

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP911-FT

Cir. Ct. No. 2004CV183

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PELL LAKE SANITARY DISTRICT NO. 1,

PLAINTIFF-RESPONDENT,

V.

VICKI VIEW AND PHILLIP PETERSON,

DEFENDANTS-APPELLANTS,

AMY TROVILLION AND KEITH SCHRAMM,

DEFENDANTS.

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ This appeal presents only one issue for our review: Are Vicki View and Phillip Peterson (the Petersons)² entitled to recover reasonable costs and attorneys’ fees incurred in defense of an action brought by the Pell Lake Sanitary District No. 1 to enforce its ordinances, pursuant to WIS. STAT. § 802.05? We hold they are not and affirm the trial court’s denial of the Petersons’ motion.

¶2 The pertinent facts in this case are brief. In February 2004, the Sanitary District filed an Ordinance Complaint and Affidavit against the Petersons alleging that they had failed to “make the required abandonments” of their septic tank and private well in violation of “sec. 3.7(d) of Ordinance No 97-1 and Section 4.0 of Ordinance No. 99-1 of Pell Lake Sanitary District No. 1.” The alleged violation, if proven, would have subjected the Petersons to “a forfeiture of \$100 to \$1,000 per month commencing with the first month of violation.” This complaint was one of many similar complaints the Sanitary District had filed against property owners. The Petersons brought a successful summary judgment motion, which resulted in dismissal of the ordinance complaint.

¶3 Pursuant to WIS. STAT. § 802.05, the Petersons then moved the trial court for an order requiring the Sanitary District to pay the Petersons’ reasonable costs, expenses and attorneys’ fees. The trial court determined that it did not have the authority to award the requested costs and attorneys’ fees under § 802.05 in a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. Because this case was decided based on the application of established precedent, it does not meet the criteria for publication set forth in WIS. STAT. RULE 809.23(1). Therefore, we will deny the appellants’ motion to convert the case to a three-judge panel.

² Vicki View is referred to as Vicki Peterson in the appellants’ brief-in-chief.

prosecution for a violation of a town sanitary district ordinance. In support of its holding, the court cited *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 293 N.W.2d 522 (1980), where our supreme court held that WIS. STAT. § 814.025, which also permits courts to award costs and attorney fees against a party pursuing frivolous claims, does not apply to quasi-criminal actions like municipal ordinance violations where the decision to proceed is based on prosecutorial discretion. *See Wiskia*, 97 Wis. 2d at 481-82. The Petersons now appeal.

¶4 The Petersons' appeal requires us to interpret and apply WIS. STAT. § 802.05. Statutory interpretation and the application of a statute to specific facts are questions of law that we review de novo. *Garcia v. Mazda Motor of Am., Inc.*, 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365.

¶5 The Petersons contest the trial court's application of *Wiskia* to their claim for costs and attorneys' fees under WIS. STAT. § 802.05. They argue the application of that case is limited to claims against municipalities for costs and attorney fees that are brought under WIS. STAT. § 814.025.

¶6 In *Wiskia*, our supreme court stated:

[I]t is well established that prosecuting attorneys and their assistants, whether a district attorney in a criminal action or a city attorney in a quasi-criminal action (an ordinance violation) must necessarily be clothed with broad discretion in deciding whether to charge a defendant or not. We believe that the application of [WIS. STAT. § 814.025] allowing defendants to recover costs for frivolous claims in quasi-criminal ordinance violations would be inconsistent with our reasoning in prior case law allowing a prosecutor to exercise his [or her] independent judgment and discretion. If we were to allow the recovery of monetary sanctions in an action subsequently found to be frivolous, we would adversely inhibit the prosecutor's free exercise of discretion and interfere with responsible and effective enforcement of the laws. Therefore, we hold that [§ 814.025], as enacted, is not applicable in quasi-criminal

actions (ordinance violations) where the decision to proceed with the action is based on prosecutorial discretion.

Wiskia, 97 Wis. 2d at 481-82. We hold that *Wiskia*'s prohibition against allowing defendants to recover costs and attorney fees under WIS. STAT. § 814.025 in quasi-criminal actions, like ordinance violations, applies with equal force to claims for costs and attorney fees brought under WIS. STAT. § 802.05 in quasi-criminal actions. Section 802.05 is in pari materia with § 814.025. *Kelly v. Clark*, 192 Wis. 2d 633, 651 n.7, 531 N.W.2d 455 (Ct. App. 1995); *see also Wisconsin Chiropractic Ass'n v. State of Wis. Chiropractic Examining Bd.*, 2004 WI App 30, ¶17, 269 Wis. 2d 837, 676 N.W.2d 580. It is clear that the legislature intended for §§ 802.05 and 814.025 to work together to deter the filing of frivolous claims. *Belich v. Szymaszek*, 224 Wis. 2d 419, 428, 592 N.W.2d 254 (Ct. App. 1999). As with § 814.025, if we were to allow the recovery of monetary sanctions pursuant to § 802.05 in a quasi-criminal action subsequently found to be frivolous, we would “adversely inhibit the prosecutor’s free exercise of discretion and interfere with responsible and effective enforcement of the laws.”³ *See Wiskia*, 97 Wis. 2d at 482.

¶7 Here, the Sanitary District filed a claim against the Petersons alleging a violation of one of its ordinances—a quasi-criminal action in which the failure of the Petersons to appear could have resulted in their arrest and which

³ We note that our supreme court has issued an order repealing and recreating WIS. STAT. § 802.05 and repealing WIS. STAT. § 814.025. S. CT. ORDER, 2005 WI 38 (eff. July 1, 2005). These changes do not impact our decision.

required them to enter a plea.⁴ *See id.* at 483. The Petersons therefore are not entitled to costs and attorneys' fees under WIS. STAT. § 802.05.⁵

By the Court.—Order affirmed.

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

⁴ The Petersons seem to suggest that the action is purely civil in nature. *See* WIS. STAT. § 66.0114(1). However, despite the language in § 66.0114 and its predecessors, we have held that, for purposes of WIS. STAT. § 814.025, a forfeiture action on behalf of a municipality is a hybrid proceeding and as such it has the characteristics of both a criminal and civil action; therefore, it must be considered quasi-criminal. *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 483, 293 N.W.2d 522 (1980) (citing *City of Milwaukee v. Cohen*, 57 Wis. 2d 38, 203 N.W.2d 633 (1973)). Indeed, when charged with the municipal ordinance violation, the “defendant is required as in criminal cases to enter a plea of guilty, not guilty or nolo contendere.” *Wiskia*, 97 Wis. 2d at 483 (citation omitted); *see also* § 66.0114(1). For the reasons set forth in the text of the opinion, we apply the *Wiskia* court’s characterization of municipal ordinance violations for purposes of § 814.025 to WIS. STAT. § 802.05.

⁵ Finally, the Sanitary District argues that this appeal is frivolous and requests additional costs, expenses and attorney’s fees. WIS. STAT. RULE 809.25(3). While we reject the Petersons’ arguments, we cannot conclude that they were without any reasonable basis in law or equity and could not be supported by a good-faith argument for extension, modification or reversal of existing law. Therefore, the court will only tax the ordinary costs against the appellant, provided under RULE 809.25.

