COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1867 **Cir. Ct. No. 2002CV192**

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

LISA LARSON,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

GUGGER CONSTRUCTION, INC., AND JOHN E. GUGGER,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS-CROSS-RESPONDENTS,

V.

DAVID C. WILLIAMS,

CROSS-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and CROSS-APPEALS from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Judgment reversed; order affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 DEININGER, J. Lisa Larson contracted with Gugger Construction, Inc., to remodel her home. She appeals a judgment that dismissed her breach of contract claim against Gugger and awarded Gugger damages on its counterclaim against her for the balance owed on the construction contract. Larson claims the circuit court erred in concluding on summary judgment that Gugger had substantially completed improvements to her home by the date agreed upon in a settlement agreement the parties had negotiated. Gugger cross-appeals the judgment insofar as it declares invalid the construction lien it filed on Larson's home. Finally, both Gugger and David Williams, Larson's attorney, cross-appeal a separate order that sanctioned Williams for maintaining a frivolous claim.

¶2 We reverse the circuit court's judgment dismissing Larson's breach of contract claim and awarding Gugger damages because we conclude there are material facts in dispute that preclude summary judgment. We also conclude that, if Gugger again prevails on remand, its construction lien is not invalid because of the failure of its notice of lien rights to comply with a statutory requirement for eight-point bold type. Finally, we reverse the circuit court's order sanctioning Attorney Williams for frivolously maintaining a theft-by-contractor claim against Gugger, and we affirm the court's denial of Gugger's request for additional sanctions against Williams based on a claim for administrative code violations alleged in Larson's complaint.

BACKGROUND

¶3 Lisa Larson, a self-employed registered nurse who cares for physically disabled persons in her home, hired Gugger Construction, a company owned by John Gugger, to remodel her home.[1] The project included remodeling the basement, kitchen, dining room, hallway, garage, and one bedroom and installing a handicapped-accessible bathroom, at a total cost of $260,573. According to the contract, the project was to start on or about May 21, 2001 and be substantially completed on or about August 17, 2001. Gugger did not begin the project until June 2001 and did not substantially complete it by the agreed upon date. Gugger attributed the delay to adverse weather conditions, inefficient planning and Larson's failure to make timely selections of certain components to be installed in the house.

¶4 By December 2001, Larson became unhappy with the lack of progress on the project. To address her concerns, the parties met on December 19, 2001, and they signed a handwritten "Settlement Agreement & Release" that, among other things, granted Larson certain credits against the balance she owed to Gugger, specified certain tasks Gugger was to perform and called for "substantial completion of the project" to be accomplished two days later on December 21st. In return, Larson agreed to waive any claims she might have against Gugger for delays or deficient performance of the contract, as well as claims for any alleged

[1] Larson named both John Gugger and his company as defendants in this action. We will generally refer in the remainder of our opinion to both Gugger Construction, Inc. and John Gugger as "Gugger." Whether the reference is to the individual or his corporation should be clear from context, and if it is not, the distinction is not material to our analysis.

violations of WIS. ADMIN. CODE ch. ATCP 110, which regulates home improvement contracts.

¶5 Larson's attorney sent Gugger a letter in late January 2002, informing Gugger that Larson had "rescinded" the December 19th settlement agreement because Gugger had breached it. Accompanying the letter was a list, prepared by an architect retained by Larson, of incomplete or deficient items that, in the architect's opinion, prevented the project from being deemed "substantially completed" on December 21st, as called for in the parties' settlement agreement. In April, a different attorney, David Williams, filed a complaint on Larson's behalf alleging that Gugger violated WIS. ADMIN. CODE ch. ATCP 110 and breached the parties' construction contract. The complaint also pled claims for theft by contractor under WIS. STAT. § 779.02(5), property damage under WIS. STAT. § 895.80 and slander of title resulting from Gugger's filing of a construction lien against Larson's property. Larson's complaint made no mention of the December 19th settlement agreement. Gugger moved for summary judgment, asserting that the parties had settled their dispute and that Gugger had complied with the settlement agreement.

¶6 Following briefing and argument on the motion, the circuit court issued a written opinion and thereafter entered an "Order for Judgment" that did all of the following: granted Gugger's summary judgment motion and awarded Gugger damages in the amount of $69,403; denied Larson's "cross-motion for summary judgment"; directed that Gugger's lien foreclosure claim could proceed; and deferred action on Gugger's claim for frivolous action costs and fees. The court later concluded that the lien notice language in Gugger's contract with Larson did not comply with statutory requirements for bolding and eight-point type, and the court therefore declared Gugger's construction lien "invalid as a

matter of law." The court subsequently entered a judgment incorporating the foregoing decisions, which Larson appeals and Gugger cross-appeals.

