COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3238 **Cir. Ct. No. 99CV000391**

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

COMSTOCK DAIRY ENTERPRISES, INC., D/B/A CRYSTAL LAKE CHEESE FACTORY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Comstock Dairy Enterprises, Inc., appeals the circuit court's denial of its post-trial summary judgment motion. Comstock sought to reform a Western National Mutual Insurance Company policy to provide

coverage for a damaged whey tank. Comstock contends that it had no obligation to pursue its alternative remedy of reformation until the court denied coverage under the policy. We disagree. Western cross-appeals, arguing that the circuit court erred by denying its motion for sanctions and that Comstock's appeal is frivolous. We conclude Comstock's motion and appeal had arguable merit. Accordingly, we affirm the judgment and order.

BACKGROUND

¶2 This case stems from a loss Comstock incurred due to a damaged whey tank. Comstock sought coverage for the loss under its boiler policy with Western.[1] After Western denied coverage, Comstock filed a complaint seeking coverage and alleging bad faith denial of coverage.

¶3 Comstock later amended its complaint to add an alternative claim for reformation of the boiler policy. The amended complaint also joined Comstock's insurance agency, Noah Insurance Group, and Noah's insurer; they were later voluntarily dismissed, without prejudice. Comstock contended that both it and its Noah agent intended the whey tank be covered. Therefore, it claimed that if the policy did not provide coverage, the policy should be reformed to provide coverage based on mutual mistake.

¶4 The boiler policy provided coverage for a loss sustained to a "covered object" due to a "covered cause of loss." The circuit court concluded that the policy's definition of "covered object" was ambiguous and construed the

[1] Comstock also sought coverage under a commercial lines policy with Western, but later abandoned its claims under that policy.

policy to include the whey tank as a "covered object," granting summary judgment to Comstock on that issue. However, factual issues remained as to whether the incident was a "covered cause of loss," whether Western acted in bad faith and the amount of damages. At trial, the jury found that the damage to the whey tank was a covered cause of loss but that Western had not acted in bad faith and set damages at $80,000.

¶5 Western appealed and we concluded that the policy did not cover the whey tank. ***Comstock Dairy Enter., Inc. v. Western Nat'l Mut. Ins. Co.***, No. 02-2005, unpublished slip op. at ¶1 (WI App Mar. 11, 2003) (***Comstock I***). Although the policy was complex, it sufficiently defined "covered object" and the whey tank did not meet that definition. ***Id.***, ¶24. We reversed and remanded with directions to enter judgment in favor of Western and to dismiss the complaint. ***Id.***, ¶29.

¶6 On remand, Comstock moved for summary judgment on its alternative claim for reformation. Western moved for sanctions against Comstock for filing a frivolous motion. The circuit court denied Comstock's summary judgment motion, concluding that it was barred from pursuing the alternative claim not submitted at trial and that the court was bound to follow our mandate in ***Comstock I*** to dismiss the complaint. The court also awarded Western statutory costs, but denied Western's motion for sanctions.

DISCUSSION

Comstock's Appeal

¶7 We review the grant or denial of a summary judgment independently, using the same methodology as the circuit court. ***Green Spring***

Farms v. Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Cody v. Dane County***, 2001 WI App 60, ¶11, 242 Wis. 2d 173, 625 N.W.2d 630.[2] We view the facts in the light most favorable to the nonmoving party. ***Cody***, 242 Wis. 2d 173, ¶11.

¶8 Comstock argues the circuit court's denial of summary judgment was erroneous because its reformation claim remained viable after the denial of coverage. Comstock contends the reformation claim was moot until our decision in ***Comstock I*** and that it was not required to pursue the moot claim. However, Comstock's arguments regarding mootness are unsupported by legal authority or the record.

¶9 First, Comstock argues that it was not required to submit its alternate theory for resolution by the jury or judge since the circuit court's earlier decision, which found the whey tank to be a "covered object," rendered the reformation theory moot. However, Comstock offers no legal support for the general proposition that alternate theories of liability become moot when a litigant receives a favorable decision on a different theory. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (need not consider arguments unsupported by legal authority).

