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DISTRICT IV

August 18, 2022

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

2021AP1518 Lucas R. Berg v. Kimber L. Clark (L.C. # 2020FA194)

Before Blanchard, P.J., Kloppenburg, and Nashold, 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).

After Kimber Clark both unambiguously ended her non-marital relationship with Lucas Berg and terminated Berg's contact with her minor child from a previous non-marital relationship, Berg petitioned for an order for visitation with the child. Clark moved for summary judgment dismissing the petition and also moved for sanctions. The circuit court granted both motions. On appeal, Berg argues that the court erred in dismissing his petition because: (1) there are genuine issues of material fact as to the required elements that Berg must prove to establish "standing," as that term is used in case law in this context, to file a petition for an order for third-party visitation; (2) the court cannot determine on summary judgment whether the best

interest of the child will be served by an order of visitation; and (3) Berg did not "forfeit" his asserted right to visitation due to the harassing and abusive nature and quantity of text messages that he had sent to Clark. Berg argues that the court erred in ordering sanctions because: (1) the court did not have grounds to sanction Berg; and (2) the amount of attorney fees awarded was unreasonable.

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 (2019-20).[1]

As to the merits of the issues raised on appeal, we conclude that Berg fails to show that the circuit court erred when it exercised its "equitable powers" to determine that Berg was not entitled to his asserted right to visitation. In light of that conclusion, we do not address his challenges to the circuit court's dismissal of his petition based on the court's determinations as to "standing" and the child's best interest.[2] We also conclude that Berg fails to show that the circuit court erroneously exercised its discretion in ordering that Berg pay a monetary sanction of $3,500 for filing the petition for an improper purpose. Accordingly, we affirm.

Clark is the mother of a minor child born in 2010. Clark met and began a romantic relationship with Berg in either December 2011 or the beginning of 2012. Berg met Clark's child after Clark began dating Berg, when Clark's child was under the age of two. Starting in June 2012, Berg, Clark, and Clark's child resided together in the same house for between thirteen

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

[2] We also do not address Clark's argument that the circuit court properly dismissed Berg's petition on the alternative ground that Berg failed to join the child's biological father as a necessary party in this action.

and sixteen months, from June 2012 to not later than October 2013. The parties maintained separate residences during the rest of their romantic relationship, which Clark ended in either late 2019 or early 2020.

Berg is the father of two minor sons from a previous marriage, with fifty percent placement of his sons. After Clark ended her romantic relationship with Berg, Clark and Berg continued playdates with all of their children for several months into 2020. In the spring of 2020, Clark terminated Berg's contact with her child.

On October 1, 2020, Berg filed a petition with the circuit court for an order that would grant him third-party visitation with Clark's child under WIS. STAT. § 767.43(1). In January 2021, Clark filed a motion for sanctions, asserting that Berg filed the petition for the improper purpose of harassing Clark and that the petition was not supported by the facts or the law. In March 2021, Clark filed a motion for summary judgment asking the court to dismiss the petition.

At a May 2021 hearing, the circuit court granted Clark's summary judgment motion and dismissed Berg's petition on the basis that it was undisputed that at least two of the required elements for "standing" to file a petition for an order for third-party visitation were not met. Further, the court determined that, regardless of whether the required elements were met, an order of visitation was not in Clark's child's best interest. Finally, the court also determined that, regardless of whether the required elements were met, Berg was not entitled to an order of visitation based on the more than 1,600 text messages that Berg had sent to Clark between June 2020 and February 2021, with "topics and conversations" that the court considered "frighten[ing]." The court explained that the text messages indicated that visitation with Clark's child was "an afterthought" to Berg's "primary goal … to get back with Ms. Clark" and

indicated that Berg would use visitation "as a tool" to continue harassing Clark "to try to get back the relationship that has been lost with Ms. Clark."

Berg filed a motion for reconsideration and opposed Clark's motion for sanctions. At a June 2021 hearing, the circuit court denied Berg's motion for reconsideration on the ground that it failed to raise any new issues of fact or law. The court also granted Clark's motion for sanctions, determining that Berg filed the petition for an order for third-party visitation "for an improper purpose," which was to "harass Ms. Clark and to try to persuade her into renewing a relationship that she had terminated." The court directed Clark's counsel to submit documentation of fees and costs for the court to consider in determining what reasonable fees and costs to award. Clark's counsel filed an affidavit in support of Clark's request for an attorney fee award of $10,000, and Berg filed an objection to the amount requested, asserting that "any award for attorney fees should be for much less than the $10,000 requested." Based on the parties' submissions, the court ordered that Berg pay Clark $3,500 as a sanction.

Dismissal of Petition

Berg argues that the circuit court erroneously dismissed his petition for visitation with Clark's child. A determination to grant or deny a petition for an order of visitation is committed to the circuit court's sound discretion. ***Martin L. v. Julie R.L.***, 2007 WI App 37, ¶4, 299 Wis. 2d 768, 731 N.W.2d 288.

Berg petitioned for an order for visitation under WIS. STAT. § 767.43(1).[3] As both parties acknowledge on appeal, § 767.43(1) does not apply here because this case does not involve a dissolved marriage, in that the child was not born or adopted during a marriage and Clark was not married during the child's life. *See* ***Holtzman v. Knott***, 193 Wis. 2d 649, 680, 533 N.W.2d 419 (1995) (concluding that § 767.43(1), at the time numbered as WIS. STAT. § 767.245,[4] does not apply "in the absence of the dissolution of marriage" and did not apply because the child "was not born of a marriage or adopted during a marriage, and his biological mother has not been married during his life"); *see also* ***Cox v. Williams***, 177 Wis. 2d 433, 439, 502 N.W.2d 128 (stating that one of the requirements to establish "standing to seek" nonparent visitation under § 767.245(1) is that "an 'underlying action affecting the family unit has previously been filed'") (quoted source omitted). Rather, Berg's petition is for a non-statutory order for third-party visitation and is governed by ***Holtzman***. In that case, our supreme court reaffirmed that circuit courts may use "their equitable power[s] to order visitation in the best interest of a child in

[3] A court order permitting visitation generally allows a non-parent who has a parent-like relationship with a child to maintain contact with the child when that contact is in the child's best interest, but it does not incorporate the rights associated with legal custody or physical placement. *See* ***Lubinski v. Lubinski***, 2008 WI App 151, ¶¶7-9, 314 Wis. 2d 395, 761 N.W.2d 676 (explaining the differences between physical placement and visitation); ***Holtzman v. Knott***, 193 Wis. 2d 649, 681-83, 533 N.W.2d 419 (1995).

[4] Since ***Holtzman*** was decided, the statutory language has been changed to include references to newly enacted subsections providing for specific statutory exceptions. *See* WIS. STAT. § 767.43(1) (beginning, "Except as provided in subs. (1m) and (2m)," which refer to exceptions for homicide conviction and a special grandparent provision, respectively). Neither party argues that the changes to the statutory language matter to the issues in this appeal.

circumstances not described in any visitation statute." ***Holtzman***, 193 Wis. 2d at 658-59, 685, 694-95.[5]

In this case, the circuit court specifically quoted the following language from ***Holtzman***: "the legislature intended the courts to use their equitable powers" to allow visitation in a third-party situation. Based on this proposition, the court exercised its "equitable powers" to determine that Berg was not entitled to his asserted right to visitation by virtue of the more than 1,600 text messages that Berg had sent Clark between June 2020 and February 2021. The court explained that it had reviewed the text messages and found that 1,343 did not deal with the child or only "tangentially mentioned" the child; and that, of the 239 that "primarily dealt with" the child, a number also dealt with Berg's relationship with Clark. The court inferred from "the topics and conversations" in the text messages that Berg's primary goal was to "get back with Ms. Clark," with the child being only "an afterthought." The court determined that the contents and tone of the text messages when considered as a whole indicated that, were the court to order visitation with the child, Berg would use the visitation "as a tool" to continue to harass Clark "to try to get back the relationship that" he lost with Clark.

As examples, the circuit court highlighted text messages that supported the court's determination that the contents of the text messages, considered as a whole, indicated that Berg sought to "get Ms. Clark back at all costs," including by filing the petition: "in one of the texts

[5] The court in ***Holtzman*** set out a "test for standing … for courts to apply before exercising their equitable powers" in a non-statutory visitation case. ***Wohlers v. Broughton***, 2011 WI App 122, ¶¶16-19, 337 Wis. 2d 107, 805 N.W.2d 118. The court created the test in recognition of "a biological or adoptive parent's constitutionally protected liberty interest in determining how to [raise] a child." ***Holtzman***, 193 Wis. 2d at 668; *see also* ***Michels v. Lyons***, 2019 WI 57, ¶16-17, 387 Wis. 2d 1, 927 N.W.2d 486 (stating that "a parent who has developed a relationship with his or her child has a fundamental liberty interest in the child's care and upbringing.").

[Berg] offered $1,000 to [Clark] for a five-Mississippi hug, and in another text, he offered $10,000 to put his kids up in some kind of a competition against her new boyfriend's kids."

The circuit court again referenced the inferences of harassment that it drew from the record as a whole, including all of the text messages, when it denied Berg's subsequent motion for reconsideration.

Berg argues that "there is no legal authority that permits a court to dismiss a third-party visitation petition" when the petitioner shows that the petitioner has met the ***Holtzman*** test, "without first determining whether visitation would be in the best interests of the child." However, Berg does not argue that ***Holtzman*** does not permit a court to exercise its "equitable powers" in such a situation. *See* ***Holtzman***, 193 Wis. 2d at 658-59. The only legal authority that Berg cites in support of this proposition is the following general statement in ***Elgin and Carol W. v. DHFS***, 221 Wis. 2d 36, 49, 584 N.W.2d 194 (Ct. App. 1998) (internal quotation marks, brackets, and quoted source omitted): "equity does not mean that a court may ignore statutes and case law to enable it to assist someone in trouble." In that case this court affirmed the dismissal of a child's grandparents' "equitable claim" in their petition for an order for visitation years after the child's parents' parental rights had been terminated and the child had been placed in foster care and then adopted. ***Id.*** at 38-39, 48. The court explained that to permit trial of such an "equitable claim" would "run contrary not only to the termination-of-parental-rights and adoption laws themselves but to the important public policy considerations underlying them." ***Id.*** at 49. Berg does not identify any laws or underlying public policy considerations that are undermined by the circuit court's exercise of its equitable powers here. Accordingly, we reject Berg's legal argument as unsupported by relevant legal authority.

Berg also argues that the circuit court erred because it drew inferences from the text messages without considering Berg's averments to the effect that he intended to use the text messages toward a goal of "restoration of his family, which included not only Clark but also [Clark's child]." Berg argues that "the [circuit] court's quantification of the text messages failed to capture this nuance" that Berg was seeking to "fight to keep Clark and [Clark's child] in his family." However, the record reflects that the court was well aware of Berg's averments in the five affidavits that Berg filed before the hearing on Clark's motion seeking dismissal of his petition. Those averments may have created factual disputes that precluded granting summary judgment as to whether Berg met the ***Holtzman*** test. But, as stated, the court determined that, regardless of whether Berg met the ***Holtzman*** test, he was not entitled to visitation. The court based this determination on the text messages, when taken as a whole and considered in the context of the parties' submissions and arguments, showed that Berg was manipulative and abusive as to Clark, both with and without referring to Clark's child. Berg had not in his summary judgment submissions addressed the frequency, content, tone, or, in the circuit court's words, the "topics and conversations," of the text messages. Given Berg's silence as to the frequency, content, and tone of the text messages, the court's inference was the only reasonable inference at that point in the litigation.

Berg argues that the circuit court erroneously "held a trial by affidavit" in resolving questions of fact about Berg's intentions in filing the petition. However, the record refutes this argument. The court relied on the submissions of the parties, including the content of the text messages, and drew reasonable inferences from all relevant material before the court. Berg did not raise any factual dispute as to the authenticity of the text messages. Berg asserts that "the text messages do not tell a complete story" and that he would have explained his intent and

clarified "the meaning of his written words." However, Berg had and failed to take the opportunity to offer his explanation in response to Clark's motion for summary judgment. In sum, Berg fails to identify any law precluding the court, in exercising its "equitable powers," from reasonably inferring from the record here the abusive or harassing nature of the text messages and his pursuing the petition as being primarily a tool to continue that abuse and harassment.