¶7 In proceedings on Gugger's motion for frivolous action fees and costs, the circuit court imposed a $500 monetary sanction against Attorney Williams for violating WIS. STAT. § 802.05 (2003-04)[2] by including Larson's theft by contractor claim in the complaint. The court denied Gugger's request for sanctions regarding Larson's claim for violations of WIS. ADMIN. CODE ch. ATCP 110. Both Gugger and Attorney Williams cross-appeal the order imposing the $500 sanction on Williams.

ANALYSIS

I. Gugger's Waiver Arguments

¶8 We begin with the court's order on summary judgment that dismissed Larson 's claims against Gugger and awarded Gugger some $69,000 for work it performed on the Larson project. Larson claims there were material facts in dispute that preclude summary judgment in favor of either party on the present record. She specifically cites factual disputes regarding what the parties meant by "substantial completion" in their December 19th settlement agreement, whether Gugger accomplished "substantial completion" by the parties' agreed upon deadline and whether Gugger materially breached the construction contract. Before we consider the merits of Larson's claims, however, we must address

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

Gugger's contention that Larson either waived or should be estopped from asserting the existence of factual disputes that preclude summary judgment.

¶9 Gugger first asserts that Larson cross-moved for summary judgment. This is not true, at least in the formal sense. We find no written motion for summary judgment from Larson in the record prior to the court's hearing on Gugger's summary judgment motion. *See* WIS. STAT. § 802.08(2). Larson responded to Gugger's summary judgment motion with a brief in opposition, accompanied by several affidavits. Her first argument in her brief is that "there are numerous genuine issues of material fact." Larson, however, does say at one point in her argument that "[i]f anyone is entitled to summary judgment on the issue of the Settlement Agreement & Release, it is Lisa Larson," and, in the conclusion of the brief, she repeats that, "if anything," it was she who was entitled to summary judgment on the issue of whether Gugger had complied with the terms of the parties' December 19th settlement agreement. We conclude, however, that these rhetorical flourishes in her brief fall short of being a "cross-motion for summary judgment."

¶10 Thus, Gugger's claim that Larson moved for summary judgment must rise or fall on what transpired at the hearing on Gugger's motion. Although oral motions for summary judgment are disfavored because they do not meet statutory requirements for filing, service and affidavits in support, *see* WIS. STAT. § 802.08(2) and (3), a court may nevertheless grant an oral request for summary judgment when made by a party opposing another party's motion. *See* § 802.08(6); ***Homa v. East Towne Ford, Inc.***, 125 Wis. 2d 73, 77 n.6, 370 N.W.2d 592 (Ct. App. 1985). The court noted early in the hearing on Gugger's motion that there appeared to be "material issues in dispute as to whether a material breach occurred." The court also noted several times that "both sides

have asked for summary judgment," although the court does not state the basis for its conclusion that Larson had also moved for summary judgment.

¶11 During an extended colloquy among the court and counsel, the court reiterated several times its belief that there were material issues of fact that "ought to be decided by a finder of fact." As the summary judgment hearing drew to a close, the court inquired of counsel for both parties whether they believed "there should be a jury on it" or whether "it shapes up … well in summary judgment." Gugger's counsel maintained the court could decide the issues on summary judgment but Larson's counsel questioned whether the court could determine "whether there was substantial completion." Moments later, however, Larson's counsel said, "I think the Court could do it based on this record." The court responded that it would attempt to decide the issues based on the record before it but continued to express concern that "additional evidence" was necessary, suggesting a trial to the court, or, if a party desired, a jury trial.

¶12 In comments that foreshadow the present dispute on appeal, the court said:

> I've got what I've got, and if I wanted to I think it would be ironclad for me to say, I'm going to decide this thing and here is the way I decide it and nobody could argue to the Court of Appeals that I couldn't do what I did, they could only argue to the Court of Appeals that there is no evidence in the record upon which I can draw the conclusions that I drew; that's all they can do.
>
> If the parties said, okay, that's where—we're living with that, that's what I will do. If they say we think additional evidence might benefit a finder of fact and that ought to be [a trial] to the Court …, we'll set something up for a day in the future….

Gugger's counsel then reaffirmed his client's desire that the court decide the matter on summary judgment. Larson's counsel asked the court to clarify "the

proposals or options." The court responded that "I either do it in summary judgment or I do it by taking additional evidence … or there is still this opportunity I think for a party … to have a jury make that determination."

¶13 Larson's counsel replied as follows to the court's statement of the options for resolving the case:

> What you are saying, as I understand, you are making reference to the case law that says if both parties move on—we think the Court on this record could make and should make a determination of whether there is substantial performance.

