COURT OF APPEALS
DECISION
DATED AND FILED

January 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP699 **Cir. Ct. No. 2013CX3**

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

IN RE THE CONTEMPT IN: EAU CLAIRE COUNTY V. CLEMENS M. BORNTREGER:

EAU CLAIRE COUNTY, A QUASI-MUNICIPAL CORPORATION,

PLAINTIFF-RESPONDENT,

V.

CLEMENS M. BORNTREGER, MATTIE J. BORNTREGER, AMOS BORNTREGER AND VERA BORNTREGER,

DEFENDANTS-APPELLANTS,

JOHN AND JANE DOE TENANTS,

DEFENDANTS.

APPEAL from an order of the circuit court for Eau Claire County: KRISTINA M. BOURGET, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Clemens and Mattie Borntreger, the owners of improved real property in Eau Claire, and Amos and Vera Borntreger, who reside in the dwelling on that property, appeal an order finding them in contempt for failing to obtain building and sanitary permits for the residence. The Borntregers, all of whom are members of the Old Order Amish religion, assert the circuit court erred when it found them in contempt because the court's prior order granting summary judgment in favor of Eau Claire County and requiring them to obtain building and sanitary permits unconstitutionally interfered with their religious liberty. Because the circuit court's prior order is not the subject of this appeal, and the Borntregers do not otherwise argue the circuit court erroneously exercised its discretion when it found them in contempt, we affirm.

BACKGROUND

¶2 Eau Claire County filed the present action against the Borntregers on July 5, 2013. The County alleged that on November 19, 2010, the Eau Claire County Land Use Controls Supervisor received a complaint that a dwelling and outhouse were being built without a permit at E25069 Stagecoach Road in Fairchild, Wisconsin. Clemens and Mattie were notified thereafter that they were not allowed to build without first obtaining permits. On January 26, 2011, the Borntregers were issued a notice of violation. Several months later, the Borntregers were issued citations for failing to obtain building and sanitary permits. The County alleged that after the citations issued, Amos and Vera

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

continued to reside at the address, and the Borntregers failed to bring the property into compliance with the Eau Claire County Code of General Ordinances.

¶3 The Borntregers filed an answer raising their religious beliefs as an affirmative defense. They asserted they "practice the Amish religion and choose to live a modest lifestyle. The use of modern technology violates their religious beliefs." The Borntregers argued their decision not to pursue building and sanitary permits was protected by article I, section 18 of the Wisconsin Constitution.[2] The Borntregers subsequently filed a motion to dismiss on this ground, asserting the "county ordinance and the state statutes [the County] relies upon violate the defendants' freedom of worship and liberty of conscience." The Borntregers argued they would not sign any application, including those for building or sanitary permits, "that states they will adhere to building codes or adhere to all applicable codes, laws, statutes and ordinances." The Borntregers reasoned that signing such a form would constitute a false statement because they had no intent to comply, and the making of false statements is prohibited by their religion.

[2] WISCONSIN CONST. art. I, § 18 provides:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

"The Wisconsin Constitution, with its specific and expansive language, provides much broader protections for religious liberty than the First Amendment." ***Coulee Catholic Schs. v. LIRC***, 2009 WI 88, ¶66, 320 Wis. 2d 275, 768 N.W.2d 868.

¶4 The County opposed the motion to dismiss on the grounds that the Borntregers did not have a sincerely held religious belief precluding them from obtaining building or sanitary permits, that the alleged religious beliefs were not burdened by compliance with the County's Code of Ordinances or Wisconsin's Uniform Dwelling Code, that the County had a compelling state interest in the safety of its citizens, and that no less restrictive alternative to the requirements at issue existed. On May 7, 2014, the circuit court denied the Borntregers' motion. The court accepted that the Borntregers, as members of the Old Order Amish religion, had sincerely held religious beliefs against making false statements and lying, but it concluded those beliefs were not burdened by the application process because the applications did not include an express or implied promise to comply with the applicable codes. The court stated, "Rather, the acknowledgement [that the applicant's proposed construction is 'subject to' applicable codes and laws] confirms the applicant's awareness that there may be rules, codes, laws and ordinances that impact the proposed construction."

¶5 The County then requested leave to file a motion for summary judgment. The court removed the scheduled trial date from its calendar and ordered the County to submit its motion, with briefing to be completed approximately one month later and a hearing on the motion scheduled for September 5, 2014. The County argued there was no genuine issue of material fact and the sole legal issue in the case had been decided by the court's May 7, 2014 order. The court agreed with the County and, on September 8, 2014, granted summary judgment to the County and ordered the Borntregers to apply for building and sanitary permits by September 30, 2014. The September 8th order stated that absent compliance by the specified date, all occupants were to vacate

the dwelling and the County was permitted to placard the residence until such time as the Borntregers received the proper permits.

¶6 The Borntregers did not appeal the circuit court's September 8, 2014 order granting the County's summary judgment motion. On October 24, 2014, the County advised the court that the Borntregers had partially complied with the court's order by signing a building permit application on September 26. However, the County represented that the Borntregers had not completed the building permit application process because they failed to submit the necessary plans and permit fees. The Borntregers also failed to apply for a sanitary permit. The County advised the Borntregers it would placard the dwelling unless they fully complied with the circuit court's order by November 5, 2014.

¶7 As of January 30, 2015, the Borntregers had not obtained building and sanitary permits. The County placarded the dwelling on January 21, 2015, but Amos and Vera Borntreger continued to occupy it. The County requested monetary forfeitures for the Borntregers' failures to comply, which the circuit court took under advisement. On February 5, 2015, the court ordered the Borntregers to vacate the property no later than March 1, 2015, unless building and sanitary permits were obtained prior to that date.

¶8 On March 12, 2015, the County filed a motion for contempt and sanctions. The circuit court held a show-cause hearing on March 23, 2015. The court found that, as of that date, the Borntregers had failed to obtain the necessary permits, yet Amos and Vera continued to live in the dwelling. The court found the Borntregers in contempt and ordered them to immediately vacate the dwelling. The court established purge conditions that required the Borntregers to obtain the proper permits. On March 24, 2015, the circuit court granted the Borntregers'

motion to stay eviction and placarding of the dwelling pending appeal. The Borntregers filed a notice of appeal from the contempt order on April 3, 2015.

DISCUSSION

¶9 On appeal, the Borntregers challenge the circuit court's resolution of the substantive constitutional issue underlying their affirmative defense. According to the Borntregers, the issue on appeal is "whether the circuit court's holding that the defendant[s] had not met their burden under the 'compelling state interest/least restrictive alternative' test was erroneous, thus leading to the contempt finding for holding steady in their beliefs." The "test" the Borntregers refer to is from ***State v. Miller***, 202 Wis. 2d 56, 549 N.W.2d 235 (1996):

> Succinctly stated, under this analysis, the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

Id. at 66. In addition to arguing they have met their burden under ***Miller***, the Borntregers also argue the County has failed to demonstrate a compelling state interest or the absence of a less restrictive alternative.

¶10 The Borntregers improperly frame the issue before this court. The circuit court addressed the merits of the Borntregers' WIS. CONST. art. I, § 18 defense when it resolved their motion to dismiss. This ruling served as the basis for the court's subsequent grant of summary judgment to the County on September 8, 2014. The September 8th order was a final order because it disposed of the entire matter in litigation and set a specific deadline for the Borntregers to

apply for building and sanitary permits consistent with that order.[3] *See* WIS. STAT. § 808.03(1). The Borntregers could have appealed that determination, but they did not do so.

¶11 Because of this failure, the order granting summary judgment is beyond our reach in the present appeal. A party cannot defend against a contempt order by raising possible infirmities in the original judgment if he or she failed to timely seek appellate relief from that judgment. ***Kriesel v. Kriesel***, 35 Wis. 2d 134, 139, 150 N.W.2d 416 (1967); ***Vick v. Strehmel***, 197 Wis. 366, 373, 222 N.W. 307 (1928). Even if the Borntregers are correct that the circuit court erred in some way when analyzing their constitutional defense, "[i]t is settled law that a judgment of a court which had jurisdiction of the subject matter of the action cannot be impeached and is immune from and not subject to collateral attack, even though patently erroneous." ***Kriesel***, 35 Wis. 2d at 139 (quoted source omitted); *see also* ***Getka v. Lader***, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976); ***State v. Hershberger***, 2014 WI App 86, ¶11, 356 Wis. 2d 220, 853 N.W.2d 586, *review denied*, 2015 WI 1, 360 Wis. 2d 173, 857 N.W.2d 617.

¶12 Our review in this case is limited to whether the circuit court properly found the Borntregers in contempt of its September 8, 2014 order and its February 5, 2015 order.[4] We review a circuit court's use of its contempt power for

[3] Although the court reserved the issue of monetary forfeitures, no further action by the circuit court would have been necessary had the Borntregers complied with the order.

[4] Unlike the court's September 8, 2014 order, the February 5, 2015 order did not address the merits of the Borntregers' constitutional defense. Instead, the court merely ordered the Borntregers to comply with the previous order granting summary judgment. Because the February 5, 2015 order did not contain any substantive constitutional analysis or call into question in any way the court's earlier grant of summary judgment, there is no basis to conclude the entry of that order provided an opportunity for the Borntregers to obtain appellate review of the issues underlying the grant of summary judgment.

an erroneous exercise of discretion. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). The Borntregers offer no reason why the circuit court erroneously exercised its discretion by finding them in contempt, independent of their assertion that the court incorrectly analyzed the constitutional issue in this case. They do not, for example, assert that they did, in fact, secure building and sanitary permits, as required by the court's order. Moreover, the Borntregers did not file a reply brief and therefore concede the County's arguments concerning the validity of the circuit court's contempt finding. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.