Sanctions

Berg challenges the existence and the amount of the sanctions award.

Pursuant to WIS. STAT. § 802.05, a person who signs a pleading makes three warranties:

> "First, the person who signs a pleading, motion or other paper certifies that the paper was not interposed for any improper purpose. Second, the signer warrants that to his or her best "knowledge, information and belief formed after reasonable inquiry" the paper is "well grounded in fact." Third, the signer also certifies that he or she has conducted a reasonable inquiry and that the paper is warranted by existing law or a good faith argument for a change in it."
>
> If the circuit court finds that any one of the three requirements set forth under the statute has been disregarded, it may impose an appropriate sanction on the person signing the pleading or on a represented party or both.

Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999) (citations omitted).

Our review of a circuit court's decision to impose sanctions under WIS. STAT. § 802.05 "is deferential." ***Jandrt***, 227 Wis. 2d at 548. "A circuit court's discretionary decision will be sustained if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 549. The determination that an action was commenced for an improper purpose "requires factual

findings, and we accept factual findings made by the [circuit] court unless they are clearly erroneous." ***Wisconsin Chiropractic Ass'n v. Chiropractic Examining Bd.***, 2004 WI App 30, ¶16, 269 Wis. 2d 837, 676 N.W.2d 580. "Whether an inference is reasonable is a question of law, as is whether there is more than one reasonable inference, and therefore these are determinations for this court to make de novo. However, which inference to draw when more than one is reasonable is for the [circuit] court to decide." ***Id.*** at ¶33 n.12 (citations omitted).

On December 28, 2020, Clark sent Berg a "safe harbor" notice under WIS. STAT. § 802.05(3), notifying him of her position that his petition was filed for the improper purpose to harass Clark and that the petition lacked a reasonable basis in fact or law. The notice informed Berg that Clark would seek sanctions if the petition was not withdrawn within twenty-one days of service of the notice. Berg did not withdraw the petition within the specified timeframe, and, on January 20, 2021, Clark filed the motion for sanctions. Clark also filed two affidavits along with copies of text messages that Berg had sent her between June 2020 and February 2021. Berg filed an affidavit in opposition to Clark's motion for sanctions. In that affidavit, Berg did not address the text messages that Clark had submitted to the circuit court.

In May 2021, at the hearing on Clark's motion for summary judgment, the circuit court reviewed the approximately 1,600 text messages that Berg sent Clark between June 2020 and February 2021. The court said the following about the text messages:

> I counted 239 primarily dealt with [Clark's child]. That left 1,343 that did not deal with him or very tangentially mentioned him. And of the 239 of those, a number of those -- I didn't put a full number on them -- but a number of those also dealt with other topics, primarily Mr. Berg's relationship with Ms. Clark. That is troubling.

> When I read the texts and how they're laid out, it's painfully obvious to this court that Mr. Berg's primary goal, at least from June of '20 through late in '20, he wanted to get back with Ms. Clark. [Clark's child] was an afterthought most of the time.

The court further said "that the topics and conversations in those texts [were] frighten[ing]."

On June 21, 2021, Berg filed a second affidavit in opposition to Clark's motion for sanctions (his sixth affidavit overall). In that affidavit, Berg reiterated his disputes of Clark's averments and specifically averred that he did not bring the petition for an improper purpose to harass Clark, but for the purpose of continuing his relationship with her child. He averred:

> I admit to texting dumb things. My only excuse is that I loved Kimber and wanted to hold our family together. I thought the only way I would be able to see [Clark's child] was through Kimber. It was only after she denied me any time with [her child] that I filed for visitation. My spending time with [Clark's child] is not an effort to maintain a relationship with Kimber. That will not happen.

He also pointed to the portion of text messages that he sent to Clark between June 2020 and February 2021 that "related directly" to Clark's child.

On June 22, 2021, the circuit court held a hearing on Clark's motion for sanctions. Clark's counsel and Clark both appeared, by video and telephone, respectively, and Berg's counsel appeared by video; Berg did not personally appear. The court focused on the text messages, saying that they "make a difference" as to the motion for sanctions. The court found that most of the text messages were focused on Clark only, with her child "as an afterthought," specifically noting that approximately "1300 of the 1600 or so were primarily focused on Ms. Clark and their relationship, not on [Berg's] relationship with [Clark's child]." The court also found that, as to the 200-300 text messages that were "sort of focused on [Clark's child], a good

portion of those were tied up with [Berg's] relationship with Ms. Clark. They went hand in hand."

The circuit court cited to one of the texts as "a sampling of the tactics and language" that Berg "put into play here" and that the court said was indicative of Berg's evident primary purpose in proceeding with this action. The court quoted from that text, which was sent one week after this action was commenced, as follows:

> I didn't want to go this route. You did this. Your selfishness and crazy [sic]. It's time you were exposed. Plus when your parents hire you an attorney and pay your fees, that's going to open eyes, too. It's time the whole fraud of Kimber Clark is exposed, all of it. You don't even get it. By you taking this course, I already won. I didn't want this. This is on you and [name of person Clark had begun dating in early 2020] now. We will see how well all of this -- quote -- legal coaching -- unquote -- these past months pay off.

The circuit court found that, from the text messages as a whole, it was evident that "t]he primary purpose of Mr. Berg's activities here, including the filing of this suit, was to get Ms. Clark back into his life one way or the other." The court explained that it was granting the motion for sanctions because Berg's text messages showed that "he was playing a game [and] he was using this legal forum as another one of his tactics to get Clark back in his life."

The court asked Clark's counsel what award she was seeking and counsel answered, "$10,000 in attorney fees," comprising the total of an initial flat fee of $3,500 to respond to and seek dismissal of the petition, and an additional flat fee of $6,500 "to respond to the later stages of the litigation." The court noted that it could not determine whether $10,000 was reasonable without supporting documentation. The court directed Clark's counsel to submit "the paperwork as to what costs specifically were incurred here," gave Berg's counsel ten days to respond to that paperwork, and said that it would determine reasonable costs based on the parties' submissions.

Clark's counsel filed an affidavit in support of her request for attorney fees. Counsel averred that her firm represented Clark for an initial flat fee of $3,500 and then, "after litigation escalated, a second flat fee of $6,500," for a total of $10,000. Counsel described the motions, briefs, and affidavits that she had prepared and filed, including her review of the "thousands of text messages sent by Berg" that she averred were "critical in this case;" and the motions, briefs, and affidavits that Berg filed and that she reviewed and responded to, including Berg's affidavits totaling almost six hundred pages. Counsel averred that, "for the purpose of comparison," $10,000 in fees represented fifty hours of work billed at $200 per hour, and further averred that she worked more than fifty hours in representing Clark from December 2020 through June 2021. Counsel requested the full $10,000 in attorney fees as a reasonable award for sanctions.

Berg's counsel filed an objection to the amount of attorney fees requested, based on Clark's counsel's failure to itemize the work undertaken for the two charged flat fees. Further, in an apparent attempt to justify the necessity of creating the circumstances in which Clark's counsel had to perform the extensive work that she described, Berg's counsel asserted that Berg needed to submit extensive documentation to respond to the allegations against him and to satisfy his burden to prove "his parent-like relationship with [Clark's child]." Counsel concluded by asserting that "any award for attorney fees should be for much less than the $10,000 requested."

The circuit court entered an order, for "the reasons stated on the record and in" Clark's counsel's affidavit, granting Clark's motion for sanctions and directing that Berg pay Clark $3,500 "as a monetary sanction awarded pursuant to WIS. STAT. § 802.05(3)."[6]

We conclude that the record establishes that the circuit court applied the correct legal standard; reviewed Berg's 1600 text messages, taken as a whole and considered in the context of the parties' submissions and arguments at the time of the hearing on the sanctions motion, and explained why the text messages were pertinent as evidence of Berg's improper purpose in commencing this action; and reached a reasonable conclusion. In particular, the court noted the persistent focus of most of the text messages on pressing Clark to resume her relationship with Berg, long after she had unambiguously terminated it, rather than on continuing his relationship with Clark's child; the tenor of the text messages, using language that the court had previously found "frighten[ing]" and using "tactics" that the court found evidenced Berg's aim "to get Ms. Clark back into his life" "at all costs;" and, as a representative sample of Berg's text messages, the text message that Berg sent Clark just days after he filed his petition in which he indicated that he did so to "expose" Clark because she "did this." The court inferred from the text messages, as what we conclude is one reasonable interpretation, that Berg commenced this action as yet another "tactic" to harass Clark into giving in to his persistent entreaties to get back together with him.

Berg argues that the circuit court erred in granting Clark's motion for sanctions without holding an evidentiary hearing to resolve disputed issues of fact. However, Berg does not

[6] Berg does not challenge the part of the circuit court's order that requires that Berg pay the amount awarded.

identify any item in the record that created a factual dispute. We note that Berg did aver in his affidavit filed eight days before the hearing on Clark's motion for sanctions that he filed his petition not for an improper purpose to harass Clark but to continue his relationship with her child. However, that last-minute assertion late in the litigation does not suffice to render unreasonable the inference drawn by the court, based on the contemporaneous text messages themselves. This included one text message, sent just days after the petition was filed, which the court found reflected that Berg filed the petition precisely for the improper purpose to harass Clark "as another one of his tactics to get Clark back in his life" long after she had unambiguously terminated their romantic relationship.

Berg argues that the circuit court erred in making that finding based on its interpretation of that text message. Berg argues that this text message (quoted above) "is not clear on its face exactly what it is referring to" and that it supports just the opposite inference than that drawn by the court. However, Berg fails to specify what language in the text message establishes as the only reasonable inference that Berg filed the petition without the improper purpose to harass Clark into resuming, or punish her for not resuming, her relationship with Berg. Berg fails to show that the inference drawn by the court, that Berg filed the petition for just that purpose, was not also reasonable.

In his reply brief Berg argues that the circuit court did not find that Berg filed his petition in order to harass Clark, but only for the purpose of resuming a romantic relationship, which is not an improper purpose. This argument misconstrues the court's finding, which is amply supported by the record, that since at least June 2020 Berg had not merely sought to resume his romantic relationship with Clark, but had persistently harassed Clark into doing so through more than 1600 text messages, long after she had unambiguously terminated the romantic aspect. That

Berg refused to accept the termination of the romantic relationship did not give him license to pursue her in this abusive, harassing manner, capped by his filing of the petition, which he confirmed by yet another text message stating that the petition was her fault for not giving in to his entreaties to become a couple again.

Berg argues that the circuit court did not afford Berg an opportunity to respond to Clark's motion for sanctions by explaining his text messages, offering supporting witnesses, and cross-examining Clark "about her conversations with him while he was texting her." However, Berg does not cite any part of the record showing that he asked the court for such an opportunity. Accordingly, he has forfeited this argument. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶26, 338 Wis. 2d 114, 808 N.W.2d 155 (we may decline to consider new arguments when doing so would "seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party"); ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence such that the [circuit] court understands that it is called upon to make a ruling."). Berg was well aware of Clark's submission of the text messages, and, after the summary judgment hearing, of the significance that the circuit court attached to them. But Berg did not specifically address the text messages until in his affidavit submitted eight days before the hearing on the sanctions motion, and he did not request an opportunity otherwise to respond to them.

As to the circuit court's decision to order Berg to pay $3,500 in attorney fees, we acknowledge that the court's comments in support of its determination of the amount of the award were not extensive. However, Berg minimizes the extent of the court's comments on the record as stating only that the court would determine the amount that is reasonable from Clark's

documentation showing the costs incurred and Berg's response. To the contrary, the court emphasized that, given the circumstances supporting the court's determination that Berg filed the petition for an improper purpose, an award of costs was necessary; that it could not consider Clark's request for the full amount of $10,000 in flat fees that she paid as reasonable without documentation; and that it would determine a reasonable amount to award based on the parties' submissions documenting and responding to the costs incurred. As we now explain, we conclude that the court's comments read as a whole and the parties' submissions support the court's exercise of discretion in awarding $3,500. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (we will uphold the circuit court's exercise of discretion if we can find facts of record that would support the circuit court's decision).

As stated, Clark's counsel submitted an affidavit explaining the two flat fees that were charged, the first in the amount of $3,500 for responding to the petition and for seeking its dismissal, and the second in the amount of $6,500 for handling the litigation thereafter. In the affidavit counsel also described the components of the litigation work, comprising the preparation of multiple affidavits supporting Clark's motions for sanctions and for summary judgment, the review of "thousands" of text messages, and the review of and preparation of the response to multiple affidavits and exhibits submitted by Berg in proceedings related to both motions.. The affidavit addressed many of the factors that a court is to consider in determining a reasonable attorney fee award. *See* WIS. STAT. § 814.045(1) (listing factors). Moreover, as Berg notes, "counsel did not identify any work that she performed on the case that did not end up being filed in court," and the court was well aware of the numerous and voluminous submissions and the complexity of the issues. The court was familiar with the results of counsel's work and well positioned to assess the reasonableness of the flat fees charged for only that work.

It is significant that the circuit court awarded the $3,500 fee paid for the initial work on the case. According to Clark's counsel's affidavit, this work included responding to and seeking dismissal of the petition through a motion for sanctions. That fact readily supports the court's determination that it was reasonable to award Clark the fee she incurred for the work that resulted in the documents filed with the court that preceded and related to the motion for sanctions (*i.e.*, preparing response to petition, preparing response to Berg's request for court ordered mediation, preparing motion for sanctions and supporting affidavit of Clark along with hundreds of text messages, reviewing Berg's submissions filed eight days before hearing on motion for sanctions). The record suffices to support the court's strongly implied finding that the initial flat fee was an appropriate measure of a reasonable award under the circumstances of this case.

Notably, Berg does not argue that either the flat fees charged or the award imposed were not reasonable. Rather, Berg argues that Clark's counsel did not provide a sufficient basis for the court to determine, and the court failed to explain why it determined, that the fees and the fee award were reasonable. However, as explained above, Clark's counsel explained the details of her work, and both the implication that the court found as reasonable the fees charged for that work based on that explanation, and the rationale for the circuit court's determination of a reasonable fee award, are readily discernible in the record.

Moreover, none of the cases that Berg cites supports his argument. First, all of those cases concerned fees that were based on numbers of hours worked and hourly rates, not flat fees as in this case. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶¶11-13, 31, 52, 275 Wis. 2d 1, 683 N.W.2d 58 (supreme court affirmed award of $15,000 in attorney fees "given … the lack of objective information provided to the trial court" that may have supported a higher

award, when circuit court declined to consider documentation of billing and numbers of hours worked which had been untimely submitted); ***Johnson v. Roma II-Waterford LLC***, 2013 WI App 38, ¶¶18, 22, 38, 346 Wis. 2d 612, 829 N.W.2d 538 (this court remanded to circuit court to exercise its discretion using the lodestar approach when plaintiff submitted itemized billing records showing the number of hours her attorneys worked and their hourly rates and circuit court reduced by over ninety percent the number of hours of attorney time awarded to the plaintiff); ***Jandrt*** , 227 Wis. 2d at 546, 579, (supreme court remanded to circuit court to determine appropriate fees due only to plaintiffs' maintenance of frivolous claim, when circuit court had awarded $716,081 in fees as sanction for plaintiffs' both commencing and continuing claim and it was not evident from documentation of fees which were due only to maintenance of claim). The presence here of only two flat fees, for separate sets of work resulting in submissions to the circuit, when each set of work was described in detail by Clark's counsel, obviates any need for the kind of documentation of billing, numbers of hours worked, and hourly rates that was at issue in the cases cited by Berg.

Second, in the last case cited by Berg, ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 588 N.W.2d 67 (Ct. App. 1998), this court did not address the circuit court's determination of the reasonable amount of attorney fees, and the language that Berg cites from that case regards sufficiency of the evidence, not the award of attorney fees. ***Id.*** at 394 (addressing standard of review of sufficiency of evidence), 398-402 (concluding only that statute at issue allows attorney fee award).

Therefore,

IT IS ORDERED that the judgment and orders are summarily affirmed pursuant to 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