COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1996

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. 95-2841

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

ROSETTA A. JORENBY, A/K/A ROSE JORENBY,

Plaintiff-Respondent,

v.

JOHN HEIBL,

Defendant-Appellant.

APPEAL from order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed*.

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Attorney John Heibl appeals from an order determining that the motion he filed on behalf of his client to strike a jury demand was frivolous under § 814.025, STATS.[1] The court ordered Heibl to pay

[1] Section 814.025, STATS., provides:

Costs upon frivolous claims and counterclaims. (1) If an action or

$1,126.06 for plaintiff's attorney fees and costs in defending the motion. Heibl contends that the trial court erred because the motion had a reasonable basis in law and there was no evidence from which the court could find that the sole purpose of the motion was to harass or maliciously injure another. We agree with each of these contentions and reverse.

Rose Jorenby and other persons similarly situated filed a complaint against Ohmeda/Anaquest Employees Credit Union (Ohmeda) alleging that Ohmeda violated the Equal Credit Opportunity Act 15 U.S.C. § 1691. The complaint did not demand a jury trial. Heibl represents Ohmeda. After Ohmeda's motion to dismiss for lack of personal jurisdiction was denied and Ohmeda had answered the complaint, the court sent a notice to both counsel entitled "Notice of Hearing." This notice stated that "[t]his case is scheduled for: Pre-trial/scheduling conference" on February 28, 1995. The minutes from that event stated "Activity: pre-trial/scheduling conference" and

(..continued)

> special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant 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 determined under s. 814.04 and reasonable attorney 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.

report that the court granted plaintiff's counsel's request to amend the complaint to delete the class action allegations and proceed as an individual action. The court set dates for filing the amended complaint, for answering the amended complaint, and for Ohmeda's filing of a summary judgment motion. The minutes stated: "Depending upon the outcome for the S.J. motion the case will either be dismissed or a scheduling conference will be scheduled."

The amended complaint, filed on March 10, 1995, requested a jury trial, and jury fees were paid on that date. Heibl, on behalf of Ohmeda, filed a motion to strike the jury demand on the ground that the plaintiff had failed to comply with § 805.01(2), STATS., which provides:

> Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.

The court held a hearing on the motion on June 19, 1995, and heard argument. At the close of the hearing, the court gave the plaintiff ten days to file a brief in response to the motion and gave Ohmeda ten days to reply. Heibl did not file a reply brief for Ohmeda or write to the court stating that he did not intend to do so. In its written decision, the court concluded that Heibl's argument made at the hearing on the motion was without merit because "under no stretch of the imagination can the hearing of February 28, 1995 be considered a scheduling or pretrial conference." The court noted that it had made this fact clear to Heibl at the hearing on the motion to strike and also noted that the February 28, 1995 hearing was held to address the defendant's objection to the plaintiff's discovery request.

The court then concluded that the motion to strike was frivolous under § 814.025, STATS. The court determined that Heibl knew or should have known that the motion to strike the jury demand had no reasonable basis in law or equity and that Heibl failed to support his motion with a good faith argument for the extension, modification or reversal of existing law. "Indeed," the court stated, "defense counsel failed to support the motion with any argument as ordered by the court on June 19, 1995." The court considered that it

was "beyond question" that the jury demand was timely. The court also concluded--based on Heibl's arguments at the June 29 hearing, his failure to file a reply brief and the previous pleadings filed in the case--that the motion to strike was "initiated in bad faith, in order to harass and increase plaintiff's litigation costs." The court directed that, upon plaintiff's application, a hearing be held on the amount of fees and costs.

The court's written decision and order were entered on August 24, 1995. On October 2, 1995, Ohmeda moved the court to reconsider the portion of the decision and order that related to § 814.025, STATS. Heibl filed with the motion his affidavit and attachments, including the "Notice of Hearing" for February 28, 1995, and correspondence between counsel.[2] Plaintiff filed an objection to consideration of this motion on the ground that it was untimely under § 805.17(3), STATS., because it was not filed within twenty days. At the hearing on October 4, 1995, scheduled on plaintiff's application to determine the amount of attorney fees, the court denied the motion to reconsider on the ground that it was untimely and denied Heibl's request to make an offer of proof in addition to that which was contained in his affidavit. Heibl had no objection to the amount of fees requested by plaintiff's counsel. He requested that the award be entered against him, not his client, because the decision not to file a reply brief was his alone.