The court then took the matter under advisement, promising to issue a written ruling within several weeks, which it did. In its summary judgment ruling, the circuit court wrote that both parties "requested summary judgment at oral argument. Both stipulated that no material fact was at issue, waived presentation of any further trial evidence and also stipulated that the Court's determination, upon the submissions was appropriate on the issues of breach and materiality."[3]

¶14 Larson maintains on appeal that the trial court erred in concluding that she had moved for summary judgment, and, alternatively, even if she had so moved, the court improperly decided the case by way of a "trial on affidavits." We agree with her latter contention.

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[3] Later, in the conclusion of its written opinion, the court said this:

> The parties, on the record, declined the opportunity to have all issues tried by a finder of fact. They stipulated that there were no issues of material fact. They waived, at oral argument, their right to try the case fully. They urged the Court to decide the case in its entirety, solely on their submissions. A reluctant court undertook this task, and it would be a shame if the losing party appeals that strategic trial choice.

¶15 As we have noted, Larson never formally moved for summary judgment, but her counsel's responses to the court's inquiries at the summary judgment hearing nonetheless conveyed acquiescence in Gugger's position that the issue of whether Gugger had breached the December 19th settlement agreement could indeed be decided on summary judgment. Moreover, as Gugger points out, Larson had several opportunities to object when the court stated at the summary judgment hearing, and later, in its memorandum decision and summary judgment order, that it was issuing its decision on cross-motions for summary judgment. Larson moved for reconsideration of the circuit court's summary judgment ruling but did not challenge the court's characterization that both parties had moved for summary judgment.

¶16 We therefore agree with Gugger that Larson should not be permitted to disavow on appeal that she joined Gugger in asking the trial court to decide the case on summary judgment. That does not mean, however, that the circuit court was absolved of its duty to independently determine, despite the parties' "cross-motions" for summary judgment, whether material facts were actually in dispute so as to preclude the granting of summary judgment to either party. *See* ***Stone v. Seeber***, 155 Wis. 2d 275, 278, 455 N.W.2d 627 (Ct. App. 1990) ("Cross motions for summary judgment sometimes imply a stipulation as to the facts of the case, but not always …. [B]oth parties might erroneously conclude from the existence of cross motions that no factual dispute exists, when in fact, one does." (Citation omitted.)).

¶17 Gugger further argues that Larson waived her right to a trial by moving for summary judgment, citing ***Powalka v. State Mutual Life Assurance Company of America***, 53 Wis. 2d 513, 192 N.W.2d 852 (1972). The plaintiff in ***Powalka***, after asking for a jury trial, moved for summary judgment in her favor.

Id. at 516-17. The defendant also moved for summary judgment and the court granted the defendant's motion. ***Id.*** at 517. On appeal, the plaintiff argued, among other things, that the circuit court had erred in granting summary judgment for the defendant. ***Id.*** at 517-18. The supreme court explained:

> [T]he reciprocal motions for summary judgment … constituted a waiver of any right to jury trial that might have theretofore existed. A motion for summary judgment carries with it the explicit assertion that the movant is satisfied that the facts are undisputed and that on those facts he is entitled to judgment as a matter of law.

Id. at 518.

¶18 Gugger's reliance on ***Powalka*** is misplaced, however, because, there, the supreme court concluded summary judgment had properly been awarded on undisputed facts. ***Id***. at 519-21. In the present case, however, our de novo review of the record on summary judgment reveals that there are numerous disputed material facts or inferences on the issue of whether Gugger substantially completed the remodeling project by the deadline set forth in the parties' settlement agreement.

¶19 Finally, Gugger also argues that, even if one or more material facts were disputed, the circuit court was entitled to make factual findings based on the affidavits submitted by the parties. In support, Gugger cites ***State v. Leitner***, 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 207, a criminal case involving a request for plea withdrawal. The defendant in ***Leitner*** supported his request with an affidavit in which he averred that he had an alibi witness who would support his claim of having been elsewhere at the time of the offense, but whom he had not previously proffered due to concerns for her health. ***Id***., ¶9. The defendant did not produce the witness, nor did he testify, at the plea withdrawal hearing,

relying instead solely on his affidavit. ***Id***., ¶¶10, 28. The circuit court denied the plea withdrawal motion, concluding that the defendant's justification lacked credibility. ***Id.***, ¶¶11, 29.

¶20 We concluded that the circuit court in ***Leitner*** had not erred in finding the defendant's proffered reasons for plea withdrawal incredible, even though the finding was based on an affidavit, not live testimony. ***Id.***, ¶¶34-36. The basis for our conclusion was that the defendant could have testified at the hearing on his motion but chose not to, relying instead on the averments in his affidavit. ***Id***., ¶34. Because the defendant had "waived his opportunity to present live testimony on disputed factual issues" and "invited" the circuit court to make its factual findings on the basis of his affidavit, ***id***., we deferred to the court's findings, ***id***., ¶36.

¶21 The procedural underpinnings of our conclusion in ***Leitner*** bear no resemblance to the posture of the case now before us. The hearing on Gugger's summary judgment motion, at which we conclude Larson implicitly cross-moved for summary judgment, was never intended to provide either party the opportunity to present live testimony on disputed issues of fact. That opportunity would not have occurred until trial, had Larson's claims survived summary judgment. Larson's apparent abandonment of her earlier argument that summary judgment in favor of Gugger should be denied because of the existence of disputed issues of material fact is not the equivalent of waiving a present opportunity to present testimony, as occurred in ***Leitner***.

¶22 In short, even if one concludes, as we do, that, by the end of the summary judgment hearing, the parties had cross-moved for summary judgment, that does not constitute a request that the court conduct a "trial by affidavits."

Summary judgment methodology plainly prohibits the circuit court (and this court) from deciding disputed issues of fact based on the summary judgment record. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986). On summary judgment, whether sought by one party alone or by opposing parties, the court may determine "only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment." ***Id***. at 512.

II. Summary Judgment on Larson's Breach of Contract Claim

¶23 Our review of the summary judgment record satisfies us that several disputed issues of material fact exist regarding whether Gugger achieved "substantial completion" of the remodeling project by the date the parties specified in their December 19th settlement agreement. First, even though the parties now agree on the definition of substantial completion that governs their dispute,[4] they disagree on what documents are relevant to the determination of whether substantial completion of the project was accomplished by the specified deadline. Larson maintains that her architect's inspection and assessment of the project, performed two weeks after the remodeling was supposed to have been substantially complete, shows that it was not. Gugger responds that the inspection and assessment are not relevant because the extent of its obligation to render the project substantially complete is spelled out in the December 19th settlement

[4] Although Larson originally claimed there was a disputed material fact regarding what the parties meant by "substantial completion" as used in their settlement agreement on December 19th, she now apparently agrees that the definition used by her architect in a letter to her attorney should govern. The definition, embraced by the American Institute of Architects, is as follows: "substantial completion" means "the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the contract documents so that the owner can occupy the work for its intended use."

agreement itself and in an undated list of "problem areas" prepared by Larson, bearing a notation "Larson's punchout list." That is, Gugger maintains that whether it substantially completed the work within the meaning of the parties' settlement agreement must be determined solely by whether Gugger accomplished the items identified in the agreement itself and in Larson's punch list.

¶24 According to an affidavit from Larson's former attorney, on December 19, 2001, he, Larson, her architect, John Gugger and his attorney met at Larson's home to discuss the status of the project. The meeting took place in the master bedroom because it was the only room suitable for a meeting because all of the other rooms had poor lighting or no lighting at all and contained construction tools and debris. The parties negotiated at some length, and Gugger's attorney drafted the handwritten Settlement Agreement for the parties to sign, which they did.

¶25 In a separate affidavit, Larson's architect avers that, after five hours of negotiations, "the parties were tired " and "did not attempt to list all the requirements necessary for substantial performance to be completed … because they were too numerous to list." According to the architect, Larson very much wanted to be "able to utilize her residence for the Christmas Holidays," and the parties "specifically agreed that the residence would be in condition by the end of December 21st for [Larson] to be able to unpack and store all of her personal property, dishes and cookware in the drawers, cupboards and other storage areas by the holidays." The architect specifically recalled that the parties discussed that the "out of square" kitchen peninsula would be remedied. Finally, the architect concluded his affidavit with his opinion that "there was never substantial completion of the contract, nor was there reasonable compliance with the terms of

the Settlement Agreement & Release, because … Gugger … did not follow through on the promises made on December 19th."

¶26 Opposing these averments, John Gugger maintains in his affidavit in support of Gugger's motion for summary judgment, that the Larson project "was substantially complete by December 21, 2001." He claims that his own and some hired carpenters devoted 108 hours between December 19th and the 21st in order that Gugger could "keep its promises under the Settlement Agreement." He also states that, thereafter, his workers took care of Larson's "punch list" as set forth in the agreement. Gugger further avers that he first became aware that Larson was not satisfied when, on January 22, 2002, his attorney informed him that Larson "was rescinding the agreement." Finally, Gugger avers that his company had credited Larson's account with the amounts agreed to on December 19th and that it was owed a final balance of $69,403.45, for which it had filed a construction lien against the Larson property.

