COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP714 **Cir. Ct. No. 2004CV2620**

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

TOWN OF PERRY,

PETITIONER-RESPONDENT,

BENJAMIN SOUTHWICK,

INTERVENOR-RESPONDENT,

V.

DSG EVERGREEN F.L.P. AND VOSS FARMS, LLC,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 DYKMAN, J. D.S.G. Evergreen, F.L.P., and Voss Farms, LLC, appeal from an order denying D.S.G. and Voss Farms sanctions against the Town of Perry and its attorney, Benjamin Southwick, for expenses D.S.G. and Voss Farms incurred in contesting the Town's condemnation proceedings. D.S.G. and Voss Farms contend that the Town and Southwick commenced frivolous condemnation proceedings under WIS. STAT. §§ 802.05(1) and 814.025(3) (2003-04)[1] because there was no reasonable legal or factual basis to commence those proceedings. We conclude that the Town and Southwick had a reasonable basis to believe the Town's commendation proceedings were valid. Accordingly, we affirm.

Background

¶2 The following facts are taken from the parties' affidavits, the circuit court orders, and the motion hearings. D.S.G. and Voss Farms own land in the Town of Perry, Dane County, Wisconsin, which the Town seeks to include in its Hauge Historic District Park. In April 2004, in a second attempt to obtain the property in dispute,[2] the Town served both condemnees with an appraisal of the property. At that time, the property was owned by D.S.G. and subject to an easement by Voss Farms, and both condemnees were represented by the same attorney, John Kassner. On June 3, 2004, D.S.G. conveyed a portion of the land

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

[2] The Town's first attempt to obtain the land in dispute in this case ended when the Town abandoned its condemnation proceedings due to a defect in the legal description of the property, which was the subject of a separate but related appeal in this court.

described in the April 2004 appraisal to Voss Farms. Voss Farms obtained separate representation to protect its new ownership interest in the property.

¶3 On June 25, 2004, Kassner, representing only D.S.G., met with the Town and its attorney, Benjamin Southwick, to negotiate the value of the land the Town sought. During that meeting, Kassner notified Southwick that D.S.G. could not sell the Town all of the land the Town sought nor negotiate the value of all of that land. Kassner did not specifically state that he no longer represented Voss Farms or that any land had been transferred between the two owners. On July 16, 2004, Southwick learned of the change in title between D.S.G. and Voss Farms through a response from a title company he had employed in representing the Town. Despite the title switch subsequent to the appraisal and the absence of Voss Farms from the required negotiations, Southwick assisted the Town in serving D.S.G. and Voss Farms a jurisdictional offer on July 21, 2004.

¶4 In August 2004, after the condemnees rejected the Town's jurisdictional offer, the Town filed a petition for condemnation proceedings. The circuit court assigned the case to the condemnation commissioners, which set a hearing on the petition for December 2004. Prior to the scheduled hearing, D.S.G. and Voss Farms each moved the circuit court for a temporary restraining order and injunction to prevent the condemnation commissioners from holding a hearing on the petition and to withdraw the assignment to the condemnation commissioners.

¶5 After a hearing, the circuit court concluded that it had been misinformed by the Town of Perry as to the jurisdictional offer. The circuit court further concluded that, due to that misinformation, its assignment of the case to the condemnation commissioners was not supported by a statutorily sufficient jurisdictional offer, and therefore withdrew the assignment. D.S.G. and Voss

Farms each moved the court for sanctions against the Town for filing a frivolous condemnation action, under WIS. STAT. §§ 802.05 and 814.025. After an evidentiary hearing, the circuit court declined to impose sanctions. D.S.G. and Voss Farms appeal.

Standard of Review

¶6 Whether the Town commenced a frivolous action in this case presents a mixed question of law and fact. *See* ***Juneau County v. Courthouse Employees***, 221 Wis. 2d 630, 639, 585 N.W.2d 587 (1998). What a party or attorney knew or should have known before commencing an action is a question of fact that we will not disturb unless clearly erroneous. ***Id.*** Similarly, "[t]he findings by the circuit court of what was said, what was done, what was thought, and reasonable inferences drawn therefrom, are questions of fact" that we uphold unless clearly erroneous.[3] ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). However, whether the facts in the record meet the legal standard of frivolousness is a question of law that we review without deference to the circuit court. ***Juneau County***, 221 Wis. 2d at 639.

