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DISTRICT IV

October 8, 2020

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

2019AP1976

In re the finding of contempt in: Jami Lynn McArdle v. Jeffrey
William McArdle (L.C. # 2014FA300)

Before Nashold, J.¹

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).

Jami McArdle appeals an order of the circuit court denying her motion to hold her ex-husband, Jeffrey McArdle, in contempt for failing to comply with court orders with respect to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

child support.² Based upon my review of the briefs and record, I conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. I reverse and remand for further proceedings consistent with this opinion.

WISCONSIN STAT. § 785.01(1)(b)³ defines “contempt of court” as intentional “[d]isobedience, resistance or obstruction of the authority, process or order of a court.” Motions for contempt follow a burden-shifting framework. *See Noack v. Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989). “Following a prima facie showing by complainant of a violation of an order, alleged contemnors bear the burden of demonstrating that their conduct was not contemptuous.” *Id.* In the instant case, this means that it was Jeffrey’s burden to show that his disobedience of the court’s orders was something other than intentional or willful. *See id.*

On appeal, this court reviews a circuit court’s contempt determination for an erroneous exercise of discretion. *See City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). This court “will find an erroneous exercise of discretion where a trial court failed to exercise discretion, the facts fail to support the decision, or the trial court applied the wrong legal standard.” *State v. Burton*, 2007 WI App 237, ¶13, 306 Wis. 2d 403, 743 N.W.2d 152.

² Because the parties share a surname in the case caption, I refer to them by their first names throughout this opinion. I further note that the circuit court also granted Jami’s motion for modification of child support and her request for attorney’s fees. These determinations are not at issue on appeal.

³ For ease of reference, I cite to the current version of the statute because there have been no changes to the relevant language during the time periods at issue.

In denying Jami's motion for contempt, the court agreed with Jami that Jeffrey failed to comply with two court orders: an order requiring that he exchange tax documents with Jami each year, and an order requiring that he notify Jami and the child support agency of a substantial change in income. It is undisputed that neither Jeffrey nor Jami provided the other party with tax documents for the years 2015, 2016, 2017, or 2018. It is also undisputed that, although Jeffrey's child support payments were based on his 2014 reported annual income of \$31,200, he failed to report a substantial change in income after his annual income increased to \$71,160 in 2016, \$88,366 in 2017, and \$93,721 in 2018. The dispute in this case centers on the circuit court's conclusions with respect to whether Jeffrey had the requisite intent upon which to base a finding of contempt.

Jami argues that the circuit court improperly required her to prove that Jeffrey's conduct was intentional after she had already made a prima facie showing that Jeffrey violated the court's orders. In support of this contention, Jami relies primarily on the following statements by the court. First, during the hearing, the circuit court found:

I can't conclude as to the 2015, 2016, 2017, and 2018 that there's enough evidence for me to find that—that level of intent to grant the motion. There's a jury instruction we give to jurors that says to jurors if you have to guess, then the party with the burden of proof hasn't met the burden of proof. And quite honestly and humbly, if I had to—if I had to make the call on the level of Mr. McArdle's intent with those years, it would simply be a guess.

Second, in the written order denying the motion, the court stated:

For the reasons stated on the record, including but not limited to the Court's comments that the Court was not able to make a finding of intent or motive to deprive Petitioner the child support payments that would have been owed if the substantial increase in Respondent's income had been known, Petitioner's

Motion for Contempt for not providing financial information from 2015-2018 is denied.

Further, although not mentioned by either party, prior to making the comments referenced above, the court explicitly asked Jami's counsel whether she agreed that Jami bore the burden of establishing that Jeffrey's failure to comply with the orders was intentional and willful, and counsel responded affirmatively:

THE COURT: ... But tell me what facts can I find with regard to [Jeffrey's] failure to comply with what was required of him as being willful and with intent. You agree that's an element that you have the burden of proving?

[COUNSEL]: I agree with that, Your Honor.

