

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2003

Cornelia G. Clark
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. 02-1358
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-61

**IN COURT OF APPEALS
DISTRICT IV**

HORST W. JOSELLIS,

PLAINTIFF-APPELLANT,

V.

PACE INDUSTRIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed and cause remanded with directions.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Horst Josellis appeals an order denying reconsideration of a prior postjudgment order. The issues are whether the trial court properly denied reconsideration and properly held frivolous the reconsideration motion. We affirm on both issues.

¶2 Josellis sued his former employer, Pace Industries, Inc., for defamation. The trial court allowed him to amend his complaint once, denied a second amendment, and then dismissed the amended complaint for its failure to adequately state a defamation claim.

¶3 Josellis moved to stay execution of the dismissal order and for permission to file a third amended complaint. The court found both motions frivolous, denied them, and ordered Josellis to pay the attorney fees Pace incurred in responding to them.

¶4 Josellis moved for reconsideration of the order. The trial court denied reconsideration, found the motion frivolous, and again ordered Josellis to reimburse Pace Industries for its attorney fees. Josellis took this appeal from the original judgment of dismissal, the order on his postjudgment motions, and the order denying reconsideration. By order dated August 19, 2002, this court limited the appeal on jurisdiction grounds to issues raised by the order on reconsideration.

¶5 The trial court properly denied reconsideration. Other than unsupported conclusory assertions, Josellis offered no factual or legal basis for his motion. The decision to deny it was discretionary. *See State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541-42, 363 N.W.2d 419 (1985). In the absence of any grounds to rule otherwise, the trial court reasonably exercised its discretion to deny relief.

¶6 The trial court also did not err in finding the motion frivolous. The trial court may award frivolousness costs and/or fees if the action lacks any reasonable basis in law, or is pursued or continued in bad faith. WIS. STAT.

§ 814.025(3) (1999-2000).¹ The issue presents a mixed question of fact and law, with the trial court's factual findings affirmed if not clearly erroneous, and the conclusion of frivolousness reviewed de novo as a question of law. See *Riley v. Lawson*, 210 Wis. 2d 478, 491, 565 N.W.2d 266 (Ct. App. 1997). Here, the record fully supports the trial court's determination that Josellis knew or should have known that his reconsideration motion lacked any basis in law or fact. Josellis had litigated and relitigated the same issues previously, and the court had carefully explained to him why his action was dismissed and why he could not keep amending his complaint. Josellis nevertheless persisted in this third attempt without offering any new arguments or basis for relief. Under these circumstances, the motion was frivolous under the statutory standard.

¶7 Josellis argues that his pro se status merits consideration in determining frivolousness. We acknowledge that Josellis litigated without counsel. Josellis's action was frivolous not because an attorney would have ceased pursuing it, but because a reasonable person in the position of a pro se litigant would have ceased it as well. See *Stoll v. Adriansen*, 122 Wis. 2d 503, 514, 362 N.W.2d 182 (Ct. App. 1984) (setting forth the standard of frivolousness for pro se litigants).

¶8 Pace requests an award of fees and costs on the appeal, contending that it, too, is frivolous. Our decision affirming the trial court's determination of frivolousness renders the appeal frivolous per se. See *Belich v. Szymaszek*, 224 Wis. 2d 419, 435, 592 N.W.2d 254 (Ct. App. 1999). We therefore award Pace

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

its reasonable attorney fees and costs incurred during the appeal, and remand to the trial court to determine to the appropriate reasonable amount.

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

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