We first address the procedure followed by the trial court in deciding the issue of frivolousness. Neither the court nor plaintiff's counsel raised the issue of frivolousness at the June 29, 1996 hearing on the motion to

---

[2] The correspondence consisted of a letter dated March 3, 1995, from Heibl to plaintiff's counsel confirming "the sum and substance of the PreTrial Conference of February 28, 1995," and specifically noting: "Neither party requested trial by jury and you projected that a trial to the court would take approximately two days;" and correspondence from plaintiff's counsel dated March 14, 1995, stating in part:

> I misstated at the pretrial conference that we would be seeking a trial before the court. My client instructed me to demand a jury trial and, therefore, I have made such demand on the Amended Complaint. I do not believe this request prejudices your client in that this demand is taking place only ten (10) days after the date of the pretrial conference, and no substantive motions or other matters have been heard since the pretrial motion.

strike the jury demand and there is no motion by plaintiff asking for a determination that the motion to strike was frivolous. The court raised this issue sua sponte in deciding the merits of the motion to strike.[3] While it is appropriate for a court to raise the issue of frivolousness on its own, the party against whom the claim is made must have notice and an opportunity to respond. *See* ***In Matter of the Estate of Bilsie***, 100 Wis.2d 342, 356, 302 N.W.2d 508, 517 (Ct. App. 1981). There need not always be a separate hearing on the issue. If the person against whom the claim of frivolousness is made is on notice of the claim and has the opportunity to respond, and if there are no factual disputes, the court may decide based on the record. *See* ***Radlein v. Industrial Fire & Casualty Ins. Co.***, 117 Wis.2d 605, 608, 629, 345 N.W.2d 874, 876, 886 (1984) (separate hearing not required where attorney was on notice to defend position because claim of frivolousness contained in motion to dismiss). *See also* ***Kelly v. Clark***, 192 Wis.2d 633, 653, 531 N.W.2d 455, 462 (Ct. App. 1995) (evidentiary hearing not necessary where facts are undisputed).

It appears that neither Ohmeda nor Heibl knew the issue of frivolousness was being considered until the written decision and order was entered on August 24, 1995. When Heibl attempted to present the court with factual material and argument against the determination of frivolousness in the form of a motion for reconsideration, the court denied the motion for reconsideration as untimely.[4] Heibl should have had the opportunity to address the claim of frivolousness and have all his arguments and factual material considered before the decision was made. An opportunity to argue the merits of the motion to strike is not a substitute for the opportunity to defend against a claim that the motion is frivolous.

---

[3] Plaintiff's brief states in its summary of facts that the court sua sponte contended that the motion was frivolous.

[4] The time limits in § 805.17(3), STATS., on which the court apparently relied, apply only to motions for reconsideration after trials to the court. ***Continental Casualty Co. v. Milwaukee Metropolitan Sewerage District***, 175 Wis.2d 527, 535, 499 N.W.2d 282, 285 (Ct. App. 1993). When § 805.17(3) does not apply, trial courts have the authority without any specific statutory basis to correct prior nonfinal rulings upon a motion for reconsideration. ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 295, 491 N.W.2d 119, 124 (Ct. App. 1992).

We now consider whether the trial court erred in determining that the motion to strike was frivolous under § 814.025(3)(b), STATS., because it had no reasonable basis in law.[5] This presents a mixed question of law and fact. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 241, 517 N.W.2d 658, 666 (1994). A determination of what a reasonable attorney knew or should have known with regard to the facts require the trial court to determine what those facts were. ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 187-88 (Ct. App. 1984). We do not overturn findings of fact unless they are clearly erroneous. ***Id.*** at 513, 362 N.W.2d at 188. However, the legal significance of those findings of facts, in terms of whether those facts would lead a reasonable attorney or litigant to conclude the claim is frivolous, presents a question of law. ***Id.*** We review questions of law de novo. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666. Doubts are resolved in favor of finding the claim nonfrivolous. ***Id.*** at 235, 517 N.W.2d at 663. A position is not frivolous simply because it is unsuccessful. ***Id.*** at 243, 517 N.W.2d at 667.

The legal basis for the motion to strike is § 805.01(2) and (3), STATS. Paragraph 2 provides that any party entitled to a trial by jury may demand a jury trial "at or before the scheduling conference or pretrial conference, whichever is held first." Section 805.01(3) provides that failure to demand a jury trial in accordance with subsec. (2) constitutes a waiver of trial "in such mode." If a reasonable attorney could consider that the February 19, 1995 hearing was a scheduling conference or pretrial conference, then Heibl's motion did have a reasonable basis in law.

---

[5] Neither the court nor the parties refer to § 802.05(1)(a), STATS., which permits a trial court to impose sanctions, including attorney fees, if a petition, motion or other paper is signed without the signer first determining that to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or paper is well-grounded in fact, is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not used for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. Section 814.025(4), STATS., provides that "[t]o the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies." Therefore, even if § 814.025 applies to the motion to strike (§ 814.025 applies to "an action ... special proceeding ... counterclaim, defense or cross complaint"), we should apply § 802.05 if it differs from § 814.025. However, in the absence of any discussion in the parties' briefs, we assume without deciding that the requirements for frivolousness because of no reasonable basis in the law and because of harassment are the same under both §§ 814.025 and 802.05(1) and also that the standard of review is the same.

Section 802.10(3)(a), STATS., provides for scheduling conferences, on a court's own motion or the motion of a party, no earlier than ninety days after the filing of the complaint. Matters set at a scheduling conference include the time for filing a motion for a default judgment, for completing discovery, for amending pleadings, for filing pretrial motions, and dates for a pretrial conference and trial. Section 802.10(3)(a)1-5. The judge is then to issue a written order reciting the schedules established. Section 802.10(3)(b). Section 802.11(1), STATS., requires that a pretrial conference be held in each case unless waived by the parties with the judge's approval. Pretrial conferences may address the numerous items listed, including whether pleadings should be amended, whether issues should be tried by the court or jury and "such other items as may aid in the disposition of the action." Section 802.11(1)(b), (e) and (m). The court may adjourn pretrial conferences from time to time or may order an additional pretrial conference. Section 802.11(3). The pretrial order issued after the conference sets or confirms the final trial date. Section 802.11(4).

At the hearing on June 19, 1995, plaintiff's counsel argued that the February 28, 1995 proceeding was not a scheduling conference because that was "set aside" to allow the pleading amendments and summary judgment motion. Although she stated that it was a pretrial conference "in effect," she also argued that it was not really a pretrial because "you can't have a pre-trial without a scheduling conference." The court referred to the February 28, 1995 proceeding as a pretrial, and expressed its concern that the demand for a jury trial had not been requested at the pretrial. However, the court gave plaintiff's attorney the opportunity to brief the issue. After plaintiff's counsel said she could file her brief within ten days, the court asked Heibl: "Do you want ten days to respond?" Heibl answered: "Please."

Apparently after that hearing, based on plaintiff's counsel's brief, the court became convinced that the February 28, 1995 proceeding was neither a scheduling conference nor a pretrial conference. However, the court's statement in its written decision that it made this clear to the defendant at the June 19, 1995 hearing is not supported by the record of that hearing. The comments the court made, which we have noted above, indicate just the opposite. The record also does not support the court's finding that the February 28, 1995 proceeding was held to address the defendant's objection to the plaintiff's discovery request. There is no reference to discovery issues in the notice of the February 28, 1995 proceeding, in the minutes, or in Heibl's letter to plaintiff's counsel summarizing the proceeding. Plaintiff does not point us to anything in the

record that indicates that the proceeding was held to discuss discovery issues, and does not even argue that that was the case.

For purposes of this appeal, we need not decide whether the February 19, 1995 proceeding was a scheduling conference or a pretrial conference or something else. The narrow issue is whether a reasonable attorney could consider it either a scheduling conference or a pretrial conference for purposes of applying § 805.01(2), STATS. We conclude a reasonable attorney could consider it a scheduling conference. We reach this conclusion based on the denomination "pretrial/scheduling conference" in the notice and the minutes, and the nature of the issues addressed at the proceeding. Some of the matters covered in a scheduling conference--amendment of pleadings and pretrial motions--were discussed and scheduled. The fact that the court chose to hold a scheduling conference after the summary judgment motion was disposed of, rather than scheduling everything, perhaps unnecessarily, on February 28, 1995, does not mean it is unreasonable to consider the February 28, 1995 proceeding as a scheduling conference for purposes of making a jury demand. The evident intent of § 805.01(2) is that the jury demand be made at or before the first conference at which the management and course of the action is discussed. A reasonable attorney could believe that the February 28, 1995 proceeding was such a conference.

In support of its conclusion that the motion to strike was frivolous under § 814.025(3)(b), STATS., the court also referred to Heibl's failure to file a reply brief "as ordered by the court" at the June 19, 1995 hearing. At the October 4, 1995 hearing, the court indicated that the failure to file the reply brief showed that Heibl, thought his motion to strike was improper. Heibl explained that he did not file a reply brief because he thought § 805.01, STATS., was clear on its face, that the court was inclined to agree with his arguments at the June 19 hearing and simply wanted to give the plaintiff the opportunity to persuade the court otherwise, and that he did not think he was ordered to reply but could do so if he chose.[6] Since we have concluded that Heibl's motion had a reasonable basis in law, his failure to file a reply brief and the reasons for that are not relevant. Heibl presented his arguments in support of his motion at the June 19,

[6] This same explanation is contained in Heibl's affidavit filed with the motion for reconsideration.

1996 hearing and that provides a sufficient basis for evaluating whether the motion had a reasonable basis in law.

Plaintiff argues on appeal that the motion to strike did not have a reasonable basis in law because the right to a jury trial is "inviolate" and the court could extend the time for filing a demand for a jury trial even if there were a waiver. Section 805.01(1), STATS., does provide that the right to a jury trial as declared in Article I, Section 5 of the Wisconsin Constitution or by statute is preserved "inviolate." However, that right may be waived in civil proceedings if statutory procedures for asserting the right are not followed. ***State ex rel. Prentice v. County Court***, 70 Wis.2d 230, 239-40, 234 N.W.2d 283, 288 (1975). If statutory procedures are not followed, parties lose their right to a jury trial and it becomes discretionary with the court. ***Id.*** at 240, 235 N.W.2d at 288. A court may, under § 801.15(2)(a), STATS.,[7] grant a motion made after the expiration of the specified time for making a demand for a jury trial upon a finding of excusable neglect. *See* ***Chitwood v. A.O. Smith Harvestore***, 170 Wis.2d 622, 628, 489 N.W.2d 697, 701 (Ct. App. 1992).

Clearly, the trial court had the authority, had it determined that plaintiff's demand for a jury trial was untimely, to extend the time period if it found excusable neglect. Perhaps it would have done so. In view of the court's discretionary authority to enlarge the deadline, one may question the wisdom of bringing the motion to strike the jury demand in the circumstances of this case. But the court's discretionary authority to enlarge the deadline does not mean there was no reasonable basis in law for the motion to strike.

We now turn to the issue of frivolousness under § 841.025(3)(a), STATS. Whether Heibl acted in bad faith in bringing the motion to strike and solely for the purpose of harassing or maliciously injuring another is analyzed

---

[7] Section 801.15(2)(a), STATS., provides in part:

> When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms.... If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect....

under the subjective standard. ***Stern***, 185 Wis.2d at 236, 517 N.W.2d at 663. The court must determine what was in the person's mind and whether his or her actions were deliberate or impliedly intentional with regard to harassment or malicious injury. ***Id.*** at 236, 517 N.W.2d at 664. The findings must be specific. ***Id.*** The requirement that the "sole" motivation be harassment or malicious injury is a "... high standard [that] typically would require a finding of bad faith based upon some statements and actions, including, for example threats. [Citation omitted.]" ***Id.*** at 239-40, 517 N.W.2d at 665.

This inquiry also involves a mixed question of fact and law. ***Id.*** at 241, 517 N.W.2d at 666. Since the inquiry is subjective and not generally susceptible to direct proof, the state of mind of the person must be inferred from the acts and statements of the person in view of the surrounding circumstances. ***Id.*** The reviewing court must accept the reasonable inferences drawn from the established facts by the trial court if more than one reasonable inference may be drawn; but if the underlying facts are undisputed or there is only one reasonable inference to be drawn, the drawing of that inference is a matter of law. ***Id.*** at 237, 517 N.W.2d at 664.

