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DISTRICT IV

February 11, 2014

To:

Hon. Julie Genovese
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2013AP761	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2436)
2013AP762	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2437)
2013AP763	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2438)
2013AP764	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2439)
2013AP765	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2680)
2013AP766	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2681)
2013AP767	State of Wisconsin v. Jason M. Huberty (L.C. # 2012CF2841)
2013AP768	State of Wisconsin v. Jason M. Huberty (L.C. # 2012FO2842)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Jason Huberty appeals a circuit court order denying his motions to award costs and to amend case captions. Based upon our review of the briefs and records, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

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

Huberty was charged with violations of administrative code provisions in these eight forfeiture cases. After pretrial conferences, the State moved to dismiss the cases, and the court granted those motions.

Huberty then moved for awards of attorney fees and costs under WIS. STAT. § 814.245(3) and (5). He also asked that the court amend the captions to show that these actions were brought by the Department of Administration, rather than by the State. The court denied this motion orally on January 17, 2013, and, after a motion for reconsideration, in writing on February 28, 2013. Huberty filed his notice of appeal on March 27, 2013, stating that he was appealing from the February 28 order.[2]

The State argues that we lack jurisdiction over some of these appeals. First, the State argues that three appeals are untimely because Huberty's notice of appeal was not filed within ninety days from the dismissal orders. This argument fails because Huberty is not seeking relief from the dismissal orders. The decisions he seeks review of are the oral and written decisions in January and February 2013. His notice of appeal is timely from both of them.

Second, the State argues that two appeals should be dismissed because the notice of appeal refers only to the January 2013 oral decision. This argument fails because the notice of appeal in the records for those appeals does not refer to that oral decision, but only to the

[2] These appeals were converted from one-judge to three-judge appeals under WIS. STAT. RULE 809.41.

February 2013 written order. Furthermore, while the State asserts without citation that misidentification of the order being appealed is a jurisdictional defect, case law holds otherwise unless a party is misled, which the State does not claim here. *See* ***Northridge Bank v. Community Eye Care Center, Inc.***, 94 Wis. 2d 201, 203, 287 N.W.2d 810 (1980).

Turning to the merits of the appeal, we conclude the dispositive issue is whether Huberty qualifies as a prevailing party, as that term is used in WIS. STAT. § 814.245(3), which provides in relevant part:

> [I]f an individual … is the prevailing party in any action by a state agency … and submits a motion for costs …, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The term "prevailing party" is not defined in the statute. In Huberty's opening brief, he assumes, without actually arguing, that he qualifies as a prevailing party because the State voluntarily dismissed its actions against him. In response, the State argues that we should apply the test stated in ***Kitsemble v. DHSS***, 143 Wis. 2d 863, 422 N.W.2d 896 (Ct. App. 1988).

In ***Kitsemble***, we held that, for purposes of WIS. STAT. § 814.245(3), a person prevails when he: (1) succeeds on any significant issue in litigation which achieves some of the benefit sought in bringing suit; (2) receives a favorable settlement from the agency as a result of the litigation; or (3) prevails on some of his claims on remand to the agency. ***Id.*** at 867. We held that Kitsemble was not a prevailing party because she sought court modification of the agency's decision, but the court ordered only a rehearing by the agency. ***Id.*** at 866-67. We stated that "a

petitioner must first receive at least some of the relief he or she requests in order to prevail," but Kitsemble did not receive her requested relief. ***Id.*** at 867.

In Huberty's reply brief, he asserts that a defendant prevails when a case is dismissed. However, he cites no legal authority for that proposition, and does not otherwise dispute the applicability of ***Kitsemble***.

We conclude that Huberty is not a prevailing party. Huberty did not "receive at least some of the relief he or she requests," because he did not request any relief. *See* ***id.*** The dismissals occurred on the State's motion, not Huberty's. Accordingly, Huberty did not succeed on any significant issue in litigation.

This conclusion makes it unnecessary to decide other issues, such as whether the caption should be amended to show the Department as plaintiff. Our use of the term "State" in this order to describe the plaintiff should not be read as implying a conclusion on that point, but merely reflects the existing caption.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals