

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 1999

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. 99-0340-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**KATHRYN L. EDGETTE, BY HER GENERAL GUARDIANS,
MICHAEL EDGETTE AND JAN EDGETTE-CARTER,**

PLAINTIFFS-APPELLANTS,

ATTORNEY ROBERT A. MICH, JR.,

APPELLANT,

V.

**DANIEL KALSCHEUER, GERALD KALSCHEUER,
SHARON KALSCHEUER, AND GENERAL CASUALTY
COMPANY OF WISCONSIN,**

DEFENDANTS-RESPONDENTS,

PHYSICIANS PLUS INSURANCE CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County:
P. CHARLES JONES, Judge. *Reversed.*

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

PER CURIAM. Kathryn Edgette, by her guardians, and her attorney Robert Mich, Jr., appeal from an order on costs and fees in this personal injury action. The order awarded \$370 to the defendants, Daniel, Gerald and Sharon Kalscheuer, and General Casualty Company of Wisconsin, for their attorney's time spent on a bankruptcy issue related to this litigation. Because we conclude that Attorney Mich's position on the issue was not frivolous, and the trial court otherwise lacked authority to order the costs in question, we reverse.¹

Edgette sued Daniel Kalscheuer for injuries she suffered after falling off a car he was driving. Because Daniel was a minor at the time, she added claims against his parents, Sharon and Gerald, under § 343.15, STATS. Three weeks before trial, Sharon filed for bankruptcy. Her counsel, Ward Richter, wrote Mich to advise him of the automatic stay of proceedings under 11 U.S.C. § 362. Richter proposed a stipulated order dismissing Sharon and continuing on with the scheduled trial against the remaining defendants.

Mich responded with a letter to the trial court acknowledging the stay. Rather than dismissing Sharon, however, Mich proposed:

that we simply proceed to trial and remove Sharon Kalscheuer from the case caption on all documents going to the jury. I also propose that no mention be made of Ms. Kalscheuer or her bankruptcy during the trial. Because the stay is automatic, I do not believe that this court needs to enter any orders to proceed to trial against the remaining, nondebtor defendants.

¹ This is an expedited appeal under RULE 809.17, STATS.

In a letter to counsel, the trial court agreed to Mich's proposal and ordered that the litigation proceed accordingly.

However, the issue apparently was not settled by the trial court's letter, because the parties raised the issue again at a pretrial motion hearing. Attorney Richter argued that Sharon must either be dismissed or the entire proceedings stayed. Mich opposed dismissal because he believed Sharon was the only insured under the General Casualty policy, and General Casualty might subsequently argue nonliability for any damages awarded against Daniel or Gerald. He reiterated that the best approach was to proceed with the trial without mentioning Sharon's name to the jury. He offered to stipulate to dismissal if General Casualty stipulated that it would not subsequently attempt to avoid liability based on her dismissal. Richter stated that General Casualty was unquestionably liable in the case regardless of Sharon's status, but refused to stipulate to that effect. The trial court again determined that staying the proceedings against Sharon rather than dismissing her was the proper course, but suggested it might reconsider if the parties raised the matter at trial.

At trial the parties reiterated their positions. Although the defendants continued to argue that Mich should dismiss the action against Sharon, they declined to ask the trial court to order dismissal. The trial court resolved the dispute by telling Mich to proceed as he wished, and the trial proceeded without mention of or participation by Sharon.

The jury returned a verdict of no negligence against Daniel. In postverdict motions, the defendants moved for a determination that Mich's refusal to dismiss the action or petition the bankruptcy court to lift the automatic stay was frivolous, and claimed \$370 in costs and fees for litigating that issue. In its

decision, the trial court determined that even though Sharon's name was removed from the caption and no reference was made to her before the jury, she remained a party to the action. The court concluded that the automatic stay was therefore violated. Citing 11 U.S.C. § 362(h), the trial court awarded the defendants their \$370 claim. The trial court, however, did not make any determination of frivolousness.

Respondents are not entitled to costs and fees under § 814.025, STATS. Without evidence of bad faith, § 814.025(3)(b), STATS., requires a finding that the party's position 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." Neither the respondents nor the trial court offered authority for the proposition that Mich's resolution of the stay issue was frivolous under this standard, and we are aware of none. In fact, in both the trial court's initial written ruling and at the subsequent motion hearing, the court adopted the proposed resolution and ordered it implemented. Although the court later expressed reservations, it chose not to order dismissal and allowed the matter to proceed as planned. Under these circumstances, we cannot conclude that Mich proceeded without any reasonable basis in the law.²

The respondents also are not entitled to costs under 11 U.S.C. § 362(h), STATS. That section provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and in appropriate circumstances, may recover punitive

² Although the matter was argued in the trial court, the respondents never formally moved to stay the proceeding, or to dismiss Sharon. Our determination makes it unnecessary to determine whether their failure to do so constituted a waiver of their subsequent claim for frivolousness costs and fees.

damages.” Respondents cite no authority that would allow recovery of damages under this section by postverdict motion in a state court action. In *State v. Shaffer*, 56 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980), we said that we would not consider argument without citation to legal authority. We see no reason to depart from that rule now.

By the Court.—Order reversed.

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

