COURT OF APPEALS DECISION DATED AND FILED

December 29, 2010

A. John Voelker
Acting 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. 2010AP624 | **Cir. Ct. No. 2009CV2543**

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT II**

ANN MOORE,

PLAINTIFF-APPELLANT,

V.

MARY DOUGHERTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. This appeal arises from Ann Moore's claimed future interest in a cottage owned by her mother, Mary Dougherty. Moore appeals from the part of an order granting Dougherty's motion for sanctions against her for

violating WIS. STAT. § 802.05 (2007-08).[1] We affirm the order. In addition, we deny Dougherty's motion to find this appeal frivolous because we conclude that Moore had a right to challenge the amount of the fees.

¶2 Although Moore raises a narrow issue, some background is necessary to put it in context. The material facts are not in dispute. Robert Dougherty and his sisters, Alice and Jane, each inherited a one-third interest in a cottage on Pewaukee Lake. Robert married Mary and they had nine children, one of whom is Moore. Decades passed. Robert, Alice and Jane died. By the time the complaint was filed in June of 2009, Robert's widow, Mary ("Dougherty"), and Alice's daughter, Suzanne Greiten, each owned a half interest. Dougherty and Greiten had equal responsibility for the cottage's upkeep, maintenance and taxes.

¶3 As the Dougherty children each reached the age of eighteen, they were expected to contribute to the Dougherty family share of the duties. In exchange, they enjoyed unlimited free use of the cottage. According to the complaint, the siblings were promised that their contributions would result in an equal interest in the property through inheritance, other devise or sale of the property. Anyone could withdraw from this agreement by voluntarily abandoning his or her interest without reimbursement.

¶4 In August 2008, Moore and six of her siblings still participated in the arrangement. They and Dougherty met to discuss Greiten's desire to either sell the property or be bought out. The Doughertys wanted to keep the property in the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

family. The siblings considered forming a corporation, each initially contributing $6000, to purchase Greiten's interest and to fund the cottage's upkeep and taxes.

¶5 After several family meetings, conflict developed between Moore and her siblings. The corporation idea was abandoned. Moore claims Dougherty asked that she bow out to keep peace, but she refused because she was willing to keep up her obligations and wanted to continue using the cottage. She alleges the family returned her $6000 and "summarily ousted" her from further financial participation and use of the cottage. Dougherty bought out Greiten's interest and is the sole owner. Moore's six siblings continue with the cottage as before.

¶6 Moore commenced this action against her mother. She claimed that Dougherty breached an oral contract to convey to her a one-seventh interest in the real property; breached a fiduciary duty by forcing her out of the arrangement; and was unjustly enriched by Moore's monetary contributions without providing compensation, usage rights or an interest in the property.[2]

¶7 Dougherty moved for summary judgment, supported by Moore's responses to interrogatories, on grounds that none of Moore's causes of action had any legal basis. Dougherty argued that Moore's complaint was fatally defective because, contrary to the statute of frauds, it referenced no written documents showing an ownership interest; it stated no facts or law demonstrating that familial ties and a hoped-for inheritance gives rise to a fiduciary relationship; and it alleged no facts showing that Moore conferred some benefit on Dougherty which Dougherty unfairly retained without payment. In opposition to the motion,

[2] The record reflects that Moore declined Dougherty's offer to reimburse her for the $9301 she had contributed to upkeep and taxes over the past thirty years.

Moore's attorney filed her own affidavit, unsupported with any documents, and a brief which for the first time broached a theory of constructive trust.

¶8 Dougherty also moved for sanctions against Moore under WIS. STAT. § 802.05(3) for filing an action comprising claims not based on any reasonable interpretation of existing law or a nonfrivolous argument for its extension when, despite proper notice, Moore did not withdraw the action. *See* § 802.05(3)(a)1. Moore acknowledged at the summary judgment hearing that she submitted nothing that arguably could place any one of the issues in dispute. She contended, however, that the allegations in the complaint and concededly inadmissible e-mails in her file between herself and Moore's siblings gave rise to a claim for which a constructive trust could be imposed. The court granted Dougherty's essentially unopposed summary judgment motion and adjourned the hearing on the sanctions motion.

¶9 The sanctions hearing was held nine weeks later. In the meantime, Moore moved for reconsideration of the summary judgment decision. Moore's and Dougherty's motions were heard together. Moore had pursued no discovery in the interim and offered no new evidence at the hearing. The court reiterated that Moore's claim that she was promised an eventual share in the cottage if she contributed to the upkeep and taxes was not a material issue of fact in the causes of action brought in the complaint. This colloquy ensued:

> MS. POULOS [Moore's counsel]: That is—That is—All the Complaint is seeking is an equitable interest in the property as a result of behavior for a period of 30 years.
>
> THE COURT: And what law supports that theory?
>
> MS. POULOS: Constructive trust.
>
> THE COURT: Why didn't you allege that in the Complaint?

MS. POULOS: I do allege that.

THE COURT: Where?

MS. POULOS: Unjust enrichment and breach of a fiduciary duty, parent child relationship. It's throughout my brief.

THE COURT: I don't see anything about a constructive trust in the pleadings whatsoever unless I'm missing something. There is no words regarding—there is nothing here asking the Court—

MS. POULOS: Well, I—

THE COURT: Let me just point for the record.

MS. POULOS: All right.

THE COURT: There nothing in the relief being sought that seeks the imposition of a constructive trust.

MS. POULOS: There are two elements to constructive thrust. One is unjust enrichment which I pled and two, a confidential relationship of some kind.

THE COURT: Where do you plead unjust enrichment?

MS. POULOS: I didn't bring my Complaint.

THE COURT: I can't help you.

MS. LAFLEUR [Dougherty's counsel]: There is one paragraph.

MS. POULOS: I pled unjust enrichment.

MS. LAFLEUR: There is one paragraph that's pled unjust enrichment. They're not set forth in separate paragraphs in the Complaint.

Your Honor, if I might clarify something. We served our sanction motion on October 4th of 2009. After serving that motion, which made it clear that we did not believe that there was a case either for purposes of sanctions or summary judgment, not one telephone call was made to ask me for any depositions in October or in advance of the summary judgment motion. Not one call was made to my office asking me to adjourn the motion to allow any discovery to take place.

> THE COURT: All right. Any comment on that, Ms. Poulos?
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> MS. POULOS: Yes.
>
> THE COURT: Is that true?
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> MS. POULOS: Yes.
>
> THE COURT: Okay. I don't know what else to do at this point in time. It was an opportunity, you're never precluded from conducting discovery, that was in October. We're in January. We've still at this point in time where there has been—there is no affidavit—even if it were somehow to change the Court's opinion, there is nothing here to indicate that any effort has been made in support of the Plaintiff's case by way of an affidavit or documents that would somehow bolster the argument that a reconsideration decision is appropriate here in favor of the Plaintiff.
>
> That issue is now moot. We're pas[t] all that and we're now on to the issue of whether or not this is a sanctionable case.

¶10 The circuit court concluded that Moore had neither commenced nor maintained the case in good faith because she brought it without a proper understanding of the law and, despite ample notice and opportunity to right the boat, she continued sailing the same course and arguing the same facts, even providing the court with an unpublished opinion, ostensibly to demonstrate that she had done legal research.

¶11 Dougherty requested $11,000 in costs and attorneys' fees she claimed she incurred in defending the frivolous lawsuit. Moore challenged the reasonableness of the amount. The court instructed Dougherty to submit support for the amount sought, to which Moore would have an opportunity to object. The court indicated that the award would be determined after its "scrutiny of the bills."

¶12 Dougherty's counsel submitted an affidavit documenting the work performed and corresponding fees charged. Moore objected on the basis that the

sanctions statute is meant to deter, not compensate; that the court awarded actual attorney fees without considering other options, explaining the offending conduct or making a finding that the litigation was frivolous or brought for an improper purpose; that the bills in the fee request were insufficiently supported and their reasonableness and necessity were unsubstantiated.[3]

¶13 The court denied Moore's motion for reconsideration and granted Dougherty's motion for sanctions against Moore in "an amount up to $11,000.00 and as determined by the Court in its discretion." Moore appeals the award.

¶14 Moore's appellate issue is narrow but it is intertwined with the underlying finding of frivolousness. As to whether an action was commenced frivolously, our review of a circuit court's decision made pursuant to WIS. STAT. § 802.05 is deferential. ***Storms v. Action Wisconsin, Inc.***, 2008 WI 56, ¶34, 309 Wis. 2d 704, 750 N.W.2d 739. The nature and extent of the prefiling investigation actually undertaken is a question of fact and we are bound by those findings unless they are clearly erroneous. *See* ***id.*** How much investigation should have been done, however, is a matter within the circuit court's discretion because the amount of research necessary to constitute an "inquiry reasonable under the circumstances" may vary. *See* ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548-49, 597 N.W.2d 744 (1999); *see also* WIS. STAT. § 802.05(2). We will sustain a discretionary act if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Jandrt***, 227 Wis. 2d at 549.

[3] Moore's additional complaint that Dougherty was overbilled by nearly $5000 was demonstrated to be an error on the billing statements. An associate's work mistakenly was billed at $30 an hour, the paralegal's hourly rate, and vice versa. The error later was rectified.

¶15 With respect to whether an action was maintained frivolously, what an attorney knew or should have known is a question of fact. ***Storms***, 309 Wis. 2d 704, ¶35. Whether those underpinnings support a finding of no basis in law or fact, however, presents a question of law which we review independently. ***Id.***

¶16 An attorney who files and advocates a pleading is certifying that, to the best of his or her knowledge, information and belief formed after an inquiry reasonable under the circumstances, the filing is not for an improper purpose, such as to harass; the legal contentions are warranted by either existing law or a nonfrivolous argument for a change in it; and the allegations either have or, after investigation, are likely to have evidentiary support. *See* WIS. STAT. § 802.05(2)(a)-(c).

¶17 As the circuit court noted, Moore's complaint set forth three claims for relief: a demand for an ownership interest in Dougherty's real estate, a breach of fiduciary duty and a claim for unjust enrichment. The complaint did not seek the remedy of a constructive trust. A constructive trust is an equitable device created by law to prevent unjust enrichment, which arises when one party receives and unjustly retains a benefit. *See* ***Wilharms v. Wilharms***, 93 Wis. 2d 671, 678, 287 N.W.2d 779 (1980). Further, the legal title must be held by someone who obtained it by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by other unconscionable conduct and who in equity and good conscience should not be entitled to beneficial enjoyment. *See* ***id.*** at 679.

¶18 The question is not whether constructive trust might have been a viable theory and remedy but whether it was pled. The complaint failed to allege its elements. Moore did not allege any facts that can be interpreted as

unconscionable conduct on the part of her mother. On this record, Dougherty had no obligation, legal or otherwise, to bequeath any interest in the cottage to Moore or to any other of her children in her will. Furthermore, Moore's acknowledged three decades of unfettered access to a lakefront cottage for a little over $9000 cannot be construed under any view as unjustly enriching Dougherty. A claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of it. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994).

¶19 Moore argues that the prayer for relief asking for "such other relief as the court deems just and equitable" was sufficient to permit the circuit court to construct an appropriate remedy—here, constructive trust. We disagree in this instance. The prayer for relief may help clarify the nature of the allegations, *see* ***Baumann v. Elliott***, 2005 WI App 186, ¶¶14-16, 286 Wis. 2d 667, 704 N.W.2d 361, but it cannot cure a complaint's insufficiencies.

