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DISTRICT III

October 16, 2019

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

2018AP983

Charles W. Nagle v. Lake Wissota Inn Condominiums Association,
Inc. (L. C. No. 2017CV293)

Before Stark, P.J., Hruz and Seidl, 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).

Charles Nagle, pro se, challenges an award of attorney fees for continuing a frivolous lawsuit. 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 (2017-18).¹

¹ References to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Nagle brought this action as the owner of one unit of an eight-unit condominium project, alleging irregularities in the operation of the Lake Wissota Inn Condominiums Association, Inc. (the Association). Nagle sought an independent audit of the Association, an outside manager, a deadline to address the purported irregularities or, in the alternative, dissolution of the Association and termination of its officers.

Approximately three weeks after the action was filed, Nagle moved for an ex parte “Injunction Pending Ruling,” “restrain[ing the defendants] from expending scarce Association funds on legal fees for the drafting of Declaration Amendments, Bylaws and other Association governing documents until the Court rules on the legality of the current Board of Directors.” A hearing on the injunction motion was scheduled.

Prior to the hearing, the Association filed an answer and affirmative defenses and a “Response To Motion For Injunction.” The latter document claimed the injunction motion was moot “because the actions Plaintiff seeks to enjoin have already been accomplished.” The response stated that the Association had passed new Bylaws and approved a fourth amendment to its original Declaration. The response argued “there is nothing for the Court to enjoin.” The response also stated that no legal fees were being paid by the Association so no costs would ostensibly be passed on to Nagle. But even if the Association would incur legal fees, Nagle could be made whole, so no irreparable harm could result in any event. Correspondence was also filed requesting that the court remove the scheduled injunction motion hearing from its calendar, or, alternatively, requesting “a warning that this Motion is completely without basis and we will be asking for attorney fees if forced to show up.”

The circuit court held the hearing and subsequently denied the injunction request, concluding there was no irreparable harm to Nagle. The court reserved ruling as to attorney fees and costs. The Association filed a motion for summary judgment with associated affidavits on the basis that Nagle's allegations either were never an issue or had been resolved, and thus no genuine issue of material fact existed. Nagle renewed his request for attorney fees and costs on the grounds that despite being informed that his purported irregularities had been addressed, and despite the fact that his request for injunctive relief had been denied, Nagle continued to pursue the lawsuit.

Following a hearing, the circuit court granted summary judgment dismissing Nagle's claims. The court concluded "there is no material issue of fact remaining for the Court to decide, any issues that may have been relevant at one point are now moot" The court also noted that Nagle had been advised in open court that he could be subject to an additional award of attorney fees and costs if the case was dismissed on summary judgment. The court ordered the submission of affidavits regarding attorney fees and costs expended for: (1) defending Nagle's motion for injunctive relief and the injunction hearing; and (2) the continued defense against Nagle's claims up to and including the summary judgment hearing. The court subsequently issued a written decision awarding attorney fees and costs, but reducing the amount of fees requested. A Judgment for Costs followed and Nagle now appeals.

On appeal, Nagle argues that the "award of Defendant's Attorney Fees is an error by the Circuit Court," and that he is "being penalized for the good faith attempt to force statutory compliance of a Condominium Association." However, Nagle failed to file any transcripts from the circuit court hearings to provide us with a complete record to aid our review. Indeed, the record shows Nagle's statement on transcript stated, "A transcript is not necessary for

prosecution of this appeal.” In his reply brief to this court, Nagle concedes that hearing transcripts were not provided. Nevertheless, Nagle argues “[t]his appeal is only of the Order filed April 10, 2018 awarding attorney’s fees to the defendants. Therefore, no hearing transcripts are required.” Nagle further contends the respondents could have provided transcripts if desired.

It is the appellant’s responsibility to assure a complete record for the issues on review. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). The scope of our review is necessarily confined to the record before this court, and missing materials are assumed to support the circuit court’s decision.² Without a transcript of the hearings at which the circuit court discussed its reasoning concerning attorney fees and costs, we have an insufficient basis to disturb any factual findings or legal determinations made by the court.³

In addition, Nagle’s arguments are underdeveloped, and we will not abandon our neutrality to develop arguments. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Nagle merely argues that the “American Rule” applies to the

² We note that both parties filed appellate briefs that violate the rules of appellate procedure. The briefs lack citations to the record on appeal, contrary to WIS. STAT. RULE 809.19(1)(d). The appendices also fail to contain accompanying record citations demonstrating the documents are part of the record on appeal. The parties also improperly use party designations such as “Plaintiff-Appellant” and “Defendant-Respondent” throughout the argument section of their respective briefs, rather than referring to the parties by name, as required by RULE 809.19(1)(i). Moreover, the appendix of Respondent Alan Grube is not paginated. Nagle also uses the phrase “abused its discretion,” which we have not used since 1992 when our supreme court replaced the phrase with “erroneous exercise of discretion.” See *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375. We admonish the parties that future violations of the rules of appellate procedure may result in sanctions.

³ To the extent that Nagle suggests in his reply brief that the irregularities he alleged in his complaint were not sufficiently addressed prior to the dismissal of his complaint by summary judgment, Nagle’s appeal is limited to the issue of whether the circuit court erred by ordering Nagle to pay attorney fees and costs. In any event, we will not address issues raised for the first time in a reply brief. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

award of attorney fees unless the matter is frivolous or pursued in bad faith. He contends that the circuit court did not explicitly mention a frivolous lawsuit or bad faith claim in its orders, and the court therefore erred in awarding attorney fees. He further contends – without citation to the record on appeal – that his only intent in commencing the lawsuit was to bring the Association into statutory compliance.

However, the circuit court concluded that whatever merit there may have been to the lawsuit when commenced, “any issues that may have been relevant at one point are now moot” Accordingly, it was not the *commencement* of the action that was relevant to the issue of frivolousness. Rather, it was Nagle’s *continuation* of the lawsuit that the court implicitly found to be frivolous.

In this regard, it is clear from the record that Nagle had been warned multiple times that the continuation of his lawsuit had no legitimate basis and that he could be subject to attorney fees and costs. In its written summary judgment decision, the circuit court specifically found that Nagle “was advised in Court on January 2, 2018, that Defendants alleged his claims were moot at that time, and that he may be subject to an additional award of defense fees and costs if the case was dismissed by Summary Judgment.” The court also stated that it “previously found at that injunction hearing held on November 22, 2017 that there was no basis to grant relief” In its subsequent written decision on attorney fees and costs, the court also noted that the answer filed before the injunction hearing affirmatively alleged that “the [A]ssociation was in fact in substantial compliance with all statutory requirements.” The court then found that “there is no material issue of fact remaining for the Court to decide, any issues that may have been relevant at one point are now moot, and summary judgment dismissing Plaintiff’s case is appropriate.”

Thus, the circuit court awarded attorney fees and costs necessarily and reasonably incurred to defend Nagle’s injunction motion, as well as the continued defense up to and including the summary judgment motion. Nagle’s intent in *commencing* the lawsuit to bring the Association into compliance with statutory requirements is therefore not dispositive. In addition, Nagle makes no argument that the amount of fees and costs awarded was unreasonable or unnecessary, and he provides no basis for us to consider it so.

In the alternative, Nagle requests that we order “an even further reduction in the amount to be paid” But again, this argument is underdeveloped, and Nagle provides no citation to the record on appeal in support of this contention. We will therefore not further address the issue. *See Elbin*, 146 Wis. 2d at 244-45.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals