

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2008

David R. Schanker
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. 2006AP2391

Cir. Ct. No. 2003CV3122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

EDWARD BAUMANN AND ELITE PROTECTION SPECIALISTS, LLC,

PLAINTIFFS-RESPONDENTS,

v.

MATTHEW F. ELLIOTT AND SECURITY ARTS CORPORATION,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Fine, J.

¶1 PER CURIAM. Matthew F. Elliott and Security Arts Corporation (collectively Elliott) appeal from an order finding that the action against them was frivolous and filed maliciously but denying an award of actual costs and attorney fees because there was no compliance with the “safe-harbor” provision in WIS.

STAT. § 802.05 (2005-06), a statutory change that became effective while this action was pending.¹ *Trinity Petroleum, Inc. v. Scott Oil Co., Inc.*, 2007 WI 88, ¶7, 302 Wis. 2d 299, 735 N.W.2d 1, holds that as a procedural rule § 802.05 has retroactive application except where retroactive application “imposes an unreasonable burden on the party charged with complying with the new rule’s requirements.” The circuit court concluded that requiring Elliott to comply with § 802.05 was not unfair. We agree and affirm the order of the circuit court.

¶2 Elliott’s answer to the complaint filed by Edward Baumann and Elite Protection Specialists, LLC, asserted that the three causes of action in the complaint were frivolous.² Elliott asked for an award of costs and attorney fees under WIS. STAT. § 814.025 (2003-04).³ Elliott’s answer was filed January 5, 2004.

¶3 In April 2006, the circuit court granted summary judgment to Elliott dismissing two causes of action. On June 9, 2006, a jury returned a verdict in Elliott’s favor on the remaining cause of action alleged in the complaint. Elliott subsequently moved for frivolous costs and attorney fees under WIS. STAT.

¹ The effective date of the newly adopted WIS. STAT. § 802.05 is July 1, 2005. *Trinity Petroleum, Inc. v. Scott Oil Co., Inc.*, 2007 WI 88, ¶3, 302 Wis. 2d 299, 735 N.W.2d 1. The “safe-harbor” provision in § 802.05(3)(a)1. requires a person seeking sanctions for frivolous litigation to serve the nonmoving party at least twenty-one days before filing a motion for sanctions and allows the motion to be filed only if the nonmoving party does not withdraw or appropriately correct the offending pleading. *Trinity Petroleum*, 302 Wis. 2d 299, ¶27.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The complaint alleged tortious interference with contracts, extortion, and defamation.

³ WISCONSIN STAT. § 814.025 (2003-04) was repealed when the newly created WIS. STAT. § 802.05 was adopted, effective July 1, 2005. *Trinity Petroleum*, 302 Wis. 2d 299, ¶3. All references to § 814.025 are to the 2003-04 statutes.

§ 814.025. Observing that the new WIS. STAT. § 802.05 took effect July 1, 2005, and requires a moving party to first give notice to the opposing party, the circuit court denied Elliott’s motion. However, the court made findings that the action against Elliott was frivolous and maliciously filed in the event that an anticipated appellate decision determined that § 802.05 did not apply retroactively.⁴

¶4 In *Trinity Petroleum*, 302 Wis. 2d 299, ¶31, the Wisconsin Supreme Court considered the application of WIS. STAT. § 802.05 in circumstances like those presented in this appeal—the motion for sanctions was filed after the effective date of the new rule but related to the plaintiff’s conduct occurring prior to the effective date of the new rule. The court held that although there is a presumption of retroactive application of a new procedural rule, “a procedural statute will not have retroactive application if it impairs contracts or disturbs vested rights” or imposes an unreasonable burden upon the party attempting to comply with the procedural requirements of the new rule. *Id.*, ¶53. The court rejected the notion that application of the rule to conduct occurring before the effective date of the rule disturbed either contract or vested rights. *Id.*, ¶¶61, 62. It reversed and remanded to the circuit court to determine whether retroactive application of § 802.05 imposed an unreasonable burden on the moving party in that case. *Id.*, ¶92.

¶5 Elliott argues that this case is not like *Trinity Petroleum* because the circuit court made a finding of malice and frivolousness thus vesting a right to

⁴ At the time of the circuit court’s decision, *Trinity Petroleum v. Scott Oil Co.*, 2006 WI App 219, 296 Wis. 2d 666, 724 N.W.2d 259, was pending before this court. This court’s determination that WIS. STAT. § 802.05 applied retroactively was entered after the circuit court’s decision. *Trinity Petroleum*, 296 Wis. 2d 666, ¶25.

recovery which is impaired by retroactive application of the safe-harbor provision. His argument ignores the plain holding in *Trinity Petroleum* that the right to relief does not accrue until the circuit court makes a finding of frivolousness. *See id.*, ¶62. Elliott's right to recovery was not a vested right, even if based on conduct occurring before the effective date of the statute, because a finding of frivolousness was not made until after the effective date.

¶6 We need only consider whether retroactive application of WIS. STAT. § 802.05 imposes an unreasonable burden on Elliott. That determination focuses on the unique circumstances and procedural posture of this particular case. *Trinity Petroleum*, 302 Wis. 2d 299, ¶74. Whether the facts as determined fulfill a legal conclusion presents a question of law which we review de novo. *Popp v. Popp*, 146 Wis. 2d 778, 787, 432 N.W.2d 600 (Ct. App. 1988).

