Judge Foster's rulings to date, and demanding a prompt response from Judge Foster.

¶27 Then, on January 19, Rudy Treml faxed an excuse, signed, he said, by "a real Doctor." The form was the same one as the last excuse, which had not been accepted by Judge Foster. But the words "certificate to return to work" were now crossed out. In addition, there appeared to be a signature by Dr. Hasanoglu. Finally, in the space providing for comments, it said: "Patient was unable to work on Monday 1-8-01. Patient was ill & unable to function."

¶28 On January 23, 2001, Judge Foster wrote Rudy Treml. She acknowledged Rudy Treml's motion and correspondence, reiterated that her refusal to honor the request for substitution was based on WIS. STAT. § 801.58(1) and (2), explained that he had a right to have this decision reviewed by a chief judge, and explained that if he did not like her other rulings to date, he could seek interlocutory review in the appellate court. She also informed Rudy Treml that she interpreted his correspondence as a request that she reconsider her earlier rulings, which, she said, would be heard in open court on January 29, 2001 at 2:00 p.m. She reminded Rudy Treml, once again, that either he or an attorney on his behalf must appear at the January 29, 2001 scheduling conference and hearing.

¶29 On January 25, Rudy Treml wrote Judge Foster, basically telling her that he was not going to comply. In particular, he wrote:

> You [sic] correspondence of January 23, 2001 still does not answer these questions. There is no Motion that I am aware of for January 29, 2001 concerning the Order signed by Commissioner Pieper regarding who may or may not appear as Plaintiff.
>
> Please be advised that I will be relying on previous rulings in this matter that state my employee "Brian Treml" can appear under Wisconsin State Statutes 799.06 as myself the Plaintiff, Rudy Treml/DBA Treml Sales & Service.
>
> It is fact under Statutory procedure the Court has not rescinded that Order in any way, shape or form to date. I will not personally appear for a "Scheduling Conference" as there is no requirement under current law or Statute which requires my bodily presence.

¶30 Yet again, Rudy Treml asked Judge Foster to recuse herself and he also, again, demanded a prompt response.

¶31 On January 26, Judge Foster issued an order that Rudy Treml appear personally at the scheduling conference on January 29, 2001. The order further stated that any questions or issues raised by him in the several letter correspondences would be addressed at that time in a hearing before the court.

¶32 Also, on January 26, Rudy Treml requested review by the chief judge of Judge Foster's denial of a request for substitution. Rudy Treml also filed a "Bill Quia Timet" claiming that Judge Foster was biased against him and a "notice and demand" that the proceedings be stayed until the matter of Judge Foster's substitution reached a final disposition.

¶33 The hearing on January 29, 2001, took place as scheduled. Again, when Judge Foster asked for the appearances for the record, Brian Treml

responded: "Brian Treml appearing as Rudy Treml." After the other appearances were announced, Judge Foster recapped the result of the last hearing and noted that she had received two excuses from a medical doctor, the first being deemed by the court to have been insufficient. She mentioned that Rudy Treml had once again raised the substitution of judge issue despite the fact that the court had already ruled on the matter. She further mentioned that there was a "clear order issued last Friday again about Rudy Treml's need to appear and in effect answer the issue raised by the defendant as to who in fact is the appropriate plaintiff in this matter" as well as Brian Treml's ability to appear on behalf of Rudy. Judge Foster then asked: "First of all to Brian Treml, why is it that your father is not here today?" Despite the past pronouncements of the trial court that Brian Treml's ability to appear on Rudy's behalf was a valid issue that the court had yet to decide, Brian Treml spoke for his father and said that: "In his reading of the statute it says that a full-time employee can personally appear as him and that is why I am here." Again, the court patiently explained that the issue was one that the court must yet decide, implicitly telling Brian Treml that the issue was one of fact and the court had to take evidence to determine whether Brian did, in fact, come under the statute and whether Treml Sales and Service was, in fact, a bona fide plaintiff.

¶34 But Brian Treml would have none of that. In his view, no facts had to be determined because he had already decided what the facts were. He said, "I work for Rudy Treml who is the owner of Treml Sales and Service."

¶35 Again, Judge Foster attempted to explain to Brian Treml that there had been a challenge to his assertion and that she had the obligation to find facts to support Brian Treml's assertion. She said, "[T]his is an important issue." She noted that the address in question is 2185 Calhoun Road in New Berlin. But she

also noted that while Treml Sales and Service was the plaintiff in the case, the complaint, signed by Rudy Treml, pro se, said, "*I* legally own property which is located at N21185 South Calhoun Road, New Berlin." (Emphasis added.) Judge Foster noted that he did not aver that his business owned the property, but that he individually owned the property. Judge Foster was telling Brian that there was a real factual issue present, just based on the four corners of the complaint, and that the court had a duty to resolve the issue.

¶36 Again, Brian Treml was having none of that. He responded: "If I may offer the contention of Rudy Treml is that Rudy Treml is Treml Sales which means any property owned by Rudy Treml is owned by Treml Sales. It is not a separate entity. It is a self entity."

¶37 The court responded: "That's not true." Brian Treml continued to debate the issue, basically contending that Treml Sales and Service was just Rudy Treml, as an individual, deciding to tack on the words "Sales and Service" solely for business reasons, but that Rudy Treml was the legal owner of the property. Brian Treml further alleged that the property was rental property and that the rents went through the business account and "if we need some evidence of that I am sure I could come up with some property taxes."

¶38 The court responded: "I think that's what [has] been requested…. That's what we have been waiting for." As Thomas Herzog, the Krippners' attorney then explained, there has to be some evidence that Treml Sales and Service is on the deeds.

