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DISTRICT II

September 7, 2016

To:

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

2016AP499-FT

In re the marriage of: Marla Joy Baker v. Robert G. Weiss
(L.C. # 2007FA1397)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Marla Jo Baker appeals a circuit court order declining to award costs and attorney's fees she incurred in defending a prior appeal brought by her former husband, Robert G. Weiss. Pursuant to a presubmission conference and this court's order of April 29, 2016, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2013-14).¹ Upon review of those memoranda and the record, we affirm.

The parties were divorced in 2010. In 2014, pursuant to a postjudgment motion filed by Marla, the circuit court ordered Robert to pay approximately \$90,000 in attorney's fees and costs

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

as an overtrial sanction. Robert appealed. Asserting the appeal was frivolous, Marla requested costs and attorney's fees pursuant to WIS. STAT. RULE 809.25(3). We affirmed the postdivorce judgment and, determining that Robert's appeal was not frivolous, denied Marla's motion for appellate costs and fees. *Baker-Weiss v. Weiss*, No. 2015AP86, unpublished slip op. (WI App Sept. 9, 2015).

Thereafter, Marla filed a motion in the circuit court seeking \$22,153.93 for costs and attorney's fees incurred in defending the 2014 postdivorce judgment on appeal. The circuit court denied the motion, determining that Marla failed to provide any legally cognizable basis supporting her request for appellate fees and costs. The circuit court rejected Marla's argument that she was entitled to additional fees "incurred to defend an original award of attorney's fees," stating the argument "was either not raised previously or Ms. Marla Baker-Weiss is attempting to appeal the decision of the court of appeals in this court." Marla now appeals.

Conceding that the court of appeals has the exclusive jurisdiction to determine whether an appeal is frivolous pursuant to WIS. STAT. § 809.25(3), Marla argues that her circuit court motion for appellate costs and fees was based not on frivolousness, but on the theory of continuing overtrial.² She asserts she is entitled to recover fees incurred in defending the circuit court's award of attorney's fees on equitable grounds, "to preserve the effectiveness of the remedial purpose" of the circuit court's award. *See Chase Lumber & Fuel Co. v. Chase*, 228

² As she did in the circuit court, Marla improperly cites to an unpublished per curiam opinion, *Glowacki-Dudka v. Dudka*, No. 2011AP521, unpublished slip op. (WI App Apr. 5, 2012). *See* WIS. STAT. RULE 809.23(3)(b) (an unpublished, authored opinion issued on or after July 1, 2009 may be cited for its persuasive value; a per curiam opinion "is not an authored opinion for purposes of this subsection."). We advise that future violations of RULE 809.23(3) may result in sanctions.

Wis. 2d 179, 213, 596 N.W.2d 840 (Ct. App. 1999). The problem is that Marla failed to advance this alternative theory of recovery in her motion to this court requesting costs and fees in the prior appeal. Her motion asserted only that Robert's appeal was frivolous. She did not seek review of our decision denying costs and attorney's fees.

We also reject Marla's argument that the circuit court was authorized to grant her request for appellate attorney's fees under *Zhang v. Yu*, 2001 WI App 267, 248 Wis. 2d 913, 637 N.W.2d 754. In *Zhang*, as part of a prior appeal, Yu sought attorney's fees under WIS. STAT. RULE 809.25(3), for a frivolous appeal. *Id.*, 248 Wis. 2d 913, ¶9. Despite finding "the bulk of Zhang's appeal" to be frivolous, we denied Yu's motion, explaining "[w]e cannot award fees under WIS. STAT. RULE 809.25(3)(a) unless 'the entire appeal is frivolous.'" *Id.* After remittitur and upon Yu's motion, the circuit court ordered Zhang to pay a portion of Yu's attorney's fees incurred on appeal due to continuing overtrial. *Id.*, ¶10. Zhang appealed and we affirmed, concluding "that when we have issued an opinion stating that a significant portion of the issues appealed in a family law matter are frivolous, that provides a necessary factor for the circuit court to hold a hearing on an allegation of overtrial, if such a motion is presented to it." *Id.*, ¶16. In the instant case, we did not declare any of Robert's appellate arguments frivolous. A determination of frivolousness by this court is a "necessary factor" for the circuit court to award attorney's fees incurred on appeal on the theory of continued overtrial.

Finally, we deny Robert's WIS. STAT. RULE 809.25(3) motion for attorney's fees and costs for a frivolous appeal. An appeal is not frivolous merely because the court disagrees with the appellant's argument. *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 614, 345 N.W.2d 874 (1984). While we reject Marla's arguments, there is nothing to suggest that those

arguments were not made in good faith. Therefore, we cannot conclude that this appeal is frivolous.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

IT IS FURTHER ORDERED that the respondent's motion for attorney's fees and costs pursuant to WIS. STAT. RULE 809.25(3), is denied.

Diane M. Fremgen
Clerk of Court of Appeals