COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2838 **Cir. Ct. No. 1999CV2117**

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF,

BRYAN BAUMEISTER, ROBIN BAUMEISTER, JEFFREY BROWN AND STACY BROWN,

INTERVENORS-RESPONDENTS,

HERITAGE MUTUAL INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

DIAMOND BUILDERS AND AUTOMATED PRODUCTS, INC.,

DEFENDANTS,

EDWARD A. SOLNER D/B/A SOLNER & ASSOCIATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SHELLEY GAYLORD, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. Edward Solner appeals a judgment of the circuit court denying his motion for sanctions under WIS. STAT. § 804.12(3) and (4) (2003-04),[1] statutes governing responses to requests for admissions, and WIS. STAT. § 814.025 and WIS. STAT. § 802.05, statutes governing frivolous lawsuits. As explained below, because Solner has failed to demonstrate that the circuit court erred, we affirm.

Background

¶2 This matter has a long and complicated litigation history. We will not recount that history in detail.

¶3 Solner, an architect, was hired to design a church. Bryan Baumeister and Jeffrey Brown were seriously injured during construction of the church when trusses they were installing collapsed. Eventually, Baumeister and Brown sued Solner, alleging negligence. Their negligence claims against Solner were dismissed in an order granting summary judgment to Solner. Solner then moved the circuit court for sanctions against Baumeister and Brown. Solner's request for sanctions was held in abeyance when Baumeister and Brown appealed the summary judgment order. Both this court and the supreme court affirmed the circuit court. For further background facts predating the resumption of litigation

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

before the circuit court following Baumeister and Brown's appeal, we direct the parties' attention to ***Baumeister v. Automated Products, Inc.***, No. 2002AP1003, unpublished slip op. (Wis. Ct. App. Nov. 20, 2003) (***Baumeister I***), and ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1 (***Baumeister II***).

¶4 Following ***Baumeister II***, proceedings resumed in the circuit court in March 2005 on Solner's request for sanctions. The parties submitted arguments back and forth several times. The circuit court rendered a series of rulings. In an order filed September 21, 2006, and a judgment entered October 12, 2006, the circuit court denied Solner's motion for sanctions. Solner appeals.

Discussion

¶5 We begin by observing that the issues listed in Solner's statement of issues are broader than the arguments Solner actually makes. For example, Solner describes the first issue as follows: "Should Baumeister and Brown be responsible pursuant to Wis. Stat. § 804.12(3) for the costs of proving matters not admitted in their Responses to Solner's Requests For Admission?" However, Solner's arguments on this topic are more limited than this broad statement of the issue suggests. In this decision, we address only the specific arguments Solner actually makes.

A. Request For Admissions

¶6 Solner argues that the circuit court erred when it concluded that sanctions were not required due to Baumeister and Brown's failure to admit the following allegations contained in Solner's request for admissions:

1. "Solner had no duty [to] either approve or design bracing for the roof truss[es] …."
2. "Solner had no duty to approve the design of the roof trusses …."
3. "Solner had no duty to design the roof trusses …."
4. "Solner did not design the temporary bracing for the roof truss installation …."
5. "Solner was not retained ... to provide ... construction supervision or inspection."
6. "Solner was not retained to inspect or supervise construction …."

Baumeister and Brown's answers effectively declined to admit or deny these assertions based on Baumeister and Brown's assertion that they possessed insufficient information.[2]

¶7 Solner argues that the circuit court erred by applying an incorrect legal standard when the court declined to impose sanctions under WIS. STAT. § 804.12(3). That statute provides:

> EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable

[2] Solner also complains about Baumeister and Brown's answer to request for admission #8. This request speaks in terms of an architect's "professional obligation or duty" to design, approve, and inspect trusses. Baumeister and Brown objected to this question on vagueness grounds, and the circuit court agreed. Solner does not address whether the request was vague. Accordingly, we decline to resolve Solner's argument with respect to request #8.

> ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

More specifically, Solner argues that the only statutory exception at issue is the other-good-reason exception, and Baumeister and Brown's "I don't know yet" answers do not, as a matter of law, fit the other-good-reason exception for two reasons:

1. Baumeister and Brown had subpoena power and discovery rights for eleven months prior to answering the requests and could have "ascertain[ed] the facts relating to the claims in their pleadings" and could have obtained a copy of the contract from Solner.

2. The answers were never supplemented, despite having subsequent access to information that undercut the basis for the denials, thus violating the obligation to "seasonably" update discovery responses under WIS. STAT. §§ 804.01(5)(b) and 804.12(4).

