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DISTRICT IV

January 26, 2015

To:

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You are hereby notified that the Court has entered the following opinion and order:

2014AP682

In re the estate of Duane O. Rowe: Estate of Duane O. Rowe v.
Virginia Rowe (L.C. # 2010PR124)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

The Estate of Duane Rowe, by its personal representative Dee Rowe (the estate), appeals an order denying its motion for damages under WIS. STAT. § 895.044 (2011-12)¹ against Virginia Rowe (the widow). The estate contends that the widow filed a frivolous motion to amend the parties' previously signed agreement settling the widow's spousal election against the estate. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

WISCONSIN STAT. § 895.044(1) authorizes the circuit court to award as damages the actual costs of litigating a special proceeding, including attorney fees, if the special proceeding was “commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another,” or if the party or party’s attorney knew, or should have known, that the special proceeding “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.” Sec. 895.044(1)(a), (b).

The determination of what a reasonable [party or] attorney knew or should have known presents a question of fact, and we will uphold the circuit court’s determination unless it is clearly erroneous. Whether what was known or should have been known supports a finding of frivolousness, however, presents a question of law subject to our *de novo* review.

Osman v. Phipps, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701 (citations omitted).

Here, the widow moved to amend the parties’ settlement agreement on the grounds of mutual mistake after an accountant who reviewed the agreement at her attorney’s behest advised her that the agreement did not appear to account for the widow’s half-interest in a family farm. The estate filed a cross-motion to enforce the settlement agreement. At a scheduling conference, the circuit court determined that the charts affixed to the settlement agreement did not reflect the actual agreement between the parties or adequately explain the equalization payment because there were items listed in the estate’s column that did not go to the estate. The estate argued, first, that the charts were accurate if properly read in conjunction with settlement negotiations, and second, that regardless of the accuracy of the charts, the subsequent distribution of assets fully effectuated the parties’ actual agreement to evenly divide the entire estate, fully taking into account the family farm.

Not convinced by the estate's arguments at the scheduling hearing, the circuit court scheduled an evidentiary hearing and invited the estate to revise a prior chart or produce a new chart with "an understandable inventory which shows ... what each party actually ended up with." The estate then filed a Memorandum of the Estate of Duane Rowe Displaying Final Distribution of Assets Pursuant to Request of Court, with an attached balance sheet. Upon receiving the balance sheet showing the final distribution of assets, the court issued an order stating:

Contrary to what was set forth in the schedules attached to the original agreement, the final distribution appears to be as set forth on the [attached balance sheet]. If [the widow] did receive all of the assets listed in her column, ... it appears the marital estate has been divided equally and the estate is ready to be closed.

The court indicated that it would provide the widow with an opportunity to dispute the accuracy of the final accounting. Instead, the widow moved to withdraw her motion to amend the settlement agreement, and the circuit court granted the motion.

The estate then filed the motion that is the subject of this appeal, seeking an award of costs and attorney fees on the ground that the widow's motion to amend the settlement agreement had been frivolous. The court concluded that the widow's motion was not frivolous because the schedules attached to the settlement agreement "did not reflect the actual distribution of assets," leaving everyone, including the court, the accountant and the widow's attorney in the dark as to what had actually occurred.

The circuit court's factual finding that the schedules attached to the settlement agreement were inaccurate is not clearly erroneous. To the contrary, it is firmly supported by the estate's own subsequent submission of a balance sheet that places assets in different columns than did the

schedules. The fact that the actual *distribution of assets* ultimately conformed to the parties' oral agreement does not alter the fact that portions of the written *settlement agreement* did not conform to the parties' oral agreement. In other words, if the widow had not withdrawn her motion, she would have been entitled to have the settlement agreement amended or reformed to reflect the actual distribution of assets agreed to by the parties. The court was therefore well within its discretion to deny the estate's motion for costs and attorney fees.

IT IS ORDERED that the circuit court's order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals