COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1024

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

IN RE THE ESTATE OF BERNICE HOUTAKKER,
DECEASED:

SR. CATHERINE HOUTAKKER, JOHN HOUTAKKER, AND
CAROL ANN CAREW,

COMPLAINANTS-APPELLANTS,

V.

GERALD F. HOUTAKKER, MARILYN E. HOUTAKKER,
AND MICHAEL P. LEE, PERSONAL REPRESENTATIVE,

RESPONDENTS-RESPONDENTS.

APPEAL from judgments and orders of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed and cause remanded with directions.*

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. Sr. Catherine Houtakker, John Houtakker, and Carol Ann Carew appeal from the circuit court's orders and from judgments entered against them for filing a frivolous claim in violation of §§ 802.05 and 814.025, STATS. The judgments awarded the estate of Bernice Houtakker $8,130 plus costs and Gerald and Marilyn Houtakker[1] $12,785.66 plus costs. Catherine, John, Carol Ann, Archie Simonson and Roger Merry[2] were each adjudged responsible for an equal portion of the judgments. Upon review, we conclude that the complaint and amended complaint were frivolous under § 802.05(1)(a) because Simonson and Merry failed to conduct a reasonable inquiry into the facts before signing the pleadings, and under § 814.025(3)(b) because Catherine, John, Carol Ann, Simonson and Merry knew or should have known that there were no facts which would establish the elements of the claims. Therefore, we affirm the circuit court. Because we also conclude that Catherine, John and Carol Ann's appeal was frivolous, we remand to the circuit court to determine who will be responsible for paying, and the amount of, the respondents' reasonable costs and fees incurred in this appeal.

BACKGROUND

This case has a long and complicated procedural history, but at its heart, it is a family dispute between Gerald and the other children of Elmer and Bernice Houtakker: Catherine, John and Carol Ann. The controversy centers on three farms: the "Home Farm," the "River Farm," and the "Spring Valley Farm."

[1] For the balance of this opinion, we refer to Gerald and Marilyn Houtakker as "Gerald."

[2] Attorneys Simonson and Merry represent the appellants on appeal; however, they have not appealed the judgments as they relate to their respective responsibilities for fees and costs.

For the majority of the proceedings, Catherine and John have been represented by Simonson and Carol Ann has been represented by Merry.[3]

In 1979, Elmer and Bernice sold the Home Farm to Gerald for $40,000 on land contract. At the time of the sale, the assessed value of the farm was $126,000. On April 19, 1984, Elmer died and his estate was probated, transferring his property to Bernice. On May 2, 1986, Bernice gave Gerald a deed for the Home Farm in satisfaction of the land contract. On April 20, 1986, Bernice sold the River Farm to Gerald on land contract for $18,600. It was then assessed at $99,875. Sometime thereafter, a notation was made on the River Farm land contract that it had been paid in full. The notation was signed by Bernice and Gerald, but it was not dated or witnessed. On July 23, 1992, Bernice sold the Spring Valley Farm to Gerald for $14,000. Again, the assessed value of the farm, $92,100, was significantly higher than the sale price.

On September 20, 1992, Catherine was appointed conservator of Bernice's property. During her conservatorship, Catherine discovered the sales of the three farms. She also found that Bernice had written many checks to Gerald for farm expenses and personal uses; that Bernice's investments were depleted; and that timber had been harvested from the farms.

On September 15, 1994, Bernice died, and Michael Lee was appointed personal representative of her estate. On April 19, 1995, Catherine and John filed a petition pursuant to § 879.61, STATS., to initiate discovery to determine whether the Home Farm, River Farm and Spring Valley Farm should be

[3] Gerald has been represented by Attorney John Baxter and Bernice's estate by Attorney Gilbert Barnard.

included in the estate. During the probate, Gerald filed an objection to Bernice's February 1, 1991 Will, on the grounds of incompetency and undue influence. On October 20, 1995, the circuit court concluded that Bernice was mentally capable and not subjected to undue influence when she executed her 1991 Will.[4]

On May 3, 1995, Lee conducted discovery during which Catherine testified that she had no admissible evidence[5] that Elmer or Bernice were incompetent when they entered into the land contract sale of the Home Farm, nor when the deed in fulfillment of that land contract was given. Catherine also testified that she believed Gerald had obtained the other farms through undue influence and that he had obtained cash and other personal property from Bernice by the same means. However, she acknowledged that she had no documents or witnesses to support that belief. Neither John nor Carol Ann were able to provide evidence that Gerald obtained property from Bernice through undue influence.

On September 11, 1995, Attorney Kim Skemp disclosed by letter to Baxter that he had performed some legal services and prepared a will for Bernice in 1988. Skemp forwarded his file, including office notes, to Baxter, and Baxter, in turn, forwarded the information to Catherine, John and Carol Ann.

On December 13, 1996, Catherine, John and Carol Ann's attorneys filed a complaint in the probate proceedings for recovery of the three farms. The complaint alleged that Gerald had obtained the farms by undue influence and had taken timber from the properties without permission. The complaint was signed

[4] Gerald appealed the decision, and on September 26, 1996, we affirmed the circuit court.

[5] Catherine said she had conversations with her mother about the farm sales. However, that evidence was barred by the Dead Man's Statute, §§ 885.16 and 885.17, STATS.

by Simonson and Merry. Gerald filed an answer denying the claims and asserting various affirmative defenses. Lee, on behalf of the estate, also denied the claims and affirmatively asserted that Skemp's notes of conversations with Bernice showed that she knew that she had given Gerald the deed in fulfillment of the land contract on the Home Farm; that nothing was due on that contract; and the deed was given and recorded in 1986. Lee further asserted that Skemp's notes showed that Bernice had sold the River Farm to Gerald for $18,600 in 1986. Included in Lee's answer was a request, on behalf of the estate, for the recovery of attorney fees and costs as sanctions under § 814.025, STATS.

On May 15, 1997, Gerald filed a motion for summary judgment, supported by extensive affidavits from Gerald, Marilyn, Attorney Leitl,[6] Baxter and Skemp. Skemp's affidavit stated that based on meetings he had with Bernice in 1988 concerning drafting a will, he understood that Bernice intended to forgive any unpaid amount on the land contracts. The will Skemp drew for Bernice was attached to his affidavit. Lee also filed a motion and brief for summary judgment with supporting affidavits by Barnard. Lee again included a request for the recovery of attorney fees and costs as sanctions under § 814.025, STATS.

On June 4, 1997, instead of filing a response and affidavits in opposition to the summary judgment motions, Catherine, John and Carol Ann filed an amended complaint. The amended complaint deleted Lee as a party to the action and omitted all of the causes of action from the December 13, 1996 complaint, except the foreclosure of the land contract on the River Farm. On July 15, 1997, the circuit court granted the motions for summary judgment and a

[6] Attorney Leitl had drafted the land contracts and deeds for the farm sales.

motion to strike the amended complaint. The circuit court ruled that the foreclosure action on the River Farm in the amended complaint had been raised in the December 13, 1996 complaint, which had been dismissed on summary judgment, and had also been the issue of litigation since 1993. On August 12, 1997, a written order granting summary judgment in favor of the respondents was filed.[7]

On July 25, 1997, Gerald filed a motion for attorney fees and costs on the grounds that the December 13, 1996 complaint and June 4, 1997 amended complaint violated both §§ 802.05 and 814.025, STATS. On August 5, 1997, Lee filed a similar motion. On December 12, 1997, the circuit court concluded that the filing of the complaint and amended complaint violated §§ 802.05(1)(a) and 814.025(3)(a) and (b). The circuit court found that because the appellants had received Skemp's file and notes long before they filed the December 13, 1996 complaint and had not conducted any discovery on the issue, or even contacted Skemp, and because Catherine testified at the May 3, 1995 discovery proceeding that she had no evidence, other than inadmissible conversations with Bernice, of undue influence in regard to the farms and Bernice's other property, Catherine, John, Carol Ann, Simonson and Merry knew or should have known that the filing of the complaint and amended complaint was not reasonably based in law or fact. The circuit court also concluded that their complaint was filed solely for the purpose of harassment. Catherine, John and Carol Ann appealed. The estate and Gerald have each filed motions for attorney fees and costs as sanctions for filing a frivolous appeal, pursuant to § 809.25(3), STATS.

[7] Catherine, John and Carol Ann appealed, and we affirmed the circuit court.

DISCUSSION

Standard of Review.

We review a circuit court's conclusion that an attorney or party has signed a frivolous complaint in violation of § 802.05(1)(a), STATS., deferentially. ***Riley v. Isaacson***, 156 Wis.2d 249, 256, 456 N.W.2d 619, 622 (Ct. App. 1990). Determining what and how much pre-filing investigation was done is a question of fact which we will not disturb unless it is clearly erroneous. ***Id.***; § 805.17(2), STATS. Whether that investigation constituted a reasonable inquiry is a discretionary determination, which we will not disturb so long as the circuit court applied a proper standard of law to the facts of record and reached a reasonable conclusion. ***Id.*** at 256-57, 456 N.W.2d at 622.

Whether Catherine, John and Carol Ann's claims were frivolous pursuant to § 814.025(3)(a) and (b), STATS., present mixed questions of law and fact. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 236, 241, 517 N.W.2d 658, 664, 666 (1994). The circuit court's findings of fact concerning what was said, what was done, what was thought, and the reasonable inferences drawn therefrom, will not be upset unless they are clearly erroneous. ***Id.***; § 805.17(2), STATS. However, the ultimate conclusion of whether the facts found fulfill the legal standard of frivolousness is a question of law reviewed without deference to the circuit court. ***Stern***, 185 Wis.2d at 236, 241, 517 N.W.2d at 664, 666. Our review of the reasonableness of the award of attorney fees and costs for filing frivolous claims is limited to whether the circuit court erroneously exercised its discretion. *See* ***Nelson v. Machut***, 138 Wis.2d 301, 304-05, 405 N.W.2d 776, 778 (Ct. App. 1987).

Frivolous Action.

"Frivolous action claims are an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." ***Stern***, 185 Wis.2d at 235, 517 N.W.2d at 663 (quoting ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis.2d 605, 613, 345 N.W.2d 874, 879 (1984)). Furthermore, an attorney has an obligation to represent his or her client zealously which may include making some claims that are not entirely clear in the law or the facts, at least when commenced. ***Stern***, 185 Wis.2d at 235, 517 N.W.2d at 663. Therefore, when it is asserted that a claim is frivolous, all doubts must be resolved against a conclusion of frivolousness. ***Id.***

1. Section 802.05, STATS.

The circuit court awarded attorney fees and costs under both §§ 802.05 and 814.025, STATS. However, where both sections apply, and to the extent that there are differences between the two, § 802.05 applies. Section 814.025(4). Accordingly, we turn first to the determination of frivolousness under § 802.05. Section 802.05(1)(a) provides that an attorney's[8] signature on any paper filed in court:

> constitutes a certificate that the attorney … has read the pleading, motion or other paper; that to the best of the attorney's … knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that [it] is not used for any improper purpose, such as to harass or to

[8] Because only Attorneys Simonson and Merry signed the complaint and amended complaint, we examine frivolousness under § 802.05, STATS., only as it pertains to Simonson and Merry, not as to Catherine, John and Carol Ann.

> cause unnecessary delay or needless increase in the cost of litigation.

Section 802.05(1)(a), STATS., imposes three obligations on a signatory of pleadings: (1) a proper purpose, (2) knowledge formed after a reasonable inquiry, and (3) a good faith belief the pleading is warranted under the law. ***Riley***, 156 Wis.2d at 256, 456 N.W.2d at 621. If any one of the three prongs has been violated, sanctions may be imposed. ***Id.*** at 256, 456 N.W.2d at 621-22.