¶10 To the contrary, WIS. STAT. § 805.12(2) provides that claims not submitted to the fact-finder at trial are waived:

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

> OMITTED ISSUE. When some material issue of ultimate fact not brought to the attention of the trial court but essential to sustain the judgment is omitted from the verdict, the issue shall be deemed determined by the court in conformity with its judgment and the failure to request a finding by the jury on the issue shall be deemed a waiver of jury trial on that issue.

Thus, Comstock should have proposed special verdict questions on any contested factual issues related to reformation.[3] Having failed to do so, Comstock has waived a jury trial on those issues. If there were no factual issues, Comstock should have sought a judicial ruling on reformation in the alternative.

¶11 Second, Comstock offers no factual support that its reformation claim was indeed moot until our decision in ***Comstock I***. Comstock argues that all the parties understood and agreed that reformation was moot after the original summary judgment. However, the circuit court repeatedly warned Comstock, both before trial and at the post-trial motion hearing, that it would not be allowed to engage in piecemeal litigation and that all its claims needed to be presented at trial or would be deemed abandoned. Additionally, the record shows that Comstock knew Western intended to appeal the summary judgment ruling. The imminent appeal, along with the policy language at issue, meant there was a very real possibility that Comstock might ultimately lose on coverage and, therefore, reformation would have a "practical effect" on the case. *See* ***State ex rel. Jones v. Gerhardstein***, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App. 1986), *aff'd*, 141 Wis. 2d 710, 416 N.W.2d 883 (1987) (issues are moot when resolution can have no practical effect on case).

[3] Comstock's Noah Insurance agent, Lowell Dague, testified at trial that he intended the tank be covered under both policies.

¶12 Comstock also points to the dismissal, without prejudice, of Noah Insurance Group in support of its contention that the reformation claim was moot. However, when an insurance agent makes a mistake, an insured has two alternate claims for relief, one against the agency and one against the insurer. ***Scheideler v. Smith & Assocs., Inc.***, 206 Wis. 2d 480, 486-87, 557 N.W.2d 445 (Ct. App. 1996). As we explained in ***Scheideler***:

> The insured may seek reformation of the policy to correct a mistake. … A claim for reformation is a claim against the insurer, and, once the policy is reformed, the insurer must provide coverage under the reformed policy. …
>
> Alternatively, an insured may sue the insurance agent for negligence and for breach of contract for failing to obtain the insurance requested.

Id. (citations omitted). An insured may pursue relief under both theories, but may only recover under one. ***Id.*** at 487. Therefore, while Comstock's dismissal of Noah, without prejudice, effectively reserved its right to later pursue its negligence claim against Noah, that dismissal had no effect on its reformation claim against Western. Comstock was required to pursue all its claims against Western—including reformation.

¶13 Also, contrary to Comstock's contentions, the circuit court's summary judgment ruling did not conclusively provide coverage for the whey tank. Comstock prevailed only on the "covered object" portion of the coverage dispute. However, the jury could have concluded that the loss was not a "covered cause of loss" under the policy and, thus, Comstock would have been without coverage. The issue of coverage was uncertain even at the time of trial.[4]

[4] Accordingly, coverage was not "the law of the case" even if, as Comstock argues without authority, the law of the case doctrine applied in the circuit court.

Comstock should have pursued any factual issues related to reformation and sought a judicial determination.

¶14 We also agree with the circuit court's conclusion that our mandate in ***Comstock I*** is conclusive and required the court to dismiss the complaint. "Where a mandate directs the entry of a particular judgment, it is the duty of the trial court to proceed as directed." ***Fullerton Lumber Co. v. Torborg***, 274 Wis. 478, 483, 80 N.W.2d 461 (1957). Our opinion in ***Comstock I*** mandated the circuit court to "ent[er] judgment in Western's favor and dismiss[] the complaint." ***Comstock I***, slip op., ¶29. The circuit court was required to follow our mandate and was without jurisdiction to grant Comstock's post-trial motion for summary judgment. If Comstock believed that its reformation was still viable, and thus dismissal of the entire complaint was inappropriate, it should have moved this court to modify the mandate.

Western's Cross-Appeal and Motion for Costs on Appeal

¶15 Western cross-appeals, arguing that the circuit court erred by denying its motion for sanctions against Comstock for making a frivolous post-trial summary judgment motion. The circuit court awarded Western statutory costs but concluded that, under the circumstances, the motion was not frivolous and therefore did not warrant sanctions.

