COURT OF APPEALS DECISION DATED AND FILED

April 18, 2006

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. 2004AP2512 **Cir. Ct. No. 2002CV196**

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

ROBERT C. MCROBERTS, JR.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

MASON SHOE MANUFACTURING COMPANY HEALTH BENEFIT TRUST,

NOMINAL-PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

TONI L. KANT AND PEKIN INSURANCE COMPANY/THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION,

DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mason Shoe Manufacturing Company Health Benefit Trust appeals an order dismissing all claims with prejudice based upon a settlement agreement between Robert McRoberts, Jr., and Toni Kant and her insurer, Pekin Insurance Company/The Farmers Automobile Insurance Association. Mason Shoe argues the circuit court erred when it concluded that equitable estoppel barred Mason Shoe from recovering its subrogation claim and that Mason Shoe was required to file a responsive pleading. We disagree and affirm the order.

¶2 McRoberts cross-appeals, arguing the circuit court erred when it denied its motion for sanctions against Mason Shoe for frivolousness. It also argues Mason Shoe's appeal is frivolous. We conclude there was arguable merit to Mason Shoe's position in the trial court and on appeal. Therefore, we affirm the order in all respects.

BACKGROUND

¶3 On June 29, 2002, Kant's vehicle struck a vehicle driven by McRoberts. McRoberts commenced this personal injury action against Kant and her insurer, Pekin. McRoberts named Mason Shoe as a nominal plaintiff.[1] McRoberts alleged Mason Shoe might have subrogation rights because it may have provided medical coverage benefits under his former spouse's health plan.

¶4 Discovery commenced. McRoberts made his first request for Mason Shoe to produce a copy of its plan in September 2003. After additional attempts

[1] McRoberts initially named First Administrators, Inc., Mason Shoe's plan administrator. Mason Shoe was later substituted as the proper party by stipulation.

by McRoberts to get the documents, Mason Shoe eventually produced a 1991 plan document in December.

¶5 On January 14, 2004, McRoberts notified Mason Shoe that he expected to settle the case soon and, based on the plan documents produced in discovery, he did not think Mason Shoe was entitled to recover. McRoberts asserted that any settlement reached would not make him whole and, therefore, the made whole doctrine would prevent Mason Shoe from recovering its subrogation interest.

¶6 A week later, McRoberts settled with Kant and Pekin. Nearly a month after the settlement, Mason Shoe sent a 1998 plan document to McRoberts, calling it a supplement to its earlier responses to McRoberts's requests for production of documents. The 1998 plan document established Mason Shoe as an ERISA[2] plan with first dollar subrogation rights and to which the made whole doctrine did not apply.

¶7 In accordance with the settlement reached with Kant and Pekin, McRoberts filed a stipulation and proposed order for partial dismissal, which would dismiss Kant and Pekin from the case. The circuit court signed the order the day it was filed, April 6. Two days later, Mason Shoe filed an objection to the stipulation and order, as well as a "claim" for its subrogation interest.

¶8 McRoberts filed motions to dismiss Mason Shoe's claims against Kant and Pekin, to strike Mason Shoe's "claim," and to preclude Mason Shoe from disavowing application of the made whole doctrine based on equitable

[2] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001-1461.

estoppel. The next day, Mason Shoe moved for relief from the order signed on April 6. McRoberts later moved for sanctions against Mason Shoe, seeking dismissal of Mason Shoe's claims, as well as costs for filing his motions to strike and dismiss and for responding to Mason Shoe's "claim" and motion for relief.

¶9 All pending motions were heard by the circuit court on July 21. The court concluded, "the parties relied upon the representations of Mason Shoe and, upon those representations, made a settlement. And, for them to come back later and say, no, I'm sorry, we have a different policy and we have different rules, I'm not going to buy it." It dismissed all of Mason Shoe's claims with prejudice and denied Mason Shoe's motion for relief from the April 6 order. It also denied McRoberts's motion for sanctions, concluding the parties had litigated a "legitimate issue."

DISCUSSION

Whether Equitable Estoppel Bars Mason Shoe from Recovery

¶10 Mason Shoe argues the circuit court erred by concluding Mason Shoe was equitably estopped from recovering its subrogation interest. Equitable estoppel has four elements: "(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Milas v. Labor Ass'n of Wisconsin, Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

¶11 When the facts are undisputed, whether those facts meet the elements of equitable estoppel is a question of law that we review independently. ***Nugent v. Slaght***, 2001 WI App 282, ¶29, 249 Wis. 2d 220, 638 N.W.2d 594.

Once the elements of equitable estoppel are satisfied, the determination of whether to apply equitable estoppel is within the circuit court's discretion. ***Id.***, ¶30.

¶12 Mason Shoe argues it never made a representation, on which McRoberts could reasonably rely, that the made whole doctrine applied or that Mason Shoe was not entitled to recover its subrogation interest. Rather, Mason Shoe contends, it has consistently maintained it was entitled to full recovery throughout the litigation. In support, Mason Shoe quotes statements it made in its discovery responses: that the plan was an ERISA plan to which the made whole doctrine did not apply and that a copy of the plan document was given to McRoberts's former spouse in 1994 and "when the Plan was revised in April of 1998."

¶13 Mason Shoe's arguments largely dodge the central issue in this case: Mason Shoe produced in discovery a 1991 plan document and, after a settlement was already reached, produced a 1998 plan document. Mason Shoe does not contest that it produced the wrong plan language or that the 1998 plan language created, as the circuit court put it, "different rules" regarding Mason Shoe's subrogation rights.[3] It is Mason Shoe's action of producing the wrong plan language from which McRoberts's equitable estoppel arguments arise.

