COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2434 **Cir. Ct. Nos. 99CV5303 & 00CV1705**

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

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Deininger, JJ.

¶1 PER CURIAM. Ronald W. Morters appeals *pro se* from the order granting the defendants' motion for costs and attorney's fees on the grounds that Morters' claims were frivolous under WIS. STAT. § 814.025(3)(b) (2001-02).[1] Morters also appeals from the judgment awarding $20,000 to the defendants.[2] Morters contends: (1) the trial court erroneously concluded that his claims were frivolous under § 814.025(3)(b); and (2) the trial court erred in its assessment of the costs and fees. We affirm.

I. BACKGROUND.[3]

¶2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] A $10,000 judgment was entered against Ronald W. Morters, and a separate $10,000 judgment was entered against his attorney, Robert E. Sutton. Sutton has not appealed his portion of the judgment. Although Morters originally attempted to also appeal his attorney's portion of the judgment, this court dismissed that portion of the appeal on jurisdictional grounds. *Cf.* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 194, 562 N.W.2d 401 (1997) (concluding that a fundamental defect existed when a non-lawyer signed a notice of appeal on behalf of a corporation).

[3] A number of facts involved in this appeal are taken from ***Morters v. Barr***, No. 01-2011, unpublished slip op. at ¶1-7 (WI App January 14, 2003), and ***Morters v. Barr***, No. 01-2011, unpublished slip op. at ¶2-4 (WI App April 30, 2002).

Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries.

¶3 The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict.

¶4 The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶5 Morters and his granddaughter then started legal malpractice suits against Barr,[4] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; that he was negligent with respect to their worker's compensation claim; that a delay in filing their personal

[4] Ronald's wife, Ann, died before either suit was filed.

injury case caused them damage; and that he had failed to demand the policy limits or file a statutory offer to settle.[5] During the pendency of these actions, the trial court consolidated the two Morters' lawsuits. Because the plaintiffs had failed to establish any evidence that their conflict-of-interest or jury-trial claims resulted in any discernable monetary damages, the trial court dismissed those claims. With respect to the claims filed with the insurance company, because the evidence revealed that Barr had properly prepared and presented the Morters' claim to the liability insurance company and the insurance company was willing to pay the policy limits, the trial court dismissed this final claim at the close of the plaintiffs' case.

¶6 Ronald and Shannon Morters then appealed both the order granting partial summary judgment and the later judgment entered in the defendants' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents filed a motion requesting frivolous costs on appeal. We affirmed the trial court in all respects. Because the Morters' brief on appeal failed to satisfy the requirements of WIS. STAT. RULE 809.19 (1999-2000), we also awarded the respondents costs and fees, including attorney fees, pursuant to WIS. STAT. RULE 809.83 (1999-2000).

¶7 In the trial court, the defendants also moved for costs and attorney's fees on the grounds that the Morters' claims against Barr were frivolous under

[5] Morters subsequently amended his complaint to add Barr's insurer, TIG Insurance Company, as a party-defendant.

WIS. STAT. § 814.025(3)(b). The trial court ultimately concluded that each of the Morters' claims was frivolous and ordered Ronald Morters and his attorney, Robert E. Sutton, to pay the defendants $20,000.[6]

II. ANALYSIS.

¶8 WISCONSIN STAT. § 814.025 provides that reasonable attorney fees shall be awarded to the defendant when a plaintiff commences or continues a claim that is found to be frivolous. Section 814.025(3)(b) provides that a claim is frivolous if "[t]he party or the party's attorney knew, or should have known, that the action ... 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." "[A] claim cannot be made reasonably or in good faith ... if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed." ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994). Furthermore, "[a]n action which initially is not frivolous may become frivolous if the party or his or her attorney learns through discovery or pretrial and trial motions that the action is without any reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." ***Kelly v. Clark***, 192 Wis. 2d 633, 655, 531 N.W.2d 455 (Ct. App. 1995).

[6] Although Ronald's granddaughter was a party to the lawsuit against Barr, the costs and fees were only levied against Ronald and his attorney. Thus, neither Ronald Morters' granddaughter, nor Attorney Sutton, is a party to this appeal.

