COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 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. 2004AP1178 **Cir. Ct. No. 2001CV123**

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

IN RE THE JUDGMENT DEBTOR IN WILLIAM E. DEUTSCH, JR. V. MARGARET L. KLINE F/K/A MARGARET L. DEUTSCH:

ALAN D. EISENBERG,

APPELLANT,

V.

WILLIAM E. DEUTSCH, JR. AND MARGARET L. KLINE F/K/A MARGARET L. DEUTSCH,

RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: LAURENCE C. GRAM, Reserve Judge. *Affirmed and cause remanded with directions.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Attorney Alan Eisenberg appeals an order denying his motion to reconsider a judgment awarding Margaret Kline attorney's fees and costs. The issue is whether the circuit court properly awarded attorney's fees to Kline as a sanction against Eisenberg for commencing a frivolous lawsuit. We affirm.

¶2 WISCONSIN STAT. §§ 802.05 and 814.025 (2003-04)[1] work together to sanction those who bring frivolous claims. *See* ***Belich v. Szymaszek***, 224 Wis. 2d 419, 428, 592 N.W.2d 254 (Ct. App. 1999). Sanctions may be imposed pursuant to § 802.05 for *commencing* a frivolous action if: (1) the pleading was not submitted for a proper purpose; (2) the pleading was not well grounded in fact; or (3) the pleading was not warranted by existing law or a good faith argument for a change in the law. *See* ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 547-48, 597 N.W.2d 744 (1999). Section 814.025 authorizes the imposition of sanctions for either commencing or *continuing* a frivolous action. ***Jandrt***, 227 Wis. 2d at 547.

¶3 Our inquiry focuses primarily on whether the pleadings in this case were well grounded in fact. *See* WIS. STAT. § 802.05. To be "well grounded in fact," a pleading must be based on a reasonable inquiry into the factual basis for the action. *See* ***Belich***, 224 Wis. 2d at 430. The court should apply an "objective standard when determining whether an attorney made a reasonable inquiry into the facts of a case," considering:

> "whether the [attorney] had sufficient time for investigation; the extent to which the attorney had to rely

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> on his or her client for the factual foundation underlying the pleading, motion, or other paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation; and whether discovery would have been beneficial to the development of the underlying facts."

Jandrt, 227 Wis. 2d at 550 (citation omitted). We will uphold factual findings on what pre-filing investigation was done unless those findings are clearly erroneous. ***Wisconsin Chiropractic Ass'n v. State Chiropractic Examining Bd.***, 2004 WI App 30, ¶16, 269 Wis. 2d 837, 676 N.W.2d 580. How much investigation *should have been done* is committed to the circuit court's discretion "because the amount of research necessary to constitute 'reasonable inquiry' may vary, depending on such things as the particular issue involved and the stakes of the case." ***Jandrt***, 227 Wis. 2d at 548-49 (citation omitted).

¶4 We conclude that the circuit court properly exercised its discretion in concluding that Eisenberg failed to adequately investigate the facts underlying the defamation claim he brought on behalf of William Deutsch against Kline. One of the elements of defamation is that the allegedly defamatory statement "tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." ***Mach v. Allison***, 2003 WI App 11, ¶12, 259 Wis. 2d 686, 656 N.W.2d 766 (Ct. App. 2002). The circuit court found that all of Deutsch's witnesses named pursuant to the scheduling order testified by deposition that their opinions of Deutsch had not been lowered by Kline's accusations. The circuit court found that, before he filed the case, Eisenberg did not interview any of the witnesses he intended to call to support his case even though the witnesses were available to him. The circuit court also found that Eisenberg conducted no independent investigation as to the defamation claim and did not speak to anyone in the

community to ascertain what Deutsch's reputation was prior to the criminal case and whether it was damaged by Kline's accusations.

¶5 It is well established that an attorney is not allowed to rely on the word of his client, but rather must perform some type of investigation to determine the accuracy of his client's assertions. *See* ***Riley v. Isaacson***, 156 Wis. 2d 249, 258-59, 456 N.W.2d 619 (Ct. App. 1990). Eisenberg was not up against a deadline, such as the running of a statute of limitations, which deprived him of the time necessary to determine whether a cause of action against Kline was meritorious. *See* ***Jandrt***, 227 Wis. 2d at 550. Because the circuit court's findings show that there was no factual basis for the damages element of the defamation claim, the court properly exercised its discretion in concluding that the defamation claim was not "well grounded in fact" made after "reasonable inquiry," and was thus frivolously brought under WIS. STAT. § 802.05.