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[3] Mason Shoe seems to argue in its reply brief that the language establishing its first dollar subrogation rights was produced to McRoberts prior to the settlement. It does not appear this argument was raised in the circuit court, and we generally decline to address on appeal arguments not raised below. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). If the argument was raised in the circuit court, Mason Shoe provides no record citations to where the issue was discussed with the court, and we will not search the record to find support for a party's argument. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

¶14 However, Mason Shoe also argues that because it always asserted it was entitled to full recovery and because McRoberts should have known the 1998 plan documents existed, McRoberts did not reasonably rely on the 1991 plan language. Although Mason Shoe asserted it had the right to recover, it did not produce plan language that supported its assertions. McRoberts repeatedly notified Mason Shoe that the plan language produced did not support Mason Shoe's contention that it was entitled to recover and that he was relying on that plan language in settlement negotiations. Further, Mason Shoe's argument that McRoberts should have known the 1998 plan document existed is unavailing when Mason Shoe itself apparently did not know the document existed. Under these circumstances, we conclude McRoberts reasonably relied on the 1991 plan documents when he entered into the settlement with Kant and Pekin. Mason Shoe cannot now use the 1998 plan language to support its contention that it is not subject to the made whole doctrine and instead entitled to first dollar recovery.

Whether Mason Shoe was Required to File a Responsive Pleading

¶15 Mason Shoe also argues the circuit court erred by concluding it was required to file a responsive pleading in order to preserve its subrogation rights. The relevant portion of the circuit court decision is as follows:

> But this is a very unusual case because the case was already settled on April 5 when I got this letter from [McRoberts's counsel], and I don't know how it impacts this case, but you probably could have brought a motion for default judgment on the basis of lack of cooperation in the pleadings. That might have resolved this issue early on. But I guess we all might do something differently had we gone back.

¶16 We need not decide whether the circuit court's comments were an accurate statement, however, because the court did not rule that Mason Shoe had

to file a responsive pleading. Instead, the court decided the case on equitable estoppel grounds, a decision we affirm on appeal.

Whether Mason Shoe's Motions or Appeal are Frivolous

¶17 McRoberts cross-appeals, arguing that the circuit court erred by concluding Mason Shoe's "claim" and motion for relief from the April 6 order were not frivolous. A claim is frivolous if it has no reasonable basis in law or equity or if it is commenced solely for the purposes of harassing or maliciously injuring another. WIS. STAT. § 814.025(3) (2001-02).[4] Our review of whether pleadings presented in the trial court are frivolous presents a mixed question of fact and law. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶3, 275 Wis. 2d 397, 685 N.W.2d 853. We uphold the circuit court's factual findings unless clearly erroneous. ***Id.*** Whether those facts meet the legal standard for frivolousness is a question of law we review independently. ***Id.***

¶18 McRoberts argues Mason Shoe's "claim" was frivolous because it was filed late and not accompanied by a motion to enlarge time and because Kant and Pekin had already been dismissed and therefore the "claim" should have been filed with a motion for relief. However, the procedural problems with Mason Shoe's "claim" do not rise to the level of maliciousness, nor render the claim completely without basis in law. Mason Shoe had plan documents establishing its right to recover its subrogation interest; those documents just were not timely produced in discovery.

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

¶19 McRoberts argues Mason Shoe's motion for relief was frivolous because it was filed solely to harass McRoberts. He contends the timing of Mason Shoe's motion—forty-seven days after it filed its "claim" and one day after McRoberts filed a motion to dismiss—shows Mason Shoe was intentionally attempting to harass him. The circuit court did not find that Mason Shoe was acting maliciously, nor do we perceive, as a matter of law, such nefarious intent. McRoberts further supports his argument by stating that, even if it prevailed on its motion, Mason Shoe had no claim against Kant or Pekin. However, McRoberts's argument supports an inference that the motion was intended to harass Kant or Pekin, not McRoberts.

¶20 McRoberts also argues that Mason Shoe's appeal is frivolous.[5] This court determines, as a matter of law, whether an appeal is frivolous. ***Tennyson v. School Dist. of Menomonie Area***, 2000 WI App 21, ¶33, 232 Wis. 2d 267, 606 N.W.2d 594. To conclude Mason Shoe's appeal is frivolous, we must determine that it was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another" or that it knew or should have known the appeal "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." *See* WIS. STAT. RULE 809.25(3)(c)1.-2.

¶21 Frivolous costs may only be awarded if the entire appeal is frivolous. ***Manor Enters. v. Vivid, Inc.***, 228 Wis. 2d 382, 402-03, 596 N.W.2d 828 (Ct. App.

[5] McRoberts raised the issue that Mason Shoe's appeal was frivolous in a motion to this court, and the issue was fully briefed by the parties. Thus, this issue is properly before us in accordance with ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621 ("[P]arties wishing to raise frivolousness must do by making a separate motion to the court, whereafter the court will give the parties and counsel a chance to be heard.").

1999). We are unpersuaded that Mason Shoe undertook its appeal in bad faith and conclude there was reasonable merit to Mason Shoe's argument that it should not be equitably estopped from recovering its subrogation claim. Because we do not conclude Mason Shoe's entire appeal is frivolous, McRoberts's motion for frivolous costs on appeal is denied.

By the Court.—Order affirmed. No costs to any party.

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