COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2745 **Cir. Ct. No. 2012CV3170**

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

TRAVEL SERVICES, INC.,

PLAINTIFF-RESPONDENT,

V.

PHILLIP D. FERRIS,

DEFENDANT-APPELLANT,

HINSHAW & CULBERTSON, LLP,

INTERESTED PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Reversed and cause remanded with directions.*

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

¶1 LUNDSTEN, J. Travel Services, represented by Hinshaw & Culbertson, LLP, filed a tortious interference with contract claim against Assistant Attorney General Phillip Ferris. For ease of discussion, we will refer to Travel Services and Hinshaw & Culbertson collectively as Travel Services.[1] Ferris moved to dismiss the complaint, and requested an order declaring the action frivolous under WIS. STAT. § 895.044.[2] Less than 21 days later, Travel Services withdrew its complaint. What was left was defendant Ferris's motion to have the action declared frivolous and the question whether dismissal of Travel Services' action should be with or without prejudice. As to frivolousness, Ferris argued, in part, that, under § 895.044(1)(b), Travel Services knew or should have known that the action lacked a reasonable basis in the law. The circuit court rejected Ferris's assertion that the action was frivolous and left in place an order of dismissal without prejudice. We reverse with respect to frivolousness, and remand with directions that the circuit court revisit whether dismissal should be with or without prejudice. We further direct that the circuit court address whether to award costs and fees and, if so, in what amount.

Background

¶2 Many of the facts in this section come from Travel Services' complaint. For purposes of this appeal, we accept all allegations in that complaint as true.

[1] Travel Services and Hinshaw & Culbertson are separately represented on appeal, but they filed a consolidated brief.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 Travel Services is a corporation that provides travel services to purchasers of memberships in its travel club products. In return for dues and annual renewal fees paid by club members, services include arranging for travel and providing rebates to qualified club members.

¶4 In 2010, Attorney Ferris, acting on behalf of the State, and in his capacity as an Assistant Attorney General, filed suit in Outagamie County against Travel Services and other defendants. During the course of discovery, Ferris asked that Travel Services produce the names and addresses of all Wisconsin purchasers of travel club memberships in travel club products produced and serviced by Travel Services. Travel Services refused on the basis that such production would be disadvantageous to its business and contractual relationships with these members. Ferris sought to compel discovery through the circuit court. In response, Travel Services sought a protective order preventing Ferris from disseminating the names and addresses of its Wisconsin members, if Travel Services was required to disclose that information. The court ordered Travel Services to produce those names and addresses, subject to a protective order directing that such information not be disclosed to anyone other than employees of the Wisconsin Department of Justice (hereafter "DOJ") and the Wisconsin Department of Agriculture, Trade, and Consumer Protection. Travel Services then disclosed the names and addresses of its nearly 1,200 Wisconsin members.

¶5 On or around September 27, 2011, Ferris mailed letters and questionnaires, on DOJ letterhead (collectively, "the letters"), to nearly all of Travel Services' Wisconsin members. The letters referenced the Outagamie County lawsuit filed by Ferris against Travel Services and other defendants. The letters told recipients that the state was gathering information from Wisconsin residents who purchased memberships in various travel clubs serviced by Travel

Services. The letters contained twelve questions seeking information regarding, for example, promotional gifts offered for attending sales presentations and whether those gifts were provided, useful, or redeemable, whether statements regarding expected savings or discounts for travel club members were as represented, and whether the use of or attempted use of membership benefits was problematic.

¶6 After Ferris sent out the letters, Travel Services received requests for cancellations of travel club memberships from recipients of the letters. And, the recipients of this correspondence renewed their memberships at a significantly reduced rate as compared with previous years.

¶7 On June 13, 2012, Travel Services filed suit against Ferris in Milwaukee County Circuit Court, after which venue was transferred to Dane County. In that suit, which is the subject of this appeal, Travel Services alleged tortious interference with contract.[3]

[3] The complaint contains a second claim, namely, interference with prospective economic relations. However, we ignore this second claim because the parties have largely done so, and nothing in the parties' briefing suggests that this separate claim raises distinct issues. The only mention we find suggesting a possible distinction is a footnote in Travel Services' appellate brief observing that Ferris does not separately address interference with prospective economic relations. Travel Services' single-sentence footnote, however, does not suggest any reason why any of Ferris's arguments do not apply equally to the interference with prospective economic relations claim, and does not ask us to affirm based on Ferris's failure to address the topic. And, we note, Travel Services withdrew both claims and made no effort before the circuit court to argue that sanctions should not be imposed because of the existence of this second claim. So far as we can tell, any possible difference between these two claims was not considered by the circuit court. Still, our decision here does not preclude further consideration of this claim on remand. For example, if Travel Services' interference with prospective economic relations claim has a separate life, that fact might implicate whether dismissal should be with or without prejudice or the appropriate award of costs and fees.

