COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3283

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

GWENDOLYN K. JEFFRO,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

HORMEL FOODS CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: LOUIS J. CECI, Reserve Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

PER CURIAM. Gwendolyn K. Jeffro appeals from the trial court judgment granting Hormel Foods Corporation sanctions of $7,283.94, jointly and severally, against her and her counsel, Eisenberg, Weigel, Carlson, Blau, Reitz &

Clemens, S.C. She argues that the trial court erred in finding her action frivolous, and in ordering that her and her counsel's liability for sanctions be joint and several. Hormel cross-appeals from the same judgment, arguing that the trial court erred in excluding from the sanctions its costs and attorney fees in pursuing the motion for sanctions.

On Jeffro's appeal, we conclude that the trial court correctly determined that the action was frivolous. We also conclude, however, that the trial court erred in ordering joint and several liability for the sanctions. On Hormel's cross-appeal, we conclude that the trial court also erred in excluding from the sanctions the cost of pursuing the sanctions motion.

I. BACKGROUND

Jeffro sued Hormel, alleging that she was injured while eating Hormel corned beef hash that, she claimed, contained splinters of glass. Prior to the time Jeffro filed her action, and again during the suit, Hormel requested the opportunity to examine the can. Jeffro's counsel, Charles W. Kramer, ignoring Hormel's requests and violating the trial court's scheduling order, did not provide the can. Consequently, Hormel moved to dismiss and sought sanctions for dilatory conduct. The trial court denied Hormel's motion for dismissal, but took the request for sanctions under advisement.

Subsequently, Attorney Kramer acknowledged that he no longer had the can, claiming that it had been thrown away following a power outage affecting the refrigerator at his law firm where the can had been stored. Likening the explanation to the existence of the tooth fairy, the trial court found the explanation incredible.

Hormel moved for summary judgment, under the doctrine of spoliation of evidence, contending that, without the can, Jeffro's case could not be proven. The trial court agreed and dismissed the case, in part because Attorney Kramer failed to appear for the summary judgment hearing. Attorney Kramer then moved for reconsideration because, he said, he had "miscalendared" the hearing. The trial court denied his motion and Jeffro does not appeal that decision. Hormel renewed its request for sanctions. Rather than ruling on the request, the trial court instructed Hormel to file a separate motion for sanctions. Hormel did so, specifying that its motion was:

> for [s]anctions, pursuant to Wis. Stats. 814.025, against Plaintiff and her counsel, jointly and severally, for commencing and continuing a frivolous claim against Hormel Foods and for destroying evidence critical to Hormel Foods' defense under circumstances constituting bad faith.

The trial court granted Hormel's motion for sanctions, but denied recovery of the costs and fees associated with the pursuit of the sanctions motion, ultimately awarding only fees and costs incurred up to the time of the hearing on Jeffro's motion for reconsideration of summary judgment. Rather than explaining the basis for its ruling, the trial court simply stated: "I'm not awarding costs for preparation of the motion and so forth that I heard today. I think we have enough to go up to the Court of Appeals and let them figure it out."

II. ANALYSIS

A. Jeffro's Appeal

1. Frivolous Action

Jeffro argues that the trial court erred in finding her action frivolous under § 814.025, STATS. She maintains that, despite the destruction of the can,

her case could have been pursued based on other evidence (her testimony, her doctor's testimony, and laboratory analysis of the can before it was discarded) and, therefore, continuing the action did not constitute the improper continuation of a frivolous case. Thus, she explains, "she could not have known that she would be barred from using the [other] evidence until the court ruled on Hormel's summary judgment motion" and, therefore, "there was no way for [her] or her counsel to have known she would not be allowed to use evidence and would therefore be unable to prove her case." Still, even assuming that Jeffro might be correct to that limited extent, her argument would fail because, as the record establishes, the trial court had additional and substantial bases for its decision.

Section 814.025, STATS., in relevant part, provides:

> **Costs upon frivolous claims and counterclaims. (1)** If an action … commenced or continued by a plaintiff … is found, at any time during the proceedings … to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> **(2)** The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action … or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
>
> **(3)** In order to find an action … to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action … 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 … 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.

