COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0610

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

IN RE THE FINDING OF ATTORNEYS FEES IN LIFE SCIENCE CHURCH, BIBLE CAMP & CHRISTIAN LIBERTY ACADEMY, MISSION OF JESUS CHRIST ALMIGHTY GOD V. SHAWANO COUNTY AND VILLAGE OF TIGERTON:

WILLIAM A. PANGMAN,

APPELLANT,

V.

SHAWANO COUNTY AND VILLAGE OF TIGERTON,

RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County: JAMES W. KARCH, Judge. *Reversed.*

Before Cane, C.J., Hoover and Schudson, JJ.

CANE, C.J. Attorney William Pangman appeals from the portion of a judgment awarding frivolous action costs to Shawano County and the Village

of Tigerton under § 814.025, STATS.[1] On appeal, Pangman contends only[2] that the circuit court erred by awarding frivolous action costs against him because: (1) he advanced two distinct positions "correctly establishing" that a tax foreclosure judgment was void; (2) even if his claims were deemed "insufficiently persuasive," they were not frivolous; (3) § 814.025 should not be used to benefit parties whose allegations of frivolousness, "as evidenced by their own actions," are themselves frivolous; and (4) his involvement in this case clarified and simplified the proceedings, thus reducing the defendants' attorney fees.

We conclude that Pangman's continuation of this action was not frivolous because when he became involved in the case and later filed a brief opposing defendants' summary judgment motions, there was a legitimate question whether claim preclusion applied and whether the plaintiffs could collaterally

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[1] Section 814.025, STATS., provides, in relevant part:

> **Costs upon frivolous claims and counterclaims**. **(1)** If an action … commenced or continued by a plaintiff … 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 .. to be frivolous under sub. (1), the court must find one or more of the following:
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> ….
>
> (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.

[2] Pangman does not appeal the portion of the judgment dismissing the plaintiffs' complaint with prejudice against Shawano County and the Village of Tigerton. In a separate appeal, we rejected Donald Minniecheske's challenge to the trial court's dismissal of the complaint. ***Shawano County v. Minniecheske***, No. 98-2090 (Wis. Ct. App. May 4, 1999).

attack the foreclosure judgment. Accordingly, we reverse that portion of the judgment requiring him to pay frivolous action costs.

I. BACKGROUND

At the outset, we note that the parties have extensively litigated this appeal's underlying subject, a land dispute between the Minniecheske family's Life Science Church and Shawano County and the Village of Tigerton. To resolve the issue on this appeal, however, we need not attempt the daunting task of summarizing this dispute's procedural history. Rather, we will set forth only the applicable factual and procedural background pertinent to this appeal.

In April 1996, plaintiffs, through attorney Paul Horvath who initially represented the plaintiffs, filed a complaint against Shawano County, the Village of Tigerton and others. The complaint requested that the circuit court void a tax foreclosure judgment and restore the Life Science Church's title based on the defendants' alleged failure to comply with statutory notice requirements of § 75.521, STATS.,[3] and the foreclosure court's refusal to grant a judicial substitution request. After a series of cross claims and third-party complaints, and following numerous judicial substitutions, the circuit court scheduled a motion hearing for May 1997 to consider fourteen pending motions. These motions included the plaintiffs' motions for injunctive relief, the County's and Village's motions to dismiss the third-party complaints, the Village's motion to dismiss the complaint under the doctrines of issue and claim preclusion, and the Village's

[3] Section 75.521, STATS., governs proceedings involving foreclosure of tax liens by actions in rem.

motion for frivolous action costs against the plaintiffs and Horvath pursuant to §§ 814.025 and 802.05(1), STATS.

