COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1600 **Cir. Ct. No. 01 CV 5004**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BENEDETTA BALISTRIERI,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

V.

JOSEPH P. BALISTRIERI,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

JOHN BALISTRIERI AND
CATHERINE BALISTRIERI
BUSATERI,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed; cross-appeal remanded with directions.*

Before Wedemeyer, P.J., Schudson and Hoover, JJ.

¶1 PER CURIAM. Benedetta Balistrieri appeals from the trial court judgment granting summary judgment and dismissing her amended complaint against her brother, Joseph P. Balistrieri, and her two other siblings. Her amended complaint presented a "cause of action in constructive trust" related to what she alleged was her one-fourth share of their deceased parents' assets, and a claim of "conversion" related to what she alleged were her "items of personal property which have been removed and taken from her" by her siblings. Joseph P. Balistrieri cross-appeals from the same judgment denying his request for costs and attorney's fees based on its determination that Benedetta's action was not frivolous.

¶2 We affirm the judgment dismissing Benedetta's action. We remand, however, for the trial court to make specific findings and, based on those findings, determine whether Benedetta's action was frivolous under WIS. STAT. § 814.025 and, if it was, assess appropriate costs and attorney's fees.

I. BACKGROUND

¶3 The case underlying this appeal is the companion to one recently reviewed by this court. *See* ***Balistrieri v. Balistrieri***, No. 01-3028, unpublished slip op. (WI App May 23, 2002). Part of the factual background relevant to the instant appeal is provided in our decision in that appeal, a copy of which is appended to this decision. As we noted, "The special administration was eventually dismissed in lieu of a civil action filed to address the issues raised in the probate matter." ***Id.*** at 2. This appeal comes from that "civil action."

¶4 As summarized by Benedetta in her current appeal, "Due to dismissal of the Special Administration by another branch of the Circuit Court shortly after commencement of this action, the initial pleadings were amended so as to eliminate that Plaintiff and causes of action related to an accounting for the estate and procurement of its assets." In the amended complaint underlying the instant appeal, however, Benedetta pursued her constructive trust and conversion claims.

¶5 Joseph moved for summary judgment on both of Benedetta's claims. In support of his motion, he filed his own affidavit as well as affidavits from his sister, Catherine Balistrieri Busateri, his brother, John J. Balistrieri, his aunt, Mary Caminiti, and his attorney, Henry G. Piano, who had also represented his father, Frank P. Balistrieri, as well as documents related to the real estate at issue. Based on his submissions, Joseph argued that Benedetta had "no cause of action in constructive trust as defined by case law." He also argued that because he had owned the real estate since 1971, and because Benedetta had left Wisconsin in 1977, it was "reasonable to assume that she abandoned the property and also that the [six-year] statute of limitations for conversion [under WIS. STAT. § 893.51] ha[d] long since extinguished any cause of action that she may have."

¶6 Benedetta, responding to the summary-judgment motion, offered her own affidavit and asserted that, in addition to the specified real estate at issue, additional "unknown" property "may be involved" because their father "secreted his assets and those of [their mother] during his lifetime for fear of revelation to law enforcement and tax authorities of the extent and nature of his holdings." She further asserted, "We believe that the evidence will show that the Balistrieri sons, in active concert with their father, laundered vast quantities of 'skim money' from illegal operations." She also contended that the statute of limitations had not

begun to run until the assets were "put out of [her] reach, … which would have been at the time of the 'estate sale' held in 2001." Joseph filed a response with supporting exhibits.

¶7 Granting summary judgment on the constructive trust claim, the trial court concluded that Benedetta had "failed to meet her burden of showing there are any evidentiary facts" forming a basis for her claim. Apparently commenting on her reference to "unknown" property, the court commented that she would not be allowed to simply say, "['G]ive me a few years and eventually I'll have some facts.[']" Further, apparently reviewing certain real estate documents included in the summary judgment submissions and commenting on the specified real estate, the court commented:

> [S]he is obligated now to show there is some scintilla of evidence in support of her claim. It is not here. All I have to look at is evidence of a bona[]fide transaction[;] consideration was paid for the transfer of propery by way of assuming mortgages and tax indebtedness and repair of the property. There is nothing in evidence that defeats that evidentiary fact.

¶8 Granting summary judgment on the conversion claim, the court commented that Benedetta had provided "no law … to say that the statute of limitation should be different for a daughter who leaves the state than for anybody else." The court concluded, therefore, that the statute of limitations "goes back to the time the person left the property and has failed to secure it or start an action to accomplish return of that property" and, therefore, that it foreclosed Benedetta's action.

¶9 Regarding Joseph's request that the court find Benedetta's action frivolous, the trial court simply concluded, "I am denying the motion for frivolousness, and I am just awarding dismissal of this claim."[1]

II. DISCUSSION

A. Benedetta's Appeal

¶10 Our standards for evaluating a challenge to a trial court's grant of summary judgment are well known and need not be elaborated here. *See* WIS. STAT. § 802.08(2). Our review is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶11 Typically, at this point in an opinion, we would identify an appellant's arguments and summarize the theories offered in support of them. In this case, however, we are unable to do so. Despite repeated readings of Benedetta's briefs, we are unable to discern the nature of her challenge to the trial court's conclusions.

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[1] The record on appeal appears to be abbreviated. It contains, "TRANSCRIPT – MOTION FOR SUMMARY JUDGMENT," but that transcript *begins* with the trial court's comment: "All right. This case, as I said, is before me on a motion for summary judgment. And I think in some of the questions I have asked I have made it clear to the parties what my concerns are." Neither that transcript, nor anything else included in the record on appeal, reflects what the trial court had "said" or what its "questions" or "concerns" were.

Nevertheless, because Joseph, in his cross-appeal, asserts that "[b]ecause the court did not hear any evidence concerning any of the issues which involve a claim for a frivolous action, the court was unable to make adequate findings of fact so as to conclude as a matter of law that [Benedetta] had not violated the frivolous action statute," and because Benedetta does not dispute that the trial court failed to make factual findings on the issue of frivolousness, we assume that nothing in any portion of the proceedings that may be missing from the record on review contains any such findings.

¶12 The first hint of the inadequacy of Benedetta's briefs comes in the table of contents, which identifies her "Argument" only as, "A grant of Summary Judgment is Inappropriate in This Case." The deficiencies further develop in her statement of the facts: "The pertinent factual averments before the Trial Court and before this Court on Appeal are those contained in a series of Affidavits here reproduced as portions of [her] Appendix." Her statement of the facts also says that "[r]eference to facts which pertain directly to issues in dispute will be raised in the Argument portion of this brief." The balance of her briefs, however, while reciting many assertions from her affidavit, fails to connect any fact to any argument challenging the trial court's conclusions.

¶13 Benedetta never really identifies her arguments or offers anything, factually or legally, to explain why she disputes the trial court's conclusions. Instead, in her brief-in-chief, she presents more than three pages on summary judgment standards, followed by approximately four pages summarizing what she deems to have been Joseph's arguments in support of summary judgment and her disagreements with them. Then, for the first time focusing on the trial court's decision, Benedetta concludes her brief-in-chief:

> The Trial Court appears to have based its decision upon an alleged insufficiency of [her] Affidavit to raise inferences or facts which lead to the conclusion there are material issues of fact in dispute.
>
> While obviously the standard of review here will require the reading of the original Affidavits and attached exhibits from both sides, and therefore it may be regarded as a bit of overkill to restate portions of them, a brief abstract may be in order.
>
> In her Affidavit, [she] asserts the position of an insider, a member of the family with knowledge as to money laundering efforts favoring her brother's law practice. She herself received funds from Frank Balistrieri and deposited those funds. She was personally aware of

> the methods by which real property assets were secreted, in one case one of the sons holding title to a property while still a child. She specifically notes some of the holdings of Frank Balistrieri and quotes directly from letters referring to [Joseph's] trust relationship relative to the family's businesses.
>
> In her Affidavit [she] further refers to a number of properties as belonging in fact, though not in apparent legal title, to Frank Balistrieri and trances [sic] them into other properties. Finally, she avers that she was physically threatened in event of her return to the Milwaukee area, which certainly bears on why she did not earlier aggressively seek possession of her chattel property.
>
> Even if a portion of the Affidavit were deemed hearsay as to her, the balance of it, those portions based upon her direct knowledge and letters of the decedent raise a strong inference that the wealth of [Joseph] is directly attributable to his father and was so entrusted on the understanding that all children (and his widow) were to benefit.
>
> CONCLUSION
>
> The decision of the trial court should be reversed.