¶8 On August 2, 2012, Ferris served two motions on Travel Services: a motion to dismiss Travel Services' complaint and a motion to declare the action frivolous and for costs and fees pursuant to WIS. STAT. § 895.044.[4]

¶9 On August 22, 2012, Travel Services withdrew its complaint. Both parties then briefed the legal status of the complaint. On October 30, 2012, the circuit court issued a written decision denying Ferris's motion for costs and fees and dismissing Travel Services' complaint without prejudice. The circuit court also denied a subsequent reconsideration motion, and Ferris appeals.

Discussion

¶10 Ferris argues that the circuit court erred by denying his motion asking that Travel Services' claim for tortious interference with contract be declared frivolous under WIS. STAT. § 895.044. Section 895.044 is relatively new, and the operative frivolousness language in it roughly tracks WIS. STAT. § 814.025(3), which was repealed in 2005. Section 895.044(1) provides, in relevant part:

> A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action ... to which any of the following applies:
>
> (a) The action … was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

[4] Apparently because of the change in venue from Milwaukee County to Dane County, the motions were not filed in Dane County until August 10, 2012. Regardless whether the timing of the filing matters with respect to the running of the 21-day time period specified in WIS. STAT. § 895.044, there is no dispute that Travel Services withdrew its complaint within 21 days under the statute.

> (b) The party or the party's attorney knew, or should have known, that the action … 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.

Ferris makes multiple arguments under this statute as to why Travel Services' action was frivolous. But to succeed, Ferris needed just one valid frivolousness argument. We conclude he had at least one, namely, his argument that, under subsection (b), Travel Services knew or should have known that its tortious interference claim had no reasonable basis in current law or a good faith argument for a change in law, because Travel Services knew or should have known that it could not prevail on all of the elements of that claim. Thus, we do not address Ferris's other arguments.[5]

¶11 Before proceeding to the heart of the matter, we dispose of three related issues.

¶12 First, both Ferris and Travel Services are mindful that subsection (b) of the statute speaks in terms of whether the action is supported by "any reasonable basis in law or equity" *and* whether the action could "be supported by a good faith argument for an extension, modification, or reversal of existing law." *See* WIS. STAT. § 895.044(1)(b). However, while both parties make arguments relating to whether Ferris's actions arguably constitute tortious interference with contract under existing law, neither meaningfully discusses what "extension, modification, or reversal of existing law" might support Travel Services' claim.

[5] We do not address Ferris's argument that, under WIS. STAT. § 895.044(1)(a), Travel Services initiated the action in bad faith. Also, we do not address alternative arguments made by Ferris with respect to § 895.044(1)(b). More specifically, we do not address Ferris's argument that Travel Services knew or should have known that the suit was barred by public officer/governmental immunity and by the litigation privilege doctrine.

That is to say, Travel Services asserts, but does not back up the proposition, that its tortious interference claim may be supported by an argument for a change in the law. Indeed, we do not understand the parties to be disputing the law, but only how that law applies to the facts here. Accordingly, we address only whether the claim is supported by existing law.

¶13 Second, there is much discussion in the appellate briefs regarding whether Ferris violated the protective order referenced above that was issued in the separate action that Ferris filed against Travel Services on behalf of the State. Travel Services asserts that Ferris violated the order. For example, Travel Services states: "As an officer of the court, Ferris is obligated to obey court orders to which he is subject.... Ferris' mailing of the 1,200 letters and surveys, notwithstanding his undisputed knowledge and in violation of the protective order explicitly mandating non-disclosure, supports the reasonable inference of implied or constructive malice." Elsewhere in its brief, Travel Services pulls back on the assertion that Ferris violated the protective order and instead talks in terms of the possibility that Ferris "may have" violated the protective order. In addition, Travel Services tells us that the judge who issued the order criticized Ferris for sending out the letters and suggested that the action might be a violation of the protective order. Ferris states in his reply brief that references to this topic by Travel Services are inappropriate. Ferris also attempts to persuade us that there was no violation.

¶14 Whether there was or was not a violation or a possible violation of the protective order does not affect our analysis. We take it as a given that the letters, as alleged in the complaint, harmed Travel Services. But the issue here is not whether Travel Services was harmed. The issue, rather, is whether it was reasonable to believe that Travel Services could obtain a remedy for this harm by

filing a lawsuit alleging tortious interference with contract. And, as we shall see, the more specific dispositive issue on appeal is whether a reasonable plaintiff in Travel Services' position could have believed it could prevail on the privilege element under which the letters must have contained false information, express or implied. This privilege issue is unaffected by whether Ferris's action in sending out the letters violated the protective order; a protective order violation would not have rendered the letters more or less truthful. Travel Services suggests no reason whatsoever why the alleged violation implicates whether the letters contained or implied false information. Accordingly, we address the protective order dispute no further.

¶15 Third, the parties dispute our standard of review with respect to the decision whether the action was frivolous. It appears that Wisconsin courts have yet to determine the appropriate standard of review for WIS. STAT. § 895.044, which was created in January 2011. *See* 2011 Wis. Act 2, § 28. Ferris argues that the decision whether an action is frivolous under this statute is a question of law that we should decide independently of the circuit court. Travel Services counters that our review of the circuit court's decision should be deferential. We need not resolve this dispute because, assuming without deciding that we must accord deference to the circuit court's frivolousness decision and, as Travel Services asks, resolve any doubts in favor of finding the claim non-frivolous, we conclude that reversal is required. A distinct standard of review issue is whether or in what amount to award costs and fees. We address that topic later in this opinion.

¶16 Having disposed of these three related issues, we turn our attention to whether the circuit court correctly decided that the tortious interference with contract claim against Ferris was non-frivolous.

¶17 A claim for tortious interference with a contract has five elements:

> "(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere."

Brew City Redevelopment Group, LLC v. Ferchill Group, 2006 WI 128, ¶37 n.9, 297 Wis. 2d 606, 724 N.W.2d 879 (quoted source omitted). The parties' dispute here is solely directed at the fifth element, whether Ferris's communication with Travel Services' members was privileged. Ferris argues that Travel Services knew or should have known that it could not possibly prevail with respect to this element. For the reasons below, we agree.

¶18 We begin with the parties' apparent agreement that truthful information is "privileged" within the meaning of that term in the fifth element of tortious interference and that the dissemination of truthful information, by itself, does not support a claim of tortious interference. The parties' agreement based on ***Liebe v. City Finance Co.***, 98 Wis. 2d 10, 295 N.W.2d 16 (Ct. App. 1980), is appropriate. In ***Liebe***, we held that "the transmission of truthful information is privileged, does not constitute improper interference with a contract, and cannot subject one to liability for tortious interference with a contract." ***Id.*** at 13. We went on in ***Liebe*** to quote with approval the following:

> "[T]he mere statement of existing facts, or assembling of information in such a way that the party persuaded recognizes it as a reason for breaking the contract is not enough [to create an action for tortious interference with contract], so long as the defendant creates no added reason and exerts no other influence or pressure by his conduct."

Id. at 18 (quoting WILLIAM L. PROSSER, LAW OF TORTS § 129, at 934-35 (4th ed. 1971) (bracketed material added by court in ***Liebe*** decision)).[6]

¶19 We acknowledge that whether interference is "privileged" is an inquiry that sometimes involves a question other than whether information is truthful. For example, "coercion by physical force" is not "privileged." *See* ***id.*** at 16 ("'Such improper means within the principles of the Restatement [include] coercion by physical force ....'" (quoted source omitted)). Travel Services, however, does not suggest that there is a privilege issue here apart from the letters' truthfulness.

¶20 As to "privilege" and, more specifically, truthfulness, Travel Services does not argue that the letters contain outright false information. Rather, Travel Services takes the position that the letters *implied* false information. According to Travel Services, because the letters implied false information, Travel Services had a good faith basis for filing the tortious interference claim against Ferris. Travel Services states this clearly in its appellate brief:

> Ferris' letter and survey strongly implied the existence of false and damaging information about Travel Services to Travel Services' [members]. On that basis, Travel Services' counsel had a strong foundation on which to conclude, in good faith, that the facts were sufficient to establish tortious interference, or, at the very least, a good

[6] Ferris contends that the application of law to the particular facts in ***Liebe v. City Finance Co.***, 98 Wis. 2d 10, 295 N.W.2d 16 (Ct. App. 1980), should have put Travel Services on notice that it could not prevail in this action. Both parties spend time comparing and contrasting the facts here with those in ***Liebe***. Ferris attempts to persuade us that ***Liebe*** compels the conclusion that Travel Services' tortious interference claim is frivolous. Travel Services argues that ***Liebe*** does not control here. We do not resolve this dispute. Assuming without deciding that ***Liebe*** does not control here, nothing in ***Liebe*** helps Travel Services because nothing in ***Liebe*** supports the view that sending the letters to Travel Services' members was actionable as tortious interference with contract.