In a separate section of his brief, Solner argues that he later proved the truth of the six assertions at issue. For purposes of our analysis, we will assume that Solner eventually proved the truth of the assertions, and we focus our attention on Solner's argument that the circuit court erred as a matter of law in applying the other-good-reason exception. As explained below, we reject Solner's argument because he has failed to present supporting arguments that are both legally and factually developed.[3]

[3] Solner argues in a footnote that the "I don't know yet" grounds for denying the requests for admissions preclude Baumeister and Brown from claiming that they "had reasonable ground to believe that [they] might prevail on the matter." WIS. STAT. § 804.12(3). Baumeister and Brown apparently misapprehend this argument as a waiver argument. In their responsive brief, they say that, contrary to Solner's assertion, they argued the preclusive effect of ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1, before the circuit court. We agree with Solner that it makes no sense for Baumeister and Brown to defend their decision to decline to admit the assertions by relying on a subsequent determination by this court and the supreme court that at least one of their duty arguments had merit. That reliance does not substitute for an analysis of whether, *at the time Baumeister and Brown responded to the requests*, they possessed reasonable grounds to believe that they would prevail on the issue.

¶8 We first address Solner's legal contention that the answers, at the time provided, were improper because Baumeister and Brown were obligated to use discovery tools available to them before declining to admit the listed assertions. Solner provides no authority for the proposition that a party answering requests for admissions must use discovery tools, such as subpoena power, before declining to admit a requested admission. We are aware of no settled Wisconsin law imposing such a requirement. We also note that Solner fails to mention or discuss the "reasonable inquiry" requirement in WIS. STAT. § 804.11(1)(b). That statute states, in part:

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

This statute appears to provide that responding parties may decline to admit or deny if "reasonable inquiry" leads to insufficient information. Our non-exhaustive research suggests that there is limited guidance on the extent of the inquiry required under circumstances like those in this case. *See* 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 36.11[5][d], at 36-36 to 36-38 (Matthew Bender 3d ed. 1997).

¶9 We next address Solner's contention that Baumeister and Brown should have been sanctioned because they failed to supplement their answers, despite having subsequent access to information that undercut the basis for the denials. This, Solner contends, was a violation of the obligation to "seasonably" update discovery responses under WIS. STAT. §§ 804.01(5)(b) and 804.12(4).

¶10 The six requests for admissions at issue here address Solner's duty or obligation to perform various tasks relating to the trusses. To assess the merit

of Solner's argument—that Baumeister and Brown subsequently obtained, or should have obtained, information that should have compelled them to admit the requests for admissions—we would need to engage in a detailed analysis of the various alleged sources of Solner's alleged duties, at what point various pieces of information came to the attention of Baumeister and Brown, and the meaning of such information. However, the pertinent section of Solner's appellate brief provides no assistance. The full extent of Solner's argument on this topic is as follows:

> [T]he contract Baumeister and Brown claimed no knowledge of was provided to them on April 2, 2001. [Al23¬133; R103/Ex.B] Nonetheless, the denials of March 2001 were still in place when Summary Judgment was granted in February 2002, almost a year later.
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> … [T]he existing record at the time of intervention already included information in the form of transcripts and reports filed on summary judgment. Baumeister and Brown inherited a case where substantial discovery had already been completed and filed. [R24&25]
>
> The need to see the contract between Solner and Trinity Church, even before filing the Complaint, should have been obvious. The fact that they did not have the contract, had not seen it, and hadn't even asked for it months into the litigation is hardly an excuse for not being able to truthfully admit or deny the most basic facts of the litigation.

These arguments and assertions, without more, do not provide a basis for concluding that the circuit court erred. For example, the mere fact that Baumeister and Brown obtained a copy of the contract does not address whether there were other arguable sources of an alleged duty or even whether there are other materials that might define the tasks Solner was retained to perform. Seemingly, Solner expects us to search the record to figure out whether the circuit court erred when that court concluded that Baumeister and Brown neither improperly responded to

the requests for admission nor improperly failed to supplement their responses. We decline to do so.[4]

B. Causation

¶11 Solner argues that the circuit court erroneously ignored our holding in ***Baumeister I*** that causation is lacking as a matter of law. Solner argues that the circuit court mistook our holding as dicta. This argument is meritless. Even if our causation discussion in ***Baumeister I*** is controlling law of the case, and not dicta, it does not follow that the lawsuit was frivolously brought or frivolously maintained.

¶12 First, our decision was in the context of *appellate* arguments. We did not address when Baumeister and Brown knew or should have known, under applicable trial court standards of frivolousness, that they could not prove causation relating to an allegation that Solner specified particular bracing instructions that were unsafe.

