COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2958

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

LAWRENCE S. BUNDY AND MARGARET ANNE BUNDY,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

UNIVERSITY OF WISCONSIN-EAU CLAIRE, LARRY G. SCHNACK, SISSY BOUCHARD, PEGGY KLEIN, DEBRA KING, DOUG NEITZEL, JEFFREY LUTZ, ART LYONS, JEANINE ROSSOW, JEANINE THULL, KAREN WELCH AND STATE OF WISCONSIN,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Eau Claire County: THOMAS J. SAZAMA, Judge. *Affirmed in part; reversed in part.*

Before Cane, C.J., Hoover, P.J., and Dykman, J.

¶1 PER CURIAM. Doctor Lawrence Bundy and Margaret Anne Bundy (Bundy)[1] appeal a summary judgment dismissing their claims against Larry Schnack, the University of Wisconsin—Eau Claire chancellor.[2] Bundy contends that his claims are separate and distinct actions for misrepresentation independent of any employment contract, and are not based upon the breach of an employment contract. He also contends that the circuit court could not grant summary judgment because the law of the case prevented it from determining whether Bundy's misrepresentation claim was valid, and Schnack had waived reliance on the authorities he cited by failing to raise them earlier. We disagree and affirm the summary judgment.

¶2 Schnack cross-appeals the decision awarding costs and attorney fees to Bundy as a sanction for failing to schedule an earlier hearing for his summary judgment motion.[3] He contends that the circuit court erroneously exercised its

[1] For ease of discussion, we refer only to Lawrence Bundy's claim because Margaret's is derivative of Lawrence's.

[2] The claims involving defendants Bouchard, Klein, King, Neitzel, Lutz, Lyons, Rossow, Thull and Welch were dismissed in prior proceedings. Schnack informs us that the University of Wisconsin—Eau Claire and the State of Wisconsin are immune from suit by virtue of sovereign immunity. Bundy does not address this but merely refers to all the defendants. Because Bundy's arguments relate only to Schnack individually, we confine ourselves to those arguments.

[3] Bundy claims that the cross-appeal is premature because the court has not yet set the amount of attorney fees imposed on Schnack. We disagree. In ***B&B Invests. v. Mirro Corp.***, 147 Wis. 2d 675, 689-90, 434 N.W.2d 104 (Ct. App. 1988), we said:

> Once appellant has been granted an appeal, respondent may use the cross-appeal procedure and have nonfinal orders reviewed. ***Johnson v. Pearson Agri-Sys. Inc.***, 119 Wis. 2d 766, 782-83, 350 N.W.2d 127, 135 (1984). Since appellant has been granted an appeal as of right, this court has jurisdiction of the cross-appeal ….

Moreover, Schnack's challenge is not to the amount of attorney fees awarded, but to the propriety of imposing any sanction at all. Accordingly, we address Schnack's cross-appeal.

discretion by imposing the sanction on him. Because the circuit court provided no legal basis for imposing the sanction, we reverse the order for sanctions.

BACKGROUND

¶3 On May 2, 1994, Bundy was sent a formal notice that his fixed-term contract at the University of Wisconsin-Eau Claire would not be renewed for the 1995-96 school year. Bundy met with Schnack who purportedly advised him that (1) the notice of nonrenewal was "just a formality;" (2) Schnack would "find a place for [Bundy] at the university;" and (3) "Don't worry about it. I have no intention of getting rid of you at this university. There will always be a place for you here at the University of Wisconsin-Eau Claire." In spite of this assurance, Bundy's employment was terminated on September 30, 1995.

¶4 Bundy initiated this litigation, claiming that in reliance upon Schnack's misrepresentations,[4] he did not appeal the nonrenewal notice or seek alternative employment. The trial court granted Schnack's motion for summary judgment to dismiss Bundy's claims. Bundy appealed, and we reversed in an unpublished decision. *See* ***Bundy v. University of Wisconsin-Eau Claire***, No. 97-2735, unpublished slip op. (Wis. App. May 27, 1998). We held that summary judgment was not appropriate on Bundy's misrepresentation claims because there were factual issues as to whether Schnack's alleged statements could form the basis of a misrepresentation claim and whether Bundy's reliance

[4] The summons and complaint were filed in December 1995. The defendants removed the matter to federal court, where they obtained summary judgment in August 1996 dismissing the federal claims. The case was then remanded to the state court for resolution of the state claims.

was reasonable, and remanded for further proceedings. Schnack filed a petition for review with the supreme court, which was denied in August 1998.