¶27 In sum, Gugger's position is that the list of discrepancies prepared by Larson's architect in mid-January is irrelevant because the Settlement Agreement required Gugger to take care of only the items noted in the agreement and on Larson's "punch list." Larson, meanwhile, argues that the items specified in the agreement and "punch list" were not the sum total of Gugger's obligations, and that "substantial completion" did not happen by December 21st, as her architect opines. Many of the facts that both parties point to in support of their respective positions are not disputed, at least in the historical sense, but that is not true of the inferences that may reasonably be drawn from them, which are very much disputed. "Where reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts, summary judgment is improper." *See* ***Cameron v. City of Milwaukee*****,** 102 Wis. 2d 448, 459, 307 N.W.2d 164 (1981). It

is well settled that "summary judgment does not lie when there are arguably ambiguous provisions in a contract and the intent of the parties to the contract is disputed." ***Riley Const. Co. v. Schillmoeller & Krofl Co.***, 70 Wis. 2d 900, 908, 236 N.W.2d 195 (1975). That is precisely the case here, and we thus conclude summary judgment cannot be awarded to either party.

¶28 It is equally well established that questions of credibility cannot be resolved on summary judgment. *See* ***Kelly v. Clark*****,** 192 Wis. 2d 633, 656, 531 N.W.2d 455 (Ct. App. 1995). The affidavits on summary judgment show that the parties dispute whether the mold inspection conducted by an acquaintance of Gugger's was sufficient to comply with the provision in the settlement agreement calling for such an inspection. Gugger testified at his deposition that he asked one of his friends to perform the mold inspection. The friend did so free of charge but did not prepare a written report. Gugger removed the mold that was visible on the exterior of the drywall but did not investigate the area behind the drywall. Larson avers in her affidavit that she hired an expert at her own expense who concluded that there was indeed a mold problem in the basement. The circuit court, after examining the conflicting submissions, concluded that Gugger had adequately investigated and remedied the mold problem, and that he "reasonably and timely" reported his findings to Larson. This conclusion is an impermissible factual finding that is apparently premised on the court's assessment of the relative credibility of the opposing submissions.

¶29 The parties also dispute the materiality of various asserted deficiencies in the work Gugger performed in Larson's kitchen. The circuit court determined that the problem of a kitchen wall being out of square came the "closest to being material," but concluded that it was not "material enough" to justify the rescission. The record establishes that, as of December 19th, the

kitchen counter "peninsula" was noticeably out of square with the remainder of the room. Affidavits from Larson' s attorney and architect aver that the parties agreed on December 19th that this problem needed to be fixed in a way satisfactory to Larson.

¶30 In his January report, the architect described the problem this way:

> The entire eastern portion of the kitchen which includes the wall, sink, dishwasher, base cabinets and counter tops was installed approximately 2'' out of square with the rest of the room. This is most visible from the stair landing when viewed next to the rectilinear tile pattern. The solution to this would be to dismantle that portion of the kitchen, demolish the wall, build a new wall that is plumb, level and square and reinstall the kitchen. The counter back splash should also be scribed to a consistent depth. The cabinets at the south end of the island were installed out of plumb which causes the drawers to open by gravity with too much force.

Larson, a mother of two, avers that she is unable to cook in her kitchen. She states that she cannot close the kitchen cabinet doors because the wall to which they are attached is crooked and that the smoke alarm goes off when she tries to use the stove because the ventilation system is not working. She also claims that one of the kitchen cabinets was installed upside down and that the countertops are not even. Despite these problems, however, Larson was apparently able to use her kitchen for some purposes.

¶31 Generally, whether a breach of a condition or a contract has occurred, and, if so, whether the breach is "material," are questions of fact reserved for a jury or the court to decide after a trial. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 184, 557 N.W.2d 67 (1996); ***Shy v. Industrial Salvage Material Co.***, 264 Wis. 118, 125, 58 N.W.2d 452 (1953); ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 459, 405 N.W.2d 354

(Ct. App. 1987). Gugger has not demonstrated a right to judgment on the breach of contract issue "with such clarity as to leave no room for controversy." ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 296, 531 N.W.2d 357 (Ct. App. 1995). On review, the question is not whether the inferences that were drawn by the circuit court are reasonable, but whether the record reveals competing inferences that could also be considered reasonable. ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189-90, 260 N.W.2d 241 (1977). We conclude, given the record on summary judgment, factual disputes exist relating to the materiality of the asserted kitchen deficiencies, and these disputes also preclude summary judgment for either party.

III. Dismissal of Lien Foreclosure Counterclaim

¶32 After Larson "rescinded" the parties' December 19th settlement agreement, Gugger served her with a "Notice of Intention to File Claim for Lien." This notice informed Larson that (1) Gugger claimed an amount due of $69,403.45, plus interest; and (2) if Larson did not remit that sum within thirty days, Gugger intended to file a construction lien against her property. Larson did not pay the amount in thirty days and Gugger filed a "Prime Contractor Claim for Lien" in the amount it claimed Larson still owed for the remodeling work. When Larson commenced her lawsuit against Gugger, the contractor counterclaimed for foreclosure of its lien.

