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DISTRICT IV

April 11, 2018

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

2017AP1017 In re the marriage of: Elena Vomastic v. Thomas Lee Vomastic (L.C. # 2015FA260)

Before Blanchard, Kloppenburg, and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Thomas Lee Vomastic appeals a circuit court judgment of divorce from his former spouse, Elena Vomastic.[1] Thomas challenges three provisions that were incorporated into the judgment: (1) the provision awarding Elena sole legal custody of their minor child; (2) the

provision allowing the minor child to travel with Elena to Russia; and (3) the provision regarding the division of spousal debt. 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 (2015-16).[2] We reject Thomas's arguments and affirm. We also conclude that this appeal is frivolous under WIS. STAT. RULE § 809.25(3). Accordingly, we remand to the circuit court for a determination of the costs, fees, and reasonable attorneys' fees incurred as a result of this appeal.

At the outset, we note that the briefs filed by Thomas's attorney do not comply with our rules of appellate procedure. Among other problems, Thomas's opening brief contains no citations to the record, in violation of WIS. STAT. RULE 809.19(1)(e), and does not provide accurate page numbers in its table of authorities, in violation of RULE 809.19(a). A more fundamental problem is that Thomas's attorney appears to believe that an appeal is an opportunity to present new facts and theories about how the circuit court should apply the relevant statutes. Thomas cites virtually no case law,[3] while ignoring a plethora of Wisconsin decisions that show that his theories lack merit. Thomas's reply brief fares no better, because he fails to respond in any meaningful way to the well-supported factual and legal arguments raised in Elena's brief and instead reproduces, often verbatim, the unsupported arguments made in the opening brief.

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[1] We will refer to respondent-appellant as Thomas and petitioner-respondent as Elena.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] Thomas cites only one decision and concedes that it does not support his position. *See* ***Lofthus v. Lofthus***, 2004 WI App 65, ¶¶8-14, 270 Wis. 2d 515, 678 N.W.2d 393 (concluding that parents have no constitutional or statutory right to equal placement).

We could affirm the judgment below based solely on this inadequate briefing. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 ("[W]e may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record."). However, in this instance, we affirm based on the fact that each of the challenged aspects of the circuit court's judgment arises out of the parties' pretrial stipulation. Specifically, the parties stipulated that: (1) Elena would be awarded sole legal custody;[4] (2) the minor child would be able to travel to Russia with Elena for not more than three weeks per year; and (3) each party would be solely liable for their own debts.

Inexplicably, Thomas's opening brief makes no mention of this stipulation. In the reply brief, Thomas argues, for the first time, that he misunderstood the terms of the stipulation. "It is a well-established rule that we do not consider arguments raised for the first time in a reply brief." *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Moreover, our court is not a fact-finding court. Any factual arguments regarding the validity of the parties' stipulation must be directed to the circuit court in the first instance. That said, it appears that Thomas forfeited this argument by failing to have made it part of his objection to Elena's proposed findings of fact and conclusions of law, which repeatedly reference the parties' stipulation. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 ("[T]he 'fundamental' forfeiture inquiry is whether a legal argument or

[4] The parties carved out an exception for legal custody as it relates to the minor child's religion. This exception does not appear to have any significance to this appeal.

theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court.") (quoted source omitted).

Thomas also argues that his attorney never signed the document that contained the stipulation provisions. As with most of Thomas's arguments, this contention is patently frivolous in light of the fact that the attorney repeatedly confirmed her client's acceptance of the stipulation provisions on the record. Specifically, the attorney stated that Thomas accepted the stipulation provisions with the exception of a "slight" and "narrow" issue involving maintenance. Based on the attorney's representations to the court, the question of whether the attorney actually signed the stipulation has no significance.

We now turn to Elena's motion for an award of fees, costs, and attorney fees (including guardian ad litem fees) under WIS. STAT. RULE 809.25(3), which authorizes an award to the successful party if we find that an appeal is frivolous. We conclude that this appeal is frivolous under RULE 809.25(3)(c)2., which authorizes an award if "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-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." Thomas's attorney knew or should have known that this appeal has no reasonable basis in law or fact.

We therefore remand this matter to the circuit court for the limited purpose of determining a proper award under WIS. STAT. RULE 809.25. We direct that the award be imposed against the attorney only, because our finding that the appeal is frivolous is based on the attorney's conduct. *See* RULE 809.25(3)(b) (allowing an award to be imposed against the appellant, the attorney, or both).

On remand, the appellees[5] should file a breakdown of what they contend are their reasonable attorney's fees and costs. As part of her filing, Elena is free to supplement the affidavit dated September 29, 2017, executed by Ginger L. Murray, Esq., and submitted to us as part of her brief on sanctions. If Thomas or his attorney seeks a hearing on either the necessity or reasonableness of the requested fees or costs, they shall request the hearing within twenty days of the filing of this fee information. If Thomas or his attorney timely requests a hearing, the circuit court shall hold one, and award those fees and costs it determines were reasonable and necessary, including fees or costs expended by Elena and the guardian ad litem in connection with that hearing.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded to the circuit court for the limited purpose of determining a proper award of costs, fees, and attorney fees as set forth herein.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[5] Only Elena filed a timely motion for a determination that the appeal was frivolous. *See* WIS. STAT. RULE 809.25(3)(a), which provides, "A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief." However, WIS. STAT. RULE 809.25(3)(a) also states, "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section." Our supreme court has explained that this is a mandatory provision. *See* ***Jackson v. Benson***, 2002 WI 90, ¶6, 255 Wis. 2d 24, 647 N.W.2d 815. On remand, we leave it to the circuit court to determine whether the guardian ad litem is also a successful party, should the guardian ad litem wish to pursue an award. Alternatively, Elena is free to pursue payment of her portion of the guardian ad litem fees as requested in her motion.