COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2257 **Cir. Ct. No. 2011CV816**

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

MICHAEL BRANDT AND HEIDI BRANDT,

PLAINTIFFS-APPELLANTS,

V.

JOE'S CRUSHING, LLC, CREAM CITY WRECKING & DISMANTLING AND JOSEPH TATE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Michael and Heidi Brandt appeal from a judgment imposing joint and several liability on them for $150,000 in attorney's fees and costs for frivolous claims they brought against Joe's Crushing, LLC, and Cream

City Wrecking & Dismantling.[1] The circuit court disposed of the Brandts' claims on summary judgment and determined that the claims were frivolous. On appeal, the Brandts argue that material factual disputes should have precluded summary judgment and their claims were not frivolous. We disagree and affirm.

¶2 The Brandts' claims arise out of a complex set of business and financial relationships between and among various related business entities and the bankruptcy of one of those entities, CAM Recycling and Materials, Inc.

¶3 In 2005, Heidi Brandt founded CAM, which recycled and disposed of concrete. In 2007, Joseph Tate agreed to invest in CAM. To facilitate his investment, Tate formed Joe's Crushing, LLC, which invested in and became a forty percent owner of CAM; Heidi remained a sixty percent owner of CAM. Tate also formed Cream City Wrecking and Dismantling and hired Michael Brandt to run that company.

¶4 In 2009, CAM commenced a bankruptcy case. The bankruptcy trustee sought court approval to liquidate for the benefit of CAM's creditors assets listed in the trustee's May 2010 summary of CAM's property. Included within the trustee's asset summary was a Bobcat T300, which the trustee noted was in the possession of either Heidi or her minor son. The bankruptcy court determined that the Brandts did not prove that they owned items for which they made a personal claim in CAM's bankruptcy case. The bankruptcy court authorized the sale of CAM's assets, which Joe's Crushing purchased. The bankruptcy court noted that if there was a dispute

[1] The Brandts' trial counsel was required to pay $25,000 of the sanction. The Brandts' counsel paid the sanction, and he did not appeal from the judgment.

regarding ownership of a particular asset, Joe's Crushing would have to address that dispute in the future.

¶5 In 2009, Cream City terminated Michael's employment.

¶6 In 2011, the Brandts sued Joe's Crushing for conversion arising from Joe's Crushing's refusal to return property included in the CAM asset sale which the Brandts claimed they owned personally. The Brandts also alleged breach of fiduciary duty relating to CAM and sought declaratory relief relating to Michael's employment relationship with Cream City.

¶7 The circuit court granted Joe's Crushing summary judgment on Heidi's breach of fiduciary duty claim. Joe's Crushing did not owe a fiduciary duty because Heidi maintained control over CAM as the sole officer and director and the majority shareholder. Furthermore, Heidi did not controvert Joe's Crushing's showing on summary judgment because she submitted a sham affidavit,[2] i.e., an affidavit that contradicted her deposition testimony in an attempt to create a factual dispute to avoid summary judgment.

¶8 The circuit court also granted summary judgment on Michael's declaratory judgment claim against Cream City because, in his deposition, Michael agreed that the parties never reached a final agreement setting out the terms of his employment relationship with Cream City. Therefore, the court concluded, there was no agreement that could be the basis of a declaratory judgment claim.

[2] A "sham affidavit" is "an affidavit that directly contradicts prior deposition testimony [and] is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained." ***Yahnke v. Carson***, 2000 WI 74, ¶¶20-21, 236 Wis. 2d 257, 613 N.W.2d 102.

Moreover, Michael, on summary judgment, denied that the memorandum of understanding attached to the amended complaint constituted the parties' agreement, in direct contravention of his deposition testimony. The court found that Michael's affidavit in opposition to summary judgment was a sham affidavit.

¶9 Because the Brandts did not submit any evidentiary facts supporting their claim of ownership of the Bobcat, the circuit court granted summary judgment to Joe's Crushing on its replevin counterclaim for the Bobcat and against the Brandts on their conversion claim against Joe's Crushing and Cream City. The court noted evidence in the summary judgment record that Joe's Crushing purchased the Bobcat as part of the bankruptcy sale of CAM's assets. The Brandts did not submit admissible evidence in opposition to the prima facie case of ownership made by Joe's Crushing.