(Citations omitted.)

¶14 While we certainly do read the original summary judgment submissions, it certainly is not "overkill" for an appellant to "restate portions of them" that support an appellate challenge. Because Benedetta's brief presents no discernable argument specifically challenging the trial court's conclusions, her "brief abstract" of the facts, untethered to any theory, accomplishes nothing.

¶15 While we are always ready and willing to carefully study a record on appeal, our review is almost aimless if unaccompanied by arguments guiding our search and focusing our attention on the facts the parties deem most supportive of their theories. Generally we do not supply argument and legal research to an appellant who presents unsupported claims. *See* ***Boles v. Milwaukee County***, 150

Wis. 2d 801, 818, 443 N.W.2d 679 (Ct. App. 1989) ("[T]his court is not required to consider an argument unsupported by authorities."); WIS. STAT. RULE 809.19(1)(e) (appellant's brief must contain "argument on each issue" with citations to relevant authorities). We need not consider "amorphous and insufficiently developed" arguments. ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

¶16 Benedetta's "arguments" are amorphous and insufficiently developed. She has presented nothing, factually or legally, forming any basis to reverse the trial court's grant of summary judgment.

B. Joseph's Cross-Appeal

¶17 In our decision reviewing the companion case, we reiterated the requirements for a trial court's consideration of a claim of frivolousness under WIS. STAT. § 814.025. *See* ***Balistrieri*****,** No. 01-3028, unpublished slip op. at 3-5. We now incorporate that discussion in this opinion as well. Here, for the same reasons we expressed, we retain jurisdiction of the cross-appeal and remand the matter to the trial court to make specific factual findings on the issue of frivolousness, based on the record and, if needed, on an additional evidentiary hearing, and to assess whatever costs and attorney's fees may be appropriate. *See* ***id.*** at 4-5.

By the Court.—Judgment affirmed; cross-appeal remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809. 23(1)(b)5.

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DISTRICT I

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You are hereby notified that the Court has entered the following opinion and order:

01-3028 In re the Estate of Antonina Balistrieri:
Joseph P. Balistrieri v. Estate of Antonina Balistrieri
(L.C. #01 PR 297)

Before Wedemeyer, P.J., Schudson and Hoover, JJ.

Joseph P. Balistrieri appeals from an order denying his motion asking the court to declare frivolous the special administration proceeding commenced by his sister, Benedetta Balistrieri,

and her attorney, F.M. Van Hecke. Joseph asserts that the trial court erred when it: (1) denied the motion without holding an evidentiary hearing; and (2) ruled that the proceeding was not a frivolous action violative of WIS. STAT. § 814.025 (1999-2000).[2] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Because the trial court failed to make specific findings of fact to support its conclusion of nonfrivolousness, we remand the matter to the circuit court with instructions to make specific factual findings and enter an appropriate order based on its findings.

I. BACKGROUND

On February 5, 2001, Benedetta filed a petition for special administration pertinent to the estate of her mother, Antonina Balistrieri, who died intestate on September 15, 1997. The circuit court appointed Attorney Van Hecke as special administrator to "investigate, discover, protect and procure assets for [Antonina's] estate; to seek orders … in aid of discovery, injunctions and restraining orders with respect to property …."

In a lengthy affidavit, Benedetta averred that although her father and mother had transferred both the family home and a business property known as the Shorecrest Hotel to her brother, Joseph, the intent of the transfer was for Joseph to act as fiduciary of the properties and divide the assets among the four children after their mother and father died. Antonina and her

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

husband, Frank Balistrieri, continued living in the family home long after the legal transfer to Joseph. Frank, also intestate, predeceased Antonina.

Additional proceedings pertinent to the special administration occurred, but are not pertinent to our disposition of this appeal. The special administration was eventually dismissed in lieu of a civil action filed to address the issues raised in the probate matter. However, Joseph filed a motion seeking frivolous costs and attorney's fees from Benedetta for the costs he incurred in defending against the special administration. He alleged that the proceeding was frivolous at commencement and in its continuation. In deciding the motion, the circuit court ruled:

> I am aware, and I made some of my rulings dismissing this action based upon the things that you mentioned, counsel. However, I don't see frivolous action. I mean, maybe Mr. Van Hecke was wrong in his evaluation of the evidence, but I just don't see it as frivolous. And part of that is my belief his reputation -- he's appeared before me, and the investigation made, and there is not padding of time and those kinds of things. I didn't agree with his theory and I dismissed the action, and I do not believe it raises to the level of frivolousness.

