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DISTRICT IV

May 18, 2023

To:

Hon. Derrick A. Grubb
Circuit Court Judge
Electronic Notice

Amanda Nelson
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Sara L. Gehrig
Electronic Notice

Cherie Mauerman
Electronic Notice

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

2022AP1466 In re the marriage of: Cherie Mauerman v. Michael Mauerman (L.C. # 2021FA63)

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).

Cherie Mauerman, pro se, appeals a divorce judgment incorporating an arbitration award that followed a mediated property division and an arbitrated maintenance award. Cherie argues that we should set aside or modify the award because the arbitrator was biased. She also argues that we should set aside or modify the award because her attorney made multiple errors in representing her throughout the mediation and arbitration process. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[1] We affirm. We also deny respondent Michael Mauerman's motion for costs and attorney fees for a frivolous appeal.[2]

This appeal arises from the dissolution of Cherie and Michael's marriage of over twenty-four years. During the pendency of their divorce, they entered into a stipulation and order providing that they would mediate property division and maintenance with an arbitrator and that, if mediation was not successful, they would arbitrate those issues.[3] The stipulation provided that the arbitrator could adopt any partial or complete mediated agreement in the arbitrator's final award.

The arbitrator held a mediation and arbitration conference. Cherie and Michael were each represented by counsel at the conference. They successfully mediated an agreement on property division, but they were unable to reach an agreement on maintenance. Maintenance was therefore arbitrated. The arbitrator awarded Cherie limited-term maintenance of $1,200 per month for five years. The arbitrator's final award included both the mediated property division and the arbitrated maintenance award.

Shortly after the arbitrator issued his award, Cherie's counsel moved to withdraw, stating as grounds that Cherie was disappointed with the arbitration award and with counsel's performance. The circuit court granted the motion.

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

[2] Because the parties share the same last name, for ease of reading we refer to them by their first names.

[3] There were no custody and placement issues because at the time of their divorce the parties had no minor children from their marriage.

Proceeding pro se, Cherie filed petitions in the circuit court to vacate or modify the arbitration award. The court concluded that Cherie had not established grounds to vacate or modify the award pursuant to WIS. STAT. §§ 788.10 and 788.11. The court confirmed the award and incorporated it into the divorce judgment. Cherie's appeal now follows.

When a party challenges an arbitration award, we review the arbitrator's decision, not the circuit court's decision. ***Cirilli v. Country Ins. & Fin. Servs.***, 2013 WI App 44, ¶7, 347 Wis. 2d 481, 830 N.W.2d 234. The scope of our review is limited and is the same as the circuit court's. ***De Pue v. Mastermold, Inc.***, 161 Wis. 2d 697, 702, 468 N.W.2d 750 (Ct. App. 1991). "The reviewing court's role is essentially supervisory, with the goal of assuring that the parties are getting what they bargained for." ***Id.*** And, "[w]hat they bargained for is arbitration." ***Id.*** A court therefore presumes that the arbitration award is valid and will not set the award aside unless the party challenging the award proves its invalidity by clear and convincing evidence. *See* ***id.***

The grounds for establishing that an arbitration award is invalid are set forth in common law and in WIS. STAT §§ 788.10 and 788.11.[4] *See* ***Baldwin-Woodville Area Sch. Dist. v. West***

[4] WISCONSIN STAT. § 788.10 states:

> (1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
>
> (a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(continued)

Cent. Educ. Ass'n, 2009 WI 51, ¶20, 317 Wis. 2d 691, 766 N.W.2d 591. "If the common law and statutory standards are not violated, the court should affirm the arbitrator's award." ***Id.*** Whether the arbitrator's award violates any of these legal standards is a question of law that we review without deference to the circuit court. ***Sands v. Menard, Inc.***, 2010 WI 96, ¶48, 328 Wis. 2d 647, 787 N.W.2d 384; ***Racine Cnty. v. International Ass'n of Machinists & Aerospace Workers Dist. 10***, 2008 WI 70, ¶11, 310 Wis. 2d 508, 751 N.W.2d 312.

Cherie first argues that we should vacate or modify the arbitrator's award because the arbitrator was biased, or in the words of the relevant statutory standard, "there was evident partiality … on the part of the arbitrator[]." *See* WIS. STAT. § 788.10(1)(b). We presume that an arbitrator is impartial, but this presumption may be rebutted by clear and convincing evidence.

> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

WISCONSIN STAT. § 788.11 states:

> (1) In either of the following cases the court in and for the county wherein the award was made must make an order modifying or correcting the award upon the application of any party to the arbitration:
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted;
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Borst v. Allstate Ins. Co., 2006 WI 70, ¶¶20, 43, 291 Wis. 2d 361, 717 N.W.2d 42. The rebuttable presumption of impartiality is consistent with the more general presumption that an arbitration award is valid. We conclude that Cherie has not rebutted the presumption of impartiality by clear and convincing evidence.

For the most part, Cherie's assertions relating to whether the arbitrator was biased reflect her disagreement with his application of the law to the facts or with his weighing of the evidence. Such assertions are not sufficient to show bias or to otherwise justify overturning the arbitrator's award. Although we will overturn an arbitrator for "manifestly disregarding the law," we do not overturn an arbitrator based on "'mere errors of judgment as to law or fact.'" ***Green Bay Prof. Police Ass'n v. City of Green Bay***, 2023 WI 33, ¶10, __ Wis. 2d __, 988 N.W.2d 664 (quoted source omitted). Rather, we "give deference to the arbitrator's factual and legal conclusions." ***Baldwin-Woodville***, 317 Wis. 2d 691, ¶20.

The closest Cherie comes to pointing to evidence of bias in the record are references to her own unsworn written statements in her circuit court submissions in which she described comments she recalled the arbitrator making during the mediation and arbitration conference. In her submissions, Cherie stated that, during the conference, the arbitrator announced that he "doesn't equalize monies nor does he order indefinite maintenance." According to Cherie, the arbitrator also told her to "get a job" and work forty hours per week despite her health conditions. Cherie argues, in effect, that her statements describing the arbitrator's comments show that he was biased and refused to follow the law governing property division and maintenance.

We conclude that Cherie's statements, without more, are not sufficient to show by clear and convincing evidence that the arbitrator was biased.[5] This is especially so considering that the record includes other evidence to support a finding that the arbitrator followed Wisconsin law governing property division and maintenance.

The arbitrator provided a notarized sworn affidavit in which he averred that he followed Wisconsin law. As to property division, he averred that he "evaluated the parties' mediated resolution of property division issues to ensure that it complied with all requirements of Chapter 767, Wis. Stats." He further averred that, "[h]ad the parties' mediated resolution of property division not comported with the requirements of Chapter 767, Wis. Stats., I would not have approved it." As to maintenance, the arbitrator averred that he "applied the law of the State of Wisconsin, including statutory and case law, to reach a resolution, as arbitrator, which I believe comports with the laws of the State of Wisconsin, and which is equitable to both parties."

Additionally, the arbitrator's award was itself evidence that the arbitrator followed Wisconsin law. The award stated that he determined maintenance based "upon consideration of all relevant statutory factors contained in WIS. STAT. § 767.56 as well as the dual factors of support and fairness as set forth in ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 406 N.W.2d [736] (1987)."[6]

[5] To be clear, we do not conclude that the arbitrator made any of the statements that Cherie alleges.

[6] As the circuit court observed, ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 406 N.W.2d 736 (1987), is a seminal case on the law of maintenance in Wisconsin.

Cherie next argues that the arbitrator's award should be vacated or modified because her attorney made multiple errors in representing her throughout the mediation and arbitration process. We reject this argument because Cherie cites no authority for the proposition that errors by a party's attorney may constitute grounds to overturn an arbitration award, nor does she otherwise develop an argument explaining how overturning an arbitration award on this basis would be consistent with the common law or statutory standards for vacating or modifying an award. We decline to address arguments that are unsupported by legal citations or that are otherwise inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that "[a]rguments unsupported by references to legal authority will not be considered" and that "[w]e may decline to review issues inadequately briefed").

To the extent that Cherie is advancing other arguments to vacate or modify the arbitrator's award, we conclude that those arguments are similarly undeveloped, and we reject them on that basis. Although we make some allowances for pro se parties, our obligations to a pro se litigant do not include "creating an issue and making an argument for the litigant." *See* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998). "We cannot serve as both advocate and judge." ***Id.***

We turn to Michael's motion for costs and attorney fees for a frivolous appeal. "[A]n appellate court decides whether an appeal is frivolous solely as a question of law." ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621.

In arguing that Cherie's appeal is frivolous, Michael relies on WIS. STAT. RULE 809.25(3). This rule provides that an appeal is frivolous if either of the following two standards is satisfied:

> 1. The appeal … was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another[] [or]
>
> 2. The party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

RULE 809.25(3)(c).

Michael contends that Cherie's appeal is frivolous under the second standard. He argues that the law is clear that an arbitration award may be overturned based only on clear and convincing evidence and that no such evidence exists here. He points out that the circuit court explained to Cherie the limited grounds for overturning an arbitration award and why there was no evidence to overturn the award here. Michael argues that, in these circumstances, Cherie knew or should have known that there was no reasonable basis in law or equity to challenge the arbitrator's award on appeal. Finally, Michael argues that Cherie makes no good faith argument to extend, modify, or reverse existing law.

Cherie counters, as we understand it, that her appeal is not frivolous for two reasons. First, she argues that it was reasonable to appeal because something the circuit court said indicated that she had a right to an appeal that would afford her a broader review of the arbitrator's award.[7] Second, she argues that there was a nonfrivolous basis to argue that the arbitrator was biased, even if that argument did not prevail.

[7] Cherie's first argument appears to be based on statements the circuit court made when explaining the limited scope of its review of the arbitrator's award. The court stated, "This is not an appeal," and also stated, "I'm very limited on what I can do here. This isn't an appeal."

We agree with Cherie's second argument and, therefore, need not decide whether her first argument may have merit. Even though we have concluded that Cherie has not established by clear and convincing evidence that the arbitrator was biased, we also conclude that she had a colorable argument for bias based on her statements describing comments she recalls the arbitrator making during the mediation and arbitration conference. As we have explained, those alleged statements are not sufficient on this record to rebut the presumption of partiality by clear and convincing evidence. Nonetheless, we conclude that Cherie's reliance on those alleged statements in her attempt to show bias is not frivolous.

Therefore,

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the motion for costs, fees, and attorney fees is denied.

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

Sheila T. Reiff
Clerk of Court of Appeals