¶10 The circuit court declined to reconsider the foregoing rulings or grant the Brandts relief from summary judgment. The court also found the Brandts' claims were frivolous under WIS. STAT. § 802.05 (2011-12)[3] because "there was absolutely no basis in fact or law for the" claims, the absence of facts should have been clear at the time the Brandts were deposed, the Brandts submitted sham affidavits to avoid summary judgment, and the Brandts increased the cost of the defense by failing to comply with court orders. The court awarded $150,000 in attorney's fees. The Brandts appeal.

¶11 We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes***

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

Mgmt., Inc., 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not "repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** at 496-97.

¶12 The Brandts argue that material factual disputes should have precluded summary judgment on their conversion claim for the Bobcat. The Brandts' appellants' brief argues extensively about the meaning of the bankruptcy court's order permitting the trustee to sell CAM's assets. While they argue that there were factual disputes regarding the owner of the Bobcat, the Brandts offer no facts, supported by citations to the record, to establish who actually owned the Bobcat: the Brandts or the Brandts' minor son.[4] Actual ownership is essential to a conversion claim. ***H.A. Friend & Co. v. Professional Stationery, Inc.***, 2006 WI App 141, ¶11, 294 Wis. 2d 754, 720 N.W.2d 96. We will not search the record for facts supporting the Brandts' claim that CAM did not own the Bobcat and therefore it was not properly included in the CAM bankruptcy sale. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

¶13 On reconsideration in the circuit court, the Brandts claimed that their nine-year-old son purchased the Bobcat for $8151 in 2007. The circuit court was particularly offended by the Brandts' claim on reconsideration that their son actually

[4] We note that the record contains assertions in the bankruptcy case that both CAM and the Brandts' minor son owned the Bobcat.

owned the Bobcat.[5] The court cited the motion for reconsideration as an example of the Brandts' approach to the litigation:

> They then attempted to somehow bring in what—years after this fact, if you will, that at least one piece of equipment was actually owned and had been purchased by their nine-year-old son and that he had ownership in it. In many respects, I found that claim to be preposterous at this point in time, especially in light of the fact that wasn't claimed in the bankruptcy court and now trying, essentially, by affidavit and otherwise that their nine-year-old son purchased a $10,000 piece of equipment and therefore it shouldn't have been part of the bankruptcy. That can't be described as anything other than preposterous and I would note under the circumstances that I don't know of any legal basis for the nine-year-old son at the time to have been able to have contracted for the purchase of the piece of equipment.… [This claim] could have been raised in the bankruptcy court and the bankruptcy court could have excluded it as not being property that should have been part of the bankruptcy estate.

¶14 As we have stated, the appellant's brief does not discuss any facts relating to the ownership of the Bobcat. The Brandts have not established on appeal that there were material facts in dispute relating to their conversion claim.

¶15 The Brandts next argue that the circuit court should not have granted summary judgment on Heidi's breach of fiduciary duty claim that Joe's Crushing, LLC, exercised control over CAM. Tellingly, the appellant's brief concedes that Heidi's affidavit in opposition to summary judgment on this issue was inadequate. The Brandts state that if the affidavit "had been properly prepared and presented to the court, it did indeed establish the existence of material issues of fact in dispute"

[5] The circuit court denied the minor child's motion to intervene in the circuit court, and no appeal was taken from that decision. An order denying a motion to intervene is appealable as of right. *See* ***Milwaukee Sewerage Comm'n v. DNR***, 104 Wis. 2d 182, 184, 311 N.W.2d 677 (Ct. App. 1981).

relating to the breach of fiduciary duty claim. The Brandts suggest that the summary judgment record contains, in various places, facts that should have precluded summary judgment. It was the Brandts' responsibility on summary judgment to bring these facts to the attention of the circuit court in a form consistent with the requirements for opposing summary judgment. ***Dawson v. Goldammer***, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. When the party opposing summary judgment fails to raise an issue of material fact, summary judgment can be rendered on that basis alone. ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983).