¶5 On remand, the case was assigned to a new judge who scheduled it for trial in October 1999. On May 12, 1999, Schnack renewed his summary judgment motion with leave of the court. He did not request or obtain a hearing date, although he requested a briefing schedule. Schnack claimed that ***Tatge v. Chambers & Owen, Inc.***, 219 Wis. 2d 99, 579 N.W.2d 217 (1998), changed the law since we rendered our decision. In June, Bundy moved to strike Schnack's motion because (1) it was untimely; (2) this was Schnack's third summary judgment motion; and (3) ***Tatge*** did not apply and, even if it did, Schnack should have raised it previously. Bundy obtained a September hearing date for his motion.

¶6 Bundy's motion was not heard until September 22, 1999, shortly before the trial date. At that time, the court also heard argument on Schnack's motion. The court denied Bundy's motion to strike and granted Schnack's motion for summary judgment. It determined that the holding in ***Tatge*** barred Bundy's misrepresentation claim. Bundy subsequently requested that the court reconsider its decision and, alternatively, requested attorney fees to sanction Schnack for his untimely motion. The court denied Bundy's motion to reconsider but granted him attorney fees as sanctions because Schnack failed to have his motion heard earlier during the summer, prior to trial preparation.

APPEAL

1. APPLICATION OF ***TATGE***

¶7 The purpose of summary judgment is to determine whether the parties' legal dispute can be resolved without a trial. *See* ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). We review motions for summary judgment using the same methodology that the trial court used. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Because the methodology is so well known, we need not repeat it here except to state that summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* ***id.*** at 496-97.

¶8 Bundy directs us to no material issues of disputed fact. We thus initially examine whether ***Tatge*** bars Bundy's claim. If ***Tatge*** applies, it would bar Bundy's tort claim against Schnack for the alleged misrepresentation.

¶9 Tatge, an "at-will" employee, had objected to the nondisclosure/noncompete provisions of a "Management Agreement" that modified his job duties and compensation arrangements. *See* ***id.*** at 102-03. He refused to sign the agreement only after being assured that his refusal would not affect his employment. *See* ***id.*** at 103. Ultimately, however, he was fired for refusing to sign. *See* ***id.*** He brought several claims against his employer and prevailed at a jury trial on his tort claim of negligent misrepresentation. *See* ***id.*** at 104-05. On post-verdict motions, however, the trial court dismissed his claim. *See* ***id.*** at 105. The court of appeals affirmed, holding in relevant part that a breach of an employment contract is not actionable in tort for misrepresentation. *See* ***Tatge v. Chambers & Owen, Inc.***, 210 Wis. 2d 51, 61, 565 N.W.2d 150 (Ct.

App. 1997). The supreme court accepted Tatge's petition for review. Before that court, Tatge challenged not only the dismissal of the negligent misrepresentation claim, but also the trial court's dismissal on summary judgment of his wrongful discharge claim. *See* ***Tatge***, 219 Wis. 2d at 101, 105.

¶10 Tatge contended that the supreme court should "address his misrepresentation claim under tort law—not as a wrongful discharge or breach of contract claim under contract law." ***Id.*** at 107. As the supreme court explained, Tatge "advocate[d] this approach by arguing that employers have an independent duty to their employees to refrain from misrepresentation." ***Id.*** Rejecting Tatge's argument, the supreme court declared, "[w]e decline to give our blessing to such an irreverent marriage of tort and contract law." ***Id.*** The court reiterated that there "must be a duty existing independently of the performance of the contract for a cause of action in tort to exist." ***Id.*** (quoting ***Landwehr v. Citizens Trust Co.***, 110 Wis. 2d 716, 723, 329 N.W.2d 411 (1983)). Moreover, in ***Tatge***, the supreme court held that "[b]ecause it is tied inextricably to his termination from employment, Tatge's misrepresentation claim was properly dismissed by the circuit court." ***Id.*** at 108.

¶11 The ***Tatge*** court determined that an alleged misrepresentation to the effect that an at-will employee's job was ongoing and was terminable only for cause was not actionable in tort. The supreme court determined that no duty to

refrain from misrepresentation exists independent of the performance of an at-will employment contract.[5] *See* ***id.***

¶12 Bundy claims that ***Tatge*** does not apply. He distinguishes his misrepresentation claim from those made in ***Tatge*** on the grounds that his claim is not based on a breach of contract, but on Schnack's misrepresentations that the nonrenewal letter was merely a formality and he need not worry about it. Thus, Bundy posits, his claim is not based upon improper contract performance. He also asserts that his damages are not breach of contract damages. We disagree.