¶16 Whether a claim is frivolous is a mixed question of law and fact. ***Kangas v. Perry***, 2000 WI App 234, ¶19, 239 Wis. 2d 392, 620 N.W.2d 429. We affirm the circuit court's findings of fact unless clearly erroneous. ***Id.*** Whether the facts meet the legal standard of frivolousness is a question of law that we review independently. ***Id.*** Further, we accept any reasonable inferences the circuit court draws from the established facts. ***Id.***

¶17 Western contends Comstock should have been sanctioned under WIS. STAT. §§ 802.05(1)(a) and 814.025.[5] Both statutes allow an opposing party to recover its costs and attorney fees incurred in litigating a claim that another party knew or should have known had no basis in fact or law. Western argues that Comstock or its attorney should have known that its motion for summary judgment for reformation was without factual or legal support.

¶18 Western asserts that Comstock should have known its motion was untimely because the circuit court repeatedly warned Comstock that it would not

---

[5] WISCONSIN STAT. § 802.05(1)(a) provides, in relevant part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. … If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

WISCONSIN STAT. § 814.025(1) provides, in relevant part:

> If an action or special proceeding commenced or continued by a plaintiff … 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 … and reasonable attorney fees.

be allowed to engage in piecemeal litigation and that it needed to bring all of its claims at trial. However, Comstock could have reasonably interpreted the discussion in which the parties agreed to dismiss Noah, along with Noah's dismissal without prejudice, to provide for survival of its reformation claim. There was at least an arguable factual basis for Comstock's belief that its reformation claim was still viable.

¶19 Western argues that our opinion in ***Comstock I*** should have notified Comstock that it would not prevail on its reformation claim. In ***Comstock I***, we rejected Comstock's argument that its expectations of coverage, along with the agent's belief that the whey tank was covered, estopped Western from denying coverage. Slip op., ¶27. Though this estoppel argument is based on the same underlying facts, it rests on a different legal theory than the reformation claim. Indeed, in support of its argument that Comstock's motion was untimely, Western asserts that Comstock did not pursue or argue its reformation claim in the circuit court or this court until its post-trial motion. We could not have rejected a claim in ***Comstock I*** that was not before us.

¶20 Western contends that the case on which Comstock rests its reformation claim, ***Trible v. Tower Ins. Co.***, 43 Wis. 2d 172, 168 N.W.2d 148 (1969), is inapplicable and, therefore, Comstock had no legal support for its reformation claim. The facts of ***Trible***, which involved a specific, express request for coverage by the insured, are distinguishable from the facts of this case and the procedural posture is different. However, merely because ***Trible*** is distinguishable does not render Comstock's argument without any basis in law. We agree with

the circuit court's conclusion that, under the facts of this case, Comstock's motion did not rise to the level of sanctionable conduct.[6]

¶21 Western also moves this court for appellate fees and costs, contending that Comstock's appeal is frivolous. Whether an appeal is frivolous is a question of law subject to our independent review. ***Kangas***, 239 Wis. 2d 392, ¶21. We may find an appeal frivolous if the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another" or if "[t]he party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law …." WIS. STAT. RULE 809.25(3)(c).

¶22 Western contends that because the circuit court was bound to follow our mandate in ***Comstock I*** to dismiss the complaint, Comstock should have known that its second appeal was barred. However, while the circuit court must follow our mandate, it "also has the authority to address any remaining unresolved issues, so long as it acts in a manner consistent with our mandate." ***Harvest Savings Bank v. ROI Invests.***, 228 Wis. 2d 733, 738, 598 N.W.2d 571 (Ct. App. 1999). As discussed above, Comstock had at least an arguable basis for believing that its reformation claim survived after the original appeal. Accordingly, the reformation claim was arguably an "unresolved issue" on which the circuit court retained jurisdiction. We conclude Comstock's appeal is not frivolous, and Western's motion for appellate costs and fees is denied.

[6] Nor do we find sanctionable Comstock's omission of a phrase when quoting Dague's testimony, which Western argues was a misrepresentation to both this court and the circuit court.

By the Court.—Judgment and order affirmed.

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