¶16 The Brandts argue that the circuit court should not have granted summary judgment on Michael's declaratory relief claim relating to his employment relationship with Cream City. The Brandts concede that Michael's affidavit was "technically deficient" and "incomplete in that it failed to provide citations to the record." On appeal, the Brandts attempt to buttress Michael's deficient affidavit. It is not our role to review materials not presented to the circuit court so as to relieve a party of the obligation to counter summary judgment in the manner required by law. ***Dawson***, 295 Wis. 2d 728, ¶¶30-31.

¶17 Because the Brandts concede that their summary judgment affidavits were inadequate, the circuit court did not err in denying the Brandts' motion for a "do-over" on reconsideration.

¶18 The Brandts challenge the circuit court's determination that their claims were frivolous and warranted sanctions. The Brandts argue that because certain of their claims survived a motion to dismiss, it is not reasonable for those same claims to be later found frivolous. In making this argument, the Brandts ignore the circuit court's findings that the Brandts did not offer sufficient facts to

support their claims at the summary judgment stage, filed sham affidavits on summary judgment, and increased litigation costs by failing to comply with circuit court orders. The Brandts do not dispute these findings. We do not address this issue further.

¶19 The Brandts next argue that the WIS. STAT. § 802.05 "safe-harbor"[6] motion filed by Joe's Crushing and Cream City was legally insufficient because it was not filed as a separate motion under § 802.05(3)(a). The Brandts' argument is not supported by the record. On April 5, 2012, Joe's Crushing and Cream City filed a § 802.05 sanctions motion dated September 6, 2011. The motion contained an affidavit of mailing of the motion on the Brandts and their counsel September 6. Joe's Crushing and Cream City filed their summary judgment motion on March 28, 2012. That motion elaborated on the basis for § 802.05 sanctions.

¶20 The Brandts argue that Joe's Crushing and Cream City had to serve a "safe-harbor" motion subsequent to the September 6, 2011 motion they filed on April 5, 2012. The Brandts cite no authority for this proposition. We will not independently develop the Brandts' argument, and therefore we will not consider this issue. ***Vesely v. Security First Nat'l Bank***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

¶21 The Brandts argue that the "safe-harbor" motion was not timely filed in relation to the time it was served on them. The Brandts offer no citation to the

[6] The "safe-harbor" provision of WIS. STAT. § 802.05 contemplates that the recipient of a sanctions motion has a twenty-one day period "to alter … potentially sanctionable conduct and avoid sanctions" before the movant may seek sanctions from the circuit court. ***Ten Mile Invs., LLC v. Sherman***, 2007 WI App 253, ¶¶2, 5, 306 Wis. 2d 799, 743 N.W.2d 442.

record to indicate that this argument was raised in the circuit court. A party raising an "issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). We will not search the record to substantiate that this argument was made in the circuit court. ***Fuller v. Riedel***, 159 Wis. 2d 323, 330 n.3, 464 N.W.2d 97 (Ct. App. 1990).

¶22 The Brandts vigorously protest the $150,000 in attorney's fees ordered as a sanction. WISCONSIN STAT. § 802.05(2) allows courts to impose appropriate sanctions when actions are "continued frivolously." ***Keller v. Patterson***, 2012 WI App 78, ¶21, 343 Wis. 2d 569, 819 N.W.2d 841.

¶23 In a strange twist, the Brandts fault Joe's Crushing and Cream City for not opposing the Brandts' frivolous claims earlier in the case and incurring attorney's fees later in the case. The Brandts offer no authority for the proposition that it was incumbent upon Joe's Crushing and Cream City to save the Brandts from themselves and their lawyer.

¶24 The Brandts argue that because they were represented, sanctions were precluded under WIS. STAT. § 802.05(3)(b)1. That provision states that monetary sanctions for frivolous claims or defenses may not be imposed upon a party who is represented. The Brandts do not substantiate that they made this argument to the circuit court. We consider it no further.

¶25 The Brandts argue that the $150,000 in attorney's fees was excessive. However, the Brandts do not, with reference to the record, argue in sufficient detail which aspect of the fees is unreasonable. Rather, the Brandts complain about the $275,000 fees requested even though the circuit court only awarded $150,000 in fees. Finally, the Brandts couch their fee objection in an argument we have already

rejected: Joe's Crushing and Cream City should have sought sanctions earlier in the case.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).