¶13 Bundy's misrepresentation claims arise out of his employment contract as a matter of law. The misrepresentation occurred during his employment and allegedly induced him to forego looking for other employment opportunities and pursuing his contract remedies. Bundy does not distinguish an assurance that a nonrenewal notice is not what it appears to be and a promise of continuing employment. We discern no difference between the two. Although Bundy claims to distinguish ***Tatge***, he recognizes his misrepresentation claim is premised upon an employer's duty, independent of the contract, not to lie to employees. This contention was expressly rejected in ***Tatge***, 219 Wis. 2d at 108.

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[5] Our decision in ***Mackenzie v. Miller Brewing Co.***, 2000 WI App 48, 234 Wis. 2d 1, 608 N.W.2d 331 (petition for review pending), clarified that ***Tatge v. Chambers & Owen, Inc.***, 219 Wis. 2d 99, 579 N.W.2d 217 (1998), precludes an employee's tort claim for alleged misrepresentation that allegedly induced continuation of employment. *See* ***Mackenzie***, 2000 WI App at ¶26. The employee's remedies are limited to whatever contract rights there are between the parties.

Mackenzie brought a claim against his employer for, among other things, intentional misrepresentation by failing to inform him that his position had been downgraded and misrepresenting that his grade level had not been affected by a reorganization. *See* ***id.*** at ¶19. Mackenzie attempted to distinguish ***Tatge*** on the grounds that it applied only to claims dependent on a contract claim of wrongful termination. *See* ***Mackenzie,*** 2000 WI App at ¶25. We rejected the argument, concluding that ***Tatge*** precludes an employee's tort claim against an employer for alleged misrepresentation that allegedly induces continuation of employment. *See* ***id.***

¶14 Moreover, Bundy's claimed damages are entirely dependent upon the termination of his contract. The promise of continuing employment was rendered false only when Bundy actually lost his job. Had his employment not been terminated, he would have no damages. Thus, his misrepresentation claim is tied inextricably to his termination from employment. Accordingly, under ***Tatge***, Bundy's misrepresentation claims are not actionable in tort.[6] The circuit court's summary judgment was appropriate.

2. LAW OF THE CASE AND WAIVER

¶15 Bundy claims that the circuit court should not have considered Schnack's renewed summary judgment motion. He asserts that our earlier decision concluding that there were outstanding material issues of fact precluding summary judgment on his misrepresentation cause of action was the law of the case. Because Schnack did not submit additional facts clarifying or resolving the disputed factual issues, Bundy contends it was inappropriate for the circuit court to grant summary judgment in favor of Schnack. He also claims that ***Tatge*****,** decided June 19, 1998, did not change the law applicable to employer's representations to at-will employees. He asserts that the principle that breach of an at-will employment contract is not actionable in tort dates back to 1983.[7]

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[6] Bundy complains that our holding should be avoided on the public policy ground that it encourages an employer to lie to its employees. We rejected this argument in ***Mackenzie***, 2000 WI App at ¶¶33-43.

[7] Bundy cites us to ***Brockmeyer v. Dun & Bradstreet***, 113 Wis. 2d 561, 575, 335 N.W.2d 834 (1983) (wrongful discharge in violation of public policy is a viable cause of action in contract, not tort); ***Dvorak v. Pluswood Wis., Inc.***, 121 Wis. 2d 218, 219, 358 N.W.2d 544 (Ct. App. 1984) (bad faith breach of an employment contract cannot be brought in tort); and ***Landwher v. Citizens Trust Co.,*** 110 Wis. 2d 716, 717, 329 N.W.2d 411 (1983) (testator's failure to properly execute his will in violation of contract was not actionable in tort). We simply note that if ***Tatge***'s principles were as clearly enunciated in those earlier decisions as Bundy asserts, a case could be made that Bundy's current claim is frivolous.

¶16 The law of the case doctrine generally prohibits relitigation on remand of a question of law decided on appeal. *See* ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 470 n.1, 543 N.W.2d 277 (1996). The rule is not inexorable and requires the exercise of judicial discretion. *See* ***State v. Brady***, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986). The law of the case may be disregarded if there has been a change in the controlling law applicable to the case. *See* ***id.*** at 447-48.

¶17 Intermixed with Bundy's law of the case argument is his contention that Schnack waived any right to rely on ***Tatge*** by not raising the issue of its application earlier in the proceedings. He contends that the supreme court's reasoning and holding on the misrepresentation issue in ***Tatge*** is nearly identical to the earlier court of appeals decision, which was published on March 13, 1997, and that Schnack inexcusably failed to raise its application until May 1999.

