

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP1373

Cir. Ct. No. 2007CV3057

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF SANCTIONS IN: RAISA QUILES, PLAINTIFF, V. REBECCA
POKOS AND PROGRESSIVE CLASSIC INSURANCE COMPANY, DEFENDANTS.**

S.A. SCHAPIRO,

APPELLANT,

v.

REBECCA POKOS AND PROGRESSIVE CLASSIC INSURANCE COMPANY,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL B. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. S.A. Schapiro appeals from an order imposing a \$250 monetary sanction against him for refusing to withdraw motions alleging professional misconduct against opposing counsel for which there was no evidentiary support. The issues are whether Rebecca Pokos and Progressive Classic Insurance Company (collectively referred to as “Progressive”) afforded Schapiro the twenty-one-day safe harbor period required by the sanctions statute, WIS. STAT. § 802.05(3)(a)1. (2007-08), and whether Progressive’s motion for sanctions was sufficiently specific to alert Schapiro to precisely the conduct allegedly warranting the sanction.¹ We conclude that Progressive provided Schapiro with the twenty-one-day safe harbor period required by § 802.05(3)(a)1. to withdraw his motion; his insistence in pursuing an albeit modified and less offending reconsideration motion did not absolve him from violating the sanctions statute. We further conclude that Progressive’s allegations of how Schapiro violated the sanctions statute were sufficiently particularized to identify the offending conduct. Therefore, we affirm.

¶2 Schapiro represented Raisa Quiles in her personal injury action for damages against (Pokos and) Progressive.² Progressive was represented by Attorney Christine M. Benson.³ Quiles’s treating physician was Marjorie Wang,

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

² Because the order challenged on appeal imposed a monetary sanction against Schapiro and not his client, we generally refer to the various motions resulting in the sanction as being filed by Schapiro rather than Quiles.

³ We generally refer to the motions and responses as being filed by Progressive. We refer to those pleadings as filed and served by Benson when they involve Benson personally, who was the target of Schapiro’s allegations resulting in the monetary sanction imposed against him.

M.D., of the Medical College of Wisconsin. Both Quiles and Progressive had identified Wang as a prospective trial witness.

¶3 On December 14, 2007, Schapiro moved the trial court to preclude Progressive from deposing or calling Wang as a trial witness, and from commenting to the jury on Wang's anticipated failure to testify ("original motion"); Schapiro also "revok[ed]" Quiles's consent previously given to Progressive for her medical records from Wang. Schapiro alleged that Wang refused to meet with him or write a medical report on Quiles's care and treatment. In his motion, Schapiro insinuated that Benson was "orchestrat[ing]" Wang's refusals. At a hearing on the motion, Benson told the trial court that she "had absolutely no contact with Dr. Wang nor can I have contact with Dr. Wang. That's just not appropriate, not proper for the defendants to do that. I would never do that. All I did was request records from Dr. Wang's office." Benson summarized her position by reiterating that

[a]t no time have I spoken with anybody ... nor has anyone in my office spoken with anyone in Dr. Wang's office, whether it be Dr. Wang, Susan Engler, or anyone associated with Dr. Wang. I will not do that, I cannot do that, nor will I ever do that unless I have a subpoena to have her testify at a deposition.

The trial court orally denied Schapiro's motion on January 10, 2008, and entered an order to that effect on January 30, 2008.⁴

¶4 On January 31, 2008, Schapiro moved for reconsideration. Progressive opposed that motion, claiming that Schapiro had: (1) erroneously

⁴ The trial court denied the motion except that it held in abeyance its ruling on whether Progressive could comment to the jury on Wang's anticipated failure to testify.

summarized the trial court's original decision; (2) cited cases that were not relevant to or supportive of Schapiro's position; and (3) insinuated that Benson had inappropriately contacted Wang, despite her insistence that she and the defendants had "no contact with Dr. Wang." At a hearing on Schapiro's reconsideration motion, Benson elaborated on her concerns, telling the trial court that she was the target of a personal attack "accus[ing her] of some untoward behavior in this case which [she is] actually very tired of. There's absolutely no evidence of that."

¶5 The trial court characterized the reconsideration motion as "bizarre," and referred to Schapiro's

repeated accusations ... that Ms. Benson has had contact with Dr. Wang or somehow controlled the fact that Dr. Wang doesn't want to speak with Mr. Schapiro, but there's no evidence whatsoever in the record, no information regarding why Dr. Wang doesn't want to speak with Mr. Schapiro, much less any connection of Ms. Benson to that.