¶9 Thus, "[a] finding of frivolousness under WIS. STAT. § 814.025(3)(b) 'is based on an objective standard, requiring a determination of whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances.'" ***Osman v. Phipps***, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701 (citing ***Riley v. Lawson***, 210 Wis. 2d 478, 491, 565 N.W.2d 266 (Ct. App. 1997)). The determination of what a reasonable attorney knew or should have known presents a question of fact, and we will uphold the trial court's determination unless it is clearly erroneous. ***Id.*** Whether these facts support a finding of frivolousness, however, presents a question of law subject to our *de novo* review. ***Id.***

¶10 In the instant case, in a written decision, the trial court ruled that each of Morters' claims were frivolous:

> Plaintiffs' first claim against Barr is an alleged deprivation of a jury trial. This claim is frivolous for many reasons. Although the original trial date was cancelled, Mr. Barr was terminated in his representation before a new trial date could be set. In addition, the decision to submit to arbitration prevented any jury trial anyway. The arbitration decision occurred after Mr. Barr's representation was terminated. It is abundantly clear that Mr. Barr could not have been responsible for any perceived deprivation of a jury trial. Accordingly, this claim is frivolous.
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> Plaintiffs' next claim that Mr. Barr had a conflict of interest in representing all of the plaintiffs. This issue was specifically addressed previously in [a fee hearing] and [the court] found that there was no conflict of interest. This claim had been litigated and lost, and a reasonable attorney should have known that filing this claim against Barr again was frivolous.
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> Plaintiffs also made a claim against Mr. Barr relating to life insurance and [a] worker's compensation claim. Defendants previously filed a motion for summary judgment on this claim, and plaintiffs never responded. Defendants were granted their motion for summary

> judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.
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> Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. ***Schlomer v. Perina***, 169 Wis. 2d 247, 253, 45 N.W.2d 399, 402 (1992)…. [P]laintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.
>
> Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration value stands as the final value of this case…. No matter what dollar amount Mr. Barr [would have] requested, plaintiffs would still only be entitled to what the case is worth - $557,000.
>
> …. Plaintiffs should have known that there was no damage, and pursuing its [sic] claim was frivolous.

¶11 We agree with the trial court's analysis of Morters' legal malpractice claims. In each instance, Morters failed to allege sufficient facts that could satisfy the elements of the claim. As the trial court adequately established, Morters and his attorney should have known that the needed facts did not exist or could not be developed. Because Morters or his attorney knew or should have known that the positions taken were frivolous, we conclude that the claims were frivolous under WIS. STAT. § 814.025(3)(b).

¶12 Morters also contends that the assessment of costs and fees against him was inappropriate. He argues, "[N]o award should have been made or the

award should have been nominal…." Morters believes that this position is consistent with the supreme court's holding in ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 575-79, 597 N.W.2d 744 (1999). We disagree.

¶13 The purpose of the frivolous claim and appeal statutes is to deter litigants from commencing or continuing frivolous actions and to punish those who do. ***Tigerton v. Minniecheske***, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997). A court may impose sanctions upon a litigant – even onerous conditions – so long as they assist the court in deterring frivolous claims and are not so burdensome as to deny the litigant meaningful access to the courts. *See* ***id.***

¶14 In ***Jandrt***, the supreme court stated that "in determining the appropriate amount of fees and expenses, a court should 'reflect upon equitable considerations in determining the amount of the sanction.'" ***Jandrt***, 227 Wis. 2d at 577 (citation omitted). Logic dictates that reasonable sanctions make a party whole by including all the costs and fees associated with defending against the frivolous claims. ***Id.*** The supreme court also stated that "[i]n some circumstances, '[a] duty of mitigation exists, and a [trial] court should ensure that the party requesting fees has not needlessly protracted the litigation.'" ***Id.*** at 578 (citation omitted).

¶15 Based on ***Jandrt***, Morters concludes that the costs and fees assessed against him were too severe, because the defendants needlessly protracted the litigation. Unfortunately, Morters argument indicates that he *still* has not learned his lesson regarding the development of a solid argument to support his claims. Morters makes a number of bald assertions, but never adequately demonstrates how the defendants *needlessly* protracted the litigation. Rather, this appeal and the case below validate the very existence of the frivolous claim and appeal statutes.

Unfortunately, Morters remains undeterred from commencing or continuing frivolous actions. Accordingly, the trial court was justified in sanctioning Morters. Because we conclude that the amount of the judgment entered against Morters was reasonable, we affirm.

¶16 Based on the foregoing rationale, the trial court is affirmed.

By the Court.—Order and judgment affirmed.

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