¶13 Second, our causation discussion in ***Baumeister I*** dealt with just one aspect of Baumeister and Brown's allegation that Solner breached his alleged duty to provide safe bracing instructions. We wrote:

> Baumeister and Brown have a causation problem. They assert that Solner was negligent when he required that the Truss Plate Institute bracing instructions be followed.... [However,] [s]ince Baumeister and Brown did not follow the Truss Plate Institute guidelines, they cannot show that a directive that the guidelines be followed was a substantial factor in producing their injuries.

[4] We note that even looking to the fact section and section I.B. of Solner's brief, we are unable to piece together a fully developed argument on this topic.

Baumeister I, No. 2002AP1003, unpublished slip op., ¶32. Solner assumes that this causation problem is a fatal flaw in all of Baumeister and Brown's negligence theories. Solner argues: "There is a complete disconnect between anything Solner did, or did not do, and the way [Baumeister and Brown] chose to temporarily brace the trusses. The intervening decision by [Baumeister and Brown] to use their own temporary bracing methods cuts off any claim that anything Solner did, or didn't do, was a factor in the collapse, much less a substantial factor." Solner contends that the "Trial Court speculated that had Solner done something special by way of specific instructions, [Baumeister and Brown] would surely have paid attention and the accident wouldn't have happened. Why [Baumeister and Brown] would pay any more attention to a directive from the architect, having ignored the engineer's suggestions, and the bright orange diagrams and pamphlets supplied by the truss manufacturer, was not explained." We disagree with Solner's assertion. As explained below, the circuit court did explain why truss installation may have played out differently had Solner provided different instructions.

¶14 Solner's no-causation argument is premised on the assumption that, if Baumeister and Brown did not follow the specified TPI instructions, they would not have followed any other instructions, even if Solner had a duty to provide such instructions. The circuit court's August 8, 2006 decision recites evidence indicating that TPI instructions are guidelines commonly sent out with trusses. According to the circuit court, the construction foreman averred that the TPI instructions are always sent with trusses and that he was quite familiar with those instructions from previous jobs. We agree with the circuit court that the fact that Baumeister and Brown failed to follow standard instructions does not show that they would not have followed instructions specific to the particular trusses specified by a project architect. Indeed, part and parcel of Baumeister and

Brown's other-duty theories is the proposition that Solner had a duty to ensure that safe instructions, specific to the particular trusses, were somehow brought to the attention of the truss installers.

¶15 Accordingly, we need not resolve whether the circuit court erroneously treated our causation discussion in ***Baumeister I*** as dicta. We agree with the circuit court that the causation problem we identified in ***Baumeister I*** does not lead to the conclusion that Baumeister and Brown's lawsuit was frivolously brought or frivolously maintained.[5]

C. Failure To Investigate

¶16 Without discussing the circuit court's handling of the issue, Solner argues that Baumeister and Brown's counsel failed to adequately investigate the facts before filing the lawsuit, as required by WIS. STAT. § 802.05(1)(a). We understand Solner to be arguing that it should have been readily apparent from information available to counsel that the lawsuit could not succeed, and the only reason counsel would not be aware of this fact is that counsel failed to use the available right to discovery to "collect the parties' contracts," failed to review information counsel possessed, and failed to interview Baumeister and Brown.

¶17 Here again, Solner fails to present an adequately developed factual and legal argument. Solner fails to provide a detailed argument laying out which facts (found by the circuit court or otherwise undisputed) show what the attorneys

[5] We also note that our comment in ***Baumeister v. Automated Products, Inc.***, No. 2002AP1003, unpublished slip op. (Wis. Ct. App. Nov. 20, 2003), on causation does not conclude with the blanket statement that Baumeister and Brown cannot show causation; rather, it concludes with the statement: "[T]hey cannot show that a directive that the guidelines be followed was a substantial factor in producing their injuries." ***Id.***, ¶32.

for Baumeister and Brown knew (or failed to learn) and when they knew it (or unreasonably failed to learn it) and why such knowledge is significant. Instead, Solner's argument is short and is comprised of a smattering of assertions, some supported by record cites and some not.[6] We decline to address the matter further.

[6] Solner's full argument on this topic is as follows:

> This case is worse [than] ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). At least in ***Jandrt***, causation turned on cutting edge scientific research in a developing area. This case was about common construction practices, contracts, and well understood professional responsibilities. Baumeister and Brown knew how it all fit together, knew the truss manufacturer had sent the TPI Standards, and knew they had not followed them.
>
> All of this was known or available to Baumeister and Brown's attorneys prior to starting the action against Solner. Baumeister and Brown's Petition to Intervene was filed May 30, 2000 and granted August 14, 2000. [R19&23] As a result, they received a copy of the deposition of Diamond Builder's job foreman, Mike Baumeister, Plaintiff [Bryan] Baumeister's brother, when it was filed on August 22, 2000. [R25/ExC] On October 11, 2000, the Complaint against Solner was filed. [R32] The sole claim in the original Complaint against Architect Solner read as follows:
>
> > 13. That said failure to approve or design temporary bracing during the construction process was a substantial factor in causing the incident of October 16, 1997 to occur and the damages alleged herein by Mr. Brown and Mr. Baumeister and their wives. [R32]
>
> Unlike ***Jandrt***, Baumeister and Brown's attorneys had the right to use discovery in the proceedings, even before suing Solner. Yet, they never bothered to collect the parties' contracts. They were still claiming ignorance as to Solner's contract the following April, when Solner's counsel voluntarily sent them a copy. [A113-133; R103/ExA&B] The Summary Judgment motion of Heritage Mutual was already on file at the time of intervention. [R24&25] It has the OSHA reports, photos and

(continued)

D. Reliance On New Affidavits

¶18 In a closely related argument, Solner contends that the circuit court misused its discretion by accepting new affidavits from Baumeister and Brown on the topic of sanctions, while at the same time denying Solner an evidentiary hearing. Solner's complete argument is the following:

> Over Solner's repeated objections, Judge Gaylord accepted and relied on new affidavits from Baumeister and Brown's attorneys, attesting to their diligence and good reputation, while at the same time refusing Solner a hearing on the newly reopened record.
>
> Whether Baumeister and Brown 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). Given the factual dispute as to the adequacy of the pre-filing investigation, as well as the hearsay and conclusory assertions contained in the affidavits, accepting them while refusing a hearing was plain error. *See* ***Wisconsin Chiropractic Ass'n v. State of Wis. Chiropractic Examining Bd.***, 2004 WI App 30, ¶30, 269 Wis. 2d 837, 676 N.W.2d 580.

¶19 We agree with Baumeister and Brown that this argument is so undeveloped that it does not merit our attention. As Baumeister and Brown point out, Solner asserts that there is a "factual dispute as to the adequacy of the pre-filing investigation," but does not identify which facts are disputed. For that matter, Solner fails to identify any assertion in the affidavits that would affect a

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> explanations for the collapse, pointing to the failure to follow TPI Recommendations.
>
> There is no indication Baumeister and Brown's attorneys ever looked at any of the available materials, or even interviewed their own clients about the TPI Recommendations. All that was necessary to fully evaluate this case was available to them prior to filing the Complaint against Solner.

dispositive issue. In sum, just because the circuit court looked to the affidavits for information does not mean that the circuit court's decision on sanctions was incorrect.

E. The Notice Of Appeal

¶20 Solner next argues that Baumeister and Brown's counsel violated WIS. STAT. § 802.05 by signing the notice of appeal leading to ***Baumeister I*** and ***Baumeister II***. Without citation to authority, Solner asserts that it is not possible to "appeal on the merits a case found frivolous under Wis. Stat. § 814.025 or § 802.05 without again running afoul of Wis. Stat. § 802.05" because the "same standards that dictate[] the case is frivolous under Wis. Stat. § 814.025 preclude filing [a] Notice of Appeal [that is] consistent with the requirements of Wis. Stat. § 802.05."

¶21 The implications of Solner's argument are interesting. If he is correct, it would seem that if a circuit court, on remand following an appeal from summary judgment, concludes that the lawsuit was either frivolously brought or frivolously maintained prior to the time the plaintiff-appellant filed a notice of appeal, a conclusion by this court or the supreme court that the appeal is not frivolous—and thus the defendant-respondent is not entitled to attorney fees for the appeal—can effectively be overridden by a trial court when it later makes its frivolousness decision and awards appellate expenses. However, we need not address this topic.

¶22 As Solner states: "If the case was frivolous in the Trial Court, the issue then becomes whether the continuation of this frivolous lawsuit, including the appeal, should result in the award of fees and expenses for both the trial court and appellate court work required to defend." Thus, Solner's notice-of-appeal

argument hinges on persuading us that the circuit court erred when it rejected his frivolousness argument, something he has not done.[7]

Conclusion

¶23 For the reasons above, we affirm the circuit court's decision denying Solner's motion for sanctions.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] Our resolution of the issues we have addressed makes it unnecessary to address Solner's assertion that the repeal of WIS. STAT. § 814.025 and revision of WIS. STAT. § 802.05 should not affect the outcome of this case.