¶18 We conclude that it was appropriate for the circuit court, in its discretion, to revisit the summary judgment decision based upon the supreme court's decision in ***Tatge***. Schnack was unable to raise ***Tatge*** in the earlier summary judgment because the supreme court did not decide it until after the briefing had been completed in both the circuit court and court of appeals.

¶19 More importantly, contrary to Bundy's contentions, our decision in ***Tatge v. Chambers & Owen, Inc.***, 210 Wis. 2d 51, 565 N.W.2d 150 (Ct. App. 1997), did not address the question of an employer's duty to refrain from misrepresentation in the context of an at-will employment relationship. *See* ***id.*** at 57-61. The supreme court answered this question, concluding that there is no duty to refrain from misrepresentation existing independent of the performance of an at-will employment contract. *See* ***Tatge***, 219 Wis. 2d at 108. No previous case

had specifically addressed this issue. Thus, the supreme court's decision in ***Tatge*** extended and clarified the law regarding the remedies available for misrepresentations occurring during the employment relationship. Therefore, there was a change in the law authorizing the circuit court to deviate from the law of the case. For the same reasons, we conclude that Schnack did not waive reliance on ***Tatge*** by failing to raise it earlier.

3. CROSS-APPEAL: ATTORNEY FEES

¶20 The award of sanctions is a matter of circuit court discretion. *See* ***Modica v. Verhulst***, 195 Wis. 2d 633, 650, 536 N.W.2d 466 (Ct. App. 1995). We will sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***id.*** The circuit court has statutory and inherent authority to impose sanctions for the failure to prosecute, failure to comply with procedural statutes or rules and for failing to obey court orders. *See* ***Schaefer v. Northern Assur. Co.,*** 182 Wis. 2d 148, 162, 513 N.W.2d 615 (Ct. App. 1994).

¶21 On cross-appeal, Schnack contends that the court erroneously exercised its discretion by imposing sanctions on him. He asserts that the court failed to base its decision on either the facts of record or the applicable law. Schnack claims that the court did not conclude that he had violated any statute, court order, or rule of procedure but instead sanctioned him for failing to have his renewed motion for summary judgment heard earlier than several weeks before trial. He claims that he had no obligation to obtain a hearing, and that the court's and counsels' calendars, not his negligence or misconduct, resulted in the delay.

¶22 The trial court based its decision to impose sanctions on Schnack for his failure to have his renewed summary judgment motion heard more promptly after it was filed. The court said that it received the motion in May and that

> I have been troubled, however, all summer long by the fact that I heard nothing from either attorney, either side in this matter all summer long until perhaps mid to late August, when the trial date was drawing near, and people began to wonder or become concerned about the motion. I think that the motion could have been scheduled sometime in June or July, perhaps even early August. I think that a great deal of cost and effort may very well have been avoided.
>
> I think costs are warranted in this situation, and I will grant that part of the motion ….

¶23 Schnack complains that he had no obligation to request a hearing on his renewed motion for summary judgment. He contends that nothing in WIS. STAT. § 802.08(2) governing summary judgment motions requires a party moving for summary judgment to schedule a hearing on his motion.[8] Bundy does not refute or otherwise respond to Schnack's contention that he had no obligation to request a hearing. Therefore, the contention is deemed admitted. *See* ***Charolais***

[8] WISCONSIN STAT. § 802.08(2) provides:

> Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages

Breeding Ranches, Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

¶24 Independently of WIS. STAT. § 802.08, no local rules required a hearing on a summary judgment motion. Judge Cameron, who had decided the earlier summary judgment motion, did not schedule a hearing and decided that motion on briefs. Accordingly, Schnack asserts that he believed the local practice did not require a hearing to be scheduled on his summary judgment motion. We agree with Schnack that under the circumstances presented, no such obligation existed.

¶25 Moreover, the facts of record do not support the court's sanction. When Schnack renewed his summary judgment motion in May, he requested a briefing schedule. No schedule was established. In June, Bundy moved to strike Schnack's motion. Bundy's papers reflected a September 3 hearing date. Bundy's hearing was subsequently rescheduled to September 22, at which time Schnack's motion was also heard. Bundy conceded that the court was not able to schedule a motion hearing until September 22. The delay was not due to misconduct or negligence on Schnack's part but, instead, to a combination of factors including hearing date availability and counsels' schedules.

¶26 Because the circuit court presumed that Schnack had an obligation that the law did not in fact impose upon him and, further, because it failed to consider relevant facts of record, we conclude that it erred by imposing sanctions upon Schnack. Accordingly, we affirm the summary judgment in favor of Schnack, but reverse the order imposing attorney fees on Schnack as a sanction.

By the Court.—Judgment affirmed; order reversed.

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