COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0364

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

THOMAS ROSKOS, D.O., M.D.,

Plaintiff,

v.

VICTOR HARDING and
WARSHAFSKY, ROTTER, TARNOFF,
GESLER, REINHARDT AND BLOCK, S.C.,

Defendants-Respondents,

S.A. SCHAPIRO,

Appellant.

APPEAL from orders of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Attorney S.A. Schapiro appeals from an order requiring him to pay $6,930.28 as sanctions for filing and continuing to

prosecute a civil conspiracy claim against the defendants, the law firm of Warshafsky, Rotter, Tarnoff, Gesler, Reinhardt and Block, S.C., and its employee, Victor Harding, for presenting frivolous motions to strike affirmative defenses pled by the defendants, and for violating a discovery protective order and temporary restraining order. Attorney Schapiro challenges the trial court's conclusions regarding the sanctions and also claims that the trial court's decision to sanction him personally violated his due process rights. We reject his arguments and affirm.

I. BACKGROUND

The facts necessary for an understanding of this appeal, while not particularly difficult, are quite extensive. Therefore, we set forth these initial facts and discuss the more specific facts for resolution of the issues raised on appeal within each particular subsection.

A. The Underlying Lawsuit.

Attorney Harding and the Warshafsky firm represent several persons who filed an underlying suit against the plaintiff, Thomas Roskos, a radiologist. (***Kurzynski, et al. v. Spaeth, et al.***, Milwaukee County Circuit Court Case No. 91-CV-016622.) The plaintiffs in that suit alleged that Roskos, Alan Spaeth, a dentist, and William Faber, a physician, "conspired to have unnecessary and unwarranted dental care performed on the plaintiffs." The plaintiffs alleged that Dr. Faber referred his patients to Dr. Roskos for x-rays, and that Dr. Roskos then determined that the plaintiffs' panoral x-rays revealed cystic lesions on their jaws. After the patients returned to Dr. Faber, they were told that they had infections in their jaws and were then referred to Dr. Spaeth for "unnecessary" dental work.

B. The Complaint and Answer in This Case.

In a separate action (the case out of which this appeal arises), Roskos brought suit against Harding and the Warshafsky firm, alleging abuse of process, defamation/libel and conspiracy to tortiously injure Roskos's

"professional business reputation" under § 134.01, STATS. The "[u]nartfully drafted" complaint, as it was described by the trial court, alleged abuse of process based on libel, claiming that the defendants used legal process (the filing of a second amended complaint in ***Kurzynski***) and "knew or should have known that there was no basis in fact for [the] charges and allegations against [Roskos] and thereafter, maliciously and wantonly and recklessly perverted the said issued legal process to cause [Roskos] to be libeled in the media and to damage [his] professional reputation." The complaint further alleged that Attorney Harding "reported to the Milwaukee Sentinel" that Roskos had participated in a "'scam' by telling patients 'falsely, fraudulently and recklessly' that they had conditions for which they needed dental work."

The second cause of action alleged defamation by virtue of a newsletter published by the Warshafsky firm, which stated: "Vic Harding is representing six people who were 'scammed' by three doctors into having unnecessary tooth extractions. What follows is the unbelievable story of how this scam was run." Although the newsletter did not mention any doctor by name, the complaint alleged that the reference was intended to refer to Roskos. Finally, the complaint alleged a conspiracy between Attorney Harding and the Warshafsky law firm under § 134.01 due to the newsletter's publication.

The defendants filed an answer, alleging ten affirmative defenses and requesting sanctions under §§ 802.05(1) and 814.025, STATS. Attorney Schapiro responded by filing motions to strike seven of the defendants' affirmative defenses and seeking sanctions.

C. The Arkansas Depositions.

Following the plaintiff's subpoena of Attorney Ted Warshafsky and the plaintiff's various discovery requests, the defendants filed a motion for a protective order and a stay of discovery pending resolution of the defendants' motion to dismiss/motion for summary judgment. On August 15, 1994, the trial court granted the defendants' motion. In the meantime, Roskos commenced litigation in Arkansas, seeking to depose Ronald Naef, a former investigator with the Wisconsin Department of Regulation and Licensing, who had been involved in the investigation of the allegations underlying ***Kurzynski***. On August 19, 1994, an Arkansas law firm representing Roskos got an

Arkansas Chancery Court to issue a subpoena for Naef's deposition to be taken on August 26. According to the affidavit of defense counsel, defense counsel spoke with the Arkansas counsel on August 24 and was told that Arkansas counsel had been hired by Attorney Schapiro "to initiate discovery on Mr. Naef." Defense counsel told Arkansas counsel that all discovery had been stayed.

That same day (August 24), the Wisconsin trial court signed an ex parte temporary restraining order prohibiting "Roskos, through his attorneys" from deposing Naef to the extent that any deposition would conflict with the court's prior order. Arkansas counsel nevertheless deposed Naef on August 26 and September 9, 1994. Prior to both depositions, Attorney Schapiro wrote to the trial court stating that Arkansas litigation was "totally unrelated to any issue in this instant case." Upon subsequent review of the transcripts, however, the trial court found that a substantial portion of the depositions focused on Naef's contacts with Attorney Harding and the Warshafsky firm.

D. The Trial Court's Determination of the Merits.

When the defendants' summary judgment motion was heard on September 12, the trial court: (1) dismissed the abuse of process claim without prejudice as being "premature"; (2) dismissed the defamation/libel claim without reference to whether dismissal was with or without prejudice because of Attorney Schapiro's failure to comply with § 895.05(2)'s requirement that a litigant seek a published correction by a potential defendant prior to initiating suit," and, (3) dismissed the § 134.01 conspiracy claim with prejudice because of the intra-corporate conspiracy bar rule that a corporation cannot conspire with its own agent. Following the plaintiff's motion for reconsideration, the trial court repeated its prior rulings on the abuse of process and § 134.01 conspiracy claims, and further dismissed the defamation/libel claim without prejudice.

E. The Trial Court's Imposition of Sanctions Against Attorney Schapiro, *Personally*.

Both parties subsequently filed motions for sanctions. The trial court denied the plaintiff's motion and partially granted the defendants' motion,

ordering sanctions against Attorney Schapiro, *personally*. The trial court concluded that the plaintiff commenced the § 134.01 conspiracy claim in violation of § 802.05(1), STATS., because it was not grounded in law or in fact and a reasonable inquiry had not been undertaken before the cause of action was filed. The trial court further concluded that the § 134.01 conspiracy claim was continued in violation of § 814.025(3)(b), STATS., "in light of the overwhelming law that does not support that cause of action." The trial court also concluded that five of the plaintiff's motions to strike the defendants' affirmative defenses were frivolous. Finally, the trial court concluded that the Arkansas depositions of Naef were taken in violation of the court's protective and temporary restraining orders, and that Attorney Schapiro had misrepresented the scope of those depositions to the court. The court thus ordered sanctions against Attorney Schapiro under § 805.03, STATS. Attorney Schapiro filed a motion for reconsideration on that portion of the sanctions order that held he was involved in the Arkansas depositions. The trial court denied Attorney Schapiro's motion, and he now appeals.

II. ANALYSIS

A. Sanctions Under § 802.05, STATS., Because of the Filing of the § 134.01 Conspiracy Claim.

The trial court concluded that the plaintiff's filing of the § 134.01 conspiracy claim violated § 802.05(1)(a), STATS. Section 802.05(1)(a), in pertinent part, provides:

> 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 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 a trial court concludes that an attorney or party has violated this section, the trial court may:

> 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's fees.

Id.

There are three prongs to § 802.05(1)(a), STATS.: (1) the signer's certification that the pleading, motion or other paper was not interposed for an improper purpose or delay; (2) the signer's warranty that the paper is "well grounded in fact" to the best of the signer's "knowledge, information and belief, formed after reasonable inquiry"; and, (3) that the signer "has conducted a reasonable inquiry and that the paper is warranted by existing law or a good faith argument for a change in it." ***Riley v. Isaacson***, 156 Wis.2d 249, 256, 456 N.W.2d, 619, 621 (Ct. App. 1990). If a trial court finds that any prong has been violated, the trial court "may" impose appropriate sanctions. Section 802.05(1)(a).

In determining whether to impose sanctions, the trial court must decide the factual questions of "what and how much pre-filing investigation was done." ***Id.*** at 256, 456 N.W.2d at 622. These findings will not be overturned on appeal unless they are clearly erroneous. ***Id.*** Further, "[d]etermining how much investigation *should* have been done ... is a matter within the trial court's discretion because the amount of research necessary to constitute 'reasonable inquiry' may vary, depending on such things as the particular issue involved and the stakes of the case." ***Id.*** (emphasis in original).

The trial court found that the conspiracy claim pled by the plaintiffs was not grounded in law or fact, and that Attorney Schapiro had failed to make a reasonable inquiry before bringing the claim. The trial court acknowledged Attorney Schapiro's submissions regarding the research undertaken before pleading the conspiracy claim. The trial court noted, however, that Attorney Schapiro could not find any case law to support his theory that he could sue Harding and Harding's own law firm for conspiracy. In concluding that the conspiracy claim was not based upon a reasonable inquiry and was not warranted by existing case law or a good faith argument for a change in case law, the trial court quoted ***Elbe v. The Wausau Hospital Center***, 606 F.Supp. 1491, 1502 (W.D. Wis. 1985), in which a federal judge from the Western District of Wisconsin stated: "'In the absence of any explicit holding on the issue, I conclude that the Wisconsin supreme court would adopt the approach taken in ***Dombrowski [v. Dowling***, 459 F.2d 190 (7th Cir. 1972)], based as it is on the well accepted principles that a corporation cannot conspire with itself and that the acts of an agent are the acts of the corporation.'"

The trial court's findings that Attorney Schapiro violated § 802.05(1)(a), STATS., are not clearly erroneous. ***Elbe's*** direction was clear. *See also* ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 426-431, 405 N.W.2d 354, 366-368 (Ct. App. 1987) (as a matter of law, parent and subsidiary companies are a "single economic unit" and thus § 134.01 conspiracy claim could not be maintained). Additionally, in ***Wausau Medical Center, S.C. v. Asplund***, 182 Wis.2d 274, 296-297, 514 N.W.2d 34, 44 (Ct. App. 1994), the Wisconsin court of appeals explicitly reiterated the bar to intra-corporate conspiracy claims under § 134.01, STATS., by holding that a conspiracy claim could not be maintained against a doctor and his service corporation. ***Asplund*** was decided February 8, 1994, almost five months before Attorney Schapiro filed the complaint in this action. Thus, in light of Attorney Schapiro's knowledge that Attorney Harding worked for the Warshafsky firm, combined with the governing principles on the intra-corporate conspiracy bar, the trial court's findings were not clearly erroneous.

B. Sanctions Under § 814.025, STATS., For Continuing the § 134.01 Conspiracy Claim.

The trial court determined that the plaintiff violated § 814.025(3)(b), STATS., by continuing to pursue the conspiracy claim. In

granting summary judgment to the defendants and in dismissing the conspiracy claim, the trial court stated that it was undisputed that Attorney Harding was an associate with the Warshafsky firm. At the sanctions hearing, the trial court concluded that it was frivolous for Attorney Schapiro to have continued pursuing the conspiracy claim "after the issue was researched with respect to the motion to dismiss and the motion for summary judgment ... in light of the overwhelming law that does not support that cause of action."

A trial court may assess frivolous costs and fees against an attorney if the 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." Section 814.025(3)(b), STATS. Whether an action is frivolous under this section is a question of law, which we independently review. ***Lamb v. Manning***, 145 Wis.2d 619, 628, 427 N.W.2d 437, 441 (Ct. App. 1988). Whether a reasonable attorney would or should have concluded that a claim is without a reasonable basis in law or equity is a mixed question of law and fact. ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 187 (Ct. App. 1984). A determination of what an attorney would or should have known with regard to the facts requires the trial court to determine what those facts were. This presents a question of fact, findings on which we will not overturn on appeal unless they are clearly erroneous. ***Id.*** at 513, 362 N.W.2d at 187-188. The legal significance of those findings, however, in terms of whether knowledge of those facts would reasonably lead an attorney to conclude the claim is frivolous, presents a legal question. ***Id.*** at 513, 362 N.W.2d at 188. A finding of frivolousness is based on an objective standard, taking into consideration what a reasonable attorney would or should have known or concluded. ***Robertson-Ryan & Assocs., Inc. v. Pohlhammer***, 112 Wis.2d 583, 589, 334 N.W.2d 246, 250 (1983).

Here, the trial court correctly determined that Attorney Schapiro's continuance of the conspiracy claim was frivolous under § 814.025(3)(b), STATS. In light of the case law interpreting § 134.01, STATS., a reasonable attorney would have or should have concluded that continuing the conspiracy claim lacked a reasonable basis in law or equity.

C. Sanctions for the Plaintiff's Motions to Strike the Defendants' Affirmative Defenses.

At the sanctions hearing, the trial court noted that Attorney Schapiro filed a motion to strike a number of the defendants' affirmative defenses the day after the defendants filed their answer and affirmative defenses. Additionally, the trial court noted: "The law is clear that if you don't set forth an affirmative defense, it's deemed waived, with the exception of statute of limitations." *See* § 802.06(8)(b), STATS. The trial court then determined that: (1) the plaintiff's motion to strike the defendants' failure to state a claim for relief affirmative defense was frivolous because the dismissed § 134.01 conspiracy claim did not state a claim for relief; (2) the plaintiff's motions to strike the defendants' absolute and conditional privilege affirmative defenses were frivolous given that the underlying ***Kurzynski*** case was still pending; and, (3) the plaintiff's attack on the intra-corporate conspiracy bar defense was frivolous because "Harding and Warshafsky are in fact one in [sic] the same." Additionally, the trial court concluded that the plaintiff's motion to strike the defendants' statute of limitations defense was frivolous, noting:

> The complaint is [u]nartfully drafted, and in fact I believe that plaintiff's counsel had difficulty in articulating to this Court what the first cause of action is based on. To not bring an affirmative defense based on statute of limitations I think would have perhaps been deficient by defense counsel.

The trial court thus concluded that the plaintiff's motion to strike the defendants' affirmative defenses was without "reasonable inquiry, which would clearly have indicated that bringing the motion to strike was not warranted or appropriate."

A motion to strike should be rejected if the affirmative defenses could be proven under any theory of law recognized in Wisconsin. ***First Nat'l Bank of Wisconsin Rapids v. Dickinson***, 103 Wis.2d 428, 432, 308 N.W.2d 910, 912 (Ct. App. 1981). "The pleading challenged by a motion to dismiss or to strike should be liberally construed with a view to achieving substantial justice." ***Id.*** On appeal, we review the trial court's finding that the plaintiff's motion to strike was frivolous under § 802.05, STATS., under the clearly erroneous standard. *See* ***Riley***, 156 Wis.2d at 256, 456 N.W.2d at 622.

Here, the trial court found frivolousness based on: (1) the reasons underlying dismissal of the plaintiff's three causes of action; (2) the fact that Attorney Schapiro filed the motion to strike the day after the defendants filed their answer; (3) the fact that the underlying suit was still pending such that motions to strike the absolute and conditional privileges were not proper; and (4) the "[u]nartfully drafted complaint." In light of all of these factors, the trial court's finding that the motion to strike violated § 802.05 was not clearly erroneous.

D. Sanctions Because of the Arkansas Depositions.

The trial court concluded that Attorney Schapiro violated two orders clarifying that the plaintiff was not to proceed with discovery in the action until the defendants' motion to dismiss/motion for summary judgment was decided, and that Attorney Schapiro misrepresented to the trial court the nature of Naef's depositions. Naef was deposed twice, without notice to the Warshafsky firm. In imposing sanctions under § 805.03, STATS., and under the trial court's inherent authority, the trial court stated:

> [T]he Court has had the benefit of reviewing transcripts of the two separate depositions taken [of] Mr. Naef, and over and over and over questions are asked of him regarding what Harding said, what Harding did, all of which has a direct correlation in the manner in which those questions were asked to Harding's conduct which is at issue in this lawsuit.
>
> This Court is satisfied based on [Attorney Schapiro's letters to the court prior to Naef's depositions] and then what happened thereafter that plaintiff's counsel's conduct violated my order and that plaintiff's counsel misrepresented to the Court what was going on in the State of Arkansas.
>
> Now it is true it is not Mr. Schapiro who took the depositions in Arkansas. It was an Arkansas lawyer. However, I believe that in essence the sins so to

> speak of Arkansas counsel are attributable to Mr. Schapiro.