> faith basis to argue that the law on tortious interference should be extended or modified to include such a circumstance.

Thus, the question is whether the letters could reasonably be read as implying false information.

¶21 Although Travel Services repeatedly asserts that the letters implied false information, Travel Services never identifies any such information. Nor can we identify what false information is reasonably implied by the letters.

¶22 There is no copy of any of the disputed letters in the appellate record. Rather, we have a description of the letters in Travel Services' complaint, which we accept as accurate for purposes of our review. Rather than creating our own summary of the complaint's characterization, we rely on a summary provided by Travel Services' appellate brief. We now quote, adding numbers to the sentences, Travel Services' summary:

1. "In the letter[s], Ferris referenced the Outagamie County lawsuit, identifying the State of Wisconsin as prosecuting an action against several named defendants, including Travel Services, Inc. and two travel clubs produced and serviced by Travel Services."

2. "He represented that the Department of Justice and Wisconsin Department of Agriculture, Trade and Consumer Protection were gathering information from [members] who had purchased vacation club memberships from Travel Services."

3. "Ferris also sought information from the [members], including complaints they had about the travel clubs, whether gifts offered in exchange for attending sales presentations had been provided or were useful or redeemable, whether statements by Travel Services regarding expected savings or discounts had been represented accurately, and he asked whether membership benefits were problematic."

Thus, the letters plainly inform readers that the state has filed a lawsuit against Travel Services and that state agencies are attempting to determine whether members have complaints relating to their memberships. The clear implication is that the agencies believe they already have evidence that Travel Services has engaged in some sort of actionable misconduct and also believe that current members might provide additional evidence of misconduct.[7] All of this, of course, was true at the time the letters went out. Conspicuously absent from Travel Services' argument is any explanation as to what it is about this implied information that is untruthful.

¶23 Having failed to identify any express or implied false information, we fail to understand the basis for Travel Services' assertion that it had a good faith belief that it could prevail with respect to the "privilege" element of tortious interference with contract.

¶24 Travel Services attempts to persuade us that, regardless whether it could ultimately prevail, there was a good faith basis for its tortious interference claim because its complaint sufficiently alleged that claim and, in particular, sufficiently alleged the privilege element. Travel Services discusses law supporting the view that, once Travel Services alleged lack of privilege, the burden of proving that the letters were privileged was on Ferris. Travel Services writes:

> Travel Services' complaint sufficiently and accurately alleged all elements of tortious interference, including its assertion that Ferris' acts in disclosing the

[7] We disagree with Ferris's assertion that, "[a]t most, Ferris implied in his correspondence that the DOJ and DATCP were investigating Travel Services for business improprieties." The indication that a suit had been filed implied more than an investigation.

> information to Travel Services' [members] and in violation of the court order, were "not privileged." That Ferris believes he may have been able to establish a privilege or justification defense does not render the complaint frivolous.

This argument misses the mark.

¶25 The applicable test, as pertinent here, is not whether a complaint is sufficient to survive a motion to dismiss for failure to state a claim, or whether the complaint should otherwise survive a challenge. Rather, the test is whether the plaintiff knew or should have known that one or more of the essential allegations in the complaint is frivolous. *See, e.g.*, WIS. STAT. § 895.044(1)(b) ("The party or the party's attorney knew, or should have known, that the action … was without any reasonable basis in law or equity ...."). As Ferris points out, the fact that a complaint is facially sufficient does not address whether the suit was commenced or continued in bad faith or, as most pertinent here, whether the plaintiff knew or should have known that the suit was unsupported by a reasonable basis in law.

¶26 That a frivolousness inquiry is directed at the merits of a case, and not on possible defects in pleadings, is a point well made, although implicitly, by both the majority and the dissent in ***Donohoo v. Action Wisconsin, Inc.***, 2008 WI 56, 309 Wis. 2d 704, 750 N.W.2d 739.

