COURT OF APPEALS DECISION DATED AND FILED

March 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0252

Cir. Ct. No. 99PA000117

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE PATERNITY OF ALYSSA D. ELKINS:

MICHAEL S. ELKINS,

PETITIONER-APPELLANT,

V.

SHAWN B. SCHNEIDER,

RESPONDENT-RESPONDENT.

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

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Michael S. Elkins appeals from an order of the circuit court dated December 6, 2002. He argues on appeal that the circuit court erred when it modified a previously entered placement order, that it erred when it

held a hearing without providing him with proper notice, that it lacked jurisdiction to reconsider its December 6, 2002 order because he had filed an appeal, and that the circuit court judge should have recused herself. We conclude that this appeal is frivolous and brought as part of a continuing course of conduct designed to harass the respondent, Shawn B. Schneider. We affirm the order of the circuit court, we remand the matter to the circuit court for a finding as directed by this opinion, we notify the Department of Justice that Elkins has brought a frivolous appeal within the meaning of WIS. STAT. § 809.103(2) (2001-02),[1] and we direct the clerk of this court to not accept any further appeals brought by Elkins against Schneider in this court unless Elkins has first obtained leave of this court to proceed with the appeal.

¶2 This appeal is one of many filed by Elkins in his continuing dispute with the mother of his child, Schneider. The underlying facts are the same as they were described in our last opinion in this series of matters issued only a few months ago, and we will not repeat them here. *See* ***Michael S.E. v. Shawn B.S.***, Nos. 02-0712 and 02-2723, unpublished slip op. (Wis. Ct. App. Sept. 24, 2003). That appeal was from a number of orders, the last of which was issued on October 8, 2002. Suffice it to say that Schneider was required by court order to bring their child to visit Elkins in prison.

¶3 Elkins sent a letter to Schneider dated October 8, 2002. The letter discussed upcoming visits to the prison. The letter said:

> I am asking to see [our child] between 10/21 and 10/24, you cannot come on Friday night since I have that used

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> with somebody who sees me Friday night and then gets a hotel and comes back on Saturday. I do not need to give you any other info or proof. But you are required to send me notice of when you are coming and it must be at least one week in advance or I will decline due to your failure to give proper notice. All calls will be 8-9 a.m. on Saturday, October 19th, November 3rd and December 28, 2002. I have given fair notice as to date and time.
>
> As for the December visit, it must be between 12/16 and 12/19 or 12/23 and 12/26. You pick and send me notice. I don't care about your problems. I'm giving plenty of time for your so-called schedule. Otherwise file something with the court. This time make sure you file it right.
>
> When you do come to visit, request the corner table. It has been arranged that you are to be monitored. Say something stupid (as you have before) and it will be caught on audio and video, so be forewarned, as with the sign it [sic] sheet as to the times.
>
> Also be forewarned, I plan to tell [our child] the truth as to Brian not being her dad and I am telling her that she is not call him anything but Brian. Foster's BS has nothing to do with the law. Brian has not rights to MINE DAUGHTER [sic], just because he was the last fool to buy you a drink in a bar and got you pregnant within a month. He is nothing to [my child] and she will be told that. Foster did not say I couldn't, so there's nothing you can do about it.

¶4 After Schneider received this letter, she forwarded it to the circuit court. The court then, sua sponte, held a hearing on the matter. Elkins appeared at the hearing by telephone from prison. He protested during the hearing that he had not received any notice of the hearing and was not prepared.

¶5 At the conclusion of the hearing, the court found that the letter showed that Elkins was not acting in the interests of his child, but rather was attempting to create problems for Schneider. The court found that this was an abuse of process. The court further noted that it had previously made this finding

in certain small claims actions which the court had found to be frivolous and unwarranted.[2] The court specifically found that the letter demonstrated:

> [I]t is more important to you [Mr. Elkins] that some friends or whoever these unidentified individuals are, visit when they want so that you can dictate to [Ms. Schneider] when she can bring your daughter up there. That indicates to me that these visits aren't about your time with [your child], they're about an opportunity for you to harass, intimidate, and control [Ms. Schneider]. Enough is enough.