Now, Mr. Schapiro's arguments are, they're thinner than thin. He's saying ... the defendants allegedly did something wrong and that ... must mean that the defendants are in cahoots with Dr. Wang and that's why Dr. Wang won't talk to Mr. Schapiro. It's really a conspiratorial argument that somehow the defense has access to Dr. Wang when the plaintiff does not, but again there's just no evidence whatsoever in the record of that. Also, [the trial court] see[s] no involvement whatsoever of Ms. Benson or anyone else in Mr. Schapiro not getting the records. There's just no involvement.

¶6 Progressive moved for sanctions, affording Schapiro twenty-one days to withdraw his previously filed (and now denied) original and reconsideration motions that contain "[baseless] accusations [against Benson] of inappropriate conduct." Schapiro apologized to the trial court and to Benson for accusing Benson of speaking with Wang, and Schapiro modified his

reconsideration motion accordingly. However, Schapiro insisted on pursuing the modified motion without modifying the criticized cases, and continued his insinuations that Benson was responsible for his inability to obtain Quiles's medical records from Froedtert Memorial Lutheran Hospital. Benson replied that she would pursue sanctions for Schapiro's failure to withdraw his reconsideration motion altogether because it contained personal attacks of unprofessional conduct against her.

¶7 WISCONSIN STAT. § 802.05 authorizes the imposition of sanctions against those who misuse the legal system. Section 802.05(2) imposes on all attorneys and unrepresented parties that

[b]y presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, [that they are] certifying that to the best of th[at] person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

- (a) The paper is not being presented for any improper purpose
- (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
- (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

§ 802.05(2). The statute's safe harbor provision is in subsection 802.05(3)(a)1., which provides that

[A] motion for sanctions ... shall describe the specific conduct alleged to violate sub. (2). The motion shall be served ... but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion....

See § 802.05(3)(a)1.

¶8 In its motion for sanctions, Progressive sought the withdrawal of Schapiro's original and reconsideration motions, alleging that Schapiro's motions were frivolous, in that Schapiro: (1) mischaracterized the law; (2) brought the motion for an improper purpose to needlessly increase litigation costs; and (3) accused Benson for inappropriately: (a) contacting Wang; and (b) interfering with discovery of Quiles's medical records. Progressive served the proposed motion on February 20, 2008, notifying Schapiro that if he did not withdraw his motions within twenty-one days, it would file the motion to pursue sanctions against Schapiro. *See* WIS. STAT. § 802.05(3)(a). Schapiro responded on February 21, 2008, by apologizing for accusing Benson of having contacted Wang and those associated with her and modified the already denied reconsideration motion, but refused to withdraw it. Benson responded on February 27, 2008, explaining why the modification did not negate her concerns, and warning Schapiro that failure to withdraw his reconsideration motion would result in Progressive filing its sanctions motion.⁵ On March 19, 2008, Progressive filed the sanctions motion,

⁵ There were twenty-nine days in February of 2008.

alleging that Schapiro's modified motion continued to: (1) mischaracterize the law; and (2) insinuate that Benson influenced Froedtert Hospital's handling of the production of Quiles's medical records.

¶9 The trial court imposed a monetary sanction of \$250 against Schapiro. The basis for the sanction was Schapiro's groundless insinuations against Benson, not for Schapiro's alleged (mis)citation to cases. *See* WIS. STAT. § 802.05(2)(c).

¶10 The trial court first recited the chronology of events to demonstrate Benson's compliance with the safe harbor provision of WIS. STAT. § 802.05(3)(a)1. The trial court explained that Progressive served its proposed motion for sanctions on Schapiro on February 20, 2008, prompting Schapiro's partial apology the next day. Schapiro then filed a modified reconsideration brief, prompting Benson to explain why Schapiro was still subject to her sanctions motion:

It appears that [Schapiro] removed the argument that I have had some inappropriate contact with Dr. Wang or her attorney, but he continues to make arguments that are not supported by facts or case law. My motion will be for sanctions for having filed the motion for reconsideration at all. The cases relied upon do not support his position, and he continues to suggest that I have been the reason that he cannot obtain the records from Froedtert Hospital.

On March 19, 2008, Benson filed the motion for sanctions. The trial court found that Benson complied with the safe harbor provision of § 802.05(3)(a)1.

¶11 The trial court then explained that after several hearings during which Benson and Schapiro were individually asked about Benson's alleged attempts to influence Wang and Froedtert Hospital to refuse to deal with Schapiro, it was clear that Schapiro's accusations and insinuations against Benson were

baseless. The trial court described the tenor of Schapiro's motion as his being unable to "do his work on behalf of the plaintiff as a result of Miss Benson." Schapiro did not modify his allegation that Froedtert Hospital "red carpeted" Quiles's medical records to Benson, and did not send those same records to Schapiro. Although Schapiro clearly believed that something untoward was occurring because Benson received Quiles's medical records but he as Quiles's attorney did not, he proffered no evidence to support his belief.

¶12 Schapiro challenges the sanctions order because he claims that Benson did not comply with two requisites of WIS. STAT. § 802.05(3)(a)1., the safe harbor provision, and the provision requiring a description of the "specific conduct alleged to violate sub. (2)." We reject Schapiro's contentions.

¶13 Schapiro first contends that because Benson's sanctions motion sought withdrawal of motions that had already been denied, compliance with the safe harbor provision was meaningless. Consequently, this does not involve a calculation error; the claimed error is that a sanctions motion seeking the withdrawal of a motion that has already been decided cannot offer a safe harbor. We disagree.

¶14 Schapiro's allegations accuse Benson of professional misconduct by interfering with the production of proposed evidence and a prospective witness; allegations of unprofessional conduct that a lawyer could reasonably determine were potentially damaging. Benson sought to have the original and reconsideration motions withdrawn to remove those repeated allegations from the public record. We conclude that the sanctions motion seeking the withdrawal of a reconsideration motion continuing an attack claiming professional misconduct by a practicing lawyer is viable pursuant to WIS. STAT. § 802.05(2)(c) and (3)(a)1.

¶15 Benson complied with the safe harbor provision of WIS. STAT. § 802.05(3)(a)1., and afforded Schapiro twenty-one days to withdraw his reconsideration motion; he chose instead to compel Benson to file and litigate her sanctions motion. Schapiro was notified that his modification was insufficient to avoid Benson pursuing sanctions against him.

¶16 Schapiro's second challenge is that Benson's motion was not sufficiently specific to alert him to what he was being accused of. We also reject that contention. Benson initially identified the objectionable material as Schapiro's original and reconsideration motions: (1) filed for an improper purpose to unnecessarily increase Progressive's attorney fees; (2) for repeatedly mischaracterizing the case law; and (3) most particularly, for his baseless and serious accusations of professional misconduct against Benson for allegedly interfering with Wang and Froedtert Hospital. After Schapiro apologized for accusing Benson of improperly contacting Wang, Benson warned the trial court and Schapiro that she would pursue her sanctions motion if Schapiro continued to mischaracterize the case law, and continued to insist, without any factual basis, that Benson influenced Froedtert Hospital to provide her with medical records and to withhold those same records from Schapiro.

¶17 We do not understand how Benson's explanation that "[t]he cases relied upon do not support [Schapiro's] position, and he continues to suggest that I have been the reason that he cannot obtain the records from Froedtert Hospital" is not sufficiently specific to apprise Schapiro of the basis for her sanctions motion. Schapiro insinuated that Benson interfered with his ability to obtain his client's medical records from Froedtert Hospital. Benson has denied this accusation, and Schapiro has proffered no evidence of Benson's alleged interference with Schapiro obtaining the records from Froedtert. Moreover, Schapiro's modification of his

reconsideration motion, admitting that he had no evidence that Benson had improperly contacted anyone associated with Wang, was evidently sufficiently specific to prompt him to withdraw some of his allegations.

¶18 We conclude that Benson complied with WIS. STAT. § 802.05(3)(a)1. by affording Schapiro twenty-one days to withdraw his reconsideration motion, and for describing the specific conduct that prompted her sanctions motion. Schapiro understood Benson’s basis for seeking sanctions sufficiently to withdraw one of his accusations; it is difficult to understand why he did not know what Benson was describing in the remainder of her motion, particularly when she explained that she would pursue her motion because Schapiro “continues to suggest that I have been the reason that he cannot obtain the records from Froedtert Hospital.”

By the Court.—Order affirmed.

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