¶6 We turn next to the malicious prosecution claim that Eisenberg brought on behalf of Deutsch against Kline. A successful claim of malicious prosecution must show that the plaintiff suffered injury or damage as a result of the prosecution. ***Strid v. Converse***, 111 Wis. 2d 418, 423, 331 N.W.2d 350 (1983). As it did with the defamation claim, the circuit court found that, prior to filing the claim, Eisenberg did not inquire into the factual underpinning for the claim of malicious prosecution. Based on this finding, the circuit court properly exercised its discretion in concluding that the malicious prosecution claim was not

well grounded in fact based on a reasonable inquiry, and was thus frivolously brought under WIS. STAT. § 802.05.[2]

¶7 Finally, we turn to the false imprisonment claim brought by Eisenberg. The circuit court found that the claim was frivolously brought and dismissed it for failure to state a claim. As explained by the circuit court, "[f]alse imprisonment is an intentional restraint that is without legal excuse or just cause by one person of the physical liberty of another," but "[e]ven liberal construction of the pleadings [does] not result in any reasonable inference that [Kline] falsely imprisoned [Deutsch]." In concluding that the claim was frivolously brought, the circuit court ruled that Eisenberg knew or should have known that the claim was not supportable. Based on our reading of the complaint, we agree that Eisenberg knew or should have known that the claim was not supportable because there was no allegation that Kline physically restrained Deutsch in any manner. *See* WIS. STAT. § 814.025(3)(b); ***Juneau County v. Courthouse Employees, Local 1312***, 221 Wis. 2d 630, 639, 585 N.W.2d 587 (1998) (whether an attorney knew or should have known that the position taken was frivolous under § 814.025 is a question of law determined by what a reasonable attorney would have known or should have known under the same or similar circumstances). The circuit court properly concluded that the false imprisonment claim was frivolous.[3]

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[2] We note that the circuit court ruled earlier in the case that Deutsch had not stated a claim for malicious prosecution, but allowed that Deutsch had stated a "skeletal" claim for abuse of process. Regardless of whether the claim was for malicious prosecution or for abuse of process, however, the claim was frivolously brought because there was no factual basis for the damages element. *See* ***Maniaci v. Marquette University***, 50 Wis. 2d 287, 299, 184 N.W.2d 168 (1971) (to show a claim of abuse of process, the plaintiff must show that he or she suffered pecuniary loss).

[3] The circuit court based its award of attorney fees for frivolousness on both WIS. STAT. §§ 802.05 and 814.025 on several alternative rationales. We do not discuss all of the grounds for (continued)

¶8 Kline moves for attorney's fees and costs on appeal. Where, as here, an appeal involves only a challenge to a circuit court finding that a lawsuit is frivolous, and we affirm that finding, the appeal is *per se* frivolous under WIS. STAT. § 802.05. *See* ***Riley***, 156 Wis. 2d at 262. We are mindful that in ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621, the supreme court held that "parties wishing to raise frivolousness must do so by making a separate motion to the court" and that Kline did not file a separate motion. But a close reading of ***Howell*** reveals that its notice requirement applies to appeals declared frivolous under WIS. STAT. RULE 809.25, not under § 802.05. ***Howell*** briefly discusses ***Riley*** and makes clear that it is not addressing the applicability of the ***Riley*** § 802.05 rule because, in ***Howell***, the court of appeals itself had not relied on ***Riley***, but had instead "determined that the appeal itself was frivolous." ***Howell***, 282 Wis. 2d 130, ¶¶20-21. In addition, we observe that, in a pure ***Riley*** situation, the separate notice required by ***Howell*** would always be pointless. First, in a pure ***Riley*** situation, there is no distinction between briefing the merits of the appeal—i.e., whether the circuit court correctly found the lawsuit frivolous—and briefing the ***Riley*** § 802.05 frivolousness issue—i.e., whether the circuit court correctly found the lawsuit frivolous. Second, ***Riley*** itself puts litigants on notice that if they appeal a circuit court ruling that a lawsuit is frivolous, and an appellate court affirms the circuit court, the appeal is *per se* frivolous if that is the only issue on appeal. We therefore remand to the circuit court to determine and award Kline reasonable appellate attorney's fees and costs.

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the circuit court's decision because the issues we have addressed provide a sufficient basis for affirming the circuit court's award.

By the Court.—Order affirmed and cause remanded with directions.

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