Pangman first appeared in an advisory capacity with Horvath at the May 1997 motion hearing, but planned to become co-counsel once he was "up to speed" with the case. At the hearing, Pangman suggested that the court entertain opposing motions for summary judgment concerning whether the plaintiffs could collaterally attack the tax foreclosure judgment. In addition, Pangman suggested that all other issues be "put … off" pending the court's resolution of the summary judgment. Counsel for the Village and the County agreed that as a threshold matter, the court should first determine whether the tax foreclosure judgment was subject to collateral attack.

The circuit court ultimately dismissed all the third-party claims, denied the plaintiffs' motion for injunctive relief, and established a briefing schedule for summary judgment motions. Before adjourning, the court stated:

> I would be remiss if I did not address the convoluted state of this case.
>
> It has been extremely difficult to unravel the claims to determine the status of the parties, and determine whether there is or is not merit in any of the claims. I struggled with it at length; counsel have, with the testimony, to the same extent.
>
> ….
>
> … I think the complaint of the plaintiffs was a sham pleading.

In their summary judgment motions, the defendants argued that because the plaintiffs had collaterally attacked the foreclosure judgment at least twice, the circuit court could properly grant summary judgment under the doctrines of claim and issue preclusion. In September, Pangman filed a brief in

opposition to defendants' motions, and in his cover letter, explained that he had been retained immediately before the May hearing "for the purpose of identifying legal issues raised by the Plaintiff[s'] underlying action, and to assist in the presentation of these issues to this court." Horvath was to remain the counsel of record.[4] Pangman's letter clarified his role: "I have agreed to represent Plaintiffs only for the limited purposes of briefing these pre-trial issues. My function has been to attempt to separate the wheat from the chaff to assist the parties in legitimately joining issue."

Further, Pangman's letter indicated that Horvath was closing his practice and had placed him in the "unenviable position of attempting to grasp the substance of an extensive and complex factual and procedural history … to defend the posture of a case which I had no hand in initiating." Further, Pangman noted that if he had been involved from the outset, he would have structured the pleadings to raise issues in a "more straight forward manner" and that he hoped that his brief would be "the dressing which might make previously tossed claims of Plaintiffs sufficiently palatable for this court and opposing counsel to digest."

In an October 31 letter, the circuit court notified counsel that it intended to grant defendants' summary judgment and dismiss the complaint based on the doctrine of claim preclusion. At a November 18 hearing, the court granted defendants' motion for summary judgment on that basis and ruled that although a party may collaterally attack a void judgment at any time, "[t]he rule does not say that a void judgment can be repeatedly attacked time after time." Additionally, the

[4] From our review of the record, it does not appear that Pangman ever became co-counsel. Instead, it seems that he moved from his initial role as an advisor to his ultimate role as the only attorney on the case.

court explained that while the plaintiffs had complained repeatedly "about being denied the opportunity to have their challenges to the validity of the tax foreclosure proceedings heard on the merits," it was "of their own doing" because they had failed to secure legal assistance.

The court then turned to the motion for frivolous action costs. It first assessed frivolous action costs against Horvath, who was not present at the hearing. The court observed that ten years had passed between Minniecheske's first complaint against the defendants involving the property in question and the last filing. Regarding this fact, the court commented, "It's inconceivable that [Horvath] would not make some inquiry as to why ten years had passed without some proceedings to vindicate the plaintiffs' rights." The court then ruled that Horvath should have known of "the existence of litigation and disputes concerning the title to the property." Given that ruling, the court determined that such information would have led a reasonable attorney to conclude that the claim was frivolous as a matter of law. The court explained that a previous case had litigated the "exact same issue of title," but was barred under the doctrine of claim preclusion.[5] Accordingly, the circuit court concluded that because claim preclusion likewise barred a subsequent action regarding the same issue of title, the action was frivolous.