The circuit court entered an order formally denying Joseph's motion for frivolousness. Joseph now appeals from that order.

II. DISCUSSION

The issue in this case involves the frivolous claim statute, WIS. STAT. § 814.025, which provides:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff or a

> counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ….
>
> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint 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.

In reviewing a circuit court's decision as to frivolousness, our standard involves a mixed question of fact and law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). "The findings by the circuit court of what was said, what was done, what was thought, and reasonable inferences drawn therefrom, are questions of fact" which will not be overturned unless clearly erroneous. ***Id.*** "[T]he ultimate conclusion of whether the facts cited fulfill the legal standard of frivolousness is a question of law which we review independently …." ***Id.***

Here, Joseph contends that the trial court failed to make specific findings and can only do so after conducting an evidentiary hearing. He is only half correct. The statute requires the circuit court to make specific findings when ruling on a motion for frivolousness. ***Sommer v. Carr***, 99 Wis. 2d 789, 792, 299 N.W.2d 856 (1981). The circuit court, however, may make such findings based on what is contained within the record without conducting an evidentiary hearing. ***Id.*** at 793. If the record does not contain sufficient evidence for the circuit court to make such findings, then the circuit court is required to conduct an evidentiary hearing. ***Id.***

Here, the circuit court did not make any specific findings to support its determination of nonfrivolousness. When a circuit court fails to make specific findings, we may retain jurisdiction of the appeal and simply remand the matter to the trial court to do so. ***Krueger v. State***, 84 Wis. 2d 272, 275, 267 N.W.2d 602 (1978); ***State v. Williams***, 104 Wis. 2d 15, 22, 310 N.W.2d 601 (1981). We conclude that this is the appropriate course of action in this case.

Accordingly, we remand the matter to the circuit court with the following directions. Upon remand, the circuit court shall make specific factual findings on the issue of frivolousness. The trial court may do so based solely on the record if it concludes the record contains sufficient evidence for such findings. If, upon remand, the trial court determines the record is insufficient, then the circuit court shall conduct an evidentiary hearing to further develop the record.[3]

More specifically, the circuit court needs to address findings specifically related to: (1) whether the action was commenced or continued in bad faith, to harass, or solely to cause malicious injury; and (2) whether Benedetta or her attorney knew or should have known that the claim lacked any reasonable basis in law or equity. The statute does not allow the trial court to

[3] We remind the circuit court that the burden of proving frivolousness falls upon the party making the assertion. ***Kelly v. Clark***, 192 Wis. 2d 633, 659, 531 N.W.2d 455 (Ct. App. 1995). "[W]hen a frivolous action claim is made, all doubts are resolved in favor of finding the claim nonfrivolous," ***id.*** at 649 (citation omitted), and the party bearing the burden must overcome this presumption, ***id.*** at 659. Indeed, our supreme court pointed out: "A claim is not frivolous merely because there is a failure of proof.… Nor is a claim frivolous merely because it was later shown to be incorrect … or because it lost on the merits." ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 243-44, 517 N.W.2d 658 (1994). Moreover, one side "warning" the other that the action is frivolous does not automatically make the continuation of the action frivolous. "[T]he nature of litigation is such that each party often considers the other's position to be without merit." ***Kelly***, 192 Wis. 2d at 650. "'When conflicting versions of fact exist, a swearing match frequently results. The mere likelihood of such a match is no reason why an attorney should accept the other side's version of the facts. Conflicting versions of the facts are standard fare in litigation.'" ***Id.***

find frivolousness *or lack thereof* without findings stating which statutory criteria are or are not present. ***Stern***, 185 Wis. 2d at 236.

Upon the foregoing reasons,

IT IS ORDERED that this case is remanded to the circuit court with directions. *See* WIS. STAT. RULE 809.21.

Cornelia G. Clark
Clerk of Court of Appeals