¶33 The dispute regarding the validity of Gugger's construction lien involves the statutorily required notice of lien rights that a prime contractor must give to a landowner:

> Every prime contractor who enters into a contract with the owner for a work of improvement on the owner's land and who has contracted or will contract with any subcontractors

> or materialmen to provide labor or materials for the work of improvement shall include in any written contract with the owner the notice required by this paragraph, and shall provide the owner with a copy of the written contract …. *The notice*, whether included in a written contract or separately given, *shall be in at least 8-point bold type*, if printed, or in capital letters, if typewritten.

WISCONSIN STAT. § 779.02(2)(a) (emphasis added). The circuit court concluded Gugger's lien notice did not comply with the type-size and bolding requirements specified in § 779.02(2)(a), and, for that reason, the court declared Gugger's lien "invalid as a matter of law." Gugger cross-appeals the dismissal of its construction lien foreclosure claim against Larson.

¶34 The interpretation of a statute and its application to a given set of facts is a question of law that we decide de novo. ***Murphy v. Droessler***, 188 Wis. 2d 420, 425, 525 N.W.2d 117 (Ct. App. 1994). Gugger concedes that the notice of lien rights in its contract with Larson was not in bold type but disputes that it was not of proper size (eight-point type or larger).[5] Gugger argues that a violation of the bolding and type-size requirements of WIS. STAT. § 779.02(2)(a) affects only the content of the notice of lien rights, not its manner of service, and Larson must therefore show prejudice before the defect would invalidate Gugger's lien. We agree. *See* ***Troutman v. FMC Corp.***, 115 Wis. 2d 683, 686, 340 N.W.2d 581 (Ct. App. 1983).

[5] Gugger maintains that the copy of the contract in the record was reduced in size from 8 ½ x 14" paper to 8 ½ x 11," and that the original contract notice is in eight-point type as required by statute. Gugger seeks to supplement the record with a copy of the lien notice in its actual size. Because we conclude that deviations from the bolding and type-size requirements for the notice do not invalidate Gugger's lien in the absence of a showing of prejudice, we deny Gugger's request.

¶35 The subcontractor in ***Troutman*** failed to include the date when materials were first furnished in his statutorily required initial notice to the owner, as required by WIS. STAT. § 779.02(2)(b). ***Troutman***, 115 Wis. 2d at 686. We concluded that, although the notice was defective, the landowner bore the burden to show that he or she "'has been misled or deceived by the insufficiency.'" ***Id***. (citing § 779.02(2)(e)). By contrast, the subcontractors in ***Murphy*** failed to comply with statutory requirements for service of the notice at issue. *See* ***Murphy***, 188 Wis. 2d at 422. We distinguished the ***Troutman*** holding in ***Murphy*** by noting that WIS. STAT. § 779.02(2) "expressly permits the *contents* of [a lien] notice to 'substantially' conform to the statutory language," unlike the manner of service, which requires strict compliance with the governing statute. ***Murphy***, 188 Wis. 2d at 427-28 (distinguishing ***Troutman***).

¶36 Larson argues, however, that the analyses in ***Troutman*** and ***Murphy*** should not apply to the present facts because both cases involved notices by subcontractors to owners under WIS. STAT. § 779.02(2)(b), which imposes no bolding or type-size requirements, unlike § 779.02(2)(a), applicable to prime contractors, which does. Larson also maintains that § 779.02(2)(e), which places the burden on her to show prejudice from a notice deficiency, does not apply to notices required to be given by prime contractors.

¶37 We reject Larson's arguments. Section 779.02(2)(e) plainly applies to all notices required by subsection (2) whenever an owner complains of "any insufficiency of any notice." *See* WIS. STAT. § 779.02(2)(e). Thus, regardless of whether a notice is given by a prime contractor or by a subcontractor, if the deficiency relates to the contents of the notice, as opposed to its service, an owner must demonstrate that he or she has been "misled or deceived" on account of the deficiency in order to have the resulting construction lien declared invalid. ***Id.***

¶38 We conclude that, in order to succeed in invalidating Gugger's construction lien, Larson was required to provide evidence on summary judgment tending to show that she was misled or deceived by Gugger's failure to provide a notice of lien rights in the parties' contract that complied with the bolding and type-size requirements under WIS. STAT. § 779.02(2)(a). Larson did not do so. We find nothing in the record on summary judgment that establishes or places in dispute that Larson was prejudiced by the cited insufficiency in the notice.[6] Accordingly, we reverse the dismissal of Gugger's counterclaim for lien foreclosure. If Gugger prevails in the contract dispute, it is entitled to pursue its lien remedies for any balance found due and owing from Larson.