Addressing Pangman's role, the circuit court remarked that the "same observations [it had] regarding claim preclusion and Mr. Horvath apply to Mr. Pangman." The court held that it strongly disagreed with Pangman's position that

[5] The court is apparently referring to ***Minniecheske v. Tigerton,*** No. 95-2993, unpublished slip op. (Wis. Ct. App. June 25, 1996), in which this court held that appellants could not, in a small claims restitution proceeding, collaterally challenge a tax foreclosure judgment for which the appeal time had expired.

claim preclusion did not apply. Despite that disagreement, it denied the motion for sanctions against Pangman because "it would be unfair to assess any portion of the costs to him." Two factors influenced the court's decision. The court first pointed out that if Pangman had withdrawn after the May hearing, "the work of all of us would have been greater." Second, the court stressed that the case should have been resolved before Pangman received it. In addition, the court ordered Pangman to continue to represent the plaintiffs concerning assessment of costs.

Nonetheless, on December 12, the circuit court issued a "supplemental decision" *awarding* frivolous action costs against Pangman. Explaining its rationale for amending its initial decision, the court commented that the November hearing transcript disclosed the

> total lack of merit to the plaintiffs' case and Mr. Pangman's pursuit of it. In fact, my final ruling … must have surprised if not bewildered not only the defendants' attorneys but Mr. Pangman as well. I can only attribute it to a mental lapse after the lengthy, frustrating and mostly irrelevant exchange I had with Mr. Pangman.

The court made three observations in support of its supplemental decision. First, it concluded that no reasonable attorney could fail to conclude that claim preclusion was an absolute bar to the plaintiffs' action. The circuit court further concluded that in response to defendants' arguments that claim preclusion applied, Pangman submitted a thirty-page brief failing to deal with claim preclusion. Second, the court notified Pangman by letter that it intended to grant summary judgment on the basis of claim preclusion and that it would also consider the motion for frivolous costs and fees. In response, Pangman had failed to suggest why his "failure to recognize the bar of claim preclusion was reasonable." Finally, the court stated that in its two-hour dialogue with Pangman at the

November hearing, he failed to rebut claim preclusion's application. Based on these observations, the court ruled that Pangman should have been aware that the plaintiffs' claim was frivolous no later than when he reviewed the defendants' initial briefs.

In a second supplemental decision dated December 30, the court stressed that its establishment of a briefing schedule "did not constitute an order that [Pangman] continue representation or take an indefensible position." Pangman then appealed.

II. ANALYSIS

A claim is frivolous if the attorney or party "knew or should have known" that the claim had no reasonable basis in law or equity and could not be supported by a good faith extension, modification or reversal of existing law. Section 814.025(3)(b), STATS.; *see also* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 240-41, 517 N.W.2d 658, 665-66 (1994) (noting same). To prevail on a motion for sanctions for filing or continuing a frivolous action, defendants must overcome the presumption that the plaintiffs' action is not frivolous. *See* ***Kelly v. Clark***, 192 Wis.2d 633, 659, 531 N.W.2d 455, 464 (Ct. App. 1995). A court uses an objective standard and asks whether a reasonable attorney would have known or should have known, under the same or similar circumstances, that the action was frivolous. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666.

Whether an action is frivolous presents a mixed question of law and fact. *See* ***State v. State Farm Fire & Cas. Co.***, 100 Wis.2d 582, 601, 302 N.W.2d 827, 837 (1981). What a reasonable attorney knew or should have known presents a factual question, ***Juneau County v. Courthouse Employees***, 221 Wis.2d 630, 639, 585 N.W.2d 587, 590-91 (1998), and we will not reverse a circuit court's

factual findings unless they are clearly erroneous. Section 805.17(2), STATS. In contrast, whether the circuit court's factual determinations support the legal determination of frivolousness is a question of law we review *de novo*. ***Juneau County***, 221 Wis.2d at 639, 585 N.W.2d at 591. [6]

We resolve all doubts regarding frivolousness in the litigant's or attorney's favor. ***Atkinson v. Mentzel***, 211 Wis.2d 628, 648, 566 N.W.2d 158, 166 (Ct. App. 1997). When determining if an action is frivolous, we are mindful that a significant purpose of § 814.025, STATS., is to help maintain the integrity of the judicial system and legal profession, and we are cautious about declaring an action frivolous lest we "stifle the ingenuity, foresightedness and competency of the bar." ***Juneau County***, 221 Wis.2d at 650, 585 N.W.2d at 595. Here, to impose reasonable attorney fees and costs under the frivolous action statute, we must be satisfied that Pangman knew or should have known that the action to void the tax foreclosure judgment was "without any reasonable basis in law or equity." *See* ***id***. at 640, 585 N.W.2d at 591.

