STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2021AP000994 & 2021AP001186

In re the finding of contempt in:
In re the marriage of:
JULIE C. VALADEZ,
Appellant,
v.

THE HONORABLE MICHAEL J. APRAHAMIAN,
Respondent.

On Notice of Appeal from Orders for Contempt
Entered on March 19, 2021 and June 15, 2021,
and an Order entered on April 15, 2021,
in the Waukesha County Circuit Court, the
Honorable Michael J. Aprahamian, Presiding

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

ARGUMENT

The three findings of contempt at issue in this case must be vacated as the circuit court acted without authority, failed to follow proper procedures, and erroneously concluded that Ms. Valadez's conduct constituted misconduct warranting summary contempt.

I. The circuit court acted without authority when it found Ms. Valadez in contempt on March 18th.

The circuit court, on its own, scheduled and held a contempt hearing based on its belief that Ms. Valadez had violated a court order. Judge Aprahamian, through counsel, argues that this sua sponte notice of hearing and subsequent finding of contempt against Ms. Valadez for sending emails was authorized under his inherent authority. (Response Br. 12-13). In doing so, he fails to address long standing precedent recognizing that, with respect to contempt, the circuit court's inherent authority has been regulated by the legislature.

In *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85, the Wisconsin Supreme Court addressed the relationship between the court's inherent contempt power and the statutes, explaining:

> "A court's power to use contempt stems from the inherent authority of the court. The power may, however, within limitations, be regulated by the

> legislature." *"Despite the fact that power exists independently of statute, this court ruled [in 1880], that when the procedures and penalties of contempt are prescribed by statute, the statute controls."* This formulation necessarily presents questions of whether the legislature has fully prescribed the procedures and penalties of contempt and, if it has, whether the limitations imposed impair the inherent authority of the court. The legislature may regulate and limit the contempt power "so long as the contempt power is not rendered ineffectual."

(internal citations omitted)(emphasis added). Wisconsin courts have long recognized that a circuit court may not exercise its inherent contempt power without following the statutory procedures set forth in ch. 785. *See Id*., ¶¶32-33*; See also Evans v. Luebke*, 2003 WI App 207, ¶17, 267 Wis. 2d 596, 671 N.W.2d 304 ("For over one hundred twenty years…the Wisconsin Supreme Court has recognized legislative regulation of the contempt power, and the court has proscribed the exercise of this power outside of the statutory scheme."); *State ex rel. Lanning v. Lonsdale,* 48 Wis. 348, 367, 4 N.W. 390 (1880)*; B.L.P. v. Circuit Court for Racine County*, 118 Wis. 2d 33, 41, 345 N.W.2d 510 (Ct. App. 1984). The legislature's regulation of the contempt power set forth therein has never been found to impair the inherent authority of the court.

Judge Aprahamian, however, seems to imply that, at least with respect to this case, the legislature's regulation of the circuit court's contempt power has rendered it ineffectual. (Response Br. 12). He does not,

however, actually make or develop that argument. Nor could such an argument be successful in this case.

An argument similar to that implied by Judge Aprahamian was made by the circuit court in *B.L.P.* v. *Circuit Court for Racine County*, 118 Wis. 2d at 39-40. In response, this court held first, that the question of whether the statute was unconstitutional because it impinged the court's inherent power was not properly before it because the circuit court had not exhausted the statutory procedure. *Id.* at 40. Further, this court held that the provisions of ch. 785 did not "unduly burden [] and substantially interfere[] with the proper function of the judicial system" as "[i]t is not unreasonable to require a court to direct the district attorney to file a complaint, thus setting the procedural framework into motion in a punitive sanction. Nor is it difficult to appoint a special prosecutor if the necessity arises." *Id.* at 40-41.

Although Judge Aprahamian provided reasons why a party to the action may not have brought a motion for remedial contempt, he did not provide any argument or reasons why he could not have referred Ms. Valadez's contempt to a prosecutor, as provided by statute. *See* Wis. Stat. § 785.03(1)(b). Nor is there any evidence that he attempted to do so and his request was denied. Just as the court in *B.L.P.*, Judge Aprahamian failed to exhaust the statutory procedure and has pointed to no reasons for this court to find that the procedure required by statute is unreasonable.

Finally, Judge Aprahamian's conclusory assertion that the contempt procedure used in this case "comported with due process and fundamental notions of fairness," is disingenuous at best. (Response Br. 13). The circuit court imposed a punitive sanction[1] which, as this was not a summary contempt proceeding, meant that Ms. Valadez had the constitutional right to, among other things, "an unbiased judge; a presumption of innocence until found guilty beyond a reasonable doubt, a right against self-incrimination; notice of the charges, the right to call witnesses, [and] time to prepare a defense." *State v. King*, 82 Wis. 2d 124, 130, 262 N.W.2d 80 (1978)(internal citations omitted). None of these constitutional protections were afforded to Ms. Valadez when she was found in contempt on March 18th.