Whether an action is frivolous presents a mixed question of fact and law. *See* ***State v. State Farm Fire & Cas. Co.***, 100 Wis.2d 582, 601, 302 N.W.2d 827, 837 (1981). In the instant case, because Jeffro does not dispute the trial court's implicit factual findings, we are concerned only with whether her and/or her counsel's undisputed conduct constitutes continuance of an action that was or had become frivolous. We review, independently, whether the facts satisfy the legal standard and support the trial court's conclusion. *See* ***Lamb v. Manning***, 145 Wis.2d 619, 628, 427 N.W.2d 437, 441 (Ct. App. 1988).

The trial court found "that the action was not started frivolously" but that, under all the circumstances, counsel's continuation of the case was "very egregious." The record supports the trial court's conclusion. In this case, the record reveals not only that the critical evidence was discarded but, before it was thrown out, counsel failed to produce it for discovery and, after it was thrown out, counsel, in the trial court's words, was "stringing along" Hormel by not disclosing that the can was gone. The trial court also doubted, if not rejected, counsel's explanation for the destruction of the can. Jeffro does not challenge these findings, and does not counter Hormel's argument that these alone constitute the "bad faith" continuation of an action under § 814.025(3)(a), STATS. *See* ***Sentry Ins. v. Royal Ins. Co. of America***, 196 Wis.2d 907, 918-19, 539 N.W.2d 911, 916 (Ct. App. 1995) (A party has "a duty … to preserve evidence essential to the claim being litigated.").

The record also reveals Jeffro's counsel's additional failures: to respond to discovery demands; to timely respond to interrogatories; to timely provide a witness list; and to comply with the trial court's scheduling order. Thus, regardless of whether Jeffro's case could have gone forward without the can, the record provides ample bases for the trial court's conclusion that the manner in

which counsel pursued the case was egregious. Accordingly, we conclude that the trial court did not err in ordering sanctions.[1]

2. Joint and Several Liability for Sanctions

Jeffro next argues that the trial court erred in ordering that she and her counsel be jointly and severally liable for the sanctions. She contends that, under ***State v. State Farm Fire & Cas. Co.***, 100 Wis.2d 582, 302 N.W.2d 827 (1981), sanctions under § 814.025(2), STATS., cannot be joint and several. Jeffro is correct.

In ***State Farm***, the supreme court reversed a trial court's order for a party's and counsel's joint and several liability for sanctions under § 814.025(2), STATS. The supreme court concluded:

> [Section] 814.025 (2) provides that the court may assess costs and attorneys' fees "so that the party and the attorney each pay a *portion* of the costs and fees." This language expressly provides for an assessment of a portion, or a specified sum, of the costs and attorneys' fees against the party and the attorney and does not allow the court to impose joint and several liability for the same.

State Farm, 100 Wis.2d at 604-05, 302 N.W.2d at 839. Thus, under ***State Farm***, payment of "a portion" requires the trial court to specify the respective amounts to

[1] Although neither party has challenged the trial court's decision for lack of specificity, we call the court's attention to the supreme court's admonishment that § 814.025(3), STATS., "does not allow the trial judge to conclude frivolousness or lack of it without findings stating which statutory criteria were present." ***Sommer v. Carr***, 99 Wis.2d 789, 792, 299 N.W.2d 856, 857 (1981).

be paid by a party and counsel. Thus, we remand this case to the trial court to determine the fair apportionment of sanctions between Jeffro and her counsel.[2]

B. Hormel's Cross-Appeal

Hormel cross-appeals contending that the trial court erred in denying its request that the sanctions encompass its additional costs and attorney fees for pursuing the sanctions motion. Hormel argues that, particularly because the trial court required it to bring a separate motion for sanctions, the court should have awarded the additional costs associated with bringing that motion. Additionally, Hormel challenges the trial court's failure to articulate any basis for its ruling. Hormel is correct.

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[2] Hormel argues that Jeffro waived any objection to the sanctions being joint and several. The record reveals, however, that at the hearing on sanctions, counsel for Jeffro, citing ***State v. State Farm Fire & Casualty Co.***, 100 Wis.2d 582, 302 N.W.2d 827 (1981), argued, "Joint and several liability is not allowed."

