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January 29, 2013

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

2012AP4 In re the marriage of: Jane M. Knasinski, n/k/a Jane M. Shenkenberg v. Carl P. Panzenhagen (L.C. #2006FA260)

Before Curley, P.J., Fine and Kessler, JJ.

Carl P. Panzenhagen appeals from postjudgment orders reinstating his monthly child support obligation established at the time of his divorce from Jane Shenkenberg and requiring him to pay the fees and costs that Shenkenberg incurred to obtain relief. Based upon our review

of the briefs and the record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2009-10).[1] We affirm the orders. We also conclude that Panzenhagen's appeal is frivolous and that he must pay the costs and attorney's fees that Shenkenberg incurred to respond to his claims in this court. We remand to determine the amount of those costs and attorney's fees.

Panzenhagen and Shenkenberg were divorced in 2006. Panzenhagen is a businessman with substantial ownership interests in several corporations. Shenkenberg is a lawyer. At the time of the divorce, the parties agreed, and the circuit court ordered, that Shenkenberg would have primary placement of the couple's two children and that Panzenhagen would pay monthly child support of $5,350 based upon his estimated gross yearly income of $350,000. The judgment of divorce further required the parties to exchange financial information annually.

In June and July 2009, Panzenhagen filed motions and related documents in support of a claim that his economic circumstances had changed and that the circuit court therefore should reduce his child support obligation. The parties resolved the issue in January 2010. On January 27, 2010, the circuit court entered an order that Panzenhagen's yearly "gross income from all sources shall be set at $150,000," and the circuit court order him to pay monthly child support of $1575.38.[2]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The circuit court's order reflects that the parties reached an agreement regarding child support and that the agreement was placed on the record. While the parties do not dispute the existence of such an agreement, we observe that no transcript of the agreement is in the record.

In August 2010, Shenkenberg filed the motions underlying this appeal. Pursuant to WIS. STAT. § 806.07, she moved for relief from the January 2010 order. She also sought a ruling that Panzenhagen was in contempt of court for failing to comply with his financial disclosure obligations and for failing to meet certain child support obligations. In support of the requests, she alleged that Panzenhagen had misrepresented his gross income in July 2009 and January 2010 and that his 2009 tax returns reflected gross income of $539,223.

After a bench trial in July 2011 that included expert testimony from three certified public accountants, the circuit court found that Panzenhagen's gross income available for child support was $451,916 in 2009. The circuit court concluded that Panzenhagen "woefully misrepresented the amount of his income prior to the order entered on January 26 [sic], 2010."

The circuit court further determined that Panzenhagen had "committed a fraud on the court in misrepresenting his financial circumstances" and that his misrepresentations artificially depressed the child support obligation established in the January 2010 order. The circuit court therefore reinstated the child support obligation imposed at the time of divorce, took related corrective action to compensate Shenkenberg for financial losses incurred as a result of Panzenhagen's misrepresentations, and required Panzenhagen to pay the attorney's fees and costs that Shenkenberg incurred in pursuing relief. Panzenhagen appeals.

Panzenhagen filed a lengthy opening brief in this court, but the bulk of that brief is a thirty-three page section labeled a "statement of facts." In the concluding five and one-half pages of his brief, he purports to address seven legal issues. Shenkenberg asserts that his appeal is frivolous.

Whether an appeal is frivolous is a question of law. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. An appeal is frivolous if "the 'party or party's attorney knew, or should have known, that the appeal ... [had no] 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.'" *See* ***id.*** (citation omitted, brackets and ellipses in ***Howell***). The test is whether, under all of the circumstances, the appellant's claims are "'so indefensible that the party or his attorney should have known [them] to be frivolous.'" ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶¶28, 30, 277 Wis. 2d 21, 690 N.W.2d 1 (citation omitted). We may require a party to pay sanctions for pursuing a frivolous appeal only if we conclude that the entire appeal is frivolous. ***Id.***, ¶26. Before we may conclude that a party's entire appeal is frivolous, we must determine that each of the party's arguments is frivolous. *See* ***id.***, ¶27.