Judge Aprahamian failed to follow the statutory procedure set forth in ch. 785 and, consequently, acted

[1] See *State v. King*, 82 Wis. 2d 124, 130, 262 N.W.2d 80 (1978)("Civil contempt looks to the present and future and the civil contemnor holds the key to his jail confinement by compliance with the order. On the other hand, the criminal contemnor is brought to account for a completed past action, his sentences are not purgeable and are determinate. Criminal contempt is punitive. It is not intended to force the contemnor to do anything for the benefit of another party."). The sanction imposed in this case was a jail sentence stayed for payment of a fine or performance of community service; it was not meant to gain compliance with an order or benefit another party. (442).

without authority when he initiated contempt proceedings and found Ms. Valadez in contempt for sending him emails. Consequently, the order for contempt and sanction must be vacated.

II. The circuit court's second finding of contempt during the March 18th hearing was clearly erroneous.

The second finding of contempt made on March 18, 2021, must also be vacated. Judge Aprahamian's findings that Ms. Valadez's conduct constituted contempt of court and warranted summary contempt were clearly erroneous and he failed to follow the proper procedure.

Contrary to the required procedure for summary contempt, Judge Aprahamian imposed a sanction before providing Ms. Valadez with her right to allocution. Judge Aprahamian did not merely state that he was "thinking of imposing" five days of jail. (Response Br. 15, 19). He imposed that sanction, specifically stating: "I'm going to sanction … I'm holding you in contempt again another five days." (464:12)[2]. There was no hesitation or qualification; Judge Aprahamian had decided to impose a sanction of five days in jail before hearing from Ms. Valadez. This is contrary to the demands of due process and fundamental fairness. *See Currie v. Schwalbach*,

[2] This court granted Ms. Valadez's motion to consolidate her cases for appeal. Citations are to the record in 2021AP001186, in which the court of appeals' document number matches the circuit court document number.

139 Wis. 2d 544, 558-59, 565, 407 N.W.2d 862 (1987)("a contemnor should be accorded a right of allocution after being summarily found in contempt and prior to imposition of the sanctions.")

In finding that the summary contempt procedure required courts to provide contemnors with the right to allocution, the Wisconsin Supreme Court explained that a contemnor shall be given the opportunity for allocution before punitive sanctions are imposed as he or she "may well have something to say that mitigates, if not explains away, the contumacious act." *Id.* at 560. Further, "the allocution requirement provides a check on the heightened potential for abuse posed by the summary contempt power and provides an opportunity for the contemnor to apologize or to defend or explain the contumacious behavior." *Id.* at 565.

The fact that Ms. Valadez was provided an opportunity to make a statement after the imposition of the sanction does not mitigate the court's violation of the required procedure. As explained in the initial brief, Ms. Valadez had already been found in contempt once and was now informed that the court had found her in contempt again and was ordering her to serve an additional five days in jail. She had no reason to believe that anything she said would change the court's decision. Thus, she had less incentive to give any explanation or apology she may have otherwise given. Someone in that position would also be justified in worrying that anything said would only make the sanction worse. Further, the court was required to

consider Ms. Valadez's statements before determining what the appropriate sanction, if any, was under the circumstances. This obviously cannot be accomplished by only allowing the contemnor to make a statement after the sanction is imposed.

Aside from failing to follow established procedure, Judge Aprahamian's findings that Ms. Valadez engaged in misconduct and that summary contempt was warranted were clearly erroneous. While he characterizes Ms. Valadez's behavior as repeatedly interrupting, what Ms. Valadez was actually doing was asking for clarification and objecting to the improper process being employed by the circuit court.

When it became apparent that the hearing was not ending after the contempt was decided, Ms. Valadez asked for clarification as to what notice was provided for any other issues being heard that day. (464:6). The circuit court did not directly answer that question so Ms. Valadez continued to try to make a record to establish that she was not provided any notice that the GAL's letters would be addressed. (464:6-9). That fact was eventually established when the circuit court explained that the only notice was a note entered on CCAP. (464:7-10). Once it was clear that the circuit court was proceeding to hold the motion hearing despite Ms. Valadez not receiving proper notice, Ms. Valadez made her first objection to the proceeding. (464:10-11). She then objected to the GAL speaking, and made one subsequent objection,

the basis for which she was not allowed to state before she was found in contempt. (464:11-12).

None of Ms. Valadez's comments or objections were rude or disrespectful to the court and all were meant to preserve the record for appeal should the circuit court proceed with the hearing and remove her child from her home. Judge Aprahamian does not suggest how, other than the manner she did, Ms. Valadez should or could have raised her objections when it became apparent that the court was going to address the request for change of placement at that hearing. Ms. Valadez's conduct did not constitute intentional misconduct or intentional disobedience of a court order.

Further, Judge Aprahamian fails to explain why Ms. Valadez's objections warranted summary contempt proceedings. He does not argue that an immediate sanction was required in order to preserve order in the court and to protect the authority and dignity of the court, as required for such proceedings. Wis. Stat. § 785.03(2); *See also Currie*, 139 Wis. 2d at 552-53. As Ms. Valadez asserted in her initial brief, her conduct in this case was simply not the type which justified a summary finding of contempt and imposition of a punitive sanction.