Based on these comments and the entire record, I conclude that the circuit court incorrectly placed the burden on Jami to establish that Jeffrey's violations of the court's orders were intentional.⁴ I further conclude that Jeffrey's arguments to the contrary are unpersuasive.

Jeffrey concedes that Jami made a prima facie showing that Jeffrey violated a court order, which shifted the burden to him. However, Jeffrey argues that the court did not improperly place the burden of proof regarding intent on Jami, but instead found that Jeffrey had not acted intentionally. Jeffrey bases his argument on what he asserts are the following findings made by the circuit court: (1) both parties were required to provide annual financial information, but neither party did so, nor did they request such information from the other party; (2) Jami and Jeffrey generally tried to avoid each other; (3) Jeffrey was not involved in any gamesmanship;

⁴ As is evident from the exchange above, the court's misallocation of the burden of proof appears to have been with the acquiescence of Jami's counsel. However, because Jeffrey does not make any forfeiture argument on appeal, I do not address that issue.

(4) Jami and Jeffrey did not communicate about the exchange of financial information; and
(5) Jeffrey's payment of other expenses on behalf of the children was inconsistent with the "cold calculation intentional" withholding of information from Jami. Accordingly, Jeffrey argues that the "overall record" shows that the court properly held Jeffrey to his burden of proving that he did not act intentionally in failing to provide his financial information to Jami.

Jami disputes that the court made all of the findings set forth above and also challenges the accuracy of some of the court's findings. Regardless, I conclude that Jeffrey's reliance on these findings is unavailing, given that the court plainly stated that it would have to "guess" as to Jeffrey's intent and that, "if you have to guess, then the party with the burden of proof hasn't met the burden of proof."⁵ These statements are inconsistent with a finding that Jeffrey met his burden of showing a lack of intent. Further, the court expressed its view of the burden of proof when it asked Jami's counsel if she agreed that intent was "an element that [Jami had] the burden of proving," to which counsel agreed. Finally, although more ambiguous, in its written order, the court also stated that it "was not able to make a finding of intent or motive." All of these statements evidence the court's application of an incorrect legal standard, namely, requiring Jami to prove that Jeffrey's disobedience of the court orders was intentional, rather than requiring Jeffrey to show that it was not.

As discussed, applying the wrong legal standard constitutes an erroneous exercise of discretion. See *Burton*, 306 Wis. 2d 403, ¶13. Thus, I reverse the circuit court's order on that

⁵ As Jami notes, if the court had viewed Jeffrey as the party with the burden of proof on intent, then the court's statement that the burden of proof has not been met would indicate a finding that Jeffrey did not meet his burden of proof, which would be at odds with the court's decision to deny Jami's motion for contempt.

basis and remand so that the court may properly allocate the burden of proof, and determine, under the proper allocation, whether Jeffrey engaged in contempt of court.⁶

IT IS ORDERED that the order of the circuit court is reversed and the cause is remanded for further proceedings consistent with this opinion.

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

Sheila T. Reiff
Clerk of Court of Appeals

⁶ Jami also argues that the circuit court erred in failing to award remedial sanctions. However, as clarified in her reply brief, Jami agrees that there must be a finding of contempt in order to award remedial sanctions. Thus, the issue in this case centers on whether Jeffrey met his burden of showing that his failure to follow court orders was not intentional or willful.

The parties also refer in their briefing to the equitable principles of laches, estoppel, and clean hands, which Jeffrey raised in the circuit court. Both parties acknowledge that the court did not specifically address the doctrines of estoppel or clean hands. In his brief-in-chief, Jeffrey does not argue that the doctrine of equitable estoppel or clean hands applies but notes that, at the hearing, the circuit court “reference[d]” laches and that Jami’s motion was “late.” He then asserts that the court’s determination that “Jami’s [contempt] motion as to 2016, 17, [and] 18 was late was a proper exercise of [the court’s] equity, authority, and discretion under the circumstances, and was not against the great weight and clear preponderance of the evidence.” To the extent Jeffrey means to argue that the doctrine of laches serves as an additional reason to affirm the circuit court’s decision, his argument is inadequately developed and need not be considered. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments).