OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

March 2, 2023

To:

Hon. Jeffrey Kuglitsch
Circuit Court Judge
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Kyle W. Engelke
Electronic Notice

Ronald McCray
2405 Sunshine Lane
Beloit, WI 53511

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

2021AP693 Ronald McCray v. The City of Beloit (L.C. # 2018CV421)

Before Fitzpatrick, Graham, 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).

Ronald McCray, pro se, appeals an order of the circuit court that denied his motion for rehearing of an action that was previously dismissed by the circuit court and subject to appellate review. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm the portion of the circuit court's order that denied McCray's motion for rehearing, and we reverse the portion of the order that sanctioned McCray pursuant to WIS. STAT. § 802.05.

[1] All references to the Wisconsin Statutes are to the 2021-22 version.

Background

This is McCray's second appeal in the second of three actions that he filed in the circuit court, all of which stem from a Beloit Police Department investigation that occurred on February 23, 2017. Much of the following factual background is taken from our prior order, which summarily affirmed the circuit court's dismissal of McCray's second action. *See* ***McCray v. City of Beloit***, No. 2018AP1648, unpublished op. and order (Ct. App. July 26, 2019; as amended Aug. 30, 2019), *review denied* (WI Dec. 13, 2019). For ease of reference, we refer to that order as our "July 26, 2019 order."

On February 23, 2017, the Beloit Police Department received a call from an employee of a Beloit dental office, who reported that McCray "got hold of some paper work" and was calling the office's patients. A police officer made contact with McCray, who stated that he had found a patient list in his front yard and had called patients on the list to alert them that their personal information should be handled with more care. The officer determined that no crime had been committed and no ordinance violated, and he closed the investigation that day. McCray took issue with how the incident and investigation were described in a police incident report.

In August 2017, McCray commenced his first action, docketed as Rock County Case No. 2017CV689, by filing a complaint against the City of Beloit. In his complaint, McCray alleged that the police investigation was false and misdirected. The City moved to dismiss the complaint based on McCray's failure to comply with WIS. STAT. § 893.80, which sets forth notice requirements for certain claims against governmental bodies.[2] Then, on September 28,

[2] WISCONSIN STAT. § 893.80(1d) and (1d)(a) provide, in relevant part:

(continued)

2017, after receiving the City's motion to dismiss, McCray served the City with a document entitled "Notice of Circumstances Giving Rise to Claim and Claim."

The circuit court held a hearing on the City's motion to dismiss McCray's first action. Following the hearing, the court issued a final order which dismissed the complaint without prejudice. The court determined that any claim arising more than 120 days before McCray served his notice of claim on the City (that is, any claim arising before May 31, 2017) was "untimely pursuant to WIS. STAT. § 893.80." The court further determined that the claims in McCray's complaint were untimely because they arose before that date. McCray did not appeal the order dismissing his first action.

In April 2018, McCray commenced his second action, docketed as Rock County Case No. 2018CV421, by filing a complaint against the City and several of its police officers (collectively, the City). McCray's complaint alleged defamation and other claims, all related to the City's actions with respect to the February 23, 2017 phone call from the dental office. The City moved to dismiss the complaint. After a hearing, the circuit court found that all of McCray's claims related back to the February 23, 2017 phone call, and the court granted the motion to dismiss the complaint with prejudice. The court also determined that the defamation

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> [N]o action may be brought or maintained against any … political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the … political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11.

claim did not state a claim for relief because none of the statements in the incident report were capable of a defamatory meaning. McCray appealed the order dismissing his second action.

On July 26, 2019, we summarily affirmed the circuit court's order dismissing McCray's second action. ***McCray***, No. 2018AP1648. In our July 26, 2019 order, we concluded that "the latest any of McCray's claims arose was March 3, 2017," meaning that "McCray was required to file a notice of claim on or before July 2, 2017." ***Id.*** at 4. We further concluded that, because "McCray did not serve any notice of claim … until September 28, 2017, which was well after the 120-day deadline … had passed," McCray's second action was untimely and the circuit court properly dismissed his complaint for failure to comply with WIS. STAT. § 893.80(1d)(a). ***Id.*** McCray petitioned our supreme court for review of the July 26, 2019 order, and our supreme court denied his petition.

Meanwhile, when McCray's appeal of the dismissal of his second action was still pending, he filed a third action, docketed as Rock County Case No. 2019CV386, against various officials and employees of the City. This third action again related to the February 23, 2017 phone call. The defendants filed a motion to dismiss based on the doctrine of issue preclusion, and they also sought sanctions under WIS. STAT. § 802.05(3) for a frivolous filing.[3] The circuit

[3] WISCONSIN STAT. § 802.05(2) provides that, by signing, filing, or submitting a motion to a court, the signer is certifying that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances":

> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument

(continued)

court entered an order dismissing McCray's third action and awarding sanctions,[4] and we ultimately affirmed the circuit court's order and granted the defendants' motion for sanctions for a frivolous appeal. *See* ***McCray v. Luther***, No. 2019AP1993, unpublished op. and order (Ct. App. Apr. 15, 2021).

With this background in mind, we turn to the motion that is the subject of McCray's current appeal. On December 11, 2020, McCray filed a "Motion for the Rehearing" of his second action, Case No. 2018CV421, "for Reasons of Fraud, Misrepresentation, and a Miscarriage of Justice." On December 18, 2020, the City filed a letter with the circuit court, which it characterized as a safe harbor notice. In this letter, the City represented that it was sending a copy to McCray, and it notified McCray that, under WIS. STAT. § 802.05, "he ha[d] 21 days to withdraw his motion [for rehearing]." The City's letter to the court stated that the motion for rehearing was "fatally flawed," and that McCray could not collaterally attack this court's July 26, 2019 order by refiling a challenge in the circuit court. Then, on January 21, 2021, the City filed a second letter, which renewed the City's warning "that [McCray] ha[d] 21 days to

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> for the extension, modification, or reversal of existing law or the establishment of new law.

WISCONSIN STAT. § 802.05(3) provides that a court "may impose an appropriate sanction upon the … parties that have violated sub. (2) or are responsible for the violation" by granting a motion filed under paragraph (3)(a)1. Section 802.05(3)(a)1. provides that "[a] motion for sanctions under this rule … shall not be filed with … the court unless, within 21 days after service of the motion … the challenged paper … is not withdrawn."

[4] Specifically, the circuit court ordered McCray to pay attorney fees incurred by the City after a specified date, and the court's order also provided that, "unless [McCray] is granted appellate relief in this action and/or the pending appeal in [Case No. 2018CV421], Plaintiff Ronald McCray is permanently enjoined from filing any further complaint or pleading against anyone that is in any way arising out of and/or related to the events of February 2017 and/or the allegations made in this action and/or [Case No. 2018CV421]."

withdraw his recently filed motion." To this letter, the City attached the sanctions motion that it had previously filed in response to McCray's third action, Case No. 2019CV386, which had been granted by the circuit court in that case.

McCray did not withdraw his motion for rehearing.

On February 22, 2021, the City filed a third letter, which asked the circuit court to deny McCray's motion for rehearing and to award the City sanctions based on McCray's failure to withdraw his motion. The City submitted a proposed order along with its letter. McCray objected. He argued, among other things, that his motion for rehearing was not frivolous, that it was meritorious, and that the City's letters to the court seeking sanctions were not properly served and did not follow the procedure set forth in WIS. STAT. § 802.05(3).

On March 4, 2021, the circuit court issued the order that is the subject of this current appeal. In its order, the court denied McCray's motions for rehearing and awarded fees and costs, including reasonable attorney fees, to the City pursuant to WIS. STAT. § 802.05. The court further enjoined McCray "from filing any further complaint, pleading or motion against anyone that is in any way arising out of and/or related to the events of February 2017 and/or the allegations made in this action."

McCray appeals. The City filed a brief in opposition to McCray's appeal, and has also moved for sanctions for a frivolous appeal pursuant to WIS. STAT. RULE 809.25(3). McCray opposes the City's motion for sanctions.

Discussion

McCray contends that the circuit court erroneously denied his motion for rehearing. In that motion and on appeal, he argues that the circuit court orders dismissing his first and second actions (2017CV689 and 2018CV421) misrepresented the facts and law and are void on that basis, and that our July 26, 2019 order is likewise void because it misrepresents the facts and law. The arguments McCray makes in his motion for rehearing and on appeal are arguments that he previously raised—or could have raised—in his first, second, and third circuit court actions and in his prior appeals.

We need not and do not decide the merits of McCray's legal and factual arguments because they are procedurally barred. To the extent that the earlier circuit courts made legal or factual errors when they dismissed McCray's first and second actions, McCray's remedy was to appeal those orders. McCray did not appeal the dismissal of his first action, and we affirmed the dismissal of his second action on appeal. Thus, the issues that were raised—or that could have been raised—in those proceedings have already been decided, and our July 26, 2019 order represents the law of the case. ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989) (stating that the law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the [circuit] court or on later appeal"). As the City cautioned in its letter to the court regarding McCray's motion for rehearing, McCray cannot relitigate the conclusions in our July 26, 2019 order by filing a motion for rehearing in the circuit court. *See generally* ***Univest Corp.***, 148 Wis. 2d at 38; *see also* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 549-51, 525 N.W.2d 723 (1995) (discussing the doctrines of claim

preclusion and issue preclusion, which relate to the common law doctrines of res judicata and collateral estoppel).

McCray also argues that the circuit court erroneously ordered him to pay the City's attorney fees pursuant to WIS. STAT. § 802.05. He asserts that his motion for rehearing was not frivolous, and that, in seeking sanctions, the City failed to follow the procedure set forth in § 802.05(3).

We conclude the circuit court had an ample factual and legal basis for determining that McCray's motion for rehearing was frivolous based on the standard set forth in WIS. STAT. § 802.05(1). As we have explained, McCray's motion is an impermissible attempt to relitigate issues that have already been litigated in a final judgment that has been affirmed by this court.

Even so, we nonetheless conclude that the circuit court erroneously exercised its discretion when it sanctioned McCray under WIS. STAT. § 802.05(3) because the City did not follow the process set forth under that statute for seeking sanctions for a frivolous filing. Under the process set forth in § 802.05(3), the City was required to serve a safe harbor letter on McCray at least 21 days before filing a motion for sanctions with the court. The City did not follow this process—it instead filed letters with the court, which asserted that McCray's motion was frivolous and made reference to a prior safe harbor letter that the City had served on McCray in another case, and it then filed a letter and proposed order rather than a motion asking the court to impose sanctions. The City does not provide any legal authority for the alternative process it fashioned, nor does the City argue that any procedural error was harmless.

We therefore affirm the portion of the circuit court's order that denied McCray's motion, and we reverse the portion of the order that awarded sanctions to the City under WIS. STAT.

§ 802.05(3). As a result of our order in this appeal, McCray will not be required to pay the fees and costs that the City incurred in responding to his motion for rehearing in this action, Case No. 2018CV421. We emphasize that our order today in no way affects the sanctions that the circuit court ordered in McCray's third action, Case No. 2019CV386, or the sanctions that we ordered in our appeal of that action, Appeal No. 2019AP1993.

This matter does not end here, however, because the City has moved for sanctions for this appeal pursuant to WIS. STAT. RULE 809.25(3). The City argues that the appeal is frivolous, and that some type of sanction is necessary to protect the court system from the continued waste of time and resources caused by the frivolous circuit court proceedings and appeals McCray initiates.

We conclude that the City is not entitled to an award of attorney fees under WIS. STAT. RULE 809.25(3). We agree with the City that the arguments McCray advances about the circuit court's denial of his motion for rehearing are frivolous under the standards set forth in RULE 809.25(3)(c) (allowing an award of costs and fees, including reasonable attorney fees, if we find an appeal to be without any reasonable basis in law or equity and not supported by a good faith argument for an extension, modification, or reversal of existing law). However, as we have explained, McCray's appeal of the circuit court's sanctions award is not frivolous and, therefore, his entire appeal is not frivolous. *See* ***Howell v. Denomie***, 2005 WI 85, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621 (providing that an appeal is not frivolous under RULE 809.25(3)(a) if the entire appeal is not frivolous); *see also* ***Thompson v. Ouellette***, 2023 WI App 7, ¶¶26-45, __ Wis. 2d __, __ N.W.2d __ (discussing a similar standard under WIS. STAT. § 895.044(5)).

However, we agree with the City that McCray has engaged in a pattern of frivolous and vexatious litigation at significant cost to the court system and, ultimately, to taxpayers. McCray's appeal of the portion of the circuit court order that denied his motion for rehearing is not only frivolous, but it is also abusive in terms of the language and accusations directed at the court system, attorneys, and parties.

One method of limiting an abusive litigant's access to the courts is to require the litigant to obtain prior approval for any future filings, on a case-by-case basis, so as to prevent additional frivolous filings. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶23-25, 247 Wis. 2d 451, 634 N.W.2d 338, *review denied* (WI Oct. 23, 2001). This method has the virtue of allowing a litigant access to the courts for any meritorious claims that may arise, while still comporting with the general disapproval of blanket orders. ***Id.***, ¶¶26-27. We conclude on our own motion that a ***Casteel***-type order is warranted here.

Accordingly, because McCray is abusing the appellate process, no further filings will be accepted from him unless he submits by affidavit all of the following: (1) a copy of the circuit court's written decision and order he seeks to appeal; (2) a statement setting forth the specific grounds upon which this court can grant relief; and (3) a statement showing how the issues sought to be raised differ from issues raised and previously adjudicated. Upon review of these documents, we will not accept the filing if we determine that McCray states no claim, defense, or appeal upon which we may grant relief. If we cannot determine from the submitted documents whether the appeal has merit, we may require additional documents or submissions from the parties.

This order is drafted narrowly to strike a balance between McCray's access to the courts, the taxpayers' right not to have frivolous litigation become an unwarranted drain on their resources, and the public interest in maintaining the integrity of the judicial system. *See* ***Minniecheske v. Griesbach***, 161 Wis. 2d 743, 749, 468 N.W.2d 760 (Ct. App. 1991) (orders limiting access to courts "should be narrowly tailored and rarely issued"). The prefiling review we require is consistent with limits on court access under both Wisconsin law and federal law. *See* WIS. STAT. § 814.29(1)(c) (indigent parties may be denied a waiver of costs "if the court finds that the affidavit states no claim, defense or appeal upon which the court may grant relief"); ***In re Davis***, 878 F.2d 211, 212-13 (7th Cir. 1989) (threshold review of the merits is "a sensible and constitutional means of dealing with a litigant intent on pressing frivolous litigation").

Therefore,

IT IS ORDERED that the circuit court order is summarily affirmed in part and reversed in part under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the City's motion for sanctions in the form of costs, fees, and reasonable attorney fees is denied.

IT IS FURTHER ORDERED that, going forward, if the clerk's office receives appellate filings from McCray, the clerk shall not immediately docket the filings and shall instead send the filing to this court for review under ***Casteel***, 247 Wis. 2d 451, ¶¶23-25.

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

Sheila T. Reiff
Clerk of Court of Appeals