COURT OF APPEALS
DECISION
DATED AND RELEASED

March 4, 1997

NOTICE

No. 96-1247

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

Bruce E. Larson and Beverly A. Larson,

Plaintiffs-Appellants,

v.

Sandoval Dental Care and Michael Sandoval,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed in part and reversed in part.*

FINE, J. This is an appeal from the trial court's dismissal of a small-claims action brought by Bruce E. and Beverly A. Larson against Sandoval Dental Care and Michael Sandoval for the recovery of $16, which the Larsons claim the defendants owe them, and the trial court's award of frivolous-action fees against the Larsons. We affirm in part and reverse in part.

Michael Sandoval is a dentist and runs Sandoval Dental Care. The Larsons testified that they made arrangements to have their sons Jesse and Peer

examined by Sandoval Dental Care under an introductory flyer that promised an examination for a $17 fee. The Larsons were charged $25 for each child, not the $17 they expected, and were told that the $17 offer applied to adults only. They paid $50 to Sandoval Dental Care, and seek the asserted overcharge of $16 ($50 – $34 [$17x2]).

The trial court found that the brochure to which the Larsons referred was "very clear that for children the price is $25 per child for a welcome exam." The trial court also concluded that the Larsons's action was frivolous "as a matter of law" because in the trial court's view, it "was brought in bad faith, without any reasonable basis in law or equity, and cannot be supported by a good faith argument for modification or reversal of the law." The trial court awarded frivolous-action fees of $120 in addition to the statutory costs.

A trial court's findings of fact may not be set aside on appeal unless they are "clearly erroneous." RULE 805.17(2), STATS. Moreover, an appellate court must accept reasonable inferences that the trial court draws from the evidence. ***State v. Friday***, 147 Wis.2d 359, 370-371, 434 N.W.2d 85, 89 (1989). Here, the brochure that is central to this action offers, in a box on one end of a strip of boxed offers, a "$17" "Welcome Dental Exam." The offer is not limited to adults. A box at the other end of the strip of boxed offers, however, offers a "$25" "Welcome Children's Exam." Although it was not unreasonable for the Larsons to focus on the $17 offer, which, as noted, was not limited by its terms to adults, it was equally reasonable for the defendants to apply the "$25" "Welcome Children's Exam" portion of the promotional brochure. Indeed, the brochure used by the Larsons in their visit to Sandoval Dental Care shows that the box offering the "$25" "Welcome Children's Exam" was cut out—as if it had been redeemed at the time the Larsons visited Sandoval Dental Care. Although the Larsons contended in their testimony that they specifically asked for the $17 special, the trial court, which is the final arbiter of the credibility of the witnesses and the inferences that are to be drawn from that testimony, credited the defendants' version of the transaction. We cannot say that this was "clearly erroneous."

Although a trial court's findings of historical fact that underlie a conclusion that an action is frivolous will not be set aside unless "clearly erroneous," RULE 805.17(2), STATS., "whether the facts cited fulfill the legal

standard of frivolousness is a question of law [that appellate courts] review independently of the conclusion[] of the" trial court. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 236, 517 N.W.2d 658, 664 (1994). The trial court did not make any findings of fact in support of its conclusion that the Larsons's claim was frivolous; rather, it recited the statutory standards as embodying its conclusion. We thus have to search the record to determine whether there is anything that supports the trial court's legal conclusion from which we can concur with the trial court's assessment under our responsibility of *de novo* review. *See* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis.2d 1, 30, 469 N.W.2d 595, 607 (1991).

The trial court concluded that the Larsons's claim was made in "bad faith." This is a reference to § 814.025(3)(a), STATS.[1] The test under this

[1] Section 814.025, STATS., provides:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
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> **(2)** The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
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> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint 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.

subsection is subjective; thus, the trial "court must determine what was in the [plaintiffs'] mind and were [their] actions deliberate or impliedly intentional with regard to harassment or malicious injury." ***Stern***, 185 Wis.2d at 236, 517 N.W.2d at 663. There is nothing in the record that would support any finding other than that the Larsons were sincerely motivated by what they thought was a "bait and switch" scheme by the defendants. That the trial court found that they were wrong in this assessment does not make their claim one that falls under § 814.025(3)(a). *See* ***Radlein v. Industrial Fire & Casualty Ins. Co.***, 117 Wis.2d 605, 614, 345 N.W.2d 874, 879 (1984) (action not frivolous merely because trial court does not accept party's argument).

The trial court also concluded that the Larsons's claim was brought "without any reasonable basis in law or equity, and cannot be supported by a good faith argument for modification or reversal of the law." This is a reference to § 814.025(3)(b), STATS. Here, the test is objective. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666: "The standard is `whether the attorney knew or should have known that the position taken was frivolous as determined by what a *reasonable attorney* would have known or should have known under the same or similar circumstances.'" ***Ibid.*** (citation omitted; emphasis in cited case). As with its conclusion under § 814.025(3)(a), STATS., the trial court did not make any findings of fact in support of its conclusion that the Larsons's claim was frivolous under § 814.025(3)(b). In this case the Larsons appeared *pro se*, and, as far as the appellate record is concerned, there appears to have been a legitimate difference of opinion as to which aspect of the promotional brochure governed and who said what to whom when the Larsons's children were brought to Sandoval Dental Care for their dental examination. Under our *de novo* review of the trial court's legal conclusion, we cannot say that, viewed objectively, the Larsons's claim was "without any reasonable basis in law."

The trial court's judgment dismissing the Larsons's claim against Michael Sandoval and Sandoval Dental Care is affirmed; the trial court's

(..continued)

> **(4)** To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

imposition of frivolous-action fees under § 814.025(3)(a) & (3)(b), STATS., is reversed.[2]

By the Court.—Judgment affirmed in part and reversed in part; statutory costs under RULE 809.25(1), STATS., awarded to the appellants.

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

[2] Michael Sandoval and Sandoval Dental Care have filed a motion seeking frivolous-appeal costs. *See* RULE 809.25(3), STATS. In light of our decision on the merits of the Larsons's appeal, we deny the motion. Moreover, the appellate brief filed by counsel for Michael Sandoval and Sandoval Dental Care does not comply with RULE 809.19(3), STATS. (incorporating the requirements of RULE 809.19(1)(d), STATS.) because its statement of facts does not contain the required "references to the record." Accordingly, the Larsons will be permitted their full statutory costs on this appeal. *See* RULES 809.25(1) & 809.83(2), STATS.