We first observe that Panzenhagen filed a brief-in-chief that includes only a single case citation to support his many substantive claims. Parties must, however, support their contentions with citations to relevant legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). To be sure, Panzenhagen cites a handful of cases in aid of his position that five of his claims should be reviewed *de novo* and two of his claims should be reviewed for an "abuse of discretion," but citations to establish procedural standards of review are insufficient to support the substantive demands for relief that Panzenhagen presents here.[3] We require parties

[3] We remind Panzenhagen that more than two decades have passed since the Wisconsin supreme court replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion." *See* ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375, citing ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

to offer authority specifically supporting each legal proposition. *See* ***Young v. Young***, 124 Wis. 2d 306, 312, 369 N.W.2d 178 (Ct. App. 1985).

We next observe that Panzenhagen uses the portion of his brief denominated a "statement of facts" to advance contentions that the circuit court rejected. He states as facts, for example, that he sought to reduce his child support obligation based on his "substantially decreased income," and that the child support order entered in January 2010 followed a "full disclosure by Panzenhagen of all his financial information." The circuit court did not make such findings, concluding instead that Panzenhagen "woefully misrepresented" his very substantial income. Indeed, the circuit court stated that it was both "unimpressed" with the "arduous process required to evaluate his true financial status" and "less than satisfied with the forthrightness of [] Panzenhagen in providing all necessary information in a timely manner."

Accordingly, we construe Panzenhagen's "statement of facts" as an argument in favor of a new set of factual findings to replace those made by the circuit court. Panzenhagen knew or should have known that "[a]n argument of this sort can never succeed on appeal because an appellate court is constitutionally prohibited from finding facts." *See* ***id.***, 124 Wis. 2d at 314. His argument is frivolous.

We turn to the seven claims that Panzenhagen presents in the argument section of his opening brief. We address each claim, although not necessarily in the same order that he presents the issues in his brief.

Panzenhagen claims that Shenkenberg "failed to timely and fairly disclose the factual basis allegedly supporting her requested relief from the stipulation and order regarding child support." Panzenhagen supports this claim with his lone substantive citation to case law, ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶21, 283 Wis. 2d 555, 699 N.W.2d 205. He states that, pursuant to this case and WIS. STAT. § 802.03(2), allegations of misrepresentation must be pled with particularity. The record shows that his claim is frivolous.

When Shenkenberg moved for relief from the modified child support order, she alleged, in part, that on July 24, 2009, "Panzenhagen filed ... a financial disclosure statement, under oath, representing his monthly gross income from all sources to approximate $500."[4] Shenkenberg further alleged in her motion that, in January 2010, Panzenhagen represented that his gross annual income in 2009 was $150,000, but that she later examined his 2009 tax returns and determined that the documents reflected gross income of $539,223. At trial, Shenkenberg presented evidence that Panzenhagen filed a financial disclosure statement in July 2009 showing gross monthly income of $500, she testified that, in January 2010, Panzenhagen "told us that he earned $150,000" in 2009, and she presented expert testimony from a certified public accountant that Panzenhagen's gross income available for child support in 2009 totaled $451,916. Plainly,

[4] The financial disclosure statement that Shenkenberg described in her motion is in the record. The statement includes Panzenhagen's disclosure, signed "under penalty of perjury," that he had a gross monthly income totaling $500.

Shenkenberg gave timely notice of the claims she made at trial. Panzenhagen's contrary assertion is indefensible.[5]

We next assess four claims, each of which Panzenhagen addresses in two or fewer paragraphs of his opening brief. All four of the claims are meritless.

