

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2012

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. 2011AP592

Cir. Ct. No. 2009CV1583

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WISCONSIN DENTAL GROUP, S.C., D/B/A FORWARD DENTAL,

PLAINTIFF-RESPONDENT,

V.

PETE KELLEY,

DEFENDANT-CO-APPELLANT,

JOHN W. KELLEY,

APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Judgment affirmed; order reversed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Pete Kelley appeals a summary judgment awarding Wisconsin Dental Group \$424 plus costs and fees for unpaid dental services. Kelley argues the circuit court erred by granting summary judgment in favor of Wisconsin Dental because there is a dispute over the reasonableness of the amount charged. Kelley also challenges the circuit court's dismissal of his counterclaims for compensatory and punitive damages. We reject Kelley's arguments and affirm the judgment.

¶2 Additionally, Kelley's counsel appeals the order imposing sanctions against him for pursuing what the circuit court determined were frivolous counterclaims. We reverse the order imposing sanctions against counsel. We also deny Wisconsin Dental's motion to impose costs for a frivolous appeal.

BACKGROUND

¶3 During a one-hour visit to Wisconsin Dental in May 2004, Kelley received two fillings for which he was charged \$251.¹ Kelley returned in July 2004 for six additional fillings which resulted in a total charge of \$724. Because the second visit also took approximately one hour, Kelley believed the charge was unreasonable and consequently paid only \$300—an amount he deemed more than adequate based on the bill from May.

¶4 In August 2009, Wisconsin Dental filed suit in small claims court, seeking the \$424 balance. Because the complaint identified Forward Dental as the plaintiff, Kelley moved to dismiss the action on grounds that Forward Dental was

¹ Wisconsin Dental charged \$112 for a one surface amalgam filling and \$139 for a two surface amalgam filling. After applying a 5% cash discount, Kelley ultimately paid \$238.45 for the May 2004 services.

a nonexistent corporation that lacked the capacity to sue. At a hearing on the motion to dismiss, counsel for Wisconsin Dental explained that its name “was mistakenly not put in completely on the original summons and complaint.” The complaint was consequently amended to identify “Wisconsin Dental Group, S.C. dba Forward Dental.”

¶5 Kelley then moved to dismiss the amended complaint, arguing that if Forward Dental lacked the capacity to sue, the original action was a nullity that could not be revived by simply amending the plaintiff’s name. The court agreed that if a party has no capacity to sue, “you can’t breathe life into something that was never alive.” It nevertheless determined that Forward Dental was “merely a trade style” of Wisconsin Dental, which had the capacity to sue. In denying the motion to dismiss, the court concluded: “So long as Wisconsin Dental Group, S.C., doing business as Forward Dental is an entity that can sue, then the fact that they were misidentified is irrelevant.”

¶6 Kelley filed his answer and counterclaimed for compensatory and punitive damages. Because the counterclaims sought damages in excess of \$5,000, the matter was transferred out of small claims court. Wisconsin Dental moved to dismiss the counterclaims and impose sanctions pursuant to WIS. STAT. § 802.05(3).² After a hearing, the court dismissed the counterclaims and took Wisconsin Dental’s request for monetary sanctions under advisement. Kelley moved for reconsideration, seeking to amend his counterclaims. Wisconsin Dental moved for summary judgment on its original claim and supplemented its motion

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

for sanctions to include a discussion of Kelley's reconsideration motion. After a hearing, the court denied reconsideration and awarded attorney fees to Wisconsin Dental as a sanction against defense counsel. Wisconsin Dental's motion for summary judgment was granted after a subsequent hearing. This appeal follows.

DISCUSSION

A. Summary Judgment

¶7 This court reviews summary judgment decisions independently, applying the same standards as the trial court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶8 Kelley argues the circuit court erred by granting summary judgment in favor of Wisconsin Dental because there is a dispute over the reasonableness of the amount that was charged for dental services. Wisconsin Dental submitted affidavits by Joy Powers, its accounts receivable manager, averring that charges are based on the actual services rendered and not on the amount of time it takes to render the services. As reflected in an itemized bill that was submitted with the summary judgment motion, Powers recounted that Kelley received five fillings that were one surface amalgams and one filling that was a three surface amalgam. For each of the one surface amalgam fillings, Kelley was charged \$112, and for the three surface amalgam filling, he was charged \$164. Powers further averred that the amounts charged were reasonable and customary within the local medical community.

