

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 16, 2004**

Cornelia G. Clark  
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. 03-3500  
STATE OF WISCONSIN**

Cir. Ct. No. 02SC034794

**IN COURT OF APPEALS  
DISTRICT I**

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**MARK OLSEN AND RITA OLSEN,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**EDWARD HOFFMANN, DDS, AND HAWTHORNE COLLECTION  
SERVICES, INC.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed and cause remanded with directions.*

¶1 KESSLER, J.<sup>1</sup> The Olsens, through their attorney Douglas Katerinos, sued Mark Olsen's dentist, Dr. Edward Hoffmann, and the collection

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

agency, Hawthorne Collection Services, Inc., to which Hoffmann referred Mark Olsen's unpaid dental bill of \$591. The Olsens, through Katerinos, asserted violation of the Wisconsin Consumer Act<sup>2</sup> because of what they claimed was pursuit of illegal collection activity after an agreement by Hoffmann to accept periodic payments. The Olsens acknowledged the debt, and after being contacted by the collection service, paid \$100 toward the balance. Thereafter they refused to pay any more of the debt. Instead, they began litigation.

¶2 It is undisputed that Hoffmann performed the dental services in question, and that the amount billed was actually due. It is also undisputed that before referring the debt for collection, Hoffmann offered to accept periodic payments, but for months thereafter received no payments whatever, and had no contact from Mark Olsen from the time Hoffmann asked Olsen to propose a payment plan until the time Hoffmann referred the debt to Hawthorne for collection several months later. The trial court granted summary judgment for the defendants, dismissing the Olsens' Consumer Act claim, the validity of which depended on finding an agreement by Hoffmann and Mark Olsen to accept periodic payments for the \$591 amount, which was due at that time. Judgment was also granted against the Olsens on Hoffmann's counterclaim for the balance of \$491 due for his services.

¶3 The trial court also found that the Olsens' claim was frivolous under WIS. STAT. § 802.05 and under the authority of WIS. STAT. § 814.025.<sup>3</sup> The trial

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<sup>2</sup> See WIS. STAT. ch. 421-427. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

<sup>3</sup> WIS. STAT. § 814.025 provides:

(continued)

court awarded costs and attorney fees to both Hoffmann and Hawthorne. As a result, a debt of \$591, which Olsens admit they owed, caused the defendants Hoffmann and Hawthorne to incur legal fees defending themselves in the amounts \$5437 and \$2347 respectively. The award was entered against both Attorney Katerinos and the Olsens. Katerinos did not appeal. The Olsens appeal, and Katerinos represents them in this appeal. Because the record amply supports the trial court decision, we affirm.

¶4 We review the grant of summary judgment *de novo*, applying the same standard as the circuit court. *Firststar Trust Co. v. First Nat'l Bank of Kenosha*, 197 Wis. 2d 484, 492, 541 N.W.2d 467 (1995). “[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party

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(1) If an action or special proceeding commenced or continued by a plaintiff ... is found, at any time during the proceedings ... to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and 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.

is entitled to judgment as a matter of law.” *M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995); *see also* WIS. STAT. § 802.08(2) (2001-02).

¶5 Careful review of the record here demonstrates that there is no disputed issue of material fact. No facts of the type that would permit a jury to conclude that either defendant violated the Wisconsin Consumer Act are in dispute. Plaintiffs’ claim, that there was an agreement by Hoffmann to accept periodic payments, is unsupported by any evidence. It is undisputed that Hoffmann’s initial offer to permit Olsen to suggest a payment method was ignored by Olsen for months. It is undisputed that Olsen made not a single payment while the proposal was open, and that he made no payment at all until contacted by Hawthorne. Even then the partial payment of \$100 was initially refused by Hoffmann. If there was ever an “offer” to accept periodic payments, it was withdrawn by referral to collection, and never thereafter renewed by Hoffmann. Indeed, the claimed existence of any “agreement” to periodic payments is further refuted by correspondence to Olsen from both Hoffmann’s office and Hawthorne Collection Agency. Summary judgment dismissing the complaint is amply supported by the record.

¶6 The finding of a frivolous claim is also amply supported by the record before the trial court. Mark Olsen admitted that the only reason he brought the suit is because his sister-in-law works for Hoffmann and “family doesn’t put family in collection.” The Olsens and their attorney continued the litigation, not just at the trial level but also in this appeal, knowing that there was no arguable basis in fact for a claimed violation of the Wisconsin Consumer Act. What is apparent from the record in this case is that the Olsens, with the assistance of their attorney, brought a frivolous lawsuit for the purpose of harassment of the

defendants. That is what the trial court found. The court's finding is amply supported by the record. This is precisely the type of conduct that WIS. STAT. § 802.05 was intended to prohibit.

¶7 Upon an appeal from a ruling of frivolousness, we need not determine whether the appeal itself is frivolous before we can award appellate costs and reasonable attorney's fees. *Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). "Rather, if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal." As the court stated in *Riley*,

Pyrrhic victories are the stuff of history but hardly balm for legal wounds. It would be unfortunate if aggrieved parties abandoned defense of their awards in order to hold down their own legal costs.... Those to whom sanctions have been awarded should be induced to defend their awards, without additional costs to themselves.

*Id.* at 262 (citation omitted). Hoffmann and Hawthorne are entitled to their legal fees and costs on this appeal for all of the reasons expressed in *Riley*. Accordingly, we remand this case to the trial court for a determination of the amount of attorney fees and costs to be awarded. See *Lucareli v. Vilas County*, 2000 WI App 157, ¶¶8-9, 238 Wis. 2d 84, 616 N.W.2d 153. The trial court should also allocate responsibility for payment of those fees and costs, as appropriate, under the provisions of WIS. STAT. §§ 802.05 and 814.025.

*By the Court.*—Judgment affirmed and cause remanded with directions.

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