Panzenhagen contends in a two-paragraph argument that he "was not obligated to provide corporate tax returns without request and without confidentiality protections." Panzenhagen's only citation to authority for this issue follows references to his financial documents and directs us to "*see also* WIS. STAT. § 767.54." The statute he cites does not support his claims. Rather, it imposes an obligation to exchange financial information in actions affecting the family. *See* ***id.***

Panzenhagen also complains that Shenkenberg did not initiate either of the two alternative dispute resolution mechanisms described in the January 2010 order. His assertion

[5] Panzenhagen uses his reply brief to extend his discussion of the contention that Shenkenberg did not allege or prove a misrepresentation. He maintains that he "did not 'claim' his income was $150,000 per year," but, rather, "the parties stipulated" to that amount. To the extent that he views entering into a stipulation and making a representation as mutually exclusive, he does not explain the legal basis for that position. His contention is thus inadequate to support his claim for relief. *See* ***Young v. Young***, 124 Wis. 2d 306, 312, 369 N.W.2d 178 (Ct. App. 1985).

Panzenhagen additionally proposes that, regardless of any misrepresentations, the circuit court should have applied equitable estoppel to hold Shenkenberg to the terms of the order that the circuit court found he procured by fraud. He does not explain how the facts found by the circuit court satisfy the elements of equitable estoppel. *Cf.* ***Jalovec v. Jalovec***, 2007 WI App 206, ¶¶9-10, 305 Wis. 2d 467, 739 N.W.2d 834 (reflecting that a party seeking to invoke equitable estoppel to prevent modification of a stipulated child support award must show, *inter alia*, that "'both parties entered into the stipulation freely and knowingly'") (citation omitted). Further, he does not tell us where the record shows that he raised the defense of equitable estoppel in the circuit court. We do not consider matters raised for the first time on appeal, and "[t]he party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Accordingly, we reject as frivolous Panzenhagen's argument that the doctrine of equitable estoppel warrants granting him relief.

includes no citations to any authority, consumes fewer than seven lines of text, and does not connect his complaint to any circuit court error.[6]

Next, Panzenhagen complains that Shenkenberg did not allege, disclose, or prove "any misrepresentations by Panzenhagen relied upon in connection with the [January 2010] stipulation and order." This is merely a self-serving declaration. Moreover, Panzenhagen presents it in two sentences and without citation to authority.

Panzenhagen also asserts that Shenkenberg failed to "timely and fairly disclose" her financial expert's report. He addresses this contention in two paragraphs, neither of which includes a citation to authority or provides legal support for a conclusion that any alleged delay in the disclosure of the expert's report warrants relief from the circuit court's orders.

Each of the preceding four claims is conclusory and undeveloped and lacks necessary legal support. Panzenhagen should have known that more than dissatisfied grumbling is required to support an appeal and that he could not reasonably pursue a claim without presenting a colorable legal reason that the alleged errors warrant granting relief from the circuit court's orders. *See* ***Verex Assur., Inc. v. AABREC, Inc.***, 148 Wis. 2d 730, 736, 436 N.W.2d 876 (Ct.

[6] We note that Shenkenberg argues in her response that Panzenhagen failed to preserve any claims based on the alternative dispute resolution provisions in the January 2010 order because he did not request mediation in response to her motions for relief. In his reply brief, Panzenhagen asserts that he preserved his claims, and he points to his opening statement at the hearing on Shenkenberg's motions. During that statement, he discussed the provisions for alternative dispute resolution, but Panzenhagen does not direct our attention to anything in his remarks reflecting that he objected to proceeding with the hearing before the circuit court, or that he asked for a stay of the circuit court proceedings to pursue alternative dispute resolution, or that he demanded a referral to mediation or arbitration. *See* ***Greene v. Hahn***, 2004 WI App 214, ¶¶18-21, 277 Wis. 2d 473, 689 N.W.2d 657 (concluding that party had waived mediation requirement by failing to request stay of proceedings in order to attempt mediation). We add that Panzenhagen's contentions on this issue in his reply brief are again offered without any citation to authority.

App. 1989). Relatedly, he should have known that "we would refuse to consider an argument without legal authority specifically supporting the relevant propositions." *See* ***Young***, 124 Wis. 2d at 312. Further, he should have known that we would not abandon our neutrality to develop his arguments for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. The claims are frivolous.

