

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 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. 2010AP461

Cir. Ct. No. 2009SC3578

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LISA WHITING,

PLAINTIFF-APPELLANT,

V.

JEFFREY WHITING,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed and cause remanded for further proceedings.*

¶1 LUNDSTEN, J.¹ Lisa Whiting appeals the dismissal of her small claims action against her former husband, Jeffrey Whiting. She argues that her

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

action, which sought rent from Jeffrey for their marital apartment, was properly brought in small claims court. She also contends that the court improperly awarded Jeffrey attorney's fees as a sanction. I disagree and affirm the dismissal and sanction. In addition, I grant Jeffrey's motion for sanctions for this appeal, and remand for an assessment of costs, fees, and reasonable attorney's fees.

Background

¶2 In March 2009, Jeffrey Whiting filed for divorce from Lisa Whiting. After this divorce filing, Lisa filed a complaint in April 2009 in small claims court seeking rent money from Jeffrey for their marital apartment. Lisa sought one-half of the rent for the period of time remaining on the lease after Jeffrey moved out of the apartment. Citing the ongoing divorce proceedings, Jeffrey sought dismissal of Lisa's small claims action and moved for sanctions under WIS. STAT. § 802.05. After a hearing, the court commissioner agreed that the ongoing divorce proceedings barred Lisa's action and, accordingly, dismissed it. The commissioner also found grounds for sanctions under both § 802.05(2)(a) and (b) and awarded Jeffrey \$660 in attorney's fees.

¶3 Lisa sought review of the court commissioner's decision by filing a small claims demand for trial. Jeffrey again moved to dismiss. After a hearing, the circuit court granted Jeffrey's motion, indicating that "[t]he case was properly handled ... in the divorce proceedings." The circuit court also imposed a \$660 sanction against Lisa. Lisa appeals *pro se* from the circuit court's judgment and order.

Discussion

¶4 Lisa asserts that the circuit court incorrectly dismissed her small claims action. Lisa apparently believes that her action was properly a small claims action because she seeks relief under WIS. STAT. § 766.70. More specifically, she asserts that § 766.70 “establishes Jeffrey Whiting’s responsibility to pay ½ the rent for the marital property.” Lisa, however, does not and could not provide a sensible argument to support that assertion.

¶5 WISCONSIN STAT. § 766.70 is found in the code’s chapter on marital property and provides various remedies for spouses. For example, § 766.70(1) provides that “[a] spouse has a claim against the other spouse for breach of the duty of good faith imposed by s. 766.15 resulting in damage to the claimant spouse’s property.”

¶6 Lisa ignores the restriction found in WIS. STAT. § 767.331. Section 767.331 expressly forbids a spouse from bringing an action under WIS. STAT. § 766.70 when there is a pending divorce action. That section states: “No action under s. 766.70 may be brought by a spouse against the other spouse while an action for divorce, annulment or legal separation is pending under this chapter.” WIS. STAT. § 767.331; *see also Gardner v. Gardner*, 175 Wis. 2d 420, 431, 499 N.W.2d 266 (Ct. App. 1993) (“Once an action for divorce is filed, a separate cause of action under sec. 766.70, Stats., is barred.”). It is undisputed that a divorce action had been filed and was pending when Lisa brought her small claims action premised on § 766.70. Thus, Lisa’s assertion that § 766.70 supports her small claims action plainly fails under § 767.331.

¶7 Beyond what I have just addressed, Lisa does not develop an alternative argument supporting her claim. Rather, Lisa’s other assertions all

assume that her action premised on WIS. STAT. § 766.70 was proper. For example, Lisa asserts that her claim was within the dollar-amount limit for a small claims action, and she argues that she should prevail on the merits of her small claims action. Neither of these assertions matter, however, because her action is barred for the reason explained in ¶6, above.²

¶8 Lisa also complains that the circuit court erred when sanctioning her. Lisa does not provide any legal argument explaining why that is true. Also fatal to this argument is Lisa's failure to provide this court with the transcript of the circuit court hearing that resulted in the sanction. In these circumstances, I "presume that every fact essential to sustain the circuit court's decision is supported by the record." *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546 (Ct. App. 2006).

