COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0868

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DAVID G. AUL and ROLLING GREEN COUNTRY ESTATES, INC., a Wisconsin corporation,

Plaintiffs-Respondents,

v.

CHARLES L. MURRAY,

Defendant-Appellant,

WILLIAM SEKERES, B.E.S.P. CORPORATION and ALL OTHER PERSONS UNKNOWN WHO CLAIM ANY RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE REAL PROPERTY DESCRIBED IN THE COMPLAINT, ADVERSE TO PLAINTIFF'S OWNERSHIP, OR ANY CLAIM UPON PLAINTIFF'S TITLE THERETO,

Defendants.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed and cause remanded with directions*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Charles L. Murray appeals from a judgment declaring that he has no interest in real estate owned by David G. Aul and Rolling Green Country Estates, Inc. The sole issue on appeal is whether Circuit Court Judge John R. Race had a duty to disqualify himself sua sponte because he acted as counsel to Kathryn Murray in a divorce action. We affirm the judgment and remand to the trial court for a determination of attorney's fees and costs for a frivolous appeal.

Aul's and Rolling Green's chain of title to the property is dependent on the interests acquired by the execution of default judgments obtained by Isabelle and Alvin Nettesheim against Charles Murray, Kathryn Murray and B.E.S.P. Corporation in actions commenced in 1982. The default judgments were taken at a time when Charles and Kathryn were divorcing. Judge Race was Kathryn's attorney in the divorce action. Kathryn was named as a party to this suit but was dismissed upon execution of a quitclaim deed.

Murray argues that upon reading the pleadings in this action, Judge Race should have realized that he was a material witness to the validity of the Nettesheim judgments and should have sua sponte disqualified himself under § 757.19(2)(b) and (4), STATS. However, a reading of the pleadings does not lead to the conclusion Murray asserts. Indeed, in his answer to the complaint, Murray denied that the actions in which the default judgments were taken had any relevancy or application in this quiet title action. There was no indication in the answer that the validity of the default judgments was at issue in this action. Judge Race could not have been put on notice by the pleadings that the validity of the judgments was challenged or that his prior representation of Kathryn would require him to give evidence in this matter.

The record reflects that the issue of asking Judge Race to recuse himself arose early in the action. Judge Race followed the procedure outlined in ***City of Edgerton v. General Casualty Co.***, 190 Wis.2d 510, 517-19, 527 N.W.2d

305, 307-08, *cert. denied*, 115 S. Ct. 1360, *and cert. denied sub nom.* ***Edgerton Sand & Gravel, Inc. v. General Casualty Co.***, 115 S. Ct. 2615 (1995), by making a declaration of the potential conflict of interest and inviting the parties to move for recusal with facts bearing on the potential conflict. Murray did not act within the sixty-day window of opportunity the trial court provided him. Murray waived any objection to having Judge Race preside over the case. *See* ***id.*** at 519, 527 N.W.2d at 308.

Subsequently, when the matter came before the court on Aul's motion for summary judgment, the court considered Murray's pro se motion for judicial substitution. The judge reiterated the circumstances of his representation of Kathryn Murray and that it did not involve this case. Murray failed to present any objective evidence that any of the grounds for mandatory disqualification under § 757.19(2)(a) through (f), STATS., existed. *See* ***City of Edgerton***, 190 Wis.2d at 521, 527 N.W.2d at 309 (need for objective factual basis to support mandatory disqualification). Once again he did not present anything to suggest that the validity of the Nettesheim judgments was in question.

On appeal, counsel for Murray suggests that because Murray was proceeding pro se at the time of the summary judgment hearing, he should be forgiven for failing to make a timely objection and the evidentiary shortfall. While pro se litigants in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to pro se prisoners. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19, *cert. denied*, 506 U.S. 894 (1992). "While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law." ***Id.*** at 452, 480 N.W.2d at 20. Murray's pro se status does not excuse his waiver.

In his reply brief, counsel for Murray contends that Murray should not be harmed by Judge Race's apparent "memory lapse and unwillingness to listen at the final hearing." Counsel's comment is unnecessarily disparaging, particularly when the record indicates that Murray was given adequate opportunity to assert his claim that Judge Race was disqualified from acting. We caution counsel to be circumspect in the future.

We conclude that there was no basis from which Judge Race could have determined that the validity of the Nettesheim judgments was challenged and that he would be a material witness in that event. Judge Race was not required to disqualify himself. We now turn to Aul's motion to have the appeal declared frivolous.

We decide as a matter of law whether an appeal is frivolous under RULE 809.25(3), STATS. ***NBZ, Inc. v. Pilarski***, 185 Wis.2d 827, 841, 520 N.W.2d 93, 98 (Ct. App. 1994). An objective standard is employed in determining whether an action is frivolous. *See* ***Sommer v. Carr***, 99 Wis.2d 789, 797, 299 N.W.2d 856, 860 (1981). The inquiry is not "whether a party can or will prevail, but rather is that party's position so indefensible that it is frivolous and should that party or its attorney have known it." ***Id.*** at 797, 299 N.W.2d at 859.

Without hesitation we conclude that the appeal was frivolous. The sole issue presented was the judge's obligation to disqualify himself, but Murray had completely failed to offer a timely objection or proof on the issue below. Moreover, the ground asserted for disqualification was a nonissue in this case. Murray's position on appeal is indefensible and does not suggest any basis in law. We remand to the trial court with directions to undertake the necessary fact finding to make an award of attorney's fees and costs occasioned by the frivolous appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.