Panzenhagen next asserts that the "minor children's needs were properly and fairly met under the terms of the stipulation and order regarding child support." His opening brief addresses this argument in four sentences, none of which includes a citation to authority. In his reply brief, Panzenhagen attempts to bolster his argument with three case citations (two of which he offers for the same proposition) and an accusation that Shenkenberg used child support payments "for her own benefit, rather than for the benefit of the minor children." "[W]e do not consider matters argued for the first time in a reply brief because that precludes the respondent from being able to address those arguments." ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727. Panzenhagen knew or should have known that a developed argument and supporting citations to authority must be included in his opening brief. *See* ***id.*** Moreover, the arguments in his reply brief are no more sufficient than those in his brief-in-chief. Panzenhagen identifies no case law establishing that a party may reap the benefit of a fraud on the court based on the party's unilateral conclusion that the fraud does not disadvantage the children he must support. The claim is frivolous.

Last, Panzenhagen "disputes the [circuit] court's acceptance of the calculations" performed by Shenkenberg's expert witness, because, he says, the expert did not take some of his business expenses into account when determining his gross income available for child support. Panzenhagen presents his dispute in six sentences of his opening brief. None of those sentences

includes a citation to case law demonstrating the viability of pursuing the dispute on appeal in light of the rule that "'[t]he weight and credibility to be given to the opinions of expert witnesses is uniquely within the province of the fact finder'-in this instance, the [circuit] court." *See* ***Schorer v. Schorer***, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993) (citation and one set of brackets omitted).

In his reply brief and in his memorandum opposing the contention that his appeal is frivolous, Panzenhagen cites WIS. ADMIN. CODE § DCF 150.02(16). He reminds us that this provision states, in part:

> "[i]ncome modified for business expenses" means the amount of income after ... subtracting business expenses that the court determines are reasonably necessary for the production of that income or operation of the business and that may differ from the determination of allowable business expenses for tax purposes.

See ***id.***

WISCONSIN ADMIN. CODE § DCF 150.02(16) is part of the administrative code chapter governing the mechanics of determining income available for child support. *See* WIS. ADMIN. CODE § DCF 150.01(1). Panzenhagen fails to explain, however, why his citations to the administrative code demonstrate that the circuit court erred by accepting the testimony of Shenkenberg's financial expert.

A party's income is a factual determination, and the circuit court is not required to accept any one valuation method over another. ***Covelli v. Covelli***, 2006 WI App 121, ¶15, 293 Wis. 2d 707, 718 N.W.2d 260. Although Panzenhagen plainly believes that the circuit court should have determined his income by subtracting business expenses in addition to those allowed for tax purposes, he offers no citation to any authority affirmatively obligating a circuit court, or an

expert on which the circuit court relies, to deduct any particular expense. Indeed, WIS. ADMIN. CODE § DCF 150.02(16) expressly gives the circuit court the authority to determine the expenses that should be deducted as reasonably necessary for income production or business operation. Panzenhagen's unsupported claim of error is frivolous.

Panzenhagen filed two briefs and a memorandum in this court. We have considered all of his claims and determined that each one is frivolous. We add that his submissions include variations on several of his themes. To the extent that we have not discussed some of those variations, we have deemed them too feeble to warrant individual attention. '"An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.'" ***County of Fond du Lac v. Derksen***, 2002 WI App 160, ¶4, 256 Wis. 2d 490, 647 N.W.2d 922 (citation omitted). We conclude that Panzenhagen's appeal is frivolous in its entirety.

We affirm the orders of the circuit court. Further, we award Shenkenberg her costs and attorney's fees pursuant to WIS. STAT. RULE 809.25(3). Because we cannot make factual findings, we remand with directions that the circuit court determine the amount of costs and attorney's fees Shenkenberg reasonably incurred in defending this appeal. The circuit court shall thereafter enter an order directing Panzenhagen to pay all of those costs and attorney's fees.

Upon the foregoing,

IT IS ORDERED that the orders appealed from are summarily affirmed and the cause is remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals