COURT OF APPEALS DECISION DATED AND FILED

March 15, 2012

Diane M. Fremgen
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. 2011AP1575

Cir. Ct. No. 2008GN481

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE FINDING OF CONTEMPT:
IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF LAVONNE M. E.:

JAMES P. GRENISEN,

APPELLANT,

V.

LA CROSSE COUNTY HUMAN SERVICES DEPARTMENT,

RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed and cause remanded with directions*.

¶1 LUNDSTEN, P.J.[1] James Grenisen appeals an order of the circuit court that found Grenisen in contempt for intentionally disobeying a court order to pay $3,440 to the estate of LaVonne M.E. As a remedial sanction, the contempt order required that Grenisen pay the proceeds to LaVonne's estate within ten days or face a $100 per day sanction thereafter until he paid. Grenisen appeals the contempt order. La Crosse County Human Services Department (the County) responds and moves for costs, fees, and attorney's fees for a frivolous appeal. I affirm the circuit court, and remand with directions for a determination of costs, fees, and attorney's fees for a frivolous appeal.

Background

¶2 The underlying proceedings, which were initiated by the County, involved a guardianship for LaVonne M.E. due to incompetency. These underlying proceedings do not affect the issues on appeal, with the following exception. During part of the guardianship proceeding, Grenisen served as counsel for LaVonne. At some point during Grenisen's representation of LaVonne, LaVonne's insurer issued a check to pay for damage to a car titled to LaVonne. Grenisen obtained the check from the insurer, and LaVonne endorsed it. Grenisen was of the opinion that LaVonne did not in fact own the car but rather a deceased friend of LaVonne's, Bob Ritter, had owned the car. According to Grenisen, Ritter's heirs told Grenisen that Grenisen could have the insurance proceeds as payment for his services, and Grenisen deposited the proceeds ($3,440) in his personal account without the approval of LaVonne's guardian.

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

¶3 Following a February 3, 2011 hearing, the circuit court issued a written order containing the above-summarized findings and ordering Grenisen to return the insurance proceeds to LaVonne's estate. The order also provided that Grenisen could no longer represent LaVonne due to a conflict of interest. A transcript of the February 3 hearing is not part of the appellate record.

¶4 After Grenisen did not pay the insurance proceeds to LaVonne's estate, the County filed a motion for contempt. A contempt hearing was held on April 1, 2011. The circuit court found Grenisen in contempt and issued an order requiring that Grenisen pay the proceeds within ten days or face a $100 per day sanction thereafter until he paid. Grenisen paid, and now appeals the contempt order.

Discussion

A. Contempt Order

¶5 Grenisen challenges the circuit court's order finding him in contempt and imposing a remedial sanction. The mere failure to comply with a court order is an insufficient basis for a contempt finding. Rather, for a finding of contempt, a party must have been able to comply with the order and the refusal to comply must be willful and intentional. ***Benn v. Benn***, 230 Wis. 2d 301, 309-10, 602 N.W.2d 65 (Ct. App. 1999). A circuit court's use of its remedial contempt power is reviewed for a misuse of discretion. *See* ***id.*** at 308. A reviewing court will affirm a circuit court's discretionary decision if the court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Id.***

¶6 The circuit court here found that Grenisen intentionally did not comply with the court's order to return the insurance proceeds to LaVonne. Grenisen's noncompliance with the order was undisputed. On the topic of whether that noncompliance was willful and intentional, the circuit court relied on the fact that, after being ordered to pay the insurance proceeds, Grenisen wrote in a March 25, 2011 submission to the court that "I will not ever voluntarily pay the $3,440." Similarly, at the contempt hearing, when asked whether he had paid, Grenisen answered, "No, because [the court's] order was improper and illegal in my opinion." The court relied on these representations by Grenisen, and concluded that Grenisen intentionally failed to comply with the order. Based on Grenisen's statements, this determination was plainly reasonable and, accordingly, I affirm the circuit court's contempt finding.

¶7 Grenisen asserts that his disobedience was not intentional, but he provides no explanation as to why this might be true. He does not attempt, for example, to explain how his failure to pay could be considered non-intentional in light of his statement prior to the contempt hearing that he would never "voluntarily pay the $3,440."