[3] "While we now apply the 'clearly erroneous' test …, cases which apply the 'great weight and clear preponderance' test … may be referred to for an explanation of this standard of review because the two tests in this state are essentially the same." ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

Discussion

¶7 WISCONSIN STAT. §§ 802.05[4] and 814.025[5] authorize a circuit court to impose sanctions against a party or attorney who commences a frivolous

[4] WISCONSIN STAT. § 802.05(1)(a) states:

> Every pleading, motion, or other paper of a party represented by an attorney … shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name…. The signature of an attorney … constitutes a certificate that the attorney … has read the pleading, motion or other paper; that to the best of the attorney'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 … 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 to 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.

[5] WISCONSIN STAT. § 814.025 states:

> **(1)** 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.
>
> **(2)** The costs and fees awarded … may be assessed fully against either the party … or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
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> **(3)** In order to find an action … to be frivolous under sub. (1), the court must find one or more of the following:

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action.[6] We review a determination of whether an action was frivolous when it was commenced under §§ 802.05 and 814.025 pursuant to § 802.05. *See* § 814.025(4) ("To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies."). Thus, we turn to the requirements of § 802.05 to determine whether the Town and Southwick's action were frivolous under either statute.[7]

> (a) The action … was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action … 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.
>
> **(4)** To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

[6] WISCONSIN STAT. §§ 802.05 and 814.025 have been repealed and replaced with recreated § 802.05, effective July 1, 2005. *See* ***Trinity Petroleum, Inc. v. Scott Oil Co., Inc.***, 2006 WI App 219, ¶9, _Wis. 2d_, 724 N.W.2d 259. Because D.S.G. and Voss Farms filed their motion for sanctions prior to July 1, 2005, the former statutes govern this appeal. Thus, we note that former WIS. STAT. § 814.025, in addition to allowing for sanctions when an action was frivolously commenced, allowed for sanctions if an action was frivolously continued. *See* ***Wisconsin Chiropractic Ass'n v. Chiropractic Examining Bd.***, 2004 WI App 30, ¶17, 269 Wis. 2d 837, 676 N.W.2d 580. Here, D.S.G. and Voss Farms argue that sanctions were required against the Town and Southwick for both commencing and continuing a frivolous action. However, our conclusion that the action was not frivolously commenced is dispositive because D.S.G. and Voss Farms have not argued that any facts changed after the petition was filed to render it frivolous. Instead, D.S.G. and Voss Farms argue that, on the same facts, the Town and Southwick both commenced and continued a frivolous action. Thus, our conclusion that the petition was not frivolous when filed necessarily means that it was not frivolous as continued.

[7] Additionally, we note that the WIS. STAT. § 814.025 provisions that are implicated in this case are substantially similar to the warranties implicated under WIS. STAT. § 802.05(1)(a). Specifically, § 814.025(3)(a) is similar to the first warranty under § 802.05(1)(a), and § 814.025(3)(b) is similar to the second and third warranties under § 802.05(1)(a). ***Wisconsin Chiropractic Ass'n***, 269 Wis. 2d 837, ¶¶17, 19. Thus, by addressing each warranty under § 802.05(1)(a) to determine whether the action was frivolously commenced, we are also addressing the applicable requirements under § 814.025(3)(a) and (b), and need not address separately the application of § 814.025 to the filing of the petition. *See* ***id.***, ¶22.