IV. The Order Sanctioning Attorney Williams

¶39 In addition to moving for summary judgment, Gugger asked the circuit court to sanction Larson for frivolously filing and maintaining her action. Alternatively, if the entire action was not found to be frivolous, Gugger asked the court to find that, at a minimum, Larson's slander of title and the theft-by-contractor claims were frivolous. The court held a hearing on the frivolousness issue and concluded that only the theft-by-contractor claim was frivolous. The court ordered Larson's attorney, David Williams, who had signed the complaint, to pay Gugger $500 as a sanction under WIS. STAT. § 802.05.[7] The court also

[6] The circuit court noted during a hearing on Gugger's motion to reconsider the ruling invalidating its lien that, although not bolded and perhaps in smaller than eight-point type, the notice of lien rights was set forth "smack-dab in the middle" of a one-page contract, which, "if you are looking at that thing, you can't be confused in any sense." The court contrasted the prominence of the notice in this case to a situation involving a contract of "15 or 20 or 90 pages where this thing is somewhere on page 76 and it might be dropped at a footnote or attached to an appendix."

[7] When this action was commenced, and when the circuit court ruled on Gugger's motion for frivolousness sanctions, WIS. STAT. § 802.05 provided in pertinent part as follows:

(continued)

concluded Larson's claim of administrative code violations was not frivolous, although the court deemed it "awfully close" to being so. The court imposed no further sanctions against either Larson or Attorney Williams.

¶40 Williams challenges the sanction imposed on him on two grounds. The first is that he did not receive sufficient notice of the possibility that a sanction would be levied against him. Second, he asserts that the theft-by-contractor claim was not frivolous. Whether an action or a claim is frivolous under either WIS. STAT. § 802.05 or WIS. STAT. § 814.025[8] is a question of law we decide de novo.[9] *See* ***Lamb v. Manning***, 145 Wis. 2d 619, 628, 427 N.W.2d 437 (Ct. App. 1988).

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation…. If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, *the court may, upon motion, or upon its own initiative, impose an appropriate sanction on the person who signed the pleading*, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

WISCONSIN STAT. § 802.05(1)(a) (emphasis added).

[8] When this action was commenced, and when the circuit court ruled on Gugger's motion for frivolousness sanctions, WIS. STAT. § 814.025(1) provided as follows:

(continued)

¶41 With respect to Williams's argument regarding lack of notice, we conclude that, although Gugger did not specifically request sanctions be imposed against Williams, Gugger's assertion that the entire action was frivolous, or alternatively, that specific claims were, sufficiently put Williams on notice that sanctions could be imposed on him as well as on his client. Both WIS. STAT. §§ 802.05(1)(a) and 814.025(2) so provide. Moreover, the court conducted a hearing on Gugger's request for sanctions, at which Williams appeared in person and by counsel. We conclude that Williams had "sufficient notice and an opportunity to respond." *See* ***Hoffman v. Economy Preferred Ins. Co.***, 232 Wis. 2d 53, 61, 606 N.W.2d 590 (Ct. App. 1999).

¶42 We nevertheless reverse the circuit court's sanction order because the circuit court improperly sanctioned Williams for frivolously *maintaining* the theft-by-contractor claim under WIS. STAT. § 802.05. The circuit court concluded that the theft claim, although not frivolous when Williams signed and filed Larson's complaint, "became frivolous" by the time the court ruled on summary judgment. At the time Williams signed and filed the complaint, he knew that

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> If an action or special proceeding commenced or continued by a plaintiff… is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

[9] Effective July 1, 2005, the former WIS. STAT. §§ 802.05 and 814.025 have been repealed and a revised § 802.05 created. *See* Wisconsin Supreme Court Order No. 03-06, 2005 WI 38 (Mar. 31 2005).

some subcontractors had filed suits against Larson alleging they had not been paid for the work they had done on her house.[10]

¶43 Both WIS. STAT. § 802.05 and WIS. STAT. § 814.025 formerly authorized a court to sanction a party for commencing a frivolous action, but only the latter authorized sanctions against a party or attorney for maintaining a frivolous action.[11] ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 547, 597 N.W.2d 744 (1999). A claim is not frivolous under § 802.05 merely because it later is shown to lack merit. *See* ***id.*** at 551. We conclude the circuit court erroneously relied on WIS. STAT. § 802.05 in sanctioning Williams for frivolously maintaining the theft-by-contractor claim. The court arguably could have sanctioned Williams for maintaining the theft claim under WIS. STAT. § 814.025, but the sanction available under that section requires the court to ascertain the amount of costs and reasonable fees attributable to the defense of the theft claim *after* the point at which it became frivolous to maintain. *See* ***Jandrt***, 227 Wis. 2d at 579. The court made no findings as to the amount of attorney fees Gugger spent defending against the theft-by-contractor claim, either before or after it allegedly became frivolous to maintain. The court ordered a $500 payment from Williams because it apparently deemed that sum to be an "appropriate sanction" under WIS. STAT. § 802.05, not because it bore any relationship to Gugger's costs and

