COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-0081
02-0082
02-0083

Cir. Ct. Nos. 00-SC-00-2301
00-SC-00-3688
01-SC-00-1872

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

MICHAEL S. ELKINS,

PLAINTIFF-APPELLANT,

V.

SHAWN B. SCHNEIDER, N/K/A SHAWN B. ELZ,

DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Michael S. Elkins appeals from judgments in three small claims actions against Shawn B. Schneider, n/k/a Shawn B. Elz, which

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

actions were consolidated by the trial court and are now consolidated by this court for purposes of appeal. We address each issue raised by Elkins in turn and, after consideration, affirm all three judgments.

Right to Jury Trial

¶2 Elkins argues that his constitutional right to a jury trial was infringed upon because he filed a proper and timely motion under WIS. STAT. § 799.21 (providing the mechanism for requesting a jury trial in small claims cases). However, § 799.21(3) specifically requires prepayment of jury fees at the time the written demand for jury trial is made. It is undisputed that Elkins did not pay jury fees with his written demand. Therefore, the trial court refused to set the matter for jury trial.

¶3 Elkins points out that the reason why no payment was made with the jury demand is that the Department of Corrections (DOC) refused to make free an amount of money from his "release account" for that purpose. The DOC refused to provide funds based on its understanding of WIS. STAT. § 814.29(1m)(d). In the DOC's view, it is only required to release these funds for specific purposes. As regards release for court actions, the statute only provides release of funds for the purpose of commencing or defending a legal action. The DOC found no authority in the statutes for releasing funds to pay civil jury fees. Elkins argues that the trial court should have ordered the DOC to release the funds for purposes of paying the jury fee or should have ruled that because he is indigent, he should not have to pay the fee.

¶4 Ekins cites no authority for either proposition. He does not discuss the statutes and does not analyze the pertinent administrative code provisions. On

that ground alone, we could decline to address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (noting that we need not address issues inadequately briefed or unsupported by references to legal authority). But we will spend some time with it. The DOC's refusal to disburse account funds for the payment of civil jury fees is a determination that is subject to administrative review. From the record, it is evident that Elkins is familiar with this administrative review process. If the issue of whether the DOC should disburse funds for the payment of civil jury trial fees is to be eventually decided by the courts, it must come after the prisoner has exhausted all administrative remedies, and only if the administrative process is adverse to the prisoner may the prisoner then file a writ of certiorari seeking redress from the administrative ruling. Elkins has failed to exhaust his administrative remedies.

¶5 We anticipate that Elkins would argue that waiting for the administrative review process to run its course would have made it too late for him to make a timely demand for a jury trial in these three small claims cases and pay the fees associated with it. Thus, as he argues in his brief in a related matter, he is caught in a "catch 22" where he sits between an administrative ruling that he thinks is wrong and a trial court's refusal to schedule a jury trial without payment of a fee.

¶6 Still, what Elkins could have done and should have done is asked the trial court to adjourn the small claims actions and the accompanying jury fees matter until the administrative review process and, if it went that far, review by a certiorari court had been completed. The issue would have then resolved itself. If Elkins won, the payment would have been made. If he lost, the payment would not be made.

¶7 Instead, Elkins made the bald assertion to the trial court that it somehow had the authority to order the DOC to release funds to pay for a jury fee simply because trial by jury is his constitutional right. The trial court denied the motion and he makes the same argument to this court.

¶8 Elkins is wrong when he claims that the trial court had a duty under the Wisconsin Constitution to order the DOC to release funds. Our supreme court has held that the requirement for prepayment of fees does not violate the Seventh Amendment right to a jury trial or the similar right under the Wis. Const. art. 1, § 5. ***Portage County v. Steinpreis***, 104 Wis. 2d 466, 471-76, 312 N.W.2d 731 (1981). And since this is a civil action, his indigency is of no moment.

¶9 What is really at issue is whether the DOC's determination unreasonably or injuriously interferes with Elkins's right to a remedy in the law or impedes the due administration of justice. On the naked record that Elkins presented to the trial court, it was not equipped to decide such an important issue. It had no competency to decide this issue. This is precisely why we have a doctrine called "exhaustion of administrative remedies." It was Elkins's burden to make an administrative review record. Had he lost at the administrative level, it would have been his continuing duty to take his position to the certiorari court so that that court could render a sober, thoughtful and careful decision on the matter. Elkins failed in his duty and the trial court properly declined Elkins's demand for a jury trial.