¶9 In turn, Kelley submitted only his own affidavit insisting that \$724 for one hour's work was outrageous. In attempting to establish the unreasonableness of the charges, his affidavit compared the dentist's bill with the hourly rates for electrical work and legal services.³ As noted above, however, the charges were based on the services rendered, not on the amount of time it took to render the services. Kelley's challenge to what he characterizes as an hourly rate does not put into genuine issue the fact that the amounts charged were reasonable and customary. We therefore conclude the circuit court properly awarded summary judgment in favor of Wisconsin Dental.

B. Dismissal of the Counterclaims

¶10 Kelley counterclaimed for compensatory and punitive damages arguing that Wisconsin Dental "took actions which resulted in credit bureau ratings listing [Kelley] as being the subject of a medical charge off to bad debt of \$424." Citing WIS. STAT. § 895.043(3), Kelley notes that a "plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Kelley alleged that the act of notifying the credit bureaus was "a malicious attempt to coerce the defendant to pay money not owed, and an intentional disregard [of] the rights of the defendant by damaging his credit rating."

³ For the first time on appeal, Kelley argues that "[t]o reach the outrageous charge of \$724 per hour, Wisconsin Dental unbundled each little filling and made a charge per filling." This court does not address arguments raised for the first time on appeal. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Even on the merits, we must reject this argument as the same billing method was used for both the May and July 2004 visits—Kelley simply had three times the fillings at the second visit.

¶11 On appeal, Kelley further argues his situation is comparable to that in *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 109 N.W.2d 516 (1961). There, Malco sued Midwest Aluminum for its refusal to pay the balance due on a contract for the purchase of windows. *Id.* at 60. Midwest Aluminum denied that the balance was due claiming it had been overcharged. It also counterclaimed for compensatory and punitive damages on grounds Malco maliciously and intentionally injured its business credit by sending various financial institutions a false letter indicating Midwest Aluminum intended to cheat and defraud its creditors. *Id.* In approving punitive damages for Malco’s conduct, the court noted:

This case presents a picture of a creditor, unsuccessful in collecting a disputed bill of approximately \$1,000, threatening and then maliciously attempting to destroy the business reputation of his debtor. Instead of using the legal remedies available for the collection of a debt, the plaintiff took upon itself a vindictive means to destroy his debtor.

Id. at 67.

¶12 *Malco*, however, is distinguishable on its facts. In *Malco*, a jury found that Midwest Aluminum owed nothing on its contract. *Id.* at 62. In contrast, as noted above, Kelley failed to establish that the amount billed was unreasonable; therefore the circuit court properly concluded that he owes the balance of what was billed. Further, Malco sent a false letter to several of Midwest Aluminum’s creditors. Here, there was no false letter. Rather, the medical write-off necessitated by Kelley’s nonpayment was reported to the credit bureaus. As the circuit court noted, this was a “standard, simple, straight forward collection” of a bill that was owed “and nothing done in a grievous or malicious fashion.” The court therefore properly granted Wisconsin Dental’s motion to dismiss the counterclaims.

C. Sanctions Against Counsel Under WIS. STAT. § 802.05

¶13 Counsel argues the circuit court erred by granting Wisconsin Dental's WIS. STAT. § 802.05 motion, which allows sanctions for pursuing frivolous litigation. The statute delineates representations that an attorney or unrepresented party implicitly makes when signing, filing, submitting or later advocating a pleading, written motion or other paper to the circuit court. WIS. STAT. § 802.05(2). Specifically, the statute provides that the person is certifying "to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," all of the following:

- (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
- (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
- (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Id. If there is a failure to comply with any one of these representations, the circuit court may impose an appropriate sanction. WIS. STAT. § 802.05(3).

¶14 Here, Wisconsin Dental challenged the counterclaims, arguing they lacked evidentiary support and were presented to unnecessarily delay the matter and needlessly increase the costs of litigation, contrary to WIS. STAT.