¶8 Grenisen lists requirements that, in Grenisen's words, pertain to "[s]ummary contempt" proceedings. For example, Grenisen lists a requirement that the contempt had to be "committed in the actual presence of the Court." Grenisen seemingly means to argue that this and the other requirements that he lists were not met. The proceedings here, however, were not "summary contempt" proceedings, which pertain to punitive sanctions, but rather were non-summary remedial sanction proceedings directed at termination of a continuing contempt of court. *See* WIS. STAT. § 785.01 (defining two different types of sanctions, remedial sanctions and punitive sanctions); WIS. STAT. § 785.03(2) (setting out a

summary procedure for imposing punitive sanctions where the contempt occurs "in the actual presence of the court").

¶9 Grenisen seems to argue that the contempt proceedings were flawed because the County, rather than LaVonne or her guardian, brought the motion for contempt. As explained in the following two paragraphs, I reject this argument because it was not sufficiently raised in Grenisen's brief-in-chief and because the argument is insufficiently developed in his reply brief.

¶10 Grenisen's brief-in-chief contains a paragraph with what appears to be a boilerplate listing of requirements for the imposition of remedial sanctions. It is true that one of the requirements he lists is that "there must be a motion to the Court by an aggrieved person other than the trial Court." But nowhere does Grenisen alert a reader that he contends that this particular requirement was not met here. Consequently, it is not surprising that the County does not argue the point. The first place Grenisen makes it clear that he contends that the contempt proceeding is improper because it was prompted by the motion of a non-aggrieved party is in his reply brief. This is too late. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286 ("[A]rguments advanced for the first time in a reply brief are waived.").

¶11 Moreover, even in Grenisen's reply brief, he does not present an adequately developed argument. Grenisen does not demonstrate why the County is not an aggrieved party within the meaning of the statute. For example, it might be that the County provides services to LaVonne and the expense of such services is affected by LaVonne's assets. Regardless whether this particular hypothetical example is true or not, my point is that Grenisen does not explain why the County cannot be an "aggrieved" party within the meaning of the contempt statute.

¶12 Grenisen makes what appear to be assertions about what occurred at the February 3, 2011 hearing. However, as the County points out, the February 3 hearing transcript is not part of the record on appeal. Grenisen's complaints directed at that hearing ignore an important rule of appellate review. When an appellant fails to ensure that a transcript is made a part of the record, appellate courts assume that what occurred at the hearing supports the circuit court's ruling. *See* ***Local 2489, AFSCME, AFL-CIO v. Rock Cnty.***, 2004 WI App 210, ¶29 n.8, 277 Wis. 2d 208, 689 N.W.2d 644 (stating: "[A]n appellant has the duty to ensure that the record is sufficient to review the issues raised on appeal, and in the event that relevant materials are not included in the record, we will assume that they support the trial court's ruling.").

¶13 The remainder of Grenisen's brief is directed at other aspects of the underlying guardianship proceedings. But Grenisen does not explain why any flaws in these other proceedings are relevant to whether the circuit court misused its discretion in finding Grenisen in contempt. That is, Grenisen does not explain why he was entitled to intentionally disobey a court order based on the other aspects of the proceedings that he discusses.

¶14 In sum, Grenisen does not present a single arguably meritorious challenge to the contempt order.

B. Frivolous Appeal

¶15 The County seeks costs, fees, and reasonable attorney's fees for a frivolous appeal pursuant to WIS. STAT. RULE § 809.25(3). Specifically, the County argues that Grenisen knew or should have known that this appeal was without any reasonable basis in the law and could not be supported by a good faith

argument for an extension, modification, or reversal of existing law. *See* RULE § 809.25(3)(c)2.

¶16 This court determines whether an appeal is frivolous as a matter of law, considering "'what a reasonable party or attorney knew or should have known under the same or similar circumstances.'" ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134 (citation omitted). If an appeal is found to be frivolous, the court shall award to the successful party costs, fees, and reasonable attorney fees. ***Id.*** "'To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous.'" ***Id.*** (citation omitted).

¶17 Applying this standard, I conclude that Grenisen's entire appeal is frivolous. As I explain above, Grenisen does not present any viable legal arguments. His only statements on point are either factually or legally unsupported or undeveloped. The remainder of Grenisen's arguments concern topics that have no apparent relevance to the contempt order. A reasonable litigant should have known this. I conclude that the standard for a frivolous appeal in WIS. STAT. RULE § 809.25(3)(c)2. is met. I therefore remand with directions that the circuit court determine an appropriate amount for costs, fees, and attorney's fees pursuant to RULE § 809.25(3).

Conclusion

¶18 For the reasons discussed, I affirm the circuit court's contempt order and conclude that the appeal is frivolous. I remand with directions that the circuit court determine an appropriate amount for costs, fees, and attorney's fees pursuant to WIS. STAT. RULE § 809.25(3).

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

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