

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1226

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PENNY L. CLAUER,

PETITIONER,

**WESTERN WISCONSIN LEGAL SERVICES,
AND THOMAS J. KELLY,**

APPELLANTS,

V.

**LAFAYETTE COUNTY, AND LAFAYETTE COUNTY
DEPARTMENT OF HUMAN SERVICES,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Lafayette County:
DANIEL L. LaROCQUE, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Western Wisconsin Legal Services and Attorney Thomas Kelly (WWLS) appeal from an order of the circuit court dismissing their motion for sanctions under § 814.025, STATS., against Lafayette County and Lafayette County Department of Human Services (the County), and dismissing their motion for leave to amend the pleadings to include costs and attorney fees under § 802.05, STATS. The issues on appeal are whether WWLS waived the issue of sanctions by not raising the issue in its previous appeal to this court, and whether the circuit court erroneously exercised its discretion when it refused to allow WWLS to amend its pleadings. Because we conclude that WWLS waived the sanctions issue and the trial court properly exercised its discretion, we affirm.

This case has a long and complicated procedural history, much of which is not relevant to the issues on this appeal. We will briefly summarize those portions which are necessary to understand the issues here. In 1996, the circuit court, by the Honorable William D. Johnston, entered a judgment finding that two attorneys at WWLS had pursued frivolous claims against the County and awarded the County attorney fees. The circuit court found that both WWLS's initial action and its motion for relief from judgment contained frivolous claims. In the "wherefore" clause of the motion for relief from judgment, WWLS asked for sanctions against the County under § 814.025, STATS. WWLS did not pursue the sanctions issue any further at that time.

WWLS appealed to this court and we reversed the decision of the circuit court. After our decision was issued, WWLS went again to the circuit court, this time before the Honorable Daniel LaRocque, and moved the court for sanctions under § 814.025, STATS., against the County, and for leave to amend its

pleadings to include a claim for costs and fees under § 802.05, STATS.¹ Judge LaRocque denied both motions, concluding that WWLS had waived the issue of sanctions against the County because it had not pursued the issue before the circuit court or raised it on the first appeal to this court, and that the motion for leave to amend was not timely.

In its brief on this appeal, WWLS asserts first that it would have been futile for WWLS to pursue its request for sanctions in the circuit court because the circuit court clearly would have ruled against it. WWLS also asserts that the circuit court ruled on its request for sanctions when it rejected “totally and completely” WWLS’s claims that the County had engaged in any misconduct. WWLS does not explain why it did not then raise the issue on its first appeal to this court.

An issue not argued on appeal is waived. *See Reiman Associates v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981). We agree with Judge LaRocque’s determination that WWLS waived the issue of whether it was entitled to sanctions under § 814.025, STATS., by not arguing the issue when WWLS first appealed to this court.

Whether to allow an amendment to pleadings is within the trial court’s discretion. *Goff v. Seldera*, 202 Wis.2d 600, 616, 550 N.W.2d 144, 151 (Ct. App. 1996). We will sustain a discretionary act of the circuit court if that court examined the relevant facts, applied a proper standard of law, and used a

¹ For the sake of clarity, we will refer to the circuit court when referring to matters in the circuit court before our first decision, and to Judge LaRocque when referring to matters before the circuit court after our first decision.

demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W. 2d 175, 184 (1982).

WWLS moved to amend its pleadings to include a request for fees under § 802.05, STATS., after the hearing on its motions sanctions. Judge LaRocque found that the motion to amend the pleadings was not timely because § 802.09(1), STATS., which allows for the liberal amendment of pleadings, should not be used as a device to circumvent the waiver or abandonment of an issue. This is a conclusion which a reasonable judge could reach, and, therefore, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