Hormel also argues that even if the trial court had no authority to order joint and several liability for sanctions under § 814.025(2), STATS., it could and also did do so under the doctrine of spoliation of evidence. In support of its argument, however, Hormel cites authorities for two propositions: (1) that destruction of evidence can be the basis for dismissal and additional sanctions; and (2) that a trial court has broad authority and discretion to fashion appropriate sanctions. But in this case, neither proposition is at issue. By contrast, Hormel offers no authority to support two additional propositions underlying its position: (1) that, under the doctrine of spoliation, a trial court can carve out an exception to the American rule; and (2) that, even if such an exception might exist, a trial court can order joint and several liability for the sanctions, in apparent conflict with the supreme court's decision in ***State Farm***.

Thus, not surprisingly, Hormel also argues that ***State Farm*** was "wrongly decided." As Hormel must know, however, this court may not depart from ***State Farm***. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997).

Hormel alternatively argues that "the Record is sufficiently developed for a finding by this Court that sanctions are appropriate against … counsel alone." We disagree. Although Hormel points to the trial court comments indicating that counsel may have been solely responsible for the destruction of evidence, the sanctions Hormel sought were also in response to other conduct in the case. Thus, whether counsel alone should be responsible for the sanctions, or whether and in what amounts the sanctions should be apportioned, may require additional fact-finding by the trial court upon remand.

"If the [trial] court finds a claim frivolous, then … it must allow 'reasonable attorney' fees." ***Sommer v. Carr***, 99 Wis.2d 789, 799, 299 N.W.2d 856, 860 (1981). The trial court has the responsibility "to determine whether the attorney's fees in question are reasonable and to refuse the enforcement of those charges which are not." ***Herro, McAndrews & Porter, S.C., v. Gerhardt***, 62 Wis.2d 179, 183, 214 N.W.2d 401, 403 (1974).

Logically, "reasonable" sanctions for a frivolous action would make a party whole by including costs and attorney fees associated with pursuing a sanctions motion. *See* ***Ron Scheiderer & Assocs. v. City of London***, 689 N.E.2d 552, 554 (Ohio 1998) ("reasonable attorneys fees incurred by a party in prosecuting a motion for sanctions may be awarded to that party upon a finding of frivolous conduct"); *see also* ***Maryland Cas. Co. v. Allen***, 561 N.W.2d 103, 106 (Mich. Ct. App. 1997). Moreover, as the supreme court has explained, whether a trial court erroneously exercised discretion in disallowing recovery of certain costs and attorney fees depends, in part, on whether the court provided any basis for its ruling. *See* ***Wisconsin Pub. Serv. Corp. v. Krist***, 104 Wis.2d 381, 395, 311 N.W.2d 624, 631 (1981).

Here, the trial court articulated no basis for disallowing the costs and attorney fees Hormel incurred after Jeffro's motion for reconsideration of summary judgment. The trial court provided no basis for its determination of what costs and fees were reasonably to be included in the sanctions; it offered nothing other than its view that "we have enough to go up to the Court of Appeals and let them figure it out." While we appreciate the trial court's confidence in our ability to do so, we have neither a record of the trial court's reasoning nor the telepathic powers that could enable us to "figure it out" in this case.

Accordingly, on the cross-appeal, we conclude that the trial court erroneously exercised discretion. We remand this case to the trial court to determine, under the ***Herro*** criteria, *see* ***Herro***, 62 Wis.2d at 184, 214 N.W.2d at 404, the amount Hormel should be awarded for costs and attorney fees related to all stages of the proceedings subsequent to the motion for reconsideration, including the preparation and litigation of its motion for sanctions. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 108, 293 N.W.2d 155, 159 (1980) ("When an appellate court is confronted with inadequate findings …, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings.").[3]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

[3] Upon remand, in both the appeal and cross-appeal, the trial court may find it necessary to hold a hearing. Because that hearing necessarily stems from Hormel's continuing pursuit of its motion for sanctions, the trial court, in determining whether and in what amount Hormel's additional costs and attorney fees should be added to the sanctions, may also consider Hormel's further costs occasioned by the hearing following remand. Thus, to say the least, we reject Jeffro's argument that "any subsequent attorney fees incurred by Hormel were not attributable to the defense against a frivolous action, but were instead attributable to the *prosecution* of its motion for sanctions" – an argument based not on law, but on "chutzpah." *See* ***State v. Windom***, 169 Wis.2d 341, 354 n.3, 485 N.W.2d 832, 837 n.3 (Ct. App. 1992) (illustrating "chutzpah" as "the gall displayed by the young man who, after he is convicted of murdering his parents, seeks leniency because he is an orphan") (Fine, J., concurring).