The court consequently suspended his visits with his child while he remained incarcerated. The court further stated that it would revisit the issue when Elkins was released from prison.

¶6 The court's written order was entered on December 6, 2002. The order states that the hearing was held on the court's own motion and was based on an October 8, 2002 letter which the court found was written by Elkins. The court then made findings "[b]ased on that letter and all the prior proceedings held in this paternity case and in the earlier small claims matters all currently pending on appeal." The court found that it was no longer in the child's best interest to have visits with Elkins as long as he is incarcerated. The order suspended a previous order which required designated times for phone calls. The order allowed Schneider to voluntarily accept phone calls or arrange visits, but she was no longer required to do so. The order concluded:

> The Court orders all of the above based on a continuing course of conduct on the part of [Michael Elkins] that can only be perceived as harassment of the mother of the minor child. The contents of the letter authored by [Mr. Elkins], dated October 8th, clearly demonstrate to this Court his

[2] ***Elkins v. Schneider***, Nos. 02-0081, 02-0082 and 02-0083, unpublished slip op. (Wis. Ct. App. June 11, 2003).

> preference to visit with friends or whomever the unidentified parties are over and above the time her spends with his minor child. Instead [Mr. Elkins] chooses to dictate to [Ms. Schneider] the time he felt was appropriate for the visitation. The Court further finds that all of these visits in the past have a source of activity leading to a series of frivolous motions for contempt. Because of his indigency status, [Mr. Elkins] was able to proceed on without any cost to him. Since this Court has previously found the vast majority of these motions to be without any merit, this Court is satisfied that a suspension of visitation is the only means available to interrupt this course of harassment.
>
> This Court further finds that the conduct of [Mr. Elkins] amounts to an assault on the dignity of the Court and the orderly administration of justice.

¶7 After this order was entered, Elkins filed with the circuit court a motion for relief from judgment. Although this motion and the subsequent proceedings are not a part of the record on appeal, this court takes judicial notice of these proceedings for the purposes of this decision. In this motion, Elkins again asserted that the December hearing had been improper because he had not received notice of the hearing. On February 14, 2003, the court then held another hearing. At the start of that hearing, the court acknowledged that through inadvertence, Elkins had not been sent advance notice of the December hearing. For that reason, the court stated it was holding the second hearing on the same issue. As a result of that hearing, the court entered an order dated February 17, 2003, which denied the motion for relief from judgment. Elkins did not file a notice of appeal from this order and it is not a subject of this appeal.

Elkins' Issues on Appeal

¶8 The notice of appeal Elkins filed for this matter states that he is appealing from the circuit court's orders of October 8, 2002, and December 4, 2002.[3] Elkins previously filed a notice of appeal from the October 8, 2002 order. That order was affirmed in ***Michael S.E. v. Shawn B.S.***, Nos. 02-0712 and 02-2723, unpublished slip op. (Wis. Ct. App. Sept. 24, 2003). Consequently, it is not a subject of this appeal. Further, in his brief, he raises issues concerning the February 14, 2003 hearing and the subsequent February 17, 2003 order. As previously stated, however, Elkins did not file a notice of appeal from that order and the time for doing so has long since expired. That order also is not a subject of this appeal. The only order which is properly before this court in this appeal is the December 6, 2002 order.

¶9 Elkins' first argument is that the circuit court erred when it modified the order of placement entered by Judge Patrick L. Snyder on May 21, 2001. That order provided for the child to visit Elkins in prison and for Elkins to have telephone contact with the child. That order also, however, expressly reserved the right for the court, sua sponte, to cancel the telephone contact or placement ordered if there was an abuse. Elkins, however, does not mention that provision of Judge Snyder's order in his brief. In the order in which the circuit court suspended the telephone contact and visitation, the court found that Elkins had acted with the intent to harass the child's mother and that his conduct constituted an abuse of process. Since the May 21, 2001 order expressly reserved the right for the court to

[3] The December order was dated December 4, 2002, and entered on December 6, 2002. We will refer to it as the December 6 order.

act sua sponte, then the circuit court did not violate the order when it subsequently suspended the visits and telephone contact until Elkins is released from prison. The argument is meritless.

¶10 The second issue raised by Elkins is whether the court can suspend or terminate a father's visits with his child without sending the father notice of the hearing as required by WIS. STAT. § 767.325(6). That statute states: "No court may *enter* an order for modification under this section until notice of the petition, motion or order to show cause requesting modification has been given to the child's parents, if they can be found, and to any relative or agency having custody of the child." (Emphasis added.) In this case, the court sua sponte held a hearing on December 4, 2002.[4] Elkins appeared at that hearing by telephone from prison. The transcript of that hearing establishes that the circuit court explained to Elkins the reason for the hearing, offered him the opportunity to respond, and explained the reasons for suspending the telephone contact and prison visits. The actual order of the court was not entered until two days later on December 6, 2002.

¶11 The statute upon which Elkins relies requires the court to provide notice before entry of an order. Elkins does not dispute that he was present, by telephone, at the December 4 hearing. The actual order was not entered until after the December 4 hearing. Since the statute does not say that it requires written notice, and there is no dispute that Elkins had actual notice of the order, we

[4] Although the court acted sua sponte, this action was necessary and reasonable as a result of Elkins' actions. The court was not required to wait for Elkins to bring yet another contempt motion, but prudently acted to preempt such an action. The hearing was, in essence, a reconsideration of previous orders.

question whether the notice given was actually inadequate. We need not decide that issue, however, because of the subsequent actions of the circuit court.

¶12 When the court discovered that Elkins had not been sent written notice of the December hearing, the court scheduled a second hearing on the matter and sent Elkins written notice. While we have stated this may have been unnecessary, it is another demonstration of the circuit court's commendable efforts to be fair to Elkins. To the extent that the court's failure to give Elkins written notice of the December 4 hearing may have been error, that error was completely remedied by the notice and subsequent hearing. In light of these subsequent actions by the circuit court, Elkins' arguments that the court erred by not giving him written notice are completely frivolous. *See* ***State v. Pfaff***, No. 03-1268-CR, ¶18, *recommended for publication* (Wis. Ct. App. Jan. 28, 2004).

¶13 The third issue Elkins raises is whether the circuit court had jurisdiction to act on his motion for relief from judgment. As we have stated, Elkins did not appeal from the February 17, 2003 order and that order is not a subject of this appeal.[5] Again we conclude that Elkins' appeal on this issue is frivolous.

¶14 The final issue Elkins raises in his brief is that the circuit court judge should have recused herself. Elkins raised the same issue in his last appeal before this court. *See* ***Michael S.E. v. Shawn B.S.***, Nos. 02-0712 and 02-2723, ¶¶12-14. In that opinion, we noted that Elkins had not adequately briefed this issue, yet we continued to explain how Judge Foster had demonstrated fairness in every hearing

[5] We note, however, that WIS. STAT. § 808.075(1) allows a circuit court during the pendency of an appeal to act under WIS. STAT. § 806.07 on a motion for relief from judgment.

involving Elkins. ***Id.***, ¶14. While in his brief in this case, Elkins cites to legal authority which explains that a judge must be impartial, his only reason for asserting that Judge Foster is biased and prejudiced is that she has ruled against him. Elkins states that the record demonstrates Schneider's continuing violations of the court's orders and the court's refusal to find Schneider in contempt. He says, in essence, if the circuit court would rule in his favor, then he would not need to keep bringing these motions. He ignores, however, that this court has affirmed the circuit court's determinations that Schneider's previous actions did not constitute contempt. *See* ***id.***, ¶¶15-17. We further found that Judge Foster has demonstrated "fairness in each hearing" and has acted within her "inherent discretion to control disposition of causes" before her. ***Id.***, ¶14. And, as we have already discussed, this case is another example of Judge Foster's determination to be fair to an extremely contentious litigant. Elkins' argument that Judge Foster should recuse herself because she has ruled against him is also frivolous.

¶15 Further, Elkins asserts that Judge Foster's finding that he has assaulted the dignity of the court and the orderly administration of justice also demonstrates her bias. Although Elkins has not specifically challenged this finding on appeal, we agree with Judge Foster's conclusion, and we have reached the point where it is time to take remedial action to protect the dignity of the court and the orderly administration of justice.