Substitution of Judge

¶10 Elkins claims that he made a timely demand for substitution of judge. He asserts that the trial court erroneously ruled that the demand was

untimely. WISCONSIN STAT. § 801.58(1) plainly states that a party in a civil action may file a written request for a new judge but that such request must be filed preceding the hearing of any preliminary contested matter. Elkins filed his substitution of judge request on August 9, 2001. In that notice, he stated that his request was being made before any notice regarding pretrial or trial had been set and was therefore timely. However, the record shows that prior to the filing of the request for substitution, the parties were contesting whether Elkins paid rent for which he claimed he was entitled to reimbursement. The court ordered that Elkins had to show documentation supporting his claim that he paid rent. This was a preliminary contested matter that the court decided. The parties also contested whether Elkins's original complaint contained enough information to allow the defense to properly prepare. The court ordered that Elkins must file an amended complaint, which Elkins did. This also was a preliminary contested matter. Therefore, the request for substitution was untimely as the court had already made rulings and such rulings were adverse to Elkins.

Whether the trial court held a trial when all parties thought it was only a pretrial which was set for that date, thus unfairly surprising Elkins

¶11 There is nothing in the record to substantiate Elkins's claim. We will not address it further.

Whether the trial court had the authority to request the DOC to extend Elkins's Mandatory Release Date

¶12 Elkins claims that the trial court did not have the authority to extend his mandatory release date pursuant to WIS. STAT. §§ 807.15, 814.025 and 814.28.

The trial court did not do this. In fact, the trial court agreed with Elkins that it had no authority to extend his mandatory release date.

The proceeds from the sale of Elkins's truck, his claim for conversion of certain items of his property and whether certain items were gifts from Elkins or were stolen

¶13 Elkins challenges the factual findings made in two of the three small claims actions that he filed. We will uphold factual findings of the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2). First, Elkins claims that the trial court erred in allowing Schneider to keep money resulting from the sale of his truck. This is a question concerning what the parties agreed to do, which is a question of fact. Elkins's complaint was that the parties agreed on how the proceeds could be used for the support of the child who Elkins and Schneider have together. He asserted that Schneider reneged on that agreement. Schneider answered that the parties agreed to use the proceeds to start a college fund for the child and that is what she did.

¶14 We do not have a transcript of the trial. Elkins has not provided one. The lack of a transcript limits review to those parts of the record available to the appellate court. ***Jocius v. Jocius***, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998). We do have the trial court's decision on the issue. The trial court relied on documentation that the money is in an account for the child and, while it is in the mother's name, it is because she is the custodian of the child. Thus, Schneider has not reneged on the agreement. This finding is not clearly erroneous.

¶15 Second, Elkins argues that the trial court erred in finding that certain items in Schneider's possession were gifts to her rather than stolen by her. Again, without a transcript, we limit our review to those parts of the record that we have

available to us, namely, the court's decision. The trial court found that when the parties were in an "intact relationship," the parties engaged in gifting and sharing of assets. This finding is not clearly erroneous.

Discovery

¶16 In ***Steinpreis***, our supreme court wrote:

> It should be noted that the small claims procedures do allow for the use of the ch. 804 discovery procedures (sec. 799.04, Stats.). These procedures are used in the rare and exceptional case, frequency of which is probably no more than 1 in 1000. The use of discovery procedures is generally inconsistent with the small claims procedures of ch. 799 which allow for trial on the return date, sec. 799.21 (2), and immediate rendering of a decision, sec. 899.215. In addition, it can be noted that it is standard practice among our courts that once discovery procedures are used in a small claims action, the case is transferred to the court's calendar for chs. 801 to 807 actions and no longer disposed of summarily.

Steinpreis, 104 Wis. 2d at 482 n.15. Coupled with case law explaining that a trial court has discretion to prohibit discovery, *see* ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 270-71, 306 N.W. 2d 85 (Ct. App. 1981), it is evident that a trial court will not misuse its discretion in reserving discovery for only those small claims cases where compelling circumstances dictate that it be allowed. Against this backdrop, this court now reviews the trial court's discretionary decision to deny discovery to Elkins.

¶17 According to Elkins, all three cases dealt with agreements between Schneider and Elkins that he claims she reneged on and she claims she did not. Elkins wanted discovery because, according to him, Schneider relied on statements from members of her family who claim to have heard Elkins confirm her understanding of these agreements. Elkins wanted to discover whom these

people were. He also claimed that these people actually had possession of his property and held onto it based on their assertion that Elkins told them they could have the property. Elkins asserted that he did no such thing. His motion to compel discovery asked for a list of Schneider's witnesses, any written or recorded statements of those witnesses, any expert opinion evidence, criminal records of such witnesses, copies of all physical evidence, the right to conduct scientific analysis of such evidence and reports from their child's doctor and school.

¶18 The trial court denied the motion to compel discovery. It held that the involvement of Schneider's extended family was neither relevant nor necessary in a search for the truth. The court further held that the focus was on the conversations that took place between the two parties and such conversations were not hearsay.

¶19 We have no indication from the record that the trial court's determination is an erroneous exercise of discretion. Elkins did not need the names of Schneider's family. He already knew them. This is evident from the exhibits in the record. He did not need the names of expert witnesses. There were none in this small claims trial. The child's records were completely irrelevant to the three small claims actions he filed. In sum, the discovery demand reeked of harassment and nothing else. There was absolutely no basis for discovery here.

Counterclaim for costs due to frivolousness

¶20 That brings us to the last issue, which is the court's award of costs to Schneider because it found all three of Elkins's actions frivolous. Elkins first argues that the issue should never have been heard because Schneider's assertion that he brought these actions for harassment purposes was made in her answer and

she did not counterclaim. There is no requirement that the issue of frivolousness be brought by a formal counterclaim. Indeed, it may be brought by motion at any time prior to judgment. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson,*** 191 Wis. 2d 278, 281-82, 528 N.W.2d 502 (Ct. App. 1995). In addition, Wisconsin's rules of pleading require courts to liberally construe pleadings so as to allow an issue to be prosecuted by either party if it can be reasonably said to be contained within the four corners of the pleading. In all three of Schneider's answers to Elkins's complaints, she alleges that Elkins threatened to harass her through court actions if he did not get his way. She also alleged that all of his complaints are based on lies. The trial court quoted from a paragraph in one of the answers, in particular, that Schneider gave. The quote is as follows:

> I strongly believe the Plaintiff has filed this suit to follow through with his threats to harass and financially drain my [sic] by use of the court system. I have letters, documents and receipts to prove my above statements. I am requesting a counterclaim for my expenses.

¶21 The trial court noted that the last phrase was in bold type. This is sufficient to state a claim that the actions are frivolous. The court did not erroneously read this answer or any other answer made by Schneider to contain a counterclaim for costs due to the harassing and frivolous nature of the claims.

¶22 The trial court found the actions frivolous. In the February 12 motion hearing and again in the May 14 ***Girouard***[2] hearing, the trial court made

[2] ***State ex rel. Girouard v. Circuit Court for Jackson County***, 155 Wis. 2d 148, 159-60, 454 N.W.2d 792 (1990). In ***Girouard***, the supreme court held that a person in a civil action may obtain free transcripts for appeal purposes if that person proves indigency and the claim is arguably meritorious. Otherwise, the person must pay for the transcripts or go without. We directed that the trial court conduct a ***Girouard*** hearing in this appeal based on Elkins's claim of indigency and his further claim that the issues on appeal had merit. The trial court made findings about those issues, which it felt lacked merit and explained why.

specific findings. In the February 12 comments, the court found that the actions were commenced with the intent to harass Schneider. The court noted the complete absence of proof by Elkins. In the ***Girouard*** hearing, the court was even more specific. The court noted that there was not "one scintilla of evidence" supporting Elkins's claims. As to the claim that the sale of the truck was not used for the child's benefit, the court found that, clearly, the account was there for the child's benefit and no one else's. As to the claim of items being stolen and converted, the court found that Elkins was guilty of "falsehoods, many out and out lies." As an example, the trial court referred to Elkins's assertion that he should be reimbursed for rent that he paid. The court remarked that there was no verification of that and, in fact, there was acknowledgement by Elkins that it was really a security deposit which he was seeking. The trial court also remarked about how the claim for conversion of personal property was based on "lies" by Elkins. For example, he claimed that Schneider's father and brother damaged his motorcycle when he never paid for the cycle. In the court's view of the documentary evidence and the record it had available, the parties got along amicably enough until Schneider entered into a relationship with another man, a man whom she eventually married. Then, and only then, did Elkins turn on her and change the perception of the agreements they had reached. This was the court's basis for the frivolous nature of the lawsuits—that they were caused by spite and fueled by lies. The record supports the trial court's determination in every respect.

¶23 As to costs granted in the amount of $716, the record shows that the court was careful to limit the costs to only those which the court believed to be legitimate. The court found the twenty-four hours Schneider spent *preparing* for the case to be reasonable but nonetheless rejected her request for payment of each

hour at a rate commensurate with what she would have made had she worked at her regular job. It did so on the premise that, with a few exceptions, victorious parties to a lawsuit are not entitled to reimbursement for time away from a job in preparing a case. The trial court did, however, allow as repayment her hourly wage because of the thirty-three hours spent *in court*. It also allowed child care expenses at a rate of $4 an hour for thirty-three hours. The total came to $716.

¶24 To this determination, Elkins's only argument is that Schneider was unemployed at the time of trial and therefore cannot be paid at the hourly wage she made when she was employed. He makes no argument that reimbursement of hourly wage while in court on a frivolous lawsuit is unlawful. As to the contention he does make, there is no proof in the record that Schneider was unemployed at the time of trial. Elkins has failed in his burden of production. This court affirms in its entirety.

By the Court.—Judgments affirmed.

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