¶39 Discussion then turned to whether Brian Treml was indeed a full-time employee of Rudy Treml Sales and Service as Brian Treml claimed. This was necessary since WIS. STAT. § 799.06(2) allows only full-time employees to

appear for a business in a small claims matter. When Brian Treml asserted that Rudy Treml had filed an affidavit attesting to Brian being a full-time employee, Herzog replied that the affidavit is silent about Brian being a full-time employee. The court concluded that this was another issue that had to be resolved by a factual hearing. Herzog responded that Rudy Treml was not present and the factual hearing could not take place. Brian Treml acknowledged that there was an order directing Rudy to be present, but insisted once again, despite clear rulings from the court on the matter, that he, Brian Treml, was appearing personally for Rudy Treml. Again, the court tried to disabuse Brian Treml of this notion and explained that the court had inherent authority to order people to appear if it will move the proceedings forward. Judge Foster told how there was no "explanation to my satisfaction really why he can't be here."

¶40 The court then, once again, tried to explain the law to Brian Treml. The explanation takes up seven pages of transcript and we will not repeat it here. Suffice it to say, the trial court covered the same ground that it had previously covered. The court even went back to the substitution of judge issue in an attempt to get Brian Treml to understand why the substitution request had been denied. The court then reinstated Treml's complaint and said: "I will give him one last opportunity."

¶41 But Brian Treml was not satisfied with this opportunity. Again, he dredged up an issue that the court had previously ruled upon. Brian Treml asked "how the defendant can file a counterclaim and have his claim moved to civil court when the plaintiff's case was … easily handled in small claims court before a Court Commissioner." The court responded: "First of all, I thought we went through [this] before, Mr. Treml, a small claims matter is a civil case. It is one and the same. There is no distinction. The legislature carved out Chapter 799 for

… dollar amounts under five thousand … [but] [i]t is still a civil action. And so the filing of the counterclaim … changed the complexity of the case … and our Supreme Court has said that Commissioners can't rule on frivolous lawsuits. Trial judges have to do that." More colloquy ensued and then Brian Treml thanked the court very much for that clarification. After still more colloquy, the matter was adjourned.

¶42 On March 12, Rudy Treml wrote Judge Foster a letter claiming that she was practicing law on Gallagher's behalf, that she was handing down verbal orders from the bench which were invalid because they were not signed in writing, that she had failed to disqualify herself because she was biased, that she had wrongfully transferred a small claims matter to her court and wrongfully allowed Gallagher to counterclaim for anything other than statutory expense, and that the small claims court was perfectly able to handle this matter in a timely fashion. Rudy Treml demanded that Judge Foster respond to his complaints in writing. A notation on the letter indicated that these matters would be taken up at the next scheduled court hearing.

¶43 The next scheduled date for a hearing before the court was March 26, 2001. Yet again, Brian Treml appeared and stated that he was "Brian Treml, Treml Sales and Service appearing as Rudy Treml." Again, Judge Foster brought up the matter of whether Treml Sales and Service "was in fact the correct Plaintiff." The court asked Brian Treml if he had brought any verification that Treml Sales and Service was the owner of the property in question. The court noted that it had ordered Rudy Treml to appear and asked Brian Treml where his father was. Brian Treml replied: "He's today at the office." Judge Foster asked: "Why is it that he's not here?" Brian Treml responded: "Because I'm allowed to appear for him under the statute. And–" Judge Foster interrupted and said:

> That has been challenged and the court certainly questions that Mr. Treml and I have all along, and I think I have been more than generous in allowing you an opportunity to establish that you are in fact authorized under the small claims statute to appear.
>
> Now another facet of the challenge is by way of Mr. Gallagher's motion and request for you to provide verification that you are in fact a full time employee or an employee of Treml Sales and Service. Do you have that with you today?

¶44 Brian Treml responded that he did not get paid any actual money for working for his father but insisted that he was still a full-time employee. Based on this, the trial court informed Brian Treml that he was not an employee of his father. To this response, Brian Treml said he "challenge[d]" that. He did not understand how a person had to be paid to be an employee. The trial court then replied that Brian Treml had to "bring in proof" that he was an employee. The trial court explained that, thus far, all that had been made were "representations" alleging that he was an employee of his father. But the court said that, absent proof, Brian was not going to be able to represent his father because Brian was not an attorney. The trial court then told Brian Treml that he was "going to have to remove" himself from the table and that the court was "not going to allow [him] any additional appearances in the matter." The trial court asked for and received from Brian Treml his father's telephone number.

¶45 The court was able to contact Rudy Treml by telephone. The trial court first explained to Rudy Treml that Brian Treml had alleged that he was an employee of Rudy but that he was not paid. The court told Rudy Treml that this was not sufficient to show employee status and asked Rudy Treml to elaborate on the form of compensation to his son.

¶46 Rudy Treml told the court that although Brian was not paid, he does get "room and board, etc." Rudy then asked if it has to be monetary payment. The court answered that in its estimation it did. Another area that the court had concerns about was Gallagher's and the Krippners' independent motions to compel answers to their interrogatories. Correlatively, all defendants moved to dismiss on grounds that Rudy Treml had commenced the action in bad faith and had been less than forthcoming in responding to the interrogatories. After some discussion, the court took the motions under advisement pending an "actual trial on the merits." The trial court then indicated that it was going to set the case for trial and inquired about dates where all parties would be available. All parties, including Rudy Treml, eventually agreed that the trial would commence on April 24 at 1:30 p.m. The court then adjourned the proceedings.

¶47 On April 5, Rudy Treml wrote Judge Foster, reiterating the concerns that he had written about in his March 12 letter and added that in addition to those concerns, he objected to Brian not being able to represent him. He asserted that Brian was his "employee" and once again claimed that Commissioner Pieper's order allowing Brian to appear was "precedence." He demanded an adjournment of the April trial date, again accusing Judge Foster of practicing law on Gallagher's behalf and claiming that Judge Foster could not sit on a case "in which a claim is against you." He also asserted that Gallagher's counterclaim did not legally exist because the court had just ruled in the March 26 hearing that his claim was not frivolous. He also accused Judge Foster of creating the confusion present in this case. Rudy Treml had also previously sought review of Judge Foster's decision to deny the substitution of judge. This was before Judge Michael Skierawski. Judge Skierawski affirmed Judge Foster's decision.