Summary contempt should be invoked "only when compelling circumstances require immediate punishment." *Matter of Finding of Contempt in State v. Kruse*, 194 Wis. 2d 418, 437, 533 N.W.2d 819 (1995)(Abrahamson, J concurring). It is meant to be

used "only in 'very limited' circumstances" in order to "balance a court's need to achieve summary vindication of its dignity and authority with the due process rights of a person faced with punitive sanctions." *Id*. Stated another way, summary contempt should be used only in "those instances where the authority and dignity of the court are threatened or impugned and the summary action is necessary for the preservation of order." *State v. Lemmons*, 148 Wis. 2d 740, 746, 437 N.W.2d 224 (Ct. App. 1989).

In determining whether summary contempt was warranted, "[i]t is the intent, content, and effect of the contumacious behavior, not its frequency, that is relevant." *Currie*, 139 Wis. 2d at 555. Here, Ms. Valadez's comments were not disruptive, disrespectful, or rude, and her intent was obvious – she was trying to point out that she had received no notice for the hearing and preserve the issue for appeal should the court continue with the emergency placement hearing. Her conduct did not warrant the imposition of summary contempt; she had not threatened or impaired the authority or dignity of the court.

Finally, Judge Aprahamian's position that the sanction imposed here does not undermine the use of summary contempt proceedings is misguided. The statute specifically states that, after a finding of summary contempt, the court may impose "a fine of not more than $500 or imprisonment in the county jail for not more than 30 days or both." Wis. Stat.

§ 785.04(2)(b). The language in *Frisch v. Henrichs*, 2007 WI 102, ¶60, on which Judge Aprahamian relies, relates to purge conditions, i.e. those conditions imposed after a finding of remedial contempt. Unlike the subsection of the statute related to remedial sanctions, the subsection applicable to punitive sanctions imposed after summary contempt does not provide courts with authority to impose alternative sanctions. *See* Wis. Stat. § 785.04(1)(e), (2)(b). The two sanctions listed are the only sanctions allowed. This makes sense, as a purge condition would be contrary to the punitive purpose of summary contempt proceedings.

The circuit court's findings that Ms. Valadez engaged in contemptuous behavior and that summary contempt was warranted, were clearly erroneous. The finding of contempt and sanction should, therefore, be vacated.

III. The circuit court's finding of contempt on June 2nd was clearly erroneous.

Finally, the circuit court's third finding of contempt, made during a hearing on June 2nd, must be vacated. As with the second finding of contempt, the circuit court's conclusion that Ms. Valadez's refusal to sign the release constituted contempt, and that contempt proceedings were warranted, was clearly erroneous.

Ms. Valadez's signed release was not necessary for the custody study worker to obtain the records she wanted, nor did the circuit court have authority to

order Ms. Valadez to sign a release of those confidential records. (*See* Initial Br. 29-33). Judge Aprahamian points to no authority otherwise. Rather, he asserts that the custody study worker said she needed the release so it was not clearly erroneous for the court to order it. (Response Br. 20-21). He also states that Ms. Valadez, a pro se litigant, should have informed him about the statutory authority that would have allowed him to simply order the release of those records. (Response Br. 21). Neither argument is persuasive.

Ms. Valadez politely explained during the hearing why she was unwilling to sign the release - she was unsure of what the release was for and of the court's authority to order it, and she wanted to obtain the advice of legal counsel. (562:19, 22-23). Further, under the circumstances, and as a pro se litigant, it was not Ms. Valadez's burden to point out the statutory authority that would allow the custody study worker to get the records she wanted, either with the release from Mr. Valadez that she already had, or by court order.

Again, Judge Aprahamian points to no case law or statute that gives him the authority to order a party to sign a release of confidential records under the circumstances of this case. As the circuit court could not require Ms. Valadez to sign the release, and she respectfully declined to do so, her choice does not constitute contempt of court.

Finally, contrary to his assertions, Judge Aprahamian's use of summary contempt proceedings was improper under the circumstances. (*See* Initial Br. 33-36). It is Judge Aprahamian that misunderstands the law surrounding contempt. As explained above, summary contempt is not appropriate in every instance in which a person commits a contempt of court. (*See Supra* Section II). It is to be used in limited and rare circumstances and only "to address certain 'emergency' situations" in which "the authority and dignity of the court are threatened or impugned and the summary action is necessary for the preservation of order." *Lemmons*, 148 Wis. 2d at 746; *See also State v. Van Laarhoven*, 90 Wis. 2d 67, 70-71, 279 N.W. 2d 488 (1979)(there must be "a compelling reason for immediate punishment related to 'vindication of the court's dignity and authority.'"). No such circumstances existed in this case. Judge Aprahamian's use of the summary contempt procedure was improper and the finding of contempt must be vacated.

CONCLUSION

For the reasons stated above, as well as those in the initial brief, Ms. Valadez respectfully requests that this court vacate all three of the circuit court's contempt orders and sanctions.

Dated and filed this 23rd day of November, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,781 words.

Dated and filed this 23rd day of November, 2021.

Signed:
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