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DISTRICT IV

April 28, 2022

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

2021AP1299 Sauk Prairie Conservation Alliance v. Wisconsin Department of Natural Resources (L.C. # 2016CV642)

Before Blanchard, P.J., Fitzpatrick, and Graham, 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).

Sauk Prairie Conservation Alliance appeals an order denying its request for attorney fees under WIS. STAT. § 814.245 (2019-20).[1] Based upon our review of the briefs and record, we

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We further conclude that, although we lack jurisdiction to hear this appeal as a matter of right, we construe the notice of appeal as a petition for leave to appeal a nonfinal order, grant leave to appeal, and reverse the order appealed from.

In February 2017, the circuit court issued an order consolidating four petitions for judicial review that were filed by the Alliance seeking review of decisions by the respondent agencies.[2] The order further provided that the parties would first file briefs related to issues in the petitions where the Alliance argued that a contested case hearing should have been held. In December 2017, the circuit court ordered that a contested case hearing be held and remanded to the Wisconsin Department of Natural Resources for that purpose. The issues from the other judicial review cases were then held in abeyance pending the results of the contested case hearings.

In January 2021, the Alliance filed a request for attorney fees under WIS. STAT. § 814.245 in connection with its claims for contested case hearings. That statute requires such requests to be filed "within 30 days after final judgment in the action." Sec. 814.245(6). In June 2021, the circuit court denied the fee request on the ground that it was untimely from the court's December 2017 order remanding for a contested case hearing. The Alliance appeals.

The Alliance argues that the circuit court erred by concluding that the December 2017 decision was a final judgment. The Alliance argues that, to determine finality for purposes of

[2] The four petitions for judicial review that were consolidated by the February 2017 order were Sauk County Case Nos. 2016CV642, 2016CV662, 2017CV20, and 2017CV52. The Alliance later filed a fifth petition for judicial review, Sauk County Case No. 2019CV516, and the circuit court entered a subsequent order consolidating that petition with the others.

WIS. STAT. § 814.245, we should apply the same test that we use to determine whether an order is final for the purpose of entitling a party to an appeal as a matter of right. That test asks whether the order disposes of the entire matter in litigation as to one or more parties. WIS. STAT. § 808.03(1). The Alliance argues that the December 2017 judgment was not final because other issues in the consolidated cases remained pending.

The Alliance also acknowledges that one implication of its argument is that the fee denial order itself is not final, because other issues in the consolidated cases also remained pending at the time of the June 2021 order denying its attorney fee request, and therefore we lack jurisdiction to hear this appeal as a matter of right. In essence, the Alliance's argument on the merits of the appeal also suggests that we lack appellate jurisdiction. Despite acknowledging this state of affairs in its opening brief, in its reply brief the Alliance asserts that it "takes no position" on jurisdiction, and that, if we dismiss the appeal on this ground, "this Court's holding on that legal issue would be law of the case and binding upon the Circuit Court."

We conclude that the June 2021 fee denial order was nonfinal, and therefore we lack jurisdiction to hear this appeal as a matter of right. However, in such cases, we may construe a party's notice of appeal as a petition for leave to appeal and grant that petition. *See* ***Caldwell v. Percy***, 105 Wis. 2d 354, 357 n.3, 314 N.W.2d 135 (Ct. App. 1981). For reasons discussed below, we conclude that we should do so here to clarify further proceedings in the litigation. *See* WIS. STAT. § 808.03(2)(a).

We turn to the merits of the appeal. This issue turns on whether the December 2017 order was a "final judgment," as that term is used in the attorney fee statute.

The attorney fee statute uses the term "final judgment" to set the time by which a motion for attorney fees must be made. WIS. STAT. § 814.245(6). The statute does not define that term. The parties have not pointed to any case law that states a test that should be applied in the context of this statute. However, they agree that we should apply the same test for this purpose as we do for determining whether a judgment is final for purposes of having an appeal as a matter of right. As stated above, that test is whether the order or judgment disposes of the entire matter in litigation as to one or more parties. *See* WIS. STAT. § 808.03(1). Application of this test presents a question of law subject to independent appellate review. ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶14, 299 Wis. 2d 723, 728 N.W.2d 670.

The parties agree that, at the time of the December 2017 order, claims from at least some of the four judicial review petitions remained unresolved. Because of those pending claims, the respondent agencies do not dispute that, if the four cases were consolidated at the time that order was issued, the order was nonfinal. Instead, the agencies argue that the two cases on which the Alliance's fee request were based were actually severed by the February 2017 order.

More specifically, the agencies argue that the February 2017 order "severed" the two cases regarding contested hearings from the other cases, by ordering this issue to be briefed first. To make this argument, the agencies rely on an ordinary definition of "sever," as meaning "to divide or separate." In practical effect, however, the agencies actually want us to use a definition of "sever" that means "not consolidated," because whether the cases were consolidated is more precisely the question, not whether they were "severed" in some everyday meaning of that word.

The February 2017 order was unambiguous in consolidating the cases. We assume, without deciding, that the agencies' argument could have some merit if the court's direction for

some cases to proceed first had been issued at a time after the consolidation order. But here, the provision that the agencies assert was a severance, that is, a non-consolidation, was contained *in the same order* as a provision expressly consolidating the cases. On its face, the effect of the February 2017 order was to consolidate the cases, regardless of whatever other distinctions it made among them in the plan for further proceedings.

Accordingly, we conclude that the four cases remained consolidated at the time of the December 2017 order for a contested case hearing, and therefore that order was not a "final judgment" for purposes of the fee statute, because it did not dispose of the entire matter in litigation as to any party. Therefore, the circuit court erred by denying the Alliance's fee motion on the ground that the motion was not timely filed after a final judgment.

If we were to dismiss this appeal for lack of jurisdiction, the June 2021 order denying the attorney fee motion would remain unreversed. The Alliance asserts that our conclusion dismissing the appeal would become law of the case and be binding on the circuit court. However, even if that is a legally accurate statement (and we express no opinion on whether it is), that result would not be self-executing. It would likely require a motion and a further ruling by the circuit court. Rather than leave what we have concluded is a legally infirm order standing in the record as a potential subject of further proceedings, we conclude that the better course is to grant leave to appeal and reverse the order.

In doing so, we acknowledge that the agencies have made additional arguments on appeal to support the denial of the Alliance's attorney fee motion. We are not addressing those arguments here, and the agencies may continue to raise them in response to any future attempt by

the Alliance in the circuit court or this court to recover the attorney fees that were the subject of the June 2021 order. Our reversal of that order is limited to the issue of timeliness.

IT IS ORDERED that, on this court's own motion, we construe the notice of appeal as a petition for leave to appeal a nonfinal order and grant leave to appeal.

IT IS FURTHER ORDERED that the order appealed from is summarily reversed under 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