¶48 On April 11, 2001, Judge Foster replied to Rudy Treml that, in light of Judge Skierawski's decision, she would continue to sit on the case, that the trial date remained firm and that the adjournment request was denied.

¶49 On April 17, Rudy Treml brought a motion for adjournment "based upon [the] courts [sic] failure to address orders and the demands of the plaintiff and ignorance of rights." The motion rehashed the same complaints that Rudy Treml had written about before. Apparently, a clerk of the court called Rudy Treml on April 18 to inform him that his motion was denied because in an April 20 letter, Rudy Treml acknowledged receiving the telephone call. In this letter, Rudy Treml notified the court that "I will not be appearing at the Scheduled Trial and will no longer participate in your improper and abusive court room and procedural antics." Again, Rudy Treml regurgitated the same claims that he had made before and *demanded* that all further proceedings be halted and adjourned. He claimed that he could not "participate in a 'Hanging' court room which is what you have created."

¶50 Judge Foster responded on April 20, 2001, with an order affirming her denial of an adjournment and telling all parties to be prepared for trial. The order also stated:

> The Plaintiff should be advised that failure to appear at the appointed date and time for trial may result in the dismissal of his claims and default judgment entered against him for the claims of the Defendants.

¶51 On April 23, Rudy Treml again wrote Judge Foster and accused her of a "hidden agenda" and "blackmail." He again, this time in bold print, informed the court that "I will not be participating or appearing and expelling [sic] any more time and funds in this matter."

¶52 On April 24, the court called the case for trial. Rudy Treml, true to his word, was not present. Brian Treml appeared instead. Again, Brian Treml referred to the order of Commissioner Pieper allowing him to appear and said that was the only "official" order of the court. Brian Treml opined that oral orders of the court made from the bench were invalid unless reduced to writing. The court responded that they are still valid orders of the court. The court reiterated that there had been no proof submitted by Rudy Treml that Brian Treml was an employee and held: "I'm not going to require you to leave the courtroom, but I am not going to permit you to participate as advocate counsel on behalf of your father [in] any way, shape or form here today." The court also commented on how one of the issues was whether Treml Sales and Service was a true party in interest in the lawsuit and stated that Rudy Treml had never verified that his business held title to the property in question. The court also reiterated that Rudy Treml had been put on notice that if he did not appear, his nonappearance might result in dismissal of his claims and said, "I will entertain a motion from either defendant on that matter at this time." Both parties asked that the Treml complaint be dismissed and the court granted the requests. It awarded any costs and attorney's fees pursuant to statute on those requests.

¶53 The case then proceeded to Gallagher's counterclaim of frivolousness and the Krippners' prayer that Treml's suit was frivolous. Testimony was had on this issue. Michael Krippner was the first person to testify. As he was testifying, Brian Treml objected on hearsay grounds at one point. The following colloquy took place:

> THE COURT: Mr. Treml you can't intersperse—you cannot intersperse any comments.
>
> [BRIAN] TREML: I don't believe that's fair to sit and have no counsel or plaintiff present at a courtroom hearing.

> THE COURT: What would be fair is your father appearing here today as directed by the court, sir.
>
> You may continue your question. You may remain in the courtroom, Mr. Treml. You must be quiet.

¶54 Brian Treml eventually left the courtroom. Michael Krippner, Anne Marie Krippner and Paul Gallagher all testified. Michael Krippner testified that he purchased a lot and built a house next door to Treml's. He wanted to build a flower bed along the lot line, but there was brush and limbs from an abandoned apple orchard on Treml's property in the way. He tried to contact Treml, but was unsuccessful. So, he contacted the city. Subsequently, he observed a wheelbarrow or two full of branches, about two-feet high and two-feet wide, which Krippner estimated would take about fifteen minutes of work. For this work, Treml charged Krippner $475. Krippner also spoke about an estimate that Treml had provided in which he asserted that it would cost $519 to replace certain trees on Treml's property. Krippner said that in all the time he has owned his property, there were no such trees on Treml's lot. Krippner related conversations with the president of the next-door condominium association who said that it is a common pattern of the Tremls to use the courts to harass people. He also related how the same day that he got the letter asserting his responsibility for the $519, two other neighbors received quotes where Rudy Treml was claiming $6000 from each of them and threatening a lawsuit. Krippner provided the letters of those neighbors as evidence. Krippner also provided a letter of a representative for a third neighbor, where the Tremls also threatened a lawsuit and asked for a certain sum.

¶55 Krippner had to hire an attorney and testified that at the time of his testimony he had incurred $3935.50 in legal fees. He further testified that Treml had caused the New Berlin police to come to his house regarding various

complaints "seven, eight [or] nine" times. On not one of these occasions did the New Berlin police cite Krippner for any infraction. Krippner said that he had the police out on the property to see if they could see any evidence of trees having been cut, but the police found no such evidence. In Krippner's view, this was simply harassment by Treml. Krippner's wife also testified, largely confirming her husband's account.

¶56 Paul Gallagher then testified. He read into the record Rudy Treml's letter to him accusing him of trespass and property damage. Enclosed with the letter was a copy of a police report. According to Treml, the police report implicated Gallagher as the "perpetrator" of the crime. Treml wrote that "criminal action … is now pending with the Waukesha District attorney as to charges being filed." Gallagher then testified that he perused the police report and all that he could find was a question put to Krippner as to whether he cut down any trees on Treml's property and Krippner replied "no" and said that "maybe Paul Gallagher did."

¶57 Gallagher then presented photographic evidence which, in his opinion, showed no evidence of any tree at the alleged site on Treml's property that could have been any bigger than one-eighth inch in diameter. Gallagher testified that "[t]here is nothing even remotely resembling a stump or a hole in the ground. There is absolutely nothing than freshly cut weeds and grass here." Gallagher said that his home was hundreds of feet away from the Treml property.

¶58 Gallagher then testified that he had never cut within fifteen or twenty feet of the lot line because there was a trench. Gallagher said that Treml's property was very heavily weeded and, in any event, he "saw the signs there." He said he never saw a tree.

¶59 Gallagher then presented police reports from years past before Gallagher even had a home in the area. This report mentioned a complaint by Treml that a developer had trespassed on his land. Gallagher said that Treml did sue this developer three different times and the cases were settled. This, Gallagher said, was evidence of a history of suits by Treml.

¶60 Gallagher commented that "there has never been any evidence" against him and there is a long history of Treml harassing neighbors. He said he had paid out $2520 worth of legal fees before deciding that the matter was getting too costly and it would be more financially advantageous for him to handle the matter himself.

¶61 At the conclusion of the testimony, the court made the following pertinent findings. The court began by commenting that there was a "strong case, well beyond clear, satisfactory and convincing that the lawsuit originally commenced against both parties or all three parties present here today is in fact frivolous under [WIS. STAT. § 814.025], done in bad faith and for purposes of harassing or injuring the parties present here and particularly harassing them." The court was satisfied that the Tremls had engaged in vexatious litigation. The court pointed to the fact that Rudy Treml, the named plaintiff, had failed to appear personally. The court focused on the police report which apparently was the "evidence" that Treml had for suing these defendants and observed that the report did not show that anyone had actually cut down any trees. The court said that it was taking into account the letters by Treml referencing that the matters were being handled by the district attorney's office. Yet, there was no reference in the police report that this matter had been referred to the district attorney's office.

¶62 The court then turned its attention to the civil complaint. The complaint referred to no defendant in particular but related an incident where the "defendant" had allegedly made a "false and harassing complaint" to town officials. The court observed that the only one who made a complaint was Michael Krippner. Yet, the complaint alleged infliction of emotional distress against Gallagher for this alleged happening.

¶63 The court then referred to what this court refers to as the abuse of process undertaken by Rudy Treml and Brian Treml from the time the complaint was filed until the date of trial, including accusations against the court itself.

¶64 The court then referenced the testimony of Gallagher that there was a history of lawsuits being filed by Treml against all of his neighbors. Building on that, the court took judicial notice of the multitude of lawsuits in Waukesha county filed by Rudy Treml against various neighbors. The court named these lawsuits, one by one. The court commented that the records showed "no indication of success at least other than what may have been settled out of court." The court concluded that "there is ample support for Mr. Gallagher's assertion here that there is a history of acrimony, shall we say, with neighbors or property owners adjacent to the rental property in New Berlin that is very well documented both at the municipal level and now at the court level with no indication of success at least other than what may have been settled out of court." The court also said that there was no documentation in this case that there was a good faith belief that Treml could prevail on the merits of the underlying charge.

¶65 The court also commented on Michael Krippner's testimony regarding the debris removed on the lot line and the resulting bill of $475 for seven hours of work. The court did the math and determined that this came to $65

an hour to remove a pile of brush that was two feet by two feet. In the court's view, the estimate was ludicrous. The trial court reasoned that this evidence impacted negatively on the court's assessment as to the credibility of Treml's assertion that trees on his property had been damaged to the extent of $519.

¶66 The court allowed attorney's fees to all of the defendants in the amounts requested. Additionally, the court cited ***Puchner v. Hepperla***, 2001 WI App 50, ¶6, 241 Wis. 2d 545, 625 N.W.2d 609, as authority for the proposition that it had the power to prohibit any further lawsuits by Rudy Treml until the attorney's fees had been paid. The court then exercised this authority. From this determination, Rudy Treml appeals.

¶67 Treml presents ten issues with many subissues. Since the answer to one issue answers another, we will address nine issues, all in turn.

1. Review by the Trial Court on November 27, 2000

¶68 Treml points out that he is the one who asked for this hearing. He wanted de novo review of Commissioner Pieper's order denying him costs after Gallagher successfully moved to vacate the default judgment against him. Treml claims that the only issue to be addressed was the costs issue. Yet, he claims that the trial court "allowed and in fact encouraged Gallagher to bring [other] issues to be resolved on November 27th." Treml claims that the court had no authority to do so. Treml also claims that because the Krippners did not appear, proceeding on any other issue was an "ex parte" communication by the court.

¶69 Treml "requests the Appeals court rule on this issue for clarification of the Statute and law and does not request a reversal of the decision as this was an

issue for the lower court to decide properly and reasonably under its inherent discretion. No relief is sought, only clarification and a standard."

¶70 Based on Treml's statement, we discern that he wants an advisory opinion. He does not tell us what "statute" he claims is in need of clarification and does not inform us of what "law" he thinks needs illumination. Courts act only to determine actual controversies—not to announce abstract principles of law or to render purely advisory opinions. *See* ***State ex rel. Ellenberg v. Gagnon***, 76 Wis. 2d 532, 535, 251 N.W.2d 773 (1977). Further, this court will not consider arguments unsupported by references to legal authority. ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Moreover, Treml does not tell us how he possibly has standing to assert a claim that only the Krippners could make regarding "ex parte" hearings. Treml has not shown any prejudice to him as a result of the Krippners' absence. Besides, the record shows that the Krippners, by their attorney, told the court they would not be attending. This whole first issue is frivolous.

2. Alleged Ex Parte Communication by Letter

and the Court Acting Without the Knowledge of the Plaintiff

¶71 Treml next references the December 4 letter by Gallagher. He claims that it was an ex parte letter to "the court" addressed to no official but the "clerk," stating that, in Gallagher's view, his counterclaim for frivolousness could not be tried in the small claims court. Treml claims that, "[w]ithin hours" the case was transferred to the circuit court, all without Treml's knowledge or the Krippners' knowledge. He argues that the court failed to "follow proper filing procedures" and that Gallagher had a duty to notify all parties of his claim and allow them to be heard.