¶20 Besides the wanting complaint, Moore failed to oppose the summary judgment. Dougherty supported her motion for summary judgment with Moore's responses to interrogatories. The response to Interrogatory 1 demonstrates the baselessness of Moore's central claim:

> 1. State each and every fact on which you base your allegation in ¶12 [of the complaint] that Plaintiff was legally obligated to contribute to the upkeep, maintenance and taxes of the cottage.
>
> **RESPONSE:** In 1978 when I graduated from college and got my first job my father told me that I was obligated to contribute to the expenses associated with the cottage if I wanted to use it. This meant that the cottage would eventually be owned by those who contributed. If you did not pay you were not in on this deal. This was a family obligation.

Beyond any problems the Dead Man's statute might pose, there also is nothing here that presents any legally cognizable claim. Yet Moore responded with nothing but her counsel's affidavit asserting only undocumented facts. This is an utter failure of proof. We agree with the circuit court that Moore's counsel brought and maintained a frivolous suit.

¶21 We finally turn to the focus of the appeal. Moore objects to the $11,000 sanction imposed on Dougherty's motion. After determining that WIS. STAT. § 802.05(2) has been violated, the circuit court "may" impose an appropriate sanction. *See* WIS. STAT. § 802.05(3). The statute limits a sanction to what the court deems sufficient deterrence. Options include "an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." Sec. 802.05(3)(b).

¶22 Moore argues that actual attorneys' fees inappropriately exceed what is sufficient for deterrence of further or comparable conduct and do not reflect any consideration of alternative sanctions. *See* WIS. STAT. § 802.05(3)(b); *see also* ***Zuk v. Eastern Pa. Psychiatric Inst.***, 103 F.3d 294, 301 (3d Cir. 1996) (discussing Federal Rule of Civil Procedure 11, the federal analogue to § 802.05).

¶23 The court was aware that, before Moore ever filed her lawsuit, Dougherty's prior attorney had cautioned Moore that none of her information "even suggest[ed] that [she] ha[d] a legally binding claim to an interest in the cottage or any monetary compensation on any contract theory or on any legally recognized equitable theory," and that Moore had rejected Dougherty's offer to reimburse her the $9301 she had contributed over the years. Moore nonetheless pressed forward, forcing her elderly mother to either capitulate or finance a defense. Moore also failed to avail herself of the twenty-one-day "safe harbor"

WIS. STAT. § 802.05 provides. These lesser steps did not deter Moore's march to the courtroom. We therefore see no erroneous exercise of discretion in the court ordering actual attorney fees.

¶24 Moore also objects to the reasonableness and necessity of the fee request Dougherty's attorneys submitted. The amount of attorney fees awarded by a circuit court will be sustained absent an erroneous exercise of discretion. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). The circuit court's determination of the amount of attorney fees is a finding of fact that we will sustain unless the court erroneously exercised its discretion. ***Lucareli v. Vilas County***, 2000 WI App 157, ¶13, 238 Wis. 2d 84, 616 N.W.2d 153. A hearing on fees generally is not necessary; an itemized bill submitted by affidavit may be sufficient. *See* ***id.***, ¶12.

¶25 The affidavits counsel tendered here detail the time spent, the work performed, the hourly rate requested, the basis for that hourly rate and specifics of the costs incurred. The circuit court, presided over by an experienced judge, supervised the handling of this case from the beginning. It was well-situated to evaluate the reasonableness and necessity of the services provided, the quality of services provided, the attorneys' expertise in this area and local billing rates. *See* ***Standard Theatres***, 118 Wis. 2d at 747. We take the court at its word that it would scrutinize the bills before determining an amount. The record before us supports the award.

¶26 As a final matter, Dougherty moved by separate motion for a finding that Moore's appeal violates WIS. STAT. RULE 809.25(3)(c)2. *See* ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. Whether an appeal is frivolous is solely a question of law. ***Id.***, ¶9.

¶27 A claim correctly adjudged to be frivolous in the circuit court is frivolous per se on appeal. ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). Moore did not directly challenge the denial of the summary judgment, however. She had a right to appeal the reasonableness and necessity of the sanctions imposed. To award costs and fees on appeal, we must determine that the entire appeal was frivolous. ***Denomie***, 282 Wis. 2d 130, ¶9. It was not. We deny the motion.

By the Court.—Order affirmed.

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