The trial court based its determination that § 841.025(3)(a), STATS., was violated on three factors: Heibl's argument on the motion to strike at the June 19, 1995 hearing; his failure to file a reply brief and "previous pleadings" filed by Ohmeda. We have already eliminated the first factor as an appropriate basis by our conclusion that the motion to strike did have a reasonable basis in law. With respect to Heibl's failure to file a reply brief, as we noted above, the court apparently inferred from that failure that Heibl knew the motion lacked a reasonable basis in law and brought the motion for an improper purpose. However, we have concluded that his motion did have a reasonable basis in law. Heibl's explanation as to why he did not file a reply brief is supported by the record of the June 19, 1995 hearing. The trial court's findings that it "ordered" Heibl to file a reply brief and that it made clear to Heibl that the February 28, 1995 proceeding was not a scheduling conference or pretrial is not supported by the record of the June 19, 1995 hearing. While it certainly would have been preferable for Heibl to advise the court that he did not intend to file a reply brief and the reasons for that, Heibl's failure to do so, based on this record, does not give rise to a reasonable inference that he filed the motion solely for the purpose of harassment.

Although the trial court does not specify which previous pleadings it was referring to, we assume it meant Ohmeda's motion to dismiss for lack of personal jurisdiction. We have examined this motion, the affidavits in support and opposition, the minutes of the first hearing, the evidentiary hearing and the court's decision denying the motion.[8] The process server's affidavit (and presumably her testimony was consistent with the affidavit) avers that at the address of 33 Ohmeda Drive, she asked for Roger Nolden, Chairman of Ohmeda/Anaquest Employees Credit Union; after the receptionist paged him with no response, another person present said to contact Gloria Smail; the receptionist said Gloria Smail was Nolden's secretary; Gloria Smail came out to the reception area and the process server said she had legal papers for Roger Nolden, Chairman of Ohmeda/Anaquest Employees Credit Union; Smail said she could take the papers and could give them to Nolden since she was his secretary and had accepted papers for him when he was not available; the process server explained who she was and what the papers were and gave them to Smail.

Smail's affidavit states that she is not and never has been an employee of Ohmeda/Anaquest Employees Credit Union; has never knowingly accepted service of process on behalf of Ohmeda/Anaquest Employees Credit Union; is not and never has been the secretary for Nolden; and has never stated to anyone that she was his secretary. In addition to Smail and the process server, Nolden and James Huberty testified at the evidentiary hearing on the motion. The minutes stated that Nolden was employed at Ohmeda and Huberty was president of Ohmeda.

The trial court's decision states that it is undisputed that Ohmeda and Ohmeda Systems Division/BOC Group have the same street address, although the Ohmeda offices are located a short distance away in a different building. In determining that proper service was obtained, the court relied on ***Horrigan v. State Farm Ins. Co.***, 106 Wis.2d 675, 317 N.W.2d 474 (1982). The citation the court relied on states that, "[a] process server has a right to expect that when he asks for someone to accept service, and, apparently in response to that request, a person comes out and accepts the papers, proper service has been obtained." ***Horrigan***, 106 Wis.2d at 683, 317 N.W.2d at 478.

[8] A transcript from the evidentiary hearing is not on the record.

The record does not provide a basis for drawing an inference from the motion to dismiss that Ohmeda or Heibl was motivated solely by the desire to harass or maliciously injure. Without the briefs that were filed and a transcript of the evidentiary hearing, we cannot determine whether the motion to dismiss was frivolous under § 814.025(3)(b), STATS. The most we can say based on the record is that it does not appear that it was. However, we need not resolve this issue for two reasons. First, it does not appear that Heibl or Ohmeda ever had notice that the court or the plaintiff considered the motion to dismiss frivolous. Second, even if the motion to dismiss were frivolous under para. (b), that does not necessarily mean a violation of para. (a). ***Stern***, 185 Wis.2d at 239, 517 N.W.2d at 665. A finding of frivolousness under para. (a) must be based on an evidentiary foundation separate from the elements of para. (b). ***Id.*** In the absence of any other evidence that supports the court's determination under para. (a), we cannot affirm that determination.

We appreciate that the trial court may have been frustrated with Ohmeda for bringing two motions that, in the court's view, did not serve to advance the progress of the litigation. However, more is needed for a determination of frivolousness under § 814.025, STATS. We conclude the requirements of neither § 814.025(3)(a) nor (b) have not been satisfied.

By the Court.—Order reversed.

Not recommended for publication in the official reports.