§ 802.05(2)(a) and (c). Our review of a WIS. STAT. § 802.05 decision is deferential. *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999); *see also Riley v. Isaacson*, 156 Wis. 2d 249, 256, 456 N.W.2d 619 (Ct. App. 1990). The circuit court’s findings of fact will be upheld unless clearly erroneous, *see* WIS. STAT. § 805.17(2), and the determination whether a violation occurred is reviewed under an erroneous exercise of discretion standard. *See Jandrt*, 227 Wis. 2d at 548; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).⁴ A circuit court’s discretionary decision will be sustained if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Finally, where there is an allegation of frivolousness, all doubts are to be resolved in favor of finding a claim nonfrivolous. *Juneau Cnty. v. Courthouse Employees, Local 1312*, 221 Wis. 2d 630, 650, 585 N.W.2d 587 (1998).

¶15 As noted above, the counterclaims were grounded in Kelley’s belief that Wisconsin Dental acted in intentional disregard of his rights when it reported him to the credit bureaus for failing to pay what he deemed to be unreasonable dental fees, thus damaging his credit rating. The court imposed sanctions against counsel on grounds that the counterclaims “completely lack[ed] legal and

⁴ The comments to the current version of WIS. STAT. § 802.05 note that our supreme court has adopted the current version of Federal Rules of Civil Procedure 11, and further acknowledge that the United States Supreme Court has held that the determination whether a violation occurred and what sanction to impose, if any, is committed to the circuit court’s discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

evidentiary support” and counsel’s conduct caused delay and unnecessary expense. The record does not support these conclusions.

¶16 First, the counterclaims had proper evidentiary support, as it is undisputed that Kelley was reported to the credit bureaus before the argument over payment was resolved. It is likewise undisputed that Kelley’s credit rating was compromised. Second, counsel provided legal authority that is not controlling, but is factually and legally comparable, thus supporting a reasonable argument for an extension of the law. Moreover, sanctions for the counterclaims were imposed against counsel while Kelley’s defense was still pending. The claimed unreasonableness of the dental fees is at the core of the counterclaims. From Kelley’s perspective, if the money was not owed, his refusal to pay should not have been reported to the credit bureaus. Ultimately, it was improper for the circuit court to conclude the counterclaims were frivolous before Kelley’s challenge to the reasonableness of the dental fees had been definitively rejected.

¶17 With respect to the circuit court’s conclusion that counsel’s conduct caused unnecessary delay and expense, it appears the court took great exception to counsel’s request to amend the counterclaims and reconsider their dismissal. The court noted counsel had “willfully” continued to advocate the counterclaims even though the court had “ruled they have no merit or evidentiary support.” As noted above, there was undisputed evidentiary support for the counterclaims even if the arguments underlying the counterclaims failed.

¶18 Further, in dismissing the counterclaims, the circuit court determined Wisconsin Dental had taken no steps that would amount to “*reckless and malicious* disregard of another’s rights.” (Emphasis added.) Counsel explained that given this language, he filed the reconsideration motion believing that his use

of the words “grievous, reckless and malicious” misled the court when Kelley needed only to show an *intentional* disregard of his rights. Given the court’s emphasis on whether Wisconsin Dental’s conduct was reckless and malicious, counsel’s reconsideration motion was neither frivolous nor abusive.

¶19 The circuit court also recounted the case’s history, acknowledging a pattern of “motion hearing after motion hearing” that it deemed detrimental to the litigation process. As counsel notes, however, he filed only two motions in small claims court—he effectively succeeded on one and was invited by the small claims court to file the other. In the circuit court, he filed only the reconsideration motion discussed above. The record, therefore, does not support the court’s determination that the counterclaims and motions were presented to unnecessarily delay the matter and needlessly increase litigation costs. Because the court did not reasonably exercise its discretion when imposing sanctions against counsel, that order must be reversed.

D. Motion for Frivolous Appeal Costs

¶20 Finally, in a motion that lists the wrong county with an argument that identifies the wrong movant, Wisconsin Dental moves this court for frivolous appeal costs pursuant to WIS. STAT. RULE 809.25(3). We may not award frivolous appeal costs unless the entire appeal is frivolous. See *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. Here, counsel has prevailed on his challenge to the circuit court’s determination that the counterclaims were frivolous. Moreover, while we reject Kelley’s challenges to both the summary judgment and the dismissal of his counterclaims, there is nothing to suggest that the arguments were not made in good faith. Therefore, the motion for frivolous appeal costs is denied.

By the Court.—Judgment affirmed; order reversed.

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

