

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2009

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. 2008AP1987

Cir. Ct. No. 2006CV9933

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JEANINE L. JACKSON,

PLAINTIFF-APPELLANT,

v.

**UNITED MIGRANT OPPORTUNITY SERVICES, CLESHETE NASH,
MONTREAL WADE, SHIMONA SEABROOKS, MARIO REED,
BESSIE GROSS, LAURIE MOSS, QUINTELLA PIPPEN AND
PAULA LAMPLEY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed and cause remanded with directions.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jeanine L. Jackson appeals from a judgment dismissing her complaint against United Migrant Opportunity Services (UMOS), Cleshete Nash, Montreal Wade and Paula Lampley. Jackson alleged that Wade, a security guard at UMOS, had intentionally inflicted emotional distress on her and that Nash and Lampley, Wade’s superiors at UMOS, negligently supervised Wade. A jury trial was begun and after Jackson rested, the circuit court granted the defendants’ motion for a directed verdict. *See* WIS. STAT. § 805.14(3) (“At the close of plaintiff’s evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence.”). The circuit court subsequently granted the defendants’ motion for sanctions and attorneys’ fees related to a motion for injunctive relief, *see Schultz v. Sykes*, 2001 WI App 255, ¶53, 248 Wis. 2d 746, 787, 638 N.W.2d 604, 623, and entered judgment against Jackson in the amount of \$13,759.92.¹ Jackson appeals. We affirm.

BACKGROUND

¶2 Because of the incomplete appellate record, a full recitation of the facts is not necessary. For purposes of this opinion, it is sufficient to note that Jackson participated in a job-training program at a UMOS facility during 2006. While at UMOS, Jackson encountered Wade, who worked as a security guard for UMOS. The parties’ descriptions of the relationship between Jackson and Wade diverge greatly, and in October 2006, Jackson commenced this litigation.

¶3 Jackson has represented herself throughout this litigation. In a Second Amended Complaint, Jackson alleged five causes of action, two of which

¹ Jackson does not raise any challenge to the circuit court’s sanction order.

survived the defendants' motion for summary judgment—intentional infliction of emotional distress by UMOS and Wade, and negligent supervision of Wade by Nash and Lampley.² A jury trial began on June 25, 2008. The minutes maintained by the clerk of the circuit court show that Jackson called Wade, Lampley, and Jasmine Jackson, in addition to herself. After Jackson rested, the defendants moved for a directed verdict. After hearing argument, the circuit court granted the motion and dismissed Jackson's complaint with prejudice.

DISCUSSION

¶4 On appeal, Jackson describes the issues as whether Wade inflicted intentional emotional distress and whether Nash and Lampley were negligent in their supervision of Wade. Jackson contends that the legal elements of her claims were met, and to support that contention, Jackson cites to deposition evidence. Jackson does not cite to any portion of the trial. Indeed, the Record does not contain the transcript of the jury trial, although it does contain copies of several depositions. In the appendix to her appellate brief, Jackson included an excerpt from the circuit court's oral decision granting the defendants' motion for directed verdict. That transcript, however, is not in the Record, and the evidentiary portion of the jury trial is likewise not in the Record.

¶5 An appellant is responsible for ensuring that the Record on appeal contains the material necessary for this court to address the issues. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226, 232 (Ct. App. 1993). Because this court does not have a copy of the trial transcript, the Record

² The dismissal of several other individual defendants and the granting of summary judgment for the defendants on the three other causes of action are not at issue on appeal.

is incomplete and “when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court’s ruling.” *Id.*, 174 Wis. 2d at 27, 496 N.W.2d at 232. “Given an incomplete record, we will assume that it supports every fact essential to sustain the [circuit] court’s [decision.]” *State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). The following observation from *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 642–643, 273 N.W.2d 233, 239 (1979), is particularly apt:

The [circuit] court, with a full record before it and having heard the testimony, determined that the defendant had not come forward with proof of contributory negligence as a cause of death. The defendant could have produced the transcript if it wished to demonstrate to this court that it had in fact met its burden of proof. It did not; and, in the absence of such proof, this court will not reverse the [circuit] court’s conclusion

¶6 A circuit court may direct a verdict when ““the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party.”” *Haase v. Badger Mining Corp.*, 2004 WI 97, ¶15, 274 Wis. 2d 143, 151, 682 N.W.2d 389, 393 (citation omitted). Because the circuit court is in the best position to judge the weight and relevancy of the evidence, we will not set aside its decision to dismiss for insufficient evidence unless the record reveals that the court was ““clearly wrong”” about the existence of credible evidence to support the claim. *Id.*, 2004 WI 97, ¶17, 274 Wis. 2d at 151, 682 N.W.2d at 393 (citation omitted).

