COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3350 **Cir. Ct. No. 2002CV9809**

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

STATE OF WISCONSIN,

PLAINTIFF,

V.

BELL PROPERTY MANAGEMENT, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

BRENDA L. HENLEY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Bell Property Management, Inc., appeals the circuit court's judgment dismissing Bell Property's third-party complaint against Brenda Henley. Bell Property argues that the circuit court improperly: (1) granted summary judgment in favor of Henley; (2) found Bell Property's action frivolous pursuant to WIS. STAT. § 814.025 (2003-04);[1] and (3) awarded $21,692 in attorney's fees and costs. We affirm.

¶2 Summary judgment is designed "to avoid trials where there is nothing to try." ***Transp. Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted). On appeal, we review the circuit court's decision de novo, using the same methodology. ***Id.*** If we determine there are no issues of material fact, and we determine that the party granted judgment is entitled to judgment as a matter of law, we will affirm the decision granting summary judgment. *See* ***Lambrecht v. Kaczmarczyk***, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶3 The State of Wisconsin commenced this action against Bell Property on behalf of Henley, seeking wages Bell Property owed Henley. Bell Property brought a third-party complaint against Henley, alleging that Henley caused Bell Property damage when she left employment because: (1) she did not give two weeks of notice before quitting to ensure a smooth transition; (2) she took timecards, passwords, and knowledge of modified computer systems with her; and (3) Bell Property lost $10,000 it had paid to a headhunter to secure Henley's

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

employment. The circuit court granted summary judgment in favor of Henley, dismissing the third-party complaint brought by Bell Property.[2]

¶4 Bell Property argues that the circuit court improperly granted summary judgment on its claim that it suffered damages because Henley did not turn over computer passwords and explain modifications she had made to the computer system. Bell Property argues Henley had a duty to turn over the passwords and inform Bell Property about modified computer files when she left employment.

¶5 We conclude that the circuit court properly granted summary judgment. The court determined that, based on the depositions, it was undisputed that Henley promptly turned over a password when asked for it the day after she left employment. It was also undisputed that this was the only time that Bell Property ever asked Henley for information. Henley was entitled to judgment as a matter of law on this claim because any duty she had to provide the password to Bell Property was met when she immediately gave the information requested. As for Bell Property's claim that Henley improperly took with her knowledge of modifications she allegedly made to the computer system, the court determined that Bell Property had not shown that anyone asked Henley for information about the computer systems. The court also determined that Bell Property had not made

[2] On appeal, Bell Property challenges the summary judgment ruling only as to its claim that Henley took passwords and knowledge of computer modifications with her. The circuit court found that the other claims had been abandoned. Bell Property conceded it could not prove the claim that Henley failed to provide two weeks' notice before quitting because nobody told Henley she was required to give the notice and the policy was not written. Bell Property abandoned the claim that Henley took timecards. The court also found Bell Property had provided no proof in support of its claim that it paid $10,000 to a headhunter and was therefore damaged when Henley quit.

any showing of damages because the accountant who was hired after Henley left had no problems accessing the computer files. Because Henley had no duty to provide information she was not asked for and because Bell Property did not show damages, summary judgment dismissing the action against Henley was proper.

¶6 Bell Property next argues that the circuit court improperly concluded that the action was frivolous under WIS. STAT. § 814.025.[3] That statute provides that a party has a continuing obligation to ensure that an action is well grounded in fact and law as a case proceeds. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 563, 597 N.W.2d 744 (1999). "Once a party or attorney knows or should have known that a claim is not supported by fact or law, it must dismiss or risk sanctions." ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶5, 275 Wis. 2d 397, 685 N.W.2d 853. The circuit court's findings of fact in this regard will be upheld unless they are clearly erroneous. *See* ***Wisconsin Chiropractic Ass'n v. State of Wisconsin Chiropractic Examining Bd.***, 2004 WI App 30, ¶20, 269 Wis. 2d 837, 676 N.W.2d 580. "[W]hether the facts as found fulfill the statutory standards presents a question of law, which we review de novo." ***Id.***

¶7 The circuit court concluded that the action was frivolous because Bell Property knew or should have known that its claim against Henley had no factual basis after the depositions had been taken. The court reasoned that the depositions of the persons who had first-hand knowledge of what occurred

[3] Effective July 1, 2005, the former WIS. STAT. §§ 802.05 and 814.025 were repealed and a revised § 802.05 was created. *See* S. Ct. Order 03-06, 2005 WI 38 (eff. Mar. 31, 2005). The circuit court ruled on June 24, 2004, that Bell Property's action was frivolous under the former § 814.025, and it awarded costs and fees to Henley on December 14, 2004.

provided no basis for any of Bell Property's claims. No one testified to having personal knowledge of the repairs allegedly necessary because Henley took passwords and modified the computer system, nor was there any explanation of what was done, who did it, and how or why it was done. We conclude, as did the circuit court, that, based on the facts as developed in the depositions, Bell Property knew or should have known that its claims were not supported in fact or law. Therefore, Bell Property is liable for attorney's fees for maintaining a frivolous action.

¶8 Finally, Bell Property challenges as excessive the circuit court's decision awarding $21,693 in costs and attorney's fees to Henley. "When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court." *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58 (citation omitted). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." ***Id.***, ¶28, quoting ***Hensley v. Eckerhart***, 461 U.S. 424, 433 (1983).

¶9 Henley's attorney submitted an itemized bill for 134 hours at $250 an hour, for a total of $33,537. The circuit court explained that it believed that Henley's counsel had put in all of the time he claimed, but the amount of time was not commensurate with the novelty or difficulty of the case for an attorney charging $250 an hour. Therefore, the circuit court reduced from $250 an hour to $150 an hour the amount charged by Henley's attorney, but did not reduce the number of hours Henley's attorney claimed he worked. The circuit court's approach was appropriate: the court lowered the hourly rate to correspond with the rate that would be reasonably charged by an attorney with a level of expertise that would require the specified amount of time to complete the work. We

conclude that the circuit court did not misuse its discretion in determining the appropriate amount of attorney's fees.

By the Court.—Judgment affirmed.

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