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May 23, 2014

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

2013AP1736 In re the Paternity of N.M.M.: Kathleen M. Bennett and State of Wisconsin v. Emmanuel F. Shonibare (L.C. #2012FA81)

Before Lundsten, Sherman and Kloppenburg, JJ.

Emmanuel Shonibare appeals an order that denied his motion to modify his physical placement time with his son Noah and to decrease his child support obligation. Respondent Kathleen Bennett moves for an award of attorney fees on the grounds that the appeal is frivolous. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the circuit court order and award costs to Bennett as the prevailing party, but deny the motion for attorney fees.

Shonibare asks this court to order a DNA paternity test and to issue a modified child support order that deviates from the percentage guidelines. His brief fails, however, to develop any coherent arguments that apply relevant authority to the facts of record to establish that the circuit court committed any specific error, and instead relies largely upon conclusory assertions of unfairness to demand relief. *See generally* WIS. STAT. RULE 809.19(1)(d) and (e) (setting forth the requirements for briefs). While we will make some allowances for the failings of *pro se* briefs, "[w]e cannot serve as both advocate and judge," and will not scour the record to develop viable, fact-supported legal theories on the appellant's behalf. ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In short, the appellant has not adequately presented any specific legal questions for this court to decide. We therefore limit our discussion to a broad overview of why the appellant has not established a right to either of the two forms of relief he seeks. Any arguments that we do not explicitly address are deemed denied. *See* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention").

First, the child support and placement modification motion that Shonibare filed in the circuit court did not request DNA paternity testing. Shonibare's isolated comment at the motion hearing that he "would like to have a … test" because he had "not done it yet" was insufficient to raise the issue

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

before the circuit court. *See* ***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"). Not only did Shonibare fail to present the circuit court with any factual or legal grounds for obtaining a post-paternity stipulation DNA test, his isolated comment on the matter was inconsistent with his motion to increase the quality and quantity of his placement time, which was premised on his prior stipulation that he *was* the child's father. Therefore, the circuit court had no reason to order genetic testing (or even rule upon the issue), and Shonibare has forfeited the issue on appeal.

As to child support, Shonibare presented the circuit court with several alternate theories for relief, but failed to produce sufficient evidence to support any of his claims. Shonibare first sought relief from the child support stipulation on the grounds that he was pressured into signing it, but he acknowledged at the motion hearing that the pressure he felt was largely the result of personal circumstances and an upcoming court date, not any improper coercion by the child's mother. Second, Shonibare argues that the amount agreed upon in the stipulation was derived from opposing counsel applying the 17% guideline figure to an erroneous annual income figure for Shonibare of $42,000, rather than his actual income of $37,200. Shonibare provided the court with a current paystub and a copy of the parties' 2011 joint tax return to show that the award represented over 19% of his income. He did not, however, present any evidence to support his assertion that the amount of child support in the stipulation was supposed to represent 17% of his income rather than a negotiated agreement. Third, Shonibare alleged in his motion that the award had become a financial hardship because he was paying $600 a month in gas for a 200-mile commute and was now subject to an additional child support order for twin infants born to another woman. Shonibare did not, however, present any testimony, much less documentation, of his current expenses, and the State noted that the

subsequent child support order was based upon a serial payor calculation that took into account the award in this case. In sum, Shonibare has not developed any argument that persuades us that the circuit court made any legal errors or erroneously exercised its discretion based upon the information that was before it.

Finally, we address Bennett's motion for costs and attorney fees. The rules of appellate procedure authorize this court to award costs and attorney fees as a sanction for a frivolous appeal, when the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or when "[t]he 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." WIS. STAT. RULE 809.25(3)(c). This court does not award costs and attorney fees arising out of motions or based upon a single frivolous argument. We award costs and attorney fees only when we deem an appeal frivolous in its entirety. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. While we agree with Bennett that claim for DNA testing was frivolous, we are satisfied that Shonibare had at least a good faith basis for requesting a modification of the child support order based upon his claims of hardship and changed circumstances, even though he ultimately failed to present adequate factual or legal support for his request. Bennett is, however, statutorily entitled to costs as the prevailing party.

IT IS ORDERED that the order denying Emmanuel Shonibare's motion to modify child support and placement is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals