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DISTRICT IV

August 4, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2167

In re the marriage of: Beverly A. Larson v. Bruce E. Larson
(L.C. # 2012FA256)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Bruce Larson, pro se, appeals a circuit court order that found that Larson's contempt motion was frivolous and imposed attorney fees against Larson. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We summarily reverse because the circuit court exceeded its authority by imposing attorney fees as a sanction in this case, and remand for the court to exercise its discretion to determine whether to impose sanctions as authorized by

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. § 802.05(3)(b). Additionally, we deny the motion by respondent P.B. for sanctions for a frivolous appeal.

Larson moved to find P.B. in contempt for failing to comply with a subpoena to appear in support of Larson's motion to compel marital counseling in this divorce case. At a February 27, 2014 hearing, the circuit court addressed Larson's contempt motion and P.B.'s motion to quash and for attorney fees. At the conclusion of the hearing, the court found that the subpoena was not properly served on P.B. and granted P.B.'s motion to quash. The court ordered Larson to pay P.B.'s attorney fees in the amount of \$750. Larson moved for reconsideration, arguing that WIS. STAT. § 814.04(1) limited P.B.'s recoverable attorney fees to \$100. *See* § 814.04(1) (when amount recovered in action is less than \$1000, attorney fees shall be \$100).

On April 9, 2014, the circuit court granted Larson's motion for reconsideration as to attorney fees. The circuit court first reviewed its factual findings from the February 27, 2014 hearing and found that there was no legal basis for Larson to pursue a contempt motion against P.B., and that Larson's conduct toward P.B. throughout these proceedings was harassing and outrageous. Next, turning to the issue of attorney fees, the court found that the amount of attorney fees permissible under WIS. STAT. § 814.04(1) was \$300 (when no amount is recovered in an action, the attorney fees shall be \$300). On reconsideration, the circuit court reduced the attorney fees assessed against Larson to \$300. Additionally, on the court's own initiative, the court ordered Larson to show cause why he should not be sanctioned for P.B.'s actual attorney fees under WIS. STAT. § 802.05(3).

On August 28, 2014, following a hearing as to sanctions, the circuit court ordered Larson to pay P.B.'s attorney fees in the amount of \$2,659. Larson appeals.

At the outset, we note that this appeal is timely only as to the August 28, 2014 order imposing sanctions. Larson filed his notice of appeal on September 9, 2014. The court's April 9, 2014 order was the final order on the merits of Larson's motion to hold P.B. in contempt. Because Larson did not file a notice of appeal within ninety days of the court's final order disposing of Larson's contempt motion, we lack jurisdiction to review the contempt issue. *See* WIS. STAT. § 808.03(1) (an order is final for purposes of appeal if it disposes of the entire matter in litigation between one or more of the parties); WIS. STAT. § 808.04(1) (appeal must be initiated within ninety days of entry of final order); WIS. STAT. RULE 809.10(1)(e) (filing of a timely notice of appeal necessary to give this court jurisdiction over an appeal); *Laube v. City of Owen*, 209 Wis. 2d 12, 16, 561 N.W.2d 785 (Ct. App. 1997) (order on the merits is final for purposes of appeal despite pending attorney fees issue). The notice of appeal of the August 2014 order does not give this court jurisdiction over prior final orders entered in this action. *See Laube*, 209 Wis. 2d at 15. We therefore limit our review in this appeal to Larson's arguments arising from the August 2014 order imposing sanctions.²

Larson contends that the circuit court's decision to impose sanctions was "borne of vengeance." Larson asserts that the circuit court harbored an unfair bias against Larson and sought to punish him for identifying the court's error in his motion for reconsideration. Larson also argues that the circuit court was hostile to Larson for asserting the court had authority to order marital counseling. We conclude that Larson's challenges to the sanctions imposed by the

² Similarly, we do not address the following challenges by Larson to the circuit court's order granting P.B.'s motion to quash: (1) that Larson was denied due process when the circuit court heard the motion to quash because P.B. failed to serve Larson with the motion five days prior to the contempt hearing; and (2) that the court erred by finding that the subpoena was not properly served on P.B. Those arguments arise from the court's order granting the motion to quash, which is not before us in this appeal.

circuit court based on Larson's perceptions of the court's subjective motivation lack both a coherent legal theory and support in the record, and thus do not warrant a response. "A party must do more than simply toss a bunch of concepts into the air with the hope that either the [circuit] court or the opposing party will arrange them into viable and fact-supported legal theories." *State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). This court need not consider arguments that either are unsupported by adequate factual and legal citations or are otherwise undeveloped. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). While we make some allowances for the failings of parties who, like Larson, appear pro se, "[w]e cannot serve as both advocate and judge," *Pettit*, 171 Wis. 2d at 647, and we will not scour the record to develop arguments for an appellant, see *Jackson*, 229 Wis. 2d at 337.

Next, Larson contends that the circuit court did not have authority to impose sanctions against Larson because the court issued its order to show cause after the court had resolved the contempt motion on the merits. Larson cites WIS. STAT. § 802.05(3)(b)2. for the proposition that monetary sanctions may not be imposed on the court's own initiative unless the court issues an order to show cause before a voluntary dismissal or settlement of the claims made by the party that is to be sanctioned. Larson contends that the purpose of § 802.05(3)(b)2. is to allow a party notice that the party may be sanctioned if the party continues to pursue a particular claim. Here, Larson asserts, the circuit court did not give Larson the required notice and opportunity to withdraw his motion in order to avoid sanctions.

The problem with Larson's argument is that he did not voluntarily dismiss or settle his motion; the court resolved the motion on the merits by granting P.B.'s motion to quash. Nothing in the statutes prohibits a court from pursuing sanctions on its own initiative after the court resolves a frivolous claim on the merits. See *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998)

(no “safe harbor” requirement for sanctions pursued on court’s own initiative; rather, court may issue order to show cause after judgment); *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 549, 597 N.W.2d 744 (1999) (“Because Wis. Stat. § 802.05 is patterned after Federal Rules of Civil Procedure 11, we may turn to federal case law interpreting Rule 11 for persuasive authority in our interpretation of the section and in the method by which it should be applied by circuit courts.”) (citation omitted)).

We agree with Larson, however, that the circuit court lacked authority to impose sanctions in the form of an order to pay P.B. her actual attorney fees in this action.³ WISCONSIN STAT. § 802.05(3)(b) limits the monetary sanctions a court may impose on its own initiative to “an order to pay a penalty into court.” On the other hand, “*if imposed on motion*,” the court may issue “an order directing payment *to the movant* of ... reasonable attorney fees.” *Id.* (emphasis added). Here, the sanctions were not imposed on motion, and P.B. was not a movant. Accordingly, we conclude that the circuit court erred by ordering Larson to pay P.B.’s attorney fees. We therefore remand for the circuit court to exercise its discretion to determine whether to impose sanctions as authorized by WIS. STAT. § 802.05(3)(b).

Finally, we address P.B.’s motion for sanctions against Larson for pursuing a frivolous appeal. We award costs and attorney fees only when we deem an appeal to be frivolous in its entirety. *State ex rel. Robinson v. Town of Bristol*, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667

³ We recognize that Larson does not perfectly articulate this argument. Because Larson is pro se, we liberally construe his brief. We determine that Larson adequately raises a challenge to the court’s authority to impose sanctions as an order to pay attorney fees on its own initiative.

N.W.2d 14. Because Larson has prevailed on the issue of whether the circuit court exceeded its authority in imposing sanctions, we conclude that his appeal is not frivolous in its entirety.

Therefore,

IT IS ORDERED that the order for attorney fees is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause remanded for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that the motion to find the appeal frivolous is denied.

Diane M. Fremgen
Clerk of Court of Appeals