¶16 The circuit court's ultimate conclusion, also not challenged by Elkins, is that his actions in this and in past cases demonstrate a "continuing course of conduct … that can only be perceived as harassment of the mother of the minor child." In her brief to this court, Schneider, who is also acting pro se, states that Elkins has harassed her by using the court system for four years. She argues that he has used lies and manipulation because he cannot get his way. She says

that the entire situation has been "an overwhelming nightmare" and hopes that there is law to keep her from being unjustly penalized and to help her and others in her situation.[6]

¶17 We agree with the circuit court and adopt its finding that Elkins' conduct throughout these proceedings establishes that he has acted with the intent to harass Schneider. We conclude that the issues Elkins raised in this appeal were meritless and that the appeal itself, therefore, was frivolous and part of his continuing attempt to use the court system to harass the mother of his child. We exercise our inherent authority to ensure that this court functions effectively and provides for the fair administration of justice by taking the following action. *See* ***Puchner v. Hepperla***, 2001 WI App 50, ¶¶7-8, 241 Wis. 2d 545, 625 N.W.2d 609.

The Prisoner Litigation Reform Act

¶18 We have concluded that the appeal was frivolous and brought to harass. Elkins is a prisoner within the meaning of WIS. STAT. § 801.02(7). Consequently, we will notify the department of justice that he has brought such an appeal. *See* WIS. STAT. § 809.103(2).

¶19 Further, the circuit court found that Elkins' conduct in this and other actions constituted a continuing course of conduct to harass Schneider. In reaching this conclusion, the circuit court considered Elkins' conduct in this and other cases, specifically referring to motions for contempt brought earlier in this same paternity proceeding. The Prisoner Litigation Reform Act also prohibits prisoners from bringing actions or special proceedings in the circuit court which

[6] Elkins responds in his reply brief by saying it is Schneider, and not he, who has lied.

are frivolous or are used for any improper purpose such as to harass. *See* WIS. STAT. § 802.05(3)(b). A motion for contempt is a special proceeding. *See* ***Wellens v. Kahl Ins. Agency Inc.***, 145 Wis. 2d 66, 69, 426 N.W.2d 41 (Ct. App. 1988). In light of the circuit court's finding that Elkins' conduct in these previous matters constituted a course of conduct designed to harass Schneider, we remand the matter to the circuit court for a finding as to whether any of those proceedings were frivolous or brought for an improper purpose under WIS. STAT. § 802.05(3)(b). If the circuit court so concludes, the court shall so notify the Department of Justice under § 805.02(3)(c).

The Orderly Administration of Justice

¶20 The records of this court demonstrate that Elkins has brought twenty appeals and writs before this court over a three-year period, thirteen of which were against Schneider. Elkins has not prevailed in any of these appeals. During that same period, Elkins has brought approximately eighty-four substantive motions.[7] A substantial amount of scant judicial resources have been devoted to Elkins and his appeals.

¶21 A person's right of access to the court is neither unconditional nor absolute. ***Puchner***, 241 Wis. 2d 545, ¶8. This is particularly true when a litigant has been found to commence litigation for the purpose of harassment. ***Id.*** A court faced with a litigant engaged in a pattern of such litigation has the authority to implement a remedy that may include limits on that person's access to the courts.

[7] This total does not include motions for extensions of time.

Minniecheske v. Griesbach, 161 Wis. 2d 743, 748, 468 N.W.2d 760 (Ct. App. 1991). We conclude that the time has come to place such limits on Elkins.

¶22 We order that Elkins may not file any civil appeal in which Schneider is the respondent in this court without first obtaining leave of this court. At the time of filing an appeal, Elkins must submit a copy of this decision and a statement which explains why the appeal has merit and that it does not raise issues which have previously been decided by this court. Schneider will not be required to respond to any appeal filed by Elkins until this court has granted him leave to proceed.[8] For the reasons stated, we affirm the order of the circuit court and remand with instructions.

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

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

[8] This limitation is strictly limited. Elkins is not prohibited from responding to any appeal filed by Schneider in which he is the respondent. He is also not prohibited from appealing from any criminal matter or seeking habeas corpus relief on behalf of himself.