¶7 This litigation was commenced before the effective date of WIS. STAT. § 802.05. The supreme court adopted the petition repealing and recreating § 802.05 on March 31, 2005, and announced that the changes to § 802.05 would become effective on July 1, 2005. *Trinity Petroleum v. Scott Oil Co.*, 2006 WI App 219, ¶1 n.2, 296 Wis. 2d 666, 724 N.W.2d 259; S. CT. ORDER 03-06, 2005 WI 38 (eff. Mar. 31, 2005). Elliott's motion for summary judgment was not filed until February 1, 2006, well after the effective date of the statute.⁵ The motion was granted in part on April 7, 2006. The jury trial commenced June 8, 2006. As

⁵ We reject Elliott's contention that this case exhibits a complex procedural history. Delay in the litigation was not occasioned by any complex discovery or procedural wrangling but by Elliott's appeal of the dismissal of the defendant insurance company. *See Baumann v. Elliott*, 2005 WI App 186, 286 Wis. 2d 667, 704 N.W.2d 361. On the insurer's motion, the circuit court litigation was stayed pending appeal. That appeal concluded after the effective date of WIS. STAT. § 802.05.

the circuit court observed, Elliott had more than ten months to comply with the safe harbor provision in § 802.05. This stands in stark contrast to the situation in *Trinity Petroleum* where the movant had only five days to file a sanctions motion between the effective date of § 802.05 and the court's oral decision on the merits. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶15-16. Elliott had notice of the new procedural requirement and an opportunity to comply. See *Mosing v. Hagen*, 33 Wis. 2d 636, 642, 148 N.W.2d 93 (1967).

¶8 The bulk of the litigation between these parties occurred after the effective date of WIS. STAT. § 802.05. Elliott seeks a sanction for the commencement and maintenance a frivolous lawsuit. Although the action was commenced before the effective date of § 802.05, it was also being actively maintained for a substantial period of time after that date. Requiring compliance with § 802.05 does not unreasonably burden Elliott.⁶

¶9 In *Trinity Petroleum*, 296 Wis. 2d 666, ¶¶26-35, this court held that a postjudgment sanctions motion does not comply with the safe-harbor provision. The supreme court's *Trinity Petroleum*, 302 Wis. 2d 299, opinion did not expressly address this court's conclusion on that point. Holdings not specifically reversed on appeal generally retain their precedential value. See *State v. Byrge*, 225 Wis. 2d 702, 717-18 n.7, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. Although that general principle may not apply

⁶ The additional burdens Elliott claims—providing Baumann with a “free pass” and depriving Elliott of the ability to recover costs and attorney fees incurred in defending against the frivolous lawsuit before the effective date of WIS. STAT. § 802.05—stem from Elliott's own failure to comply with the new procedural requirement when there was amply opportunity to do so.

in certain situations, *see Spencer v. Brown County*, 215 Wis. 2d 641, 650-51, 573 N.W.2d 222 (Ct. App. 1997), there is no reason not to apply it here where the supreme court did not reverse our earlier holding and did not reach that step of our analysis because it remanded for further proceedings on retroactivity. Our *Trinity Petroleum* opinion retains its precedential value in holding that a postjudgment sanction motion does not comply with the safe-harbor provision. Therefore, we reject Elliott’s claim that WIS. STAT. § 802.05 has no application when frivolity cannot be determined until the conclusion of a jury trial. We recognized in *Trinity Petroleum* that a party cannot delay serving its sanction motion until conclusion of the case. *Trinity Petroleum*, 302 Wis. 2d 299, ¶28. That comports with the purpose of § 802.05 to deter and expeditiously weed out the frivolous from nonfrivolous suits to reduce disruption and delay in the courts. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶43-45; *Trinity Petroleum*, 296 Wis. 2d 666, ¶¶17-21.

¶10 Our decision in *Trinity Petroleum* also disposes of Elliott’s claim that Baumann was on notice of a claim for frivolous costs and attorney fees because WIS. STAT. § 814.025 was referenced in the answer and letters were written demanding that the frivolous action be dismissed.⁷ In *Trinity Petroleum*, 296 Wis. 2d 666, ¶¶32-33, this court rejected an argument that invoking § 814.025 in a prejudgment brief was sufficient. We explained that “[w]arnings are not motions” and the revised statutes explicitly provide that the “‘safe harbor’ period begins to run only upon service of the motion” in order to “stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule.” *Trinity Petroleum*, 296 Wis. 2d 666, ¶33 (citation omitted). Elliott’s

⁷ Elliott sent letters dated October 19, 2004, and April 7, 2006, suggesting the lawsuit is frivolous and offering to accept dismissal.

warning shots across the bow are no substitute for the required motion and do not render the retroactive application of WIS. STAT. § 802.05 unfair.

¶11 Elliott's remaining argument is that the circuit court failed to exercise its discretion because it did not sua sponte sanction Baumann for bringing claims the court found to be not only frivolous but filed with intent to maliciously injure. Although WIS. STAT. § 802.05(3)(a)2. gives the circuit court authority to initiate a show cause proceeding to determine if a party has violated § 802.05, nothing in the provision requires the court to do so. *Cf. State v. Thurmond*, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655 (no law requiring a trial court to declare a mistrial on its own motion). It is disingenuous to suggest that the circuit court should have timely done what Elliott himself failed to do. *See State v. Williquette*, 180 Wis. 2d 589, 603-04, 510 N.W.2d 708 (Ct. App. 1993) (appellate court has not looked with favor upon claims of prejudicial error based upon the circuit court's failure to act sua sponte), *aff'd*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995). The failure to act sua sponte is not the equivalent of a failure to exercise discretion.

By the Court.—Order affirmed.

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