Thus, relying on ***In re Kunstler***, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991), the trial court concluded that despite the fact that Attorney Schapiro did not actually take Naef's depositions, the acts of Arkansas counsel were nevertheless attributable to Attorney Schapiro. In ***Kunstler***, attorney William Kunstler was held liable for sanctions despite his argument that he "'did not actively participate in the instant litigation,'" but instead relied on co-counsel. ***Id.*** at 513-514. The Fourth Circuit Court of Appeals, however, rejected Kunstler's argument. ***Id.***

Section 805.03, STATS., authorizes a trial court to impose sanctions on a party or attorney for failing "to comply with the statutes governing procedure in civil actions" or for failing to obey a court order. Section 805.03, STATS.; *see* ***Strong v. Brushafer***, 185 Wis.2d 812, 821-825, 519 N.W.2d 668, 672-673 (Ct. App. 1994). Additionally, a trial court also has the inherent authority to impose sanctions for "'failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." ***Schaefer v. Northern Assur. Co.***, 182 Wis.2d 148, 162, 513 N.W.2d 615, 621 (Ct. App. 1994) (citation omitted). We review the trial court's decision to impose sanctions under § 805.03, STATS., and under a trial court's inherent authority under the erroneous exercise of discretion standard. ***Strong***, 185 Wis.2d at 822, 519 N.W.2d at 672; ***Schaefer***, 182 Wis.2d at 163, 513 N.W.2d at 621.

Here, correspondence from Arkansas counsel indicates that Arkansas counsel was reporting to Attorney Schapiro. The letter, dated August 25, 1994, and which was "faxed" to Attorney Schapiro prior to Naef's first deposition, recites that the Wisconsin trial court's order had not been registered in Arkansas and that such an order would have to be "brought to the attention of an Arkansas court before it may be enforced." The letter also recites that Roskos ordered him to proceed, despite his warnings of possible sanctions in Wisconsin. The letter also recites that it was the intent of Arkansas counsel to depose Naef "unless instructed by you [Attorney Schapiro], Dr. Roskos, or an Arkansas court."

Additionally, Attorney Schapiro made two representations to the trial court that Naef's depositions would have nothing to do with the issues in this case. From our review of the transcripts, the trial court accurately found that a substantial portion of Naef's depositions focused on Naef's contacts with Attorney Harding and the Warshafsky firm. The trial court did not erroneously exercise its discretion in imposing sanctions under its inherent authority and under § 805.03, STATS., against Attorney Schapiro.

E. Attorney Schapiro's Due Process Claim.

Attorney Schapiro argues that the trial court did not give him notice that sanctions would be imposed against him personally and, thus, violated his due process rights. We disagree.

The sanctions hearing had been "noticed-up" and the language of the various sanction statutes give Attorney Schapiro notice that sanctions may be awarded against him. *See* ***Buchanan v. General Casualty Co.***, 191 Wis.2d 1, 12, 528 N.W.2d 457, 462 (Ct. App. 1995) (existence of § 805.03 is sufficient notice to parties that sanctions could be imposed); *cf.* ***Donaldson v. Clark***, 819 F.2d 1551, 1559-1560 (11th Cir. 1987) (existence of Rule 11 "constitutes a form of notice"). As part of his notice argument, Attorney Schapiro also claims that he was denied the opportunity to obtain counsel, present his own testimony and present expert witnesses to testify regarding his conduct. Here, however, the relevant material facts that formed the bases for the trial court's imposition of sanctions were undisputed. *See* ***Kelly v. Clark***, 192 Wis.2d 633, 654-655, 531 N.W.2d 455, 462 (Ct. App. 1995) (unless facts are undisputed or right to hearing is waived, party or attorney is entitled to evidentiary hearing prior to imposition of sanctions). Therefore, an evidentiary hearing was not required.

F. Appellate Costs to Defendants.

Finally, the Defendants seek frivolous appeal costs and fees. As we have previously stated:

> [U]pon an appeal from a ruling of frivolousness, the reviewing court need not determine whether the appeal itself is frivolous before it can award appellate costs and reasonable attorney's fees. Rather, if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal.

Riley, 156 Wis.2d at 262, 456 N.W.2d at 624. The "party prevailing in the defense of an award of fees under sec. 802.05 is also entitled to a further award on appeal without a finding that the appeal itself is frivolous under Rule 809.25(3), STATS." ***Id.*** at 263, 456 N.W.2d at 624.[1]

By the Court. – Orders affirmed.

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

[1] Because the defendants do not separately argue § 809.25(3), STATS., *see* ***Riley v. Isaacson***, 156 Wis.2d 249, 263-264, 456 N.W.2d, 619, 624-625 (Ct. App. 1990), we do not address that issue.