¶8 Under WIS. STAT. § 802.05, a person makes three warranties when signing a pleading: (1) that the pleading was not executed for an improper purpose; (2) that, to the signer's best information and belief after reasonable inquiry, the pleading is well grounded in fact; and (3) that, upon reasonable inquiry, the pleading is either supported by existing law or by a good-faith argument for a change in the law. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). D.S.G. and Voss Farms contend that the Town and Southwick violated all three requirements[8] because they knowingly filed a condemnation petition that was not supported with the statutory prerequisites of good-faith negotiations and a jurisdictional offer, and they did not have a good-faith argument for why they could nonetheless commence condemnation proceedings.[9] We disagree, and conclude that on the facts presented the Town and Southwick had a good-faith basis for arguing that they could proceed on the appraisal and negotiations they had completed before D.S.G. and Voss Farms transferred title to a portion of the land the Town sought to condemn.

[8] D.S.G. and Voss Farms argue that the Town and Southwick commenced condemnation proceedings in violation of both the second and third warranty (that the condemnation proceedings were not grounded in fact and that they were not grounded in existing law or a good-faith argument to modify the law). However, both arguments center on whether the Town and Southwick had a good-faith basis for arguing that the pre-title-switch appraisal and negotiations continued to support their petition for condemnation proceedings. We therefore address both arguments together.

[9] We need not address the parties' arguments over whether WIS. STAT. § 32.06(7) requires that the condemnor verify that the jurisdictional offer mandated under § 32.06(3) has been made and served, or only requires that the petition allege a jurisdictional offer has been made and served in accord with the statutes. We conclude that the Town and Southwick had a good-faith basis for arguing that D.S.G. and Voss Farms's transfer in title did not disturb their previous compliance with the requirements for a valid jurisdictional offer. Thus, even if the statutes require that the Town and Southwick verify a valid jurisdictional offer had been served, the Town and Southwick had a good-faith argument that they had met those requirements.

¶9 At the outset, the parties agree that WIS. STAT. § 32.06(2) and (2a) require that a condemnor serve an appraisal on the condemnees and attempt to negotiate in good faith for a purchase price before serving a jurisdiction offer.[10] They also agree that the Town and Southwick prepared an appraisal which, when prepared, accurately reflected the ownership interests in the land the Town sought to condemn, and that the Town attempted negotiations with D.S.G. before serving the jurisdictional offer. D.S.G. and Voss Farms, however, argue that the Town and Southwick could not in good faith rely on their appraisal or the corresponding negotiations when they prepared and served a jurisdictional offer because they knew that D.S.G. had transferred title to some of that land after the appraisal was completed.[11]

¶10 We agree with the circuit court that the Town's petition for condemnation proceedings was not frivolous because the Town and Southwick had a good-faith basis to argue that the statutes would allow them to continue the condemnation proceedings despite the change in title after the original appraisal.

[10] WISCONSIN STAT. § 32.06(2) requires the condemnor to "cause at least one … appraisal to be made of the property proposed to be acquired" and to "provide the owner with a full narrative appraisal upon which the jurisdictional offer is based." WISCONSIN STAT. § 32.06(2a) requires the condemnor to "attempt to negotiate personally with the owner or one of the owners or his or her representative of the property sought to be taken for the purchase of the same."

[11] D.S.G. and Voss Farms also argue that those negotiations were invalid because Voss Farms had obtained separate representation and were not present at the negotiations. Southwick testified that he was led to believe before the meeting that Kassner represented both D.S.G. and Voss Farms, and that Kassner did not inform him during the meeting that he no longer represented Voss Farms. Kassner testified that he did inform Southwick that he no longer represented Voss Farms, though not in so many words. The circuit court found that Southwick was not informed during the meeting that Kassner was not representing Voss Farms. That finding is not clearly erroneous and we therefore will not disturb it. D.S.G. can hardly complain that the Town acted improperly when, had D.S.G.'s attorney been candid about the title switch, the Town's "improper" action might have been avoided.

"Frivolous action claims are an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." ***Stern***, 185 Wis. 2d at 235 (citation omitted). Because "litigants and lawyers must have the opportunity to espouse legal principles in good faith without fear of personal loss" and "it is only when *no* reasonable basis exists for a claim or defense that frivolousness exists," we resolve all doubts as to frivolousness in favor of the litigant or attorney so accused. ***Juneau County***, 221 Wis. 2d at 650-51 (citation omitted). We conclude that, after reasonable inquiry, the Town could make a reasonable argument that it could properly file a petition for condemnation proceedings despite the change in title.

