

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 19, 2011**

A. John Voelker  
Acting 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. 2010AP2328**

**Cir. Ct. No. 2009SC802**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**MILWAUKEE PAIN TREATMENT SERVICES, S.C.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALLEN JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

¶1 KESSLER, J.<sup>1</sup> Allen Johnson, *pro se*, appeals a circuit court order granting judgment in favor of Milwaukee Pain Treatment Services, S.C.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(Milwaukee Pain).<sup>2</sup> The circuit court found that Johnson's failure to comply with a scheduling order and his failure to appear at a pre-trial conference constituted egregious conduct and determined that Johnson's acts warranted substantial sanctions. Because we conclude that the circuit court did not erroneously exercise its discretion in entering a judgment against Johnson, we affirm. We also conclude that Johnson's appeal is frivolous and grant Milwaukee Pain's motion for costs, fees and attorney's fees.

### **BACKGROUND**

¶2 This case arises out of a small claims action in which Milwaukee Pain filed suit against Johnson for payment of services rendered. The parties appeared for a contested hearing before a court commissioner. After the court commissioner found in favor of Milwaukee Pain, Johnson demanded a jury trial before a circuit court judge. *See* WIS. STAT. § 799.207(2)(b). The circuit court held a scheduling conference on February 24, 2010, and issued a scheduling order. Both parties were present at the scheduling conference when the order was issued. The scheduling order directed the parties to file pretrial reports by June 11, 2010, and that the court would hold a pretrial conference on June 18, 2010. The order also expressly warned the parties that a failure to comply with the requirements of the order could result in sanctions, including entering judgment and dismissing claims or defenses. A subsequent telephone conference adjusted the dates to June 18, 2010, as the deadline for the pretrial reports, and June 29, 2010, for the pretrial conference.

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<sup>2</sup> Johnson appeared *pro se* throughout the proceedings in small claims court and in the circuit court.

¶3 Milwaukee Pain filed a motion for summary judgment, which was denied by the circuit court. Johnson did not appear at the June 14, 2010 summary judgment hearing. Johnson also did not appear at the pretrial conference on June 29, 2010, nor did he file a pretrial report in accordance with the directives of the scheduling order. At the pretrial conference, the circuit court found that Johnson's failure to appear and failure to comply with the scheduling order constituted egregious conduct warranting sanctions. The circuit court entered a written judgment against Johnson. This appeal follows.

### DISCUSSION

¶4 Johnson presents many issues on appeal, however he provides no legal or factual bases for any of his claims, nor does he provide any references to the record. Therefore, we do not address his contentions that Milwaukee Pain made fraudulent statements, unlawfully withheld costs, committed deceptive advertising and made misleading comments to the circuit court. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); *Lechner v. Scharrer*, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988) (we do not consider arguments that are undeveloped and unsupported by citations to authority or the record); *see also State v. Peck*, 143 Wis. 2d 624, 639-40 n.7, 422 N.W.2d 160 (Ct. App. 1988) (where appellant does not refer us to portions of the record supporting his or her factual assertions, we disregard the unsupported statements).

#### *A. Erroneous Exercise of Discretion.*

¶5 The only appealable issue is whether the circuit court erroneously exercised its discretion in awarding judgment to Milwaukee Pain. Circuit courts have the authority to dismiss actions or grant a default judgment when a party has interfered with the orderly administration of justice. WIS. STAT. § 805.03.

However, ““a dismissal under this section should be considered appropriate only in cases of egregious conduct by a claimant.”” *Trispel v. Haefer*, 89 Wis. 2d 725, 732, 279 N.W.2d 242 (1979) (citation omitted); *see also East Winds Properties, LLC v. Jahnke*, 2009 WI App 125, ¶13, 320 Wis. 2d 797, 772 N.W.2d 738. The decision of whether to impose sanctions and the decision of which sanctions to impose are within a circuit court’s discretion. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. We will reverse a circuit court’s imposition of a sanction for noncompliance with a court order only when a party shows “a clear and justifiable excuse” for the noncompliance. *Buchanan v. General Cas. Co.*, 191 Wis. 2d 1, 7, 528 N.W.2d 457 (Ct. App. 1995); *see also* WIS. STAT. § 805.17(2) (a circuit court’s findings of fact are binding unless they are clearly erroneous).

¶6 Johnson did not provide a clear and justifiable excuse for his failure to appear at the pretrial conference and for his failure to submit a pretrial report, despite the clear warning on the scheduling order that a failure to do so would result in sanctions. The order clearly states that such sanctions “may include entering judgment or dismissing claims or defenses.” Johnson provides one sentence in his reply brief stating that “ongoing care of [his] elderly father seems hardly egregious compared to [Milwaukee Pain’s alleged conduct].” We do not find Johnson’s vague, undeveloped and unsubstantiated statement adequate to conclude that the circuit court erroneously exercised its discretion.

*B. Frivolous Appeal.*

¶7 Milwaukee Pain also contends that Johnson’s appeal is frivolous and seeks costs, fees and attorney’s fees pursuant to WIS. STAT. RULE 809.25(3). We agree that Johnson’s appeal is frivolous. An appeal is frivolous if (1) it was filed

solely for the purpose of harassing or maliciously injuring another; or (2) the party or the party's attorney knew, or should have known, that the appeal 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. WIS. STAT. RULE 809.25(3)(c)1&2. A frivolous appeal filed by a *pro se* litigant can result in the same harm as one filed by a lawyer. ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 609-10, 589 N.W.2d 633 (Ct. App. 1998). In determining whether a *pro se* litigant should have known about the facts and law relating to the arguments presented, the court must apply an objective standard, requiring us to determine what a reasonable person in the appellant's position should know or should have known. ***Id.*** at 608. *Pro se* litigants are required to conduct reasonable investigations of the facts and the law prior to filing an appeal. ***Id.***

¶8 Johnson's appellate brief solely contains conclusory statements with no references to the record and absolutely no references to the law. A reasonable person in Johnson's position should have known that an appeal lacking *any* legal support and relying solely on conclusory factual statements would not hold up and could not be supported by a good faith argument for an extension, modification or reversal of existing law. It is clear that Johnson did not reasonably investigate the facts and the law prior to filing this appeal and was simply looking for an opportunity to retry his case. Therefore, Milwaukee Pain is entitled to costs, fees and attorney's fees pursuant to WIS. STAT. RULE 809.25(3).

## CONCLUSION

¶9 For all the foregoing reasons, we affirm the circuit court and grant Milwaukee Pain's motion for costs, fees and attorney's fees pursuant to WIS. STAT. RULE 809.25(3).

*By the Court.*—Judgment affirmed.

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