¶27 The majority and the dissent in ***Donohoo*** addressed whether the circuit court correctly determined that a defamation lawsuit was commenced or continued frivolously under WIS. STAT. § 802.05 and the then-existing WIS. STAT. § 814.025. *See* ***Donohoo***, 309 Wis. 2d 704, ¶31. Neither of the competing opinions focuses on the pleadings. Rather, those opinions focus on whether plaintiff's counsel could reasonably believe he could prevail. Both the majority and the dissent exhaustively discuss the merits of the claim. Neither spent time

discussing whether the plaintiff's complaint was somehow defective or vulnerable. The majority agreed with the circuit court that a reasonable attorney should have known that the attorney could not prove the "actual malice" element of defamation. *See* ***id.***, ¶¶57, 63, 72. Similarly, the dissent focused on whether the plaintiff's attorney could have reasonably believed he could prevail on the defamation claim:

> The dispositive questions presented by this review are: whether a reasonable attorney in Attorney Donohoo's position could have concluded that no reasonable jury could find the following facts: (1) Action Wisconsin's statement is false; (2) the statement defamed Grant Storms; and (3) when it made the statement, Action Wisconsin did not believe the statement was true, or made it with reckless disregard as to its truth.

Id., ¶91 (Roggensack, J., dissenting).

¶28 Accordingly, we reject Travel Services' argument that its action was not frivolous because its complaint sufficiently pled the privilege element of tortious interference. And, as we have explained, Travel Services knew or should have known that it could not otherwise prevail with respect to the privilege element of tortious interference with contract. Accordingly, we reverse the circuit court's order denying Ferris's request to declare the action frivolous under WIS. STAT. § 895.044.

¶29 Our conclusion that we must reverse the circuit court's frivolousness determination implicates that court's decision to deny Ferris's request to dismiss with prejudice. And, of course, the circuit court must now address whether to award costs and fees and, if so, in what amount. We now address each of these topics, starting with the circuit court's decision to let stand an order dismissing without prejudice.

¶30 After Ferris served Travel Services with a motion to dismiss, Travel Services attempted to voluntarily withdraw its action. The circuit court determined that, because Ferris, the adverse party, had already filed a motion when Travel Services withdrew its action, that withdrawal was governed by WIS. STAT. § 805.04(2) and required a court order for dismissal. The circuit court dismissed Travel Services' action without prejudice. On appeal, Ferris argues that the circuit court erred by not dismissing Travel Services' action with prejudice.

¶31 WISCONSIN STAT. § 805.04(2) governs voluntary dismissals and provides that "an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper." Unless the court specifies otherwise, "a dismissal under this subsection is not on the merits." ***Id.*** The decision is discretionary. ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. When considering whether to dismiss with or without prejudice, courts consider various factors, including: "'[1] the plaintiff's diligence in bringing the motion; [2] any undue vexatiousness on the plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparing for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss.'" ***Clark v. Mudge***, 229 Wis. 2d 44, 49, 599 N.W.2d 67 (Ct. App. 1999) (quoted source and internal quotation marks omitted).

¶32 Travel Services argues on appeal that the circuit court's determination that the lawsuit was not frivolous weighs in favor of dismissal without prejudice. Ferris presents arguments supporting dismissal with prejudice. It appears to us that this is a discretionary determination that the circuit court should revisit in light of our conclusion that the lawsuit, so far as the record before us discloses, is frivolous.

¶33 Turning to costs and fees, in light of our conclusion that the circuit court erred when it rejected Ferris's argument that the action was frivolous, the circuit court must now address whether to award costs and fees. Neither party addresses this topic. We simply note that, under WIS. STAT. § 895.044(2)(a), when a party has withdrawn its action within 21 days of the adverse party filing a motion under § 895.044(2), as occurred here, a circuit court "may" impose costs and fees. The use of "may" in this subsection stands in contrast to the use of "shall" in § 895.044(2)(b).

Conclusion

¶34 We reverse the circuit court's decision denying Ferris's motion for costs and fees under WIS. STAT. § 895.044. More specifically, we reverse that part of the circuit court's order deciding that Travel Services did not know, or should not have known, that its tortious interference claim "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." We conclude that Travel Services knew or should have known that the action was frivolous under this standard.

¶35 We remand for further proceedings consistent with this opinion. On remand, the circuit court is directed to address whether dismissal should be with or without prejudice and whether to award costs and fees and, if so, in what amount.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.