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DISTRICT II

September 10, 2003

To:

Hon. Joseph D. McCormack
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You are hereby notified that the Court has entered the following opinion and order:

02-0826

Gerald F. Weiland and Carol Ann Weiland v. Daniel G. Paulin and
Joan E. Paulin (L.C. #01-CV-119)

Before Anderson, P.J., Brown and Nettesheim, JJ.

In this case, this court affirmed a summary judgment and, on our own motion, concluded that the appeal was frivolous. *See Weiland v. Paulin*, 2002 WI App 311, ¶2, 259 Wis. 2d 139, 655 N.W.2d 204. We remanded the cause for a hearing to determine reasonable costs, fees and attorney fees, and directed all costs assessed to be paid solely by the Paulins' appellate counsel. *Id.* The Paulins petitioned for review, and our supreme court, in a two-paragraph order, granted the Paulins' petition for review, summarily reversed the frivolousness determination, and remanded the cause to this court with the following directions:

“(1) the court of appeals shall give Attorney [Joseph J.] Kroening an opportunity to be heard regarding the frivolous appeal determination, and (2) the court of appeals shall then make

specific findings to support any conclusion that the appeal is frivolous under Wis. Stat. § (Rule) 809.25(3)(c)2.” *Weiland v. Paulin*, 2003 WI 27, 260 Wis. 2d 277, 659 N.W.2d 875.

On May 1, 2003, this panel sent a letter to Cornelia G. Clark, Clerk of the Supreme Court and the Court of Appeals, seeking clarification of the “make specific findings” portion of that order. In particular, we asked:

1. Does the Supreme Court’s reference to ‘specific findings’ envision that this court issue a new decision after the court has heard Attorney Kroening on the issue?

2. Or, bearing in mind that this court does not have the authority to engage in formal fact-finding, does the Supreme Court envision that we must order a fact-finding, evidentiary hearing by a referral of the matter to a special master or referee, to be followed by a further opinion of this court?

In response, we received a letter from Clerk Clark informing us that “the requested clarification is unnecessary. The court remains confident that the panel will correctly discern the appropriate procedures to be followed in this matter without further direction. Accordingly, the court respectfully declines your request.”

Left then to our own devices, on August 20, 2003, this court conducted a hearing which we believe comports with the supreme court’s directive. We heard argument from the attorneys for both parties. We inquired of counsel whether they were satisfied that the hearing complied with the supreme court’s order; they both indicated that they were. We inquired of Attorney Kroening whether the content of his petition for review and of his letter to the Office of Lawyer Regulation adequately represented his position on the matter of frivolousness; he indicated that

they did. We are convinced that we have satisfied the first requirement of the supreme court's order.

Regarding the second requirement that we make specific findings to support any conclusion that the appeal is frivolous, we adopt and incorporate by reference our language from our opinion as those requisite findings. *See Weiland*, 259 Wis.2d 139, ¶¶21-30. We are convinced that nothing presented by Attorney Kroening, whether in his petition for review, his letter to the Office of Lawyer Regulation, or in his oral presentation to this court at the hearing, requires any modification to the detailed and careful language we used in our opinion to make a frivolousness determination in the first instance. The hearing, the petition and the letter confirm our understanding, as expressed in our original opinion, that the Paulins' briefs on appeal failed to apprise us of the real basis for the circuit court's ruling. In his appeal brief, Attorney Kroening defended against one of the multiple arguments raised by the Weilands in their motion for summary judgment—the argument that the Paulins' home was a manufactured home and was therefore contrary to one of the restrictive covenants. However, Attorney Kroening did not make an issue of the separate and independent basis for the trial court's grant of summary judgment—that the Paulins were obligated by the restrictive covenants to submit their plan for any structure (manufactured home or otherwise) to the architectural board prior to building. This separate and independent basis for the grant of summary judgment is controlling absent appellate argument to the contrary, even assuming, *arguendo*, the plausibility of the arguments made by Attorney Kroening regarding the manufactured home issue.

We held then and reaffirm now that an attorney should know that if summary judgment is requested based on multiple, alternative grounds and is granted on one of the alternative grounds, and the attorney's appellate brief debates a different ground without even mentioning, let alone

arguing about, the correctness of the ground upon which the trial court granted summary judgment, such non-argument renders the appeal without any reasonable basis in law or equity.

Accordingly, we again conclude that the appeal is frivolous under WIS. STAT. RULE 809.25(3)(c)2, and we remand the cause to the circuit court for a hearing to determine the Weilands' costs, fees and reasonable attorney fees in responding to this appeal. We further direct that all costs and fees assessed shall be paid solely by the Paulins' appellate counsel, Attorney Joseph J. Kroening.

Upon the foregoing reasons,

IT IS ORDERED that the appeal no. 02-0826 is frivolous, pursuant to WIS. STAT. RULE 809.25(3)(c)2.

IT IS FURTHER ORDERED that the cause is remanded to the circuit court for a hearing to determine costs, fees and reasonable attorney fees.

IT IS FURTHER ORDERED that all costs and fees assessed shall be paid solely by the Paulins' appellate counsel, Attorney Joseph J. Kroening.

Cornelia G. Clark
Clerk of Court of Appeals