On appeal, the defendants maintain that because a reasonable attorney should have known that claim preclusion barred the plaintiffs' claims, the action was frivolous. They contend that although a void judgment may be collaterally attacked, claim preclusion bars the plaintiffs from repeatedly challenging the foreclosure judgment after it has been deemed valid. The

[6] Pangman cites the standard of review for a court's exercise of discretion in ***Grace v. Grace***, 195 Wis.2d 153, 157, 536 N.W.2d 109, 110-11 (Ct. App. 1995), and suggests that we give "very little deference" to the circuit court's decision because of its "sua sponte" and "off-the-record about face" after refusing to sanction him at the November hearing. The standard of review to be applied for an award of frivolous action costs is well established, and ***Grace***, which addressed a trial court's discretionary determination to hold open a wife's maintenance award, is inapplicable here.

defendants further contend that the plaintiffs previously challenged the foreclosure judgment's validity on the same grounds in ***Minniecheske v. Tigerton***, No. 95-2993, unpublished slip. op. (Wis. Ct. App. June 25, 1996); ***Shawano County v. Redman***, No. 95-2938, unpublished slip op. (Wis. Ct. App. Sept. 24, 1996); and ***Minniecheske v. Shawano County***, No. 95-2157, unpublished slip op. (Wis. Ct. App. May 7, 1996).[7]

Here, we need not decide whether claim preclusion applies because even if the doctrine indeed bars the action, Pangman's continuation of the action was not frivolous. Although the court found at the November hearing that Pangman knew or should have known that claim preclusion barred the action, it found that it would be unfair to sanction him for continuing the action when his participation reduced the parties' work and because the case should have been resolved before he became involved. When Pangman became involved at the May hearing and thereafter filed his brief in opposition to the summary judgment motion, there was a legitimate question regarding whether claim preclusion applied and whether the foreclosure judgment could be collaterally attacked.

[7] Additionally, the Village asserts that even if claim preclusion does not bar the plaintiffs' action, it is still frivolous because issue preclusion applies and because the plaintiffs failed to file a proper notice of claim and itemized statement of damages. In fact, several of the plaintiffs' current claims, while directed at the same foreclosure judgment, are new. Nonetheless, the initial issue is whether a judgment that has been repeatedly sustained may be collaterally attacked based on the plaintiffs' insistence that it is void.

The Village acknowledges that the trial court did not consider these additional claims, but citing ***Auric v. Continental Cas. Co.***, 111 Wis.2d 507, 516, 331 N.W.2d 325, 330 (1983), it contends that we may properly address these issues because their resolution would sustain the judgment. ***Auric*** provides that a respondent may raise an issue in his briefs without filing a cross appeal "when all that is sought is the raising of an error which, if corrected, would sustain the judgment." ***Id***. Because that is not the case here, and because the trial court did not address those issues, we will confine our analysis to the arguments the trial court considered. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (noting the general rule that, ordinarily, we will not consider arguments not raised to the circuit court).

Further, the circuit court requested briefs on the issue, and while Pangman's arguments did not ultimately persuade the court, that does not render his continuation frivolous. Resolving all doubts in Pangman's favor, and considering the case's posture when Pangman became involved and filed his motion in opposition to summary judgment, we cannot conclude that no reasonable basis existed for his action to vacate the judgment as void. Accordingly, we reverse that portion of the judgment awarding frivolous action costs against Pangman.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.