In order to perform an adequate investigation, an attorney is expected to inquire into the facts and to read and consider the law. ***Belich v. Szymaszek***, No. 97-3447, slip op. at 5 (Wis. Ct. App. Jan. 13, 1999, ordered published Feb. 23, 1999). How much investigation is reasonable depends on the circumstances of the case. For example, in ***Riley***, 156 Wis.2d at 257-60, 456 N.W.2d at 622-23, we concluded that an attorney who filed a claim based solely on information obtained from his client without independently investigating the facts and without exploring contradictory records had not conducted a reasonable inquiry to determine whether his client's claim was well-grounded in fact. Accordingly, we concluded that the circuit court properly exercised its discretion in deciding that the attorney neglected the investigatory duties mandated by § 802.05, STATS. ***Riley***, 156 Wis.2d at 260, 456 N.W.2d at 623.

Here, the circuit court made several findings of fact concerning information known to Simonson and Merry before each signed the complaint. The court found that, among other things, the attorneys had copies of all of the land contracts and deeds relating to the farms. They knew of Leitl's and Skemp's files relating to the transactions, and they also had Catherine's testimony of May 3, 1995, during which she admitted that she had no admissible evidence of undue influence.

Although Simonson and Merry never deposed or even called Skemp, they concluded that he had no admissible evidence or usable information. Simonson contends that only the information contained in Skemp's affidavit, which was attached in support of the respondents' summary judgment motions, would have changed his clients' position. However, the affidavit contained essentially the same information as the file and as the will drafted by Skemp. Further, Simonson and Merry had reviewed Skemp's affidavit when they filed the amended complaint which alleged foreclosure of the land contract on the River Farm, a claim contained in the original complaint and contradicted by information in Skemp's affidavit. Because Simonson and Merry knew of testimony and documents which directly contradicted information contained in the complaint and amended complaint, yet failed to verify and explore that evidence, and because they had no admissible evidence to support the claims they made, the circuit court properly exercised its discretion in concluding that each failed to make a reasonable investigation contrary to § 802.05, STATS.

2. Section 814.025(3)(a), STATS.

The question of whether a reasonable attorney or litigant "commenced, used or continued" a claim "in bad faith, solely for purposes of harassing or maliciously injuring another," under § 814.025(3)(a), STATS., is analyzed under a subjective standard, whereby the court must determine what was in the person's mind and whether his or her actions were deliberate or impliedly intentional with regard to harassment or malicious injury. ***Stern***, 185 Wis.2d at 235-36, 517 N.W.2d at 663-64. Because the inquiry is subjective, and not generally susceptible to direct proof, the person's state of mind must be inferred from his or her acts or statements in view of the surrounding circumstances. ***Id.*** at 236-37, 517 N.W.2d at 664. The court's findings of fact must be specific because

attitudes such as bad faith, harassment and maliciousness do not appear in the record unless the circuit court finds them present. ***Id.*** at 236, 517 N.W.2d at 664.

A finding of frivolousness under subsec. (3)(a) must be based on an evidentiary foundation separate from the elements of subsec. (3)(b). For example, in ***Stern***, among the facts cited by the circuit court in support of its conclusion that Attorney Stern had filed a claim solely for the purpose of harassing another, were that opposing counsel told Stern that his claims were precluded by caselaw and that Stern had "bought into" his client's sense of outrage. ***Id.*** at 238-40, 517 N.W.2d at 664-65. The supreme court concluded that such facts did not support the circuit court's ruling that the claim was frivolous under § 814.025(3)(a), STATS. ***Stern***, 185 Wis.2d at 240, 517 N.W.2d at 665. The court reasoned that the contradictory caselaw did not absolutely preclude Stern's claim and even if it did, it would not go to whether the claim was brought as harassment under subsec. (3)(a), rather it would go to whether the claim had a reasonable basis in law or equity under subsec. (3)(b). ***Id.*** at 238-39, 517 N.W.2d at 664-65. Further, the supreme court concluded that the circuit court's factual finding concerning Stern's outrage was a "bald conclusion with no facts stated to support such an inference." ***Id.*** at 239, 517 N.W.2d at 665. The supreme court noted that a finding of frivolousness under § 814.025(3)(a) is limited to situations in which the sole motivation for the suit was harassment or malicious injury and that such a high standard requires a finding of bad faith based upon some statements and actions, including, for example, threats. ***Id.*** at 239-40, 517 N.W.2d at 665.

The circuit court found several facts concerning what Catherine, John and Carol Ann knew or should have known prior to filing the complaint and amended complaint; however, with regard to the frivolousness of the complaints under § 814.025(3)(a), STATS., the court's factual findings were limited to the

following: "With this knowledge amply before complainants and their attorneys, I conclude filing the complaints was done in bad faith and for the purpose of harassing Gerald and Marilyn Houtakker. This was made apparent by the demeanor of Sr. Catherine [w]hen she testified at the May 3, 1995 hearing." What the appellants knew or should have known prior to filing the complaints supports a finding of frivolousness under subsec. (3)(b), not subsec. (3)(a). Furthermore, the court's finding concerning Catherine's demeanor at the discovery hearing is a conclusion which is not supported by specific facts as to why Catherine's demeanor led the court to conclude that Catherine, John and Carol Ann filed their complaints solely for the purpose of harassment. Since only a conclusion of harassment and no supporting facts were cited, the circuit court erred in concluding the complaints were frivolous under § 814.025(3)(a).

3. Section 814.025(3)(b), STATS.

A claim is frivolous under § 814.025(3)(b), STATS., if the party or attorney "knew or should have known" that the claim was "without any reasonable basis in law or equity." In contrast to the analysis under subsec. (3)(a), a finding of frivolousness under subsec. (3)(b) is based on an objective standard whereby the court must determine what a reasonable person would have known under the same or similar circumstances. ***Stern***, 185 Wis.2d at 240-41, 517 N.W.2d at 665-66 (citing ***Sommer v. Carr***, 99 Wis.2d 789, 797, 299 N.W.2d 856, 860 (1981)). "The question is not whether a party can or will prevail, but rather is that party's position so indefensible that it is frivolous and should that party or its attorney have known it." ***Sommer***, 99 Wis.2d at 797, 299 N.W.2d at 859.

The threshold inquiry under subsec. (3)(b) is whether the claim has a reasonable basis in law. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666. If the

attorney or party knows or should reasonably know that the facts necessary to meet the required elements of an allegation are not present and cannot be produced, then the claim is frivolous. ***Id.*** at 244, 517 N.W.2d at 667. For example, in ***Stoll v. Adriansen***, 122 Wis.2d 503, 515, 362 N.W.2d 182, 189 (Ct. App. 1984), we concluded that "the total lack of evidence necessary to prove negligence would lead a reasonable party to conclude under the facts of this case that assertion of such a claim would be frivolous."

In Wisconsin, there are two alternative methods of establishing undue influence. One method requires proof of four elements: (1) susceptibility to undue influence, (2) opportunity to influence, (3) disposition to influence, and (4) coveted result. ***Lee v. Kamesar***, 81 Wis.2d 151, 158, 259 N.W.2d 733, 737 (1977). When three of the four elements have been established by clear, satisfactory and convincing evidence, only slight evidence of the fourth element is required. ***Id.*** at 158-59, 259 N.W.2d at 737-38. The second method of establishing undue influence requires proof of: (1) a confidential relationship between the testator and the alleged influencer, and (2) suspicious circumstances surrounding the making of the will. ***Id.*** at 159, 259 N.W.2d at 738. Catherine, John and Carol Ann argue that undue influence is established under the second method.

To support their claims, Catherine, John and Carol Ann mischaracterize the transactions with Leitl and they ignore other dispositive evidence. For example, Leitl stated that although he may have met with Gerald outside the presence of Bernice, he considered himself the attorney for the family. Catherine, John and Carol Ann had copies of all of the land contracts and deeds Leitl drafted, showing the transactions between Bernice and Gerald, and Catherine had seen all of her mother's files and records on this matter during her

conservatorship. Catherine even admitted that she had no admissible evidence of undue influence. And finally, prior to December 1996, they and their attorneys had Skemp's files and the will he drafted for Bernice, which showed that Bernice intended to sell the farms to Gerald at greatly reduced prices. This was essentially the same information that was in Skemp's affidavit, which was the document that prompted them to abandon all of their claims, except the foreclosure action on the River Farm land contract. They knew in December 1996 the same facts that they knew in June 1997. Therefore, we conclude that the claims made were frivolous because Catherine, John, Carol Ann, Simonson and Merry knew or should have known that there were no facts which would establish the elements of the claims. Therefore, the complaint and amended complaint were frivolous within the meaning of § 814.025(3)(b), STATS.