¶7 By not ensuring that the trial transcript was included in the appellate Record, Jackson has made it impossible for this court to ascertain whether the circuit court was clearly wrong. We must assume that the missing parts of the

Record support the circuit court's decision and, accordingly, Jackson's appeal fails.

FRIVOLOUS APPEAL

¶8 UMOS contends that Jackson's appeal is frivolous and moves for costs and attorneys' fees under WIS. STAT. RULE 809.25(3)(c).³ That statute provides that an appeal is frivolous when:

1. The appeal ... was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
2. The party or the party's attorney knew, or should have known, that the appeal ... 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.

¶9 UMOS contends that Jackson's appeal is frivolous under either standard. It also asks this court to grant injunctive relief and "revoke Jackson's ability to proceed before the court as an indigent and requir[e] Jackson to pay the costs and fees imposed in this action before filing or continuing any further litigation involving UMOS, its agents and its employees."

¶10 Whether an appeal is frivolous under WIS. STAT. RULE 809.25(3)(c)2. is a question of law. *Larson v. Burmaster*, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 369, 720 N.W.2d 134, 151. This court considers "what a reasonable party or attorney knew or should have known under the same or similar circumstances." *Ibid.* (citation omitted). The question is not whether the

³ UMOS filed a separate motion when it filed its respondent's brief. The motion is timely. See WIS. STAT. RULE 809.25(3)(a). Jackson filed a response opposing UMOS's request.

appellant can prevail on appeal, but rather whether the appeal is so indefensible that the party should have known it to be frivolous. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶28, 277 Wis. 2d 21, 43, 690 N.W.2d 1, 11. Although any doubts should be resolved in favor of finding an appeal not to be frivolous, *ibid.*, “a pro se litigant is required to make a reasonable investigation of the facts and the law before filing an appeal,” *Holz v. Busy Bees Contracting, Inc.*, 223 Wis. 2d 598, 608, 589 N.W.2d 633, 637 (Ct. App. 1998).

¶11 Jackson’s appeal was frivolous under WIS. STAT. RULE 809.25(3)(c)2. In her Statement on Transcript, filed at the outset of the appeal, Jackson stated that a transcript was not necessary for the prosecution of the appeal. In light of this court’s standard of review of a directed verdict, set forth in ¶6, Jackson’s choice to proceed without a transcript doomed her appeal to failure. Without a trial transcript, it can easily be said that Jackson’s appeal did not have a reasonable basis in law or equity and, therefore, was frivolous within the meaning of RULE 809.25(3)(c)2.⁴ We decline, however, to order injunctive relief against Jackson. As evidenced by the unchallenged sanction order entered by the circuit court, Jackson’s conduct during this litigation was highly suspect. It does not yet,

⁴ We decline to hold Jackson’s appeal frivolous under WIS. STAT. RULE 809.25(3)(c)1. Whether Jackson filed her appeal in bad faith, solely for purposes of harassing or maliciously injuring UMOS, would be “analyzed under a subjective standard.” *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 235–236, 517 N.W.2d 658, 663 (1994) (discussing WIS. STAT. § 814.025(3)(a)). “The court must determine what was in the person’s mind and were his or her actions deliberate or impliedly intentional with regard to harassment or malicious injury.” *Id.*, 185 Wis. 2d at 236, 517 N.W.2d at 663. Because this court cannot make findings of fact, *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980); WIS. CONST. art. VII, § 5(3), a finding under RULE 809.25(3)(c)1. would have to be made as a matter of law, *see Tomah-Mauston Broad. v. Eklund*, 143 Wis. 2d 648, 659, 422 N.W.2d 169, 173 (Ct. App. 1988). Because Jackson’s appeal is frivolous under the objective standard of RULE 809.25(3)(c)2., we need not consider whether the appeal was frivolous under the RULE 809.25(3)(c)1. standards.

however, rise to the level of repetition needed to justify injunctive relief. *See, e.g., Puchner v. Hepperla*, 2001 WI App 50, ¶2, 241 Wis. 2d 545, 548–549, 625 N.W.2d 609, 610 (per curiam) (twenty previous appellate court filings); *State v. Casteel*, 2001 WI App 188, ¶19, 247 Wis. 2d 451, 461, 634 N.W.2d 338, 344 (eight previous WIS. STAT. § 974.06 motions); *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 745, 468 N.W.2d 760, 761 (Ct. App. 1991) (“more than five years of numerous pleadings, motions and appeals ... based on the same facts and issues”).

¶12 We remand the matter to the trial court to conduct a hearing to assess the amount of reasonable costs and attorney fees incurred by UMOS on appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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