¶9 Regarding the circuit court sanction, the record contains only the circuit court minute sheet and the circuit court's order stating: "Attorney fees are also awarded in the amount of \$660.00." Thus, I can only conclude that the circuit court imposed the sanction for the same two reasons as the court commissioner. Either of these two reasons provides a basis for affirming the circuit court.

¶10 First, I would affirm a sanction under WIS. STAT. § 802.05(2)(a), which allows sanctions for a filing with an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Notably, this ground for sanctions requires factual findings by the circuit court. *See Wisconsin Chiropractic Ass'n v. Chiropractic Examining Bd.*, 2004 WI App 30,

² Lisa also requests "attorneys fees" and "small claims court filing fees." Lisa does not provide any context for these requests and, thus, I do not address them.

¶16, 269 Wis. 2d 837, 676 N.W.2d 580. Here, because Lisa has not provided the transcript, I must assume that the facts support a sanction under this provision and, accordingly, would affirm the sanction.

¶11 Second, I would affirm a sanction under WIS. STAT. § 802.05(2)(b), which allows sanctions for frivolous legal contentions. Applied here, I have already explained that Lisa’s argument on appeal is meritless. And, as far as the record reveals, Lisa presented the same unsupported argument to the circuit court after receiving notice that the argument was meritless.

¶12 For the reasons stated, I affirm the circuit court’s dismissal of Lisa’s action and the imposition of sanctions.

¶13 Jeffrey moves for costs, fees, and reasonable attorney’s fees for this appeal pursuant to WIS. STAT. RULE 809.25(3). Jeffrey argues that either of two grounds for sanctions supports granting his motion: first, that Lisa’s appeal is “solely for purposes of harassing or maliciously injuring” Jeffrey and, second, that Lisa knew, or should have known, that her appeal was frivolous. *See* RULE 809.25(3)(c). I conclude that sanctions are merited under the second ground.

¶14 I apply the following principles:

[A]n appeal is frivolous if “[t]he party or the party’s attorney knew, or should have known, that the appeal or cross-appeal 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.” Sec. 809.25(3)(c)2. Whether an appeal is frivolous is a question of law. An appellate court considers “what a reasonable party or attorney knew or should have known under the same or similar circumstances.” “As with lawyers, a pro se litigant is required to make a reasonable investigation of the facts and the law before filing an appeal.” If an appeal is found to be frivolous, “the court *shall* award to the successful party costs, fees, and

reasonable attorney fees under this section.” Sec. 809.25(3)(a) (emphasis added). “To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous.”

Larson v. Burmaster, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134 (citations omitted).

¶15 Applying these principles, I conclude that the entire appeal is frivolous. Lisa has presented an appellate argument that is largely incoherent and, to the extent there is an actual legal argument, it is patently meritless. The record demonstrates that Lisa should have known her appeal was frivolous because the same meritless argument was rejected in the previous proceedings. To the extent that Lisa raises a new issue by challenging the circuit court’s sanctions, her argument is undeveloped and unsupported by the record.

¶16 Thus, I conclude that Lisa’s entire appeal is frivolous because she either knew, or should have known, that her appeal 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.” See WIS. STAT. RULE 809.25(3)(c)2.

¶17 I also observe that a sanction here is consistent with the policy described in *Riley v. Isaacson*, 156 Wis. 2d 249, 456 N.W.2d 619 (Ct. App. 1990). That is, if I do not grant Jeffrey’s request for sanctions, I would undercut the make-whole remedy provided by WIS. STAT. § 802.05. See *Riley*, 156 Wis. 2d at 262 (“The intent is to provide a ‘make-whole’ remedy to place the prevailing party in the position it would have been in had the frivolous argument not been advanced in the trial court.”).

Conclusion

¶18 For the reasons stated, I affirm the circuit court's dismissal of Lisa's action and the sanction imposed. I also remand for an assessment of costs, fees, and reasonable attorney's fees under WIS. STAT. RULE 809.25(3).

By the Court.—Judgment and order affirmed and cause remanded for further proceedings.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