Evidentiary Hearing.

Catherine, John and Carol Ann contend that the circuit court erred because it did not conduct an evidentiary hearing on the frivolousness issue. The court had based its findings of fact and conclusions of law on affidavits submitted by the parties and upon the entire summary judgment record.

While the question of frivolousness is not determined in the same manner as motions for summary judgment and often demands a judicial trial with an opportunity to examine and cross-examine witnesses, when facts are undisputed, the determination may be made without an evidentiary hearing. ***Kelly v. Clark***, 192 Wis.2d 633, 652-55, 531 N.W.2d 455, 461-62 (Ct. App. 1995). Here, because the determination of frivolousness under §§ 802.05 and 814.025(3)(b), STATS., involved objective standards based on facts of record, the

court properly determined frivolousness under those sections without an evidentiary hearing.

Reasonable Costs and Attorney Fees.

Fees and costs may be assessed based on a conclusion of frivolousness under either subsec. (3)(a) or (3)(b) of § 814.025, STATS., or against the signatories of the complaints under § 802.05, STATS. The circuit court is in the best position to make a determination about the reasonableness of the attorney fees in a particular case because it has observed the quality of the services rendered and has access to the file to review the work that has gone into the case since its inception. ***Nelson***, 138 Wis.2d at 305, 405 N.W.2d at 778 (citing ***Standard Theatres v. Transportation Dep't***, 118 Wis.2d 730, 747, 349 N.W.2d 661, 671 (1984)). This expertise includes an ability to evaluate whether an attorney's services on a particular matter were necessary. In addition, under § 814.025(2), the court may assess the costs of a frivolous claim against the attorney, the client or both. We will affirm the circuit court's judgment and assessment of attorney fees and costs as sanctions, so long as such fees and costs were reasonable and necessary. *See* ***Stern***, 185 Wis.2d at 234-35, 517 N.W.2d at 663.

Relying on the affidavits submitted by Baxter and Barnard, the circuit court concluded that fees in the amount of $12,785.66 were reasonable for Baxter's services and that $8,130 was reasonable for Barnard's services. By awarding reasonable attorney fees, the court implicitly held that the services of both attorneys were necessary to defend against the allegations contained in the complaint and amended complaint. Because Catherine, John and Carol Ann submitted no evidence to refute the reasonableness of the claimed fees, the court

properly exercised its discretion in relying solely on the affidavits submitted in support of the motion.

Frivolous Appeal.

The respondents each move for costs and fees as sanctions for filing a frivolous appeal under § 809.25(3), STATS. Because we conclude that Catherine, John and Carol Ann's claims were correctly adjudged as frivolous in the circuit court, the appeal is frivolous *per se* on appeal. *See* ***Riley***, 156 Wis.2d at 262, 456 N.W.2d at 624. Therefore, we remand to the circuit court to determine the amount of such fees and the persons who will be responsible for them, as a result of this appeal.

CONCLUSION

We conclude that Catherine, John and Carol Ann's complaint and amended complaint were frivolous under §§ 802.05(1)(a) and 814.025(3)(b), STATS., because Simonson and Merry failed to conduct a reasonable inquiry into the facts before signing the pleadings and because Catherine, John and Carol Ann knew or should have known that there were no facts which would establish the elements of their claims. However, the facts of record do not support the circuit court's conclusion that such actions were commenced solely for the purpose of harassment, in violation of § 814.025(3)(a). We affirm the circuit court's assessment of reasonable attorney fees and costs against Catherine, John and Carol Ann. Accordingly, we also conclude that Catherine, John and Carol Ann's appeal was frivolous and we remand for further proceedings consistent with this opinion.

By the Court.—Judgments and orders affirmed and cause remanded with directions.

Not recommended for publication in the official reports.