¶72 Treml asserts that had he been notified, the "outcome of the case would be different had this matter been tried before a Commissioner." He further asserts that if "that is not the case, a review of the law and standards is the requested relief and the addition of costs if the Appellant is successful."

¶73 This precise issue was never raised in the trial court. We have carefully reviewed the record and cannot find one instance where Treml complained that the letter was an ex parte communication. If such an instance indeed exists, it is Treml's obligation to provide the pinpoint citation to the record. He has not done so. We need not sift through the record for facts supporting his contention. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). This precise issue is raised for the first time on appeal and is waived. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1983). The issue raised is frivolous. To the extent that he wishes us to write an advisory opinion, the request is frivolous.

3. Whether WIS. STAT. Ch. 799 is the Exclusive Procedure to be Used in this Small Claims Case

¶74 Treml asserts that because all the claims, even Gallagher's counterclaim asserting frivolousness, were under $5000, small claims was the "exclusive" procedure and that the court erred by changing the case to a "civil" case. This is a ludicrous position for several reasons. First, this was always and still is a small claims matter. Just because a circuit court judge handles the small claims matter rather than a court commissioner does not take the case out of small claims and into the civil arena. Despite several attempts by the trial court in this case to explain the law to Treml, he continues to harbor the view that only a court commissioner is entitled to be the tribunal in a small claims matter, that small

claims actions are different than civil claims and that the trial court erred by applying civil procedure pursuant to WIS. STAT. ch. 800.

¶75 The preamble to WIS. STAT. ch. 799 should have alerted Treml that circuit courts do indeed have authority to hear small claims cases. WISCONSIN STAT. § 799.01(1) states, in pertinent part that "this chapter is the exclusive chapter to be used in *circuit court*." (Emphasis added.) Moreover, article VII, section 8 of the Wisconsin Constitution states, in pertinent part: "Except otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state." Civil actions are defined as any action which is not a criminal action. As long ago as ***Taylor v. De Camp***, 68 Wis. 162, 164, 31 N.W. 728 (1887), the Wisconsin Supreme Court, noting that a statute during that time stated: "Actions are of two kinds, civil and criminal," then remarked, "and a criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof; and every other action is a civil action." Therefore, small claims actions are civil actions and circuit court judges have authority to hear small claims civil actions. Treml's arguments to the contrary are frivolous.

¶76 Treml's claim that court commissioners have some kind of exclusive authority to hear small claims matters unless the amount requested exceeds $5000 is likewise frivolous. Treml has not bothered to cite any portion of the small claims chapter in support of his argument. While we are loathe to do his work for him, we do point out that WIS. STAT. § 799.206(1) tells how, in counties establishing at least one part-time or full-time court commissioner position, the actions are returnable to a court commissioner and that subsec. (4) tells how the court commissioner shall hear all matters using the procedures set forth in WIS. STAT. § 799.207. But these sections of the small claims chapter do not give the

court commissioners the exclusive authority to hear small claims cases. In truth, court commissioners are not judges. They are appointed by judges to assist in the administration of cases. They have only that authority delegated by a statute or by a judge. WIS. STAT. § 757.69(1). Treml's claim is frivolous.

¶77 Treml argues that even if it was proper for the circuit court to hear the matter rather than the commissioner, the circuit court should have used the WIS. STAT. ch. 799 procedure rather than civil procedure. We do not know what "procedure" occurred which was contradictory to the small claims procedure. Treml does not tell us. He simply complains that the trial court conducted this matter as if it was a civil case. Treml is off the mark once again. As we said before, small claims matters are civil matters. While not all of WIS. STAT. ch. 801 to 847 is applicable in small claims matters, WIS. STAT. § 799.04(1) explicitly says that "[e]xcept as otherwise provided in this chapter, the general rules of practice and procedure in chs ... 801 to 847 shall apply." Treml's argument to the contrary is frivolous.

¶78 Treml argues that the "transfer" of the case from the court commissioner to the trial court was in violation of the "specific and clear" reading of WIS. STAT. ch. 799. He complains that when Gallagher filed his counterclaim, it was beyond the "limitations of [WIS. STAT. §] 799.01" because it was late. He also claims that the December 4 letter informing the court that a court commissioner could not decide the frivolous action counterclaim was noticed only to the clerk, not to him. He concludes, therefore, that "[t]he Court had no right under procedure to act or assign Judges and transfer Treml's Case until or at such time Gallagher followed proper Procedure."

¶79 First, this is waived as he never complained about the counterclaim being filed late before this appeal. He does not cite to any part of the record which shows otherwise. Second, on its merits, we note that the counterclaim was filed the day after the order allowing Gallagher back into the case. There is no authority cited by Treml which says that this was late. Third, Treml's assertion that he never got a copy of the December 4 letter is patently false. The record shows a letter from Brian Treml to the court, dated December 6, 2000, and filed December 7, 2000, which begins: "I am in receipt of Mr. Gallagher's Correspondence dated December 4, 2000." Fourth, the notation of the court commissioner, written onto the December 4 letter, as we explained awhile ago, said that Gallagher was "right" and requested a transfer of the case to the circuit court. WIS. STAT. § 757.69(5) says: "A court commissioner may transfer to a court any matter in which it appears that justice would be better served by such a transfer." Because ***Hessenius v. Schmidt***, 102 Wis. 2d 697, 703-04, 307 N.W.2d 232 (1981), clearly provides that only "courts" may decide whether a matter is frivolous, the court commissioner's decision was obviously one where the ends of justice would be better served by having the case heard by a judge. Treml's arguments on this point are frivolous.

¶80 Treml argues that Gallagher's claim for fees as a result of Treml filing a frivolous action did not arise out of the "transaction of the damage to Treml's property" and concerns fees incurred after the action had been filed. Therefore, the court was duty-bound to dismiss the counterclaim. Treml's assertion is absurd. The plain meaning of WIS. STAT. § 814.025 is to allow a party to claim that an action is frivolous and, if so found by the trial court, to collect costs and attorney fees. The very essence of the claim is to allow fees incurred after the action has been filed. The assertion is frivolous.

¶81 Treml asserts that he had a "contract" with the "Waukesha County Court System" to have his case tried in the forum he chose because he paid a small claims filing fee. Thus, he was entitled to a "Small Claims Trial." He further complained that Gallagher paid no fees for filing his counterclaim and thus was able to get the case transferred into a "Civil Case before a Judge for **free**" denying him due process. He claims the county "breached" his contract and "performed criminal conversion" and "basically did whatever they chose to do with Treml's Small Claims Case."

¶82 This claim is ridiculous. When a citizen pays a fee, recognized by statute, to begin an action, it is not a "contract." The courts are not a "party" to a contract. The courts are a constitutional branch of government designed to resolve disputes between citizens or to decide whether a citizen has violated a crime. Moreover, there is no procedure requiring a person filing a counterclaim in a small claims case to pay a fee unless the counterclaim asks for money damages that takes the case out of small claims. This case never left small claims as we said above. It was simply tried before a circuit judge with authority to hear small claims cases. Treml's assertions are frivolous.

4. Substitution of Judge

¶83 Treml argues that he filed his substitution request in a timely manner because it was filed less than ten days after the December 4, 2000 letter by Gallagher saying that the case could not be tried before a court commissioner and within ten days after Treml found out that Judge Foster was taking over the case. He relies on WIS. STAT. ch. 799 for his assertion. He (finally) recognizes that this right can be waived by participation in preliminary motions in which the judge is allowed to receive evidence that of necessity is used and weighed in deciding the

ultimate issues. He cites ***Pure Milk Prods. Coop. v. NFO***, 64 Wis. 2d 241, 219 N.W.2d 564 (1974). However, he maintains that although Judge Foster did hear his motion for costs on November 27, 2000, and denied the motion, that motion was limited to de novo review of the court commissioner's denial of his motion for costs and nothing else. He therefore asserts that the November 27 hearing was not preliminary to the ultimate issues.

¶84 Treml is wrong. His motion for costs was in relation to his son's appearance before the court commissioner when Gallagher moved to vacate the default judgment that Treml had obtained. Surely this hearing had to do with the ultimate issue in this case—whether Gallagher was liable to Treml for a money judgment. When the motion was granted, Treml wanted costs for his son's appearance at the motion hearing. That was preliminary to the ultimate issue. The trial court patiently explained to Treml's son that WIS. STAT. § 801.58(1) provides that a substitution is timely only if it is made before the hearing of a preliminary contested matter. The trial court also explained that the statute applied to small claims matters. The trial court was right. As we already noted, WIS. STAT. § 799.04 tells how WIS. STAT. chs. 801 to 847 apply to small claims cases unless specifically provided otherwise. Nothing in WIS. STAT. ch. 799 specifically negates § 801.58(1). Treml's argument is frivolous.

5. Whether Brian Treml Could Appear Pursuant to WIS. STAT. § 799.06(2) and the Order to Provide Medical Excuses

¶85 Treml next takes issue with the trial court's order that he provide a medical excuse for why he failed to appear at a hearing when he was unambiguously ordered to appear. Treml continues to take the position that he consistently applied throughout the proceedings—that his son Brian was legally

entitled to appear in his stead and the order that he personally appear was improper. Therefore, he claims, the order that he provide a medical excuse for this nonappearance was equally improper.

¶86 WISCONSIN STAT. § 799.06(2) discusses appearances. It reads as follows:

> A person may commence and prosecute or defend an action or proceeding under this chapter and may appear in his, her or its own proper person or by an attorney regularly authorized to practice in the courts of this state. Under this subsection, a person is considered to be acting in his, her or its own person *if the appearance is by a full-time authorized employee of the person.* (Emphasis added.)

¶87 For Brian to appear for Rudy, it was important that Brian be a full-time employee of Rudy. Treml insists that if an issue is raised as to whether an appearance is being made by "a full-time authorized employee," it is the objecting party's burden to prove the negative—that the person is *not* a full-time employee—rather than his burden to prove the positive—that the person *is* a full-time employee.

¶88 This issue is controlled by ***Littleton v. Langlois***, 37 Wis. 2d 360, 155 N.W.2d 150 (1967). In that case, the supreme court reviewed the nature and purpose of the former version of WIS. STAT. § 799.06(2) in the context of an alleged unauthorized practice of law due to the appearance of the wife of the plaintiff. The defendant claimed that the judgment was void because the plaintiff appeared neither in person nor by an attorney, but by his wife. ***Littleton***, 37 Wis. 2d at 361. Both the small claims court and the circuit court rejected this reasoning. ***Id***. The supreme court affirmed, declaring that:

> [T]he objective of the small claims procedure is speedy and inexpensive justice. This aim would not be furthered by insisting that a party to a lawsuit had to appear under all

> circumstances by attorney only unless appearing in proper person. The circuit judge stated that, "The public interest does not require that a wife be prevented from appearing in a Small Claims court as an agent for her husband." Such representation could be improper, however, if it became more than casual and constituted a usual and customary method of doing business. Essentially it is within the discretion of the trial judge to make sure that the latitude permitted under small claims procedure be not abused. There are, no doubt, numerous cases where the appearance by other than an attorney or the actual party would constitute the practice of law to a prohibited degree, and the failure of the trial judge to promptly restrain and prohibit such conduct would constitute an abuse of discretion.

Id. at 363.

¶89 The court then took note of the change in the statute (to the current version of WIS. STAT. § 799.06(2)) and commented:

> We conclude that this statute clearly gives authority to the trial judge in the proper exercise of his [or her] discretion to insist on appearance of a party in person or by attorney ….

Littleton, 37 Wis. 2d at 364.

¶90 Based on ***Littleton***, it is apparent that the law has been in place since 1967 and that law says the trial judge has the discretion to inquire into whether a person appearing for the plaintiff is qualified to so act. Because Brian Treml's own comments to the court were that he had frequently appeared in small claims court on his father's behalf and because there were objections from the defendants that Brian was not a full-time employee, the trial court not only had the discretion to get to the bottom of the factual issue, but the failure to restrain prohibited conduct would in itself be an erroneous exercise of discretion.

¶91 It was not a misuse of discretion for the trial court to insist that Rudy Treml appear and prove that Brian was a full-time employee. Our supreme court has spoken to the placement of burdens in ***State v. McFarren***, 62 Wis. 2d 492,

499-503, 215 N.W.2d 459 (1974). The court commented that the burden should normally be placed on the person who has the proof "peculiarly within his [or her] knowledge." ***Id.*** at 500-01 (citation omitted). Whether Brian was a full-time employee was peculiarly within Rudy's knowledge. He properly was assigned the burden of proving that his son worked full time for him and the trial court properly exercised its authority to order his appearance so that the issue could be resolved. The court has the inherent authority to ensure that the court "functions efficiently and effectively to provide the fair administration of justice." ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999). The court wanted to resolve the issue. It had the authority to do so in the manner it did.

¶92 Moreover, we must be mindful of what kind of issue was before the court. The issue was a factual one. Quite simply, the issue was whether Brian was a full-time employee. To decide such an issue would require a fact-finding hearing. Time and again, Judge Foster attempted to explain to Brian Treml that what she needed was to have a fact-finding hearing so she could determine whether Brian was a full-time employee. But Brian and Rudy insisted that a fact-finding hearing was not a proper avenue for determining whether Brian was a full-time employee. To their way of thinking, if Brian said he was a full-time employee, then he was a full-time employee and let the defendants disprove it. That line of thinking, consistent throughout the trial court proceedings and continued here, is frivolous.

¶93 Treml also points out that, in his view, the law allows full-time employees to be paid in a form other than by monetary compensation. First, Treml has provided no authority for this proposition. Second, and more importantly, Treml never appeared in court so that a fact-finding hearing could take place. Thus, the trial court was never able to determine if, in fact, Brian

Treml was being paid in a form other than by monetary compensation. Treml cannot use a nonsworn statement made in a telephone conversation with the court as "proof" that Brian worked for "room, board, etc." Treml should have appeared in court and put his evidence in the record at a fact-finding hearing. He did not do so.

¶94 When the court demanded a medical excuse from Rudy Treml, it was consistent with the court's inherent authority to move the issue to the fact-finding stage, a stage which Treml consistently avoided. The medical excuse issue is frivolous.

¶95 Two other comments made in the brief by Rudy Treml bear specific mention. Treml accuses the court of "chaotic" proceedings. This court disagrees. Treml and his son brought about the chaos. The trial court was only doing its best to undo the chaos.

¶96 Treml also cites a statement made by Judge Foster at the January 29, 2001 hearing which he argues was a concession by Judge Foster of her bias against him and that she should have recused herself. He claims that she acted "in an improper manner." Treml quotes Judge Foster as having said, "Obviously, I'm biased against you." Treml has taken this statement completely out of context. The statement was made during a discussion of why the court was denying Treml's request for substitution. It was Judge Foster's conclusion that by sitting on and deciding the costs matter on November 27, 2000, she had ruled on a preliminary matter pertinent to the ultimate issues in the case and, therefore, the request was untimely under WIS. STAT. § 801.58. She then explained that the statute was meant to prevent a losing party on a preliminary matter from then availing oneself of the substitution statute. She said:

> [T]he mere fact that I may have ruled on that preliminary matter against you in my estimation isn't with an indication of bias or prejudice but for on that one issue. Obviously I'm biased against you because I ruled against you on that legal issue. It is limited to that, period.

¶97 This is not a concession of bias against the person on the trial court's part. It is an explanation that after ruling against a party in a preliminary matter, that party cannot use the substitution statute. It is a further explanation that the ruling against Treml was a bias against his position on that limited matter, not a bias against Treml personally. Treml's attempt to make this statement something that it was not is abhorrent. It is frivolous.

6. "Can a Court Dismiss a Case and Upon Reinstatement Claim It Only Dismissed an Amended Complaint?"

¶98 Treml "requests" that this court rule on this issue only to clarify the law but "does not request a reversal of the decision as this was an issue for the lower court to decide properly and reasonably under the law. No relief is sought, only clarification and a standard." In other words, Treml is again asking us to devote precious judicial resources to provide him with an advisory decision. For reasons already previously expressed, we refuse to take up this issue. This issue is frivolous.

7. Interlocutory Appeal Rights

¶99 Treml again requests an advisory opinion on this issue. We will not address it. This issue is frivolous.

8. Accusations of Fraud

¶100 Treml asserts that he was "accused of fraud several times by the Court at the bequest of Defendant Paul Gallagher." These accusations were that Brian was filing documents as Rudy Treml, that Rudy was not the true plaintiff, that Rudy did not exist, that Rudy was not ill with the flu on January 8, that Rudy was not copying documents to the other parties and that Rudy was not the person signing the pleadings. As proof, Treml cites a statement by Judge Foster that she wanted future pleadings to be signed by him in a legible fashion. Treml objects to these "accusations" and claims harassment by the court. He states that he was the person who signed the documents, not his son, and no one has proven otherwise. He says he does not request reversal of the case on this ground.

¶101 We will not address it then, but we will comment on it. Treml never appeared in court. Never. Brian, his son, always appeared and stated that he was appearing "as Rudy Treml." This court has perused the documents filed by Rudy Treml. The signing by Treml was always with only one initial and that initial was illegible. Surely, the court has inherent authority to require that Rudy Treml make his signings legible. This was especially so in this case where Rudy never appeared and Brian always said he was appearing as Rudy. This issue is frivolous.

¶102 Finally, Treml writes that the court itself accused him of fraud. Not once did the court ever make any finding that any of the accusations he lists were actually true. But the accusations were at issue. As such, the court had inherent authority to require Rudy to sign legibly to resolve a genuine issue.

9. "Trial Hearing, Evidentiary Hearing, Default, Dismissal?"

¶103 Under this heading, Treml first claims that he was justified in refusing to proceed to trial until all the discovery issues had been decided. He cites no authority to support his belief that he may decide when the trial will take

place and when it will not. The court has inherent authority to calendar its cases. If Treml thought he was being forced to go to trial before discovery was completed, he had two remedies. One remedy was to petition this court for review of a nonfinal order of the court. He never did that. Another remedy was to appear at trial and if the result was adverse to him, then appeal that result on the grounds that lack of discovery prejudiced him at trial. He chose not to appear. His attempt to fashion his own remedy was frivolous and his appeal on that ground is frivolous.

¶104 He again rehashes the view that Brian Treml should have been allowed to appear for him at the trial. He is wrong. Rudy Treml had his chances to have a fact-finding hearing to determine whether Brian could appear for him. He refused to follow through. The contention is meritless and frivolous.

¶105 Treml objects to the finding of frivolousness. He points to an earlier statement of the court as proof that the court had previously ruled that his case was not frivolous and was therefore the law of the case. So, he wonders how the court could now switch gears when it had already ruled that his case was not frivolous. Here is what happened. The defendants wanted the lawsuit dismissed because of Treml's discovery violations and the like. The court denied the motion to dismiss. The court stated that "the prudent course of action … particularly in light of the counterclaim here, [is to take any potential sanction] under advisement biding the outcome on actual trial on the merits." Therefore, the court never made a finding that Treml's case was not frivolous. Again, Treml has taken a statement made by the trial court and lifted it out of context. This tactic makes the whole issue frivolous.

¶106 Treml says that he was entitled to notice that the court would be considering the counterclaim at trial. The above statement of the trial court, made on March 26, was the notice. The allegation is frivolous. Likewise, his complaint that he was entitled to an evidentiary hearing on the issue of frivolousness is in itself frivolous. He had notice early on that the counterclaim was a subject for trial. He had the opportunity to appear and contest the issue. He did not appear.

¶107 He argues that the evidence concerning attorney fees was never submitted to him prior to trial. The answer is: He should have been at the trial so that he could contest it. He did not appear. The issue is frivolous.

¶108 He argues that Gallagher was not entitled to attorney fees because they were incurred prior to his being allowed back into the case. Therefore, argues Treml, the fees were not incurred while Gallagher was actually *in* the case. The case began with Treml's complaint. It was ongoing from there. All fees incurred by Gallagher were the result of this lawsuit. The issue is frivolous.

¶109 Treml claims that he has been prosecuted in this case and was denied due process. On the contrary, Judge Foster bent over backwards to bring these issues to a fact-finding hearing and get the case moving. It was Treml's obstinacy which prevented the case from moving forward. His claim is frivolous.

Conclusion

¶110 The trial court ruled that Treml's case was commenced in bad faith solely for purposes of harassing or maliciously injuring another. A review of the evidence, both testimonial and documentary, supports the finding. Treml filed suit without any evidence whatsoever that the defendants cut down the trees. There were no eyewitnesses, no offer of proof, nothing. All that Treml had was a police

report that did not confirm whether the trees even existed or, if they did exist, that they had been cut. The police report gave no indication that anyone was the perpetrator other than the unsupported hunch of Treml. That is not enough to swear out a complaint against someone. Treml also wrote a letter to Gallagher, vaguely insinuating that he was the subject of an upcoming criminal action. This was simply harassment. This was made in bad faith. This was malicious. The findings of the trial court, including the award of attorney's fees, are upheld.

¶111 The defendants ask that this appeal be ruled frivolous. We grant the request. As we have detailed, all issues raised by Treml are frivolous.

¶112 Treml objects to the finding by the trial court that he cannot begin any other suits in Waukesha county until he pays the fees ordered by the court. He objects to the finding that he behaved in a "vexatious" fashion. We uphold that finding. This suit embodies the very definition of vexatious litigation.

¶113 Finally, Treml seems to complain that the court was more interested in punishing him for the way he prosecuted this action than in the merits of his complaint. First of all, the court addressed the merits of the complaint and made detailed findings that it was commenced in bad faith solely with the intent to harass Treml's neighbors. Second, the trial court did not find the case frivolous for the way Treml prosecuted his case.

¶114 While the trial court did not speak to Treml's prosecution of the case as grounds for its finding of frivolousness, we will speak to it. In this court's opinion, the complaint was not only begun in bad faith, it was continued in bad faith. Despite clear rulings on the case, Rudy Treml refused to follow the orders of the court. Instead, he resisted the orders of the court as if the law did not apply to him, as if he was impervious to the application of the law to him. In this court's

view, Treml's obstinacy 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. While the trial court made its frivolousness finding based upon WIS. STAT. § 814.025(3)(a), this court holds that the finding could have been equally based upon § 814.025(3)(b).

¶115 This opinion will be forty-three pages long before it is done. Most appellate opinions are decidedly sparse when it comes to rehashing the procedural status of the case leading up to the appeal. The majority of time and effort is normally devoted to a discussion of the law. But, in this case, we felt compelled to spend the first twenty-five pages discussing the events leading to the appeal and only seventeen pages to discuss nine issues. Clearly, this case is upside down. Treml spent his resources on the process, not on the facts and not on the law. His expenditure caused the defendants to expend their financial resources, the trial court to expend its judicial resources that could have been put to better use and caused this court to expend its resources to resolve a small claims action which should never have been instituted in the first place.

¶116 We affirm the trial court in its entirety. We remand with directions that the trial court determine the fees and costs due to the defendants for this frivolous appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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