[10] Gugger's attorney asserted at the frivolousness hearing that Larson had been sued not by Gugger's subcontractors but by contractors hired directly by her to do work unrelated to the parties' contract. Neither party presented evidence as to whether these contractors were in fact hired by Gugger or by Larson.

[11] The newly created version of WIS. STAT. § 802.05 (see footnote 9) is patterned after Federal Rules of Civil Procedure 11, and it provides that an attorney can be sanctioned both for filing and "later advocating" a frivolous claim. *See* § 802.05(2) (effective July 1, 2005).

reasonable fees in defending the theft claim. Thus, the sanction cannot be sustained under either §§ 802.05 or 814.025.

¶44 Gugger also appeals the sanctions order, arguing that the circuit court erred by not further sanctioning Williams under either WIS. STAT. § 802.05 or WIS. STAT. § 814.025 for filing and maintaining a claim alleging violations of WIS. ADMIN. CODE ch. ATCP 110. Gugger contends the circuit court erroneously relied on a subjective standard in concluding that Attorney Williams engaged in a good faith effort to extend or modify the law regarding violations of WIS. ADMIN. CODE ch. ATCP 110. *See* ***Riley v. Lawson***, 210 Wis. 2d 478, 491, 565 N.W.2d 266 (Ct. App. 1997) (noting that the applicable standard is an objective one: "whether the … attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known").

¶45 Because our review is de novo, however, it is immaterial whether the circuit court applied a subjective or an objective standard in deciding whether Williams knew or should have known that a claim under WIS. ADMIN. CODE ch. ATCP 110 would be frivolous. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 241, 517 N.W.2d 658 (1994) ("[T]he ultimate conclusion about whether what was known or should have been known supports a finding of frivolousness … is a question of law which we review independently of the conclusions of the circuit … court[]."). The legal question to be resolved in a frivolous action analysis is not "whether one can prevail on his [or her] claim, but whether the claim is so indefensible that the party or [the party's] attorney should have known it to be frivolous." ***Juneau County v. Courthouse Employees, Local 1312***, 216 Wis. 2d 284, 295-96, 576 N.W.2d 565 (Ct. App. 1998). Furthermore, "[w]hen a

party's claim can be determined only after research and deliberation, it is not frivolous." ***Id.*** at 296 (citation omitted).

¶46 We conclude the circuit court properly resolved all doubts as to the frivolousness of the administrative code violation claim in Williams' favor. *See* ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 649, 566 N.W.2d 158 (Ct. App. 1997); ***Booth v. American States Ins. Co.***, 199 Wis. 2d 465, 478, 544 N.W.2d 921 (Ct. App. 1996) (explaining that a claim is not frivolous merely because it did not "carry the day"). We also independently conclude that an attorney in Williams' position could reasonably advance a claim on Larson's behalf alleging Gugger violated certain administrative regulations, based on the facts known to counsel and the law as it existed or in good faith might be argued extended. *See* WIS. STAT. §§ 802.05(1)(a) and 814.025(3)(b)*;* ***Riley***, 210 Wis. 2d at 491.[12] Accordingly, we affirm the sanction order insofar as it denies Gugger's request for sanctions based on the alleged frivolousness of the administrative code violation claim.

[12] Gugger's assertion that the administrative code violation claim was frivolous is premised largely on its position that Larson settled any such claim under the terms of the parties' settlement agreement. We conclude, however, that Williams could reasonably believe that Gugger breached the settlement agreement, rendering Larson's release of Gugger from any claims inoperative. We also note that Williams argued that the settlement agreement itself constituted a violation of the regulations, or, at a minimum, that any purported waiver of Larson's claim of administrative code violations was unenforceable. We cannot conclude that this position had no reasonable basis in the law or in a good faith argument for an extension of it. *See* WIS. ADMIN. CODE § ATCP 110.06(2) ("No seller shall enter into any home improvement contract wherein the buyer waives the right to assert against the seller … any claim or defense the buyer may have against the seller in their contract.").

CONCLUSION

¶47 Except for that part of the June 1, 2004 order that "denied in part" Gugger's motion for frivolous action fees and costs, which denial we affirm, we reverse the appealed judgment and order, and we remand for further proceedings in the circuit court consistent with this opinion.

By the Court.—Judgment reversed; order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.