

**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. 00-0024

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ROBERT A. KERBELL,

PLAINTIFF-RESPONDENT,

v.

OTTER CREEK BUILDERS, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. Otter Creek Builders, LLC (Otter Creek), appeals an order awarding Robert Kerbell attorney fees and costs for a frivolous defense

pursuant to WIS. STAT. § 814.025.¹ Otter Creek argues that (1) its defenses were not frivolous; (2) attorney fees were improperly awarded against Otter Creek's attorney and owner; (3) the amount of attorney fees awarded were not reasonable; and (4) a due process hearing was required to determine the appropriateness of attorney fees. Because material facts were in dispute, we conclude that Otter Creek was entitled to a hearing. The circuit court order is therefore reversed.

BACKGROUND

¶2 Otter Creek was formed to develop single family homes, townhouses, and apartments. Richard Morris and his business partner, Loren Brueggeman, owned Otter Creek. Both acted as governor, member, and manager of Otter Creek and created the Ridges Condominium Plat 1 (Ridges). Brueggeman listed the condominium units for sale through Mike Tainter, a real estate salesperson and broker. Kerbell submitted an offer to purchase a Ridges condominium through Tainter. The offer contained a buy-back provision. Brueggeman accepted and signed the offer on behalf of Otter Creek. Following agreement on several upgrades to the condominium unit, the parties agreed on a final purchase price of \$206,379.53.

¶3 Several months after closing, Kerbell sought to exercise the buy-back provision and demanded that Otter Creek repurchase the unit. Otter Creek did not respond and Kerbell brought suit demanding that the buy-back provision be enforced. In its answer, Otter Creek alleged five defenses: (1) Brueggeman lacked corporate authority to authorize the buy-back provision; (2) the complaint failed to state a claim against Otter Creek; (3) the claim was barred by the

¹ All statutory references are to the 1997-98 version unless otherwise noted.

doctrines of unclean hands, laches, estoppel, and waiver; (4) Kerbell failed to join an indispensable party; and (5) the claims were barred by fraud.

¶4 Prior to trial, the parties prepared and filed a stipulation of agreed facts. However, Otter Creek refused to stipulate that Brueggeman signed a listing contract with Tainter on Otter Creek's behalf, that Tainter was the agent of Otter Creek at the time of the sale, and that Tainter did not have any reason to doubt the Brueggeman's authority to act on Otter Creek's behalf. Nonetheless, on the day of trial, Otter Creek consented to entry of judgment requiring it to repurchase the condominium for the sum of \$196,379.53. Kerbell, who had prepared for trial, then moved for attorney fees and costs pursuant to WIS. STAT. § 814.025(3)(b). The court allowed each side to file briefs and any other submissions regarding the motion.

¶5 Kerbell relied on Tainter's deposition. He was the only witness deposed. Based on that deposition, Kerbell maintained that Otter Creek knew or should have known that its defenses were without any factual basis. The trial court agreed, granted the motion and awarded attorney fees against Otter Creek and its attorneys, Morris, Carlson & Hoelscher, P.A., in the amount of \$6,017.64 for all expenses incurred after Tainter's deposition. *See Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 563, 597 N.W.2d 744 (1999). Otter Creek appeals the order.

DISCUSSION

¶6 A finding of frivolousness under WIS. STAT. § 814.025(3)(b)² is based on an objective standard. *See Stern v. Thompson & Coates, Ltd.*, 185

² WIS. STAT. § 814.025(b)(3) provides that:

(continued)

Wis. 2d 220, 241, 517 N.W.2d 658 (1994). The standard is whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable person would have known or should have known under the same or similar circumstances. *See id.* The inquiry under subsection (3)(b) involves a mixed question of law and fact. *See State v. State Farm Fire & Cas. Co.*, 100 Wis. 2d 582, 601-02, 302 N.W.2d 827 (1981). Determining what was known or should have been known involves questions of fact. Findings will not be upset unless they are against the great weight and clear preponderance of the evidence. *See Sommer v. Carr*, 99 Wis. 2d 789, 792, 299 N.W.2d 856 (1981). The 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 trial court. *See State Farm*, 100 Wis. 2d at 602.

¶7 Otter Creek claims that a hearing was required prior to awarding attorney fees. Determination of attorney fees may be made without an evidentiary hearing where the facts are undisputed and only a question of law remains. *See Sommer*, 99 Wis. 2d at 793. Here, the trial court relied on the deposition of Mike Tainter to support its finding that Otter Creek's continued assertion of its defenses was frivolous. However, in opposition to Kerbell's motion, Otter Creek submitted an affidavit by Richard Morris, one of the owners of Otter Creek. In his affidavit, Morris disputes Tainter's testimony. For example, Morris states he told Tainter before Kerbell's closing that Brueggeman did not have authority to enter into a

The party or the party's attorney knew or should have known, that the action, special proceeding, counterclaim, defense or cross complaint 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.

buy-back agreement. This directly goes to Otter Creek's first defense in its answer that Brueggeman lacked authority to enter the agreement.

¶8 Thus, the record does not support the circuit court's conclusion that the facts are "undisputed." As a result, Otter Creek is entitled to an evidentiary hearing on the factual disputes before the court makes findings on the motion for fees and costs under WIS. STAT. § 814.025.

¶9 Our conclusion disposes of all the issues in this case save one. Otter Creek contends that the circuit court erred in ordering fees against Richard Carlson (the attorney who appeared for Otter Creek) and Richard Morris (the owner of Otter Creek and a member of Carlson's law firm). The court's conclusions of law do indeed state that Kerbell is entitled to an award against Carlson and Morris, in addition to Otter Creek and Carlson's law firm. However, the order entered by the court only awards fees against Otter Creek and the law firm. The order does not award fees against Carlson and Morris personally. This appeal is limited to the order. Therefore, there is no issue properly before us regarding an award against Carlson and Morris.

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

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

