

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 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. 2005AP1521**

**Cir. Ct. No. 2004CV365**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**CATHERINE A. DELLABELLA,**

**PLAINTIFF-APPELLANT,**

**REED J. PETERSON,**

**CO-APPELLANT,**

**v.**

**DELLABELLA MOTORS, INC., ALAN F. DELLABELLA,  
DEBRA A. DELLABELLA, TIMOTHY RUNDE AND RUNDE CHEVROLET, INC.,**

**DEFENDANTS,**

**W. PHIL KARRMANN, STEPHEN R. BUGGS,  
JOHN A. BAXTER AND KRISTIN L. KARRMANN,**

**DEFENDANTS-RESPONDENTS.**

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APPEALS from orders of the circuit court for Grant County:  
ROBERT P. VANDEHEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Catherine Dellabella appeals a summary judgment order which dismissed her conspiracy claim against the attorney and law firm representing her son in the sale of a family-owned business. Dellabella's attorney, Reed Peterson, appeals a separate order requiring him to pay \$5,000 in costs and attorney fees for having filed a frivolous claim. We affirm both orders.

¶2 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.... [Next,] we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

*Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted). Our summary judgment review in this case needs to go no further than the first step, because we conclude the complaint fails to state a claim against the dismissed defendants.

¶3 The complaint alleges that Catherine was the majority shareholder in Dellabella Motors and lent the company in excess of \$150,000 over a period of several years. In 2001, Catherine transferred her shares in the automobile dealership to her son, Allan. Allan then arranged to sell Dellabella Motor's assets

to Runde Chevrolet. Allan and Dellabella Motors were represented by Kristin Karrmann, and Runde Chevrolet was represented by William Kelly. The complaint next asserts:

As part of the transaction, Runde Chevrolet, its officers and Kelly conspired with Dellabella Motors, Allan, and Kristin Karrmann to defraud the creditors of Dellabella Motors. The defrauding of creditors occurred when Dellabella Motors agreed to indemnify Runde Chevrolet for creditor claims if Runde Chevrolet waived the requirements of the Bulk Sale Transfer Law, Chapter 406 of the Wisconsin Statutes.

The complaint goes on to claim that Dellabella Motors did not repay Catherine on her loans and Allan converted all of the proceeds of the sale for his personal use.

¶4 The trial court dismissed Catherine's claim against Karrmann and her firm for conspiracy to defraud. It further found the claim to be frivolous and ordered Catherine and Peterson to each pay half of the \$10,000 malpractice deductible Karrmann's firm had paid to defend the suit.

¶5 As the trial court noted, it is well established that an attorney cannot be held liable to a third party for actions taken on behalf of a client except in limited situations, such as where counsel's conduct is fraudulent. *Goerke v. Vojvodich*, 67 Wis. 2d 102, 106-07, 226 N.W.2d 211 (1975). We conclude the facts alleged in the complaint do not come close to showing that Karrmann or her firm engaged in fraud or conspiracy to defraud.

¶6 Fraud generally consists of an intentional misrepresentation, or a failure to disclose information where there is a duty to do so. *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶49, 284 Wis. 2d 307, 700 N.W.2d 180. The circumstances constituting an alleged fraud must be pleaded with particularity

with regard to the time, place and content of the misrepresentation. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271.

¶7 The complaint does not specify any misrepresentation made by Karrmann at any place or time, or any duty of disclosure that Karrmann would have owed to Catherine. Rather, the only act by Karrmann that the complaint alleges to be “fraudulent” is her involvement in the agreement to have Dellabella Motors indemnify Runde Chevrolet for creditor claims if Runde Chevrolet waived the requirements of the bulk transfer statutes. The decision to waive compliance with the bulk transfer statutes is plainly neither unlawful nor fraudulent.

¶8 The bulk transfer provisions set forth in WIS. STAT. ch. 406 (2003-04)<sup>1</sup> provide a mechanism for providing notice to creditors when an entity sells or transfers large amounts of equipment or assets outside the ordinary course of business. There is nothing in the statutory scheme which precludes parties from agreeing to some other arrangement for dealing with existing creditors. To the contrary, WIS. STAT. §§ 406.104(1) and 406.105 simply provide that bulk transfers are “ineffective” against a creditor unless other provisions of the statutes have been complied with. WISCONSIN STAT. § 406.111 further provides a creditor a window of six months following a bulk transfer (or discovery of a concealed transfer) to bring a claim.

¶9 Under these provisions, Catherine had six months after the sale of the assets of Dellabella Motors to enforce her rights as a creditor against Runde Chevrolet, which in turn could have invoked the indemnification agreement

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

against Dellabella Motors. Catherine's apparent failure to do so is in no way attributable to Karrmann, who did not represent her. Thus, whatever involvement Karrmann may have had in the decision to waive the statutory bulk transfer notice requirements, that decision simply did not deprive Catherine of her rights as a creditor and cannot be construed as a conspiracy to defraud her.

¶10 The real focus of the complaint—and of Catherine's arguments on appeal—is that Dellabella Motors distributed all of the proceeds of the sale to Allan without repaying the loans to Catherine—*i.e.*, a fraudulent transfer claim against Dellabella Motors. Again, however, absent fraud or some other malicious act on counsel's part, Allan's *counsel* cannot be liable for damages Catherine may have suffered as the result of the alleged fraudulent transfer. *See Goerke*, 67 Wis. 2d at 106-07. The complaint does not allege that Karrmann had any role in the dissolution of Dellabella Motors or the distribution of its assets, much less that she committed any specific fraudulent or malicious act in that regard.

¶11 Having concluded that the complaint fails to state any valid claim against Karrmann or her firm, we do not address the alternate theories of liability Catherine attempts to argue based on her summary judgment materials. We turn to Peterson's challenge to the attorney fee award.

¶12 WISCONSIN STAT. § 814.025<sup>2</sup> authorizes the court to award costs and attorney fees upon determining that an action or defense is frivolous, either because it was commenced in bad faith, or because the party or the party's

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<sup>2</sup> 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). The trial court's order in this case is dated May 18, 2005, and is therefore analyzed under the repealed statute.

attorney knew or should have known that the action or defense lacked 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. “The determination of what a reasonable [party or] attorney knew or should have known presents a question of fact, and we will uphold the circuit court’s determination unless it is clearly erroneous. Whether what was known or should have been known supports a finding of frivolousness, however, presents a question of law subject to our *de novo* review.” *Osman v. Phipps*, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701 (citations omitted).

¶13 Here, we fully agree with the trial court that Peterson should have known that there was no basis in law for a claim by Catherine against Karrmann based on Karrmann’s actions relating to the bulk transfer act. Furthermore, the caselaw Peterson cites in support of his theory of Karrmann’s potential liability for a fraudulent transfer is inapplicable because the complaint failed to allege any facts linking Karrmann to the alleged fraudulent transfer of the proceeds from the sale. Finally, Peterson complains that there was no evidentiary hearing. But he does not suggest that there was any disagreement about the amount Karrmann’s firm paid to its malpractice carrier, nor does he set forth any other factual dispute that needed to be resolved by a hearing. In sum, we see no basis to set aside the trial court’s award of attorney fees.

*By the Court.*—Orders affirmed.

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