¶11 Before the circuit court, both Kassner and Southwick said that D.S.G. and Voss Farms's change in title after the Town completed its appraisal presented a novel issue under the statutes, and neither knew the consequences of the Town filing the petition despite the title transfer. The condemnation statutes do not directly deal with the consequences of a title switch after an appraisal is prepared, and no case law directly governs this scenario.[12] The applicable statutes require that the condemnor serve an appraisal on the owner, providing a full narrative upon which the jurisdictional offer will be based, and that the condemnor attempt to personally negotiate with the owner. WIS. STAT. § 32.06(2), (2a), and (3). If that offer is not accepted within twenty days, the condemnor may file a petition for condemnation proceedings, and the court then assigns the matter to the

[12] We, as well, need not resolve this issue. Instead, we only answer the question of whether there was a good-faith legal and factual basis to argue that the statutes would allow the Town to file a condemnation petition after the title switch. Whether the title switch was a sharp practice or served a timely needed business requirement is also an issue we need not decide.

county condemnation commissioners.[13] WIS. STAT. § 32.06(7). According to the Town and Southwick's view, the Town had complied with the statutory requirements by serving an appraisal that was valid when obtained, and by engaging in negotiations with Kassner, who they reasonably believed represented both D.S.G. and Voss Farms. Without deciding whether the statutory requirements were in fact met, we agree that they support a reasonable argument that they were.

¶12 Southwick's responsibility was to represent his client's interests, and that required him to address an issue not yet clear in the law on the facts presented. *See* ***Stern***, 185 Wis. 2d at 235. Southwick was faced with a novel tactic employed by D.S.G. and Voss Farms—transferring title to part of a parcel after the Town completed its appraisal but before it served a jurisdictional offer. This tactic, if continually repeated, would prevent a condemnor from ever condemning property under D.S.G.'s proffered interpretation of the statute. In view of this possibly absurd result under D.S.G.'s interpretation, statutory and case law did not clearly govern the facts of the case. We are not convinced that Southwick's decision to proceed was frivolous.

¶13 Further, while the court did not allow the Town to amend its petition to reflect the change in ownership under WIS. STAT. § 32.14,[14] it acknowledged

[13] We need not resolve whether the circuit court properly assigned this case to the condemnation commissioners nor the propriety of withdrawing that assignment.

[14] WISCONSIN STAT. § 32.14 provides:

> The court or judge may at any time permit amendments to be made to a petition filed pursuant to s. 32.06, amend any defect or informality in any of the proceedings authorized by this subchapter and may cause any parties to be added and direct

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that the existence of an amendment provision in the condemnation chapter supported the Town and Southwick's argument:

> I think a good argument has been made that … where the appraisal at the time it was made did address the property as it then existed, the statutory time frames march out and things can happen, and in fact, the statutes contemplate that things can happen under the amendments section which has played a role in this case, 32.14, and it does contemplate that parties can be added….
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> ….
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> So it comes down to whether or not I feel that Mr. Southwick was without any basis in fact or law to proceed with this petition … whether he could, in the face of what was a title switch, proceed and rely on what he testified was the practice of the condemnation commissioners to take updated appraisals to address these issues of what has occurred from the date of the filing of the petition to the date that they get to the valuation, and I think the fact that there is a practice of updated appraisals is significant, and nobody disputed that testimony ….
>
> ….
>
> It is a high burden to impose frivolous costs against an attorney. I don't think that the conduct of Mr. Southwick rises to the level.

¶14 Finally, D.S.G. and Voss Farms's argument that the Town and Southwick filed the petition for an improper purpose is unavailing. D.S.G. and Voss Farms argue that, because there was no good-faith basis in the facts or the law for the Town's filing a condemnation petition, it must follow that their only reason was to harass. This argument fails based on our conclusion that the Town

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> such notice to be given to any party of interest as it deems proper.

and Southwick did have a good-faith basis for filing the petition. We therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.