COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2116

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

JANE A. CAHILL, A/K/A JANE A. CAHILL-TRYON, AND NORENE SOLHEIM,

PLAINTIFFS-RESPONDENTS,

V.

DUANE A. CATLIN, MARJORIE A. CATLIN, CORY R. CATLIN AND JESSICA CATLIN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

VERGERONT, J. Duane, Marjorie, Cory and Jessica Catlin appeal a jury verdict awarding $500 in compensatory damages and $5,000 in punitive damages to their neighbor, Norene Solheim, and her daughter, Jane Cahill. They also appeal the trial court's order denying their post-verdict motions challenging

the verdict and requesting attorney fees under § 814.025, STATS. Finally, they appeal the dismissal of their counterclaim for slander of title. We reject each of their arguments and affirm. We also deny the motion of Cahill and Solheim for attorney fees for the appeal.

BACKGROUND

Duane, Marjorie and Cory Catlin own a home at 1303 West Wisconsin in Portage, Wisconsin, purchased in September 1990. Cahill purchased the adjoining home, 1301, in April 1990, and her mother, Norene Solheim, lives there. The Catlins' decision to build a fence around their backyard in 1994 and 1995 gave rise to a dispute over the boundary between the two properties. The surveyor hired by Cahill eventually established the boundary line such that one corner of Cahill's garage encroached a few inches on the Catlins' property, and a strip about ten-and-one-half feet wide along the west side of Cahill's garage was entirely on the Catlins' side of the boundary.

Cahill and Solheim initiated this lawsuit, alleging encroachment, tortious injury to property and damage to real estate, private nuisance, trespass, invasion of privacy, intentional infliction of emotional distress, and adverse possession. They requested compensatory and punitive damages as well as various types of equitable relief. The Catlins filed an answer and counterclaim for slander of title, which alleged that Cahill and Solheim had filed a lis pendens against the whole of the Catlins' property, even though the complaint alleged an interest in only a fraction of the Catlins' property.

Prior to trial, the court dismissed the claim for encroachment and the counterclaim for slander of title. After the plaintiffs concluded presentation of their case to the jury, the Catlins moved for dismissal, and the court deferred its

ruling. At the close of all evidence, the court denied that motion and the Catlins' motion for a directed verdict, concluding that there was enough evidence to submit all five claims to the jury. The jury determined that plaintiffs did not adversely possess real estate to which the Catlins held title; the fence the Catlins erected was not a nuisance; the Catlins did not in a highly offensive manner unreasonably invade the plaintiffs' privacy; and the Catlins did not intentionally inflict severe emotional distress on the plaintiffs. However, the jury decided that the Catlins did damage and destroy the plaintiffs' land or things growing on the land (special verdict question no. 4) and determined that $500 would reasonably compensate for that (question no. 5). The jury also determined that the Catlins did trespass, but awarded no compensatory damages for the trespass. Finally, the jury determined that the Catlins acted maliciously or in intentional disregard of the rights of the plaintiffs (question no. 13) and assessed $5,000 in punitive damages (question no. 14).

After verdict, the Catlins moved for a trial on their slander of title counterclaim, requested the court change the "yes" answers on special verdict question nos. 4 and 5 to "no" and the compensatory and punitive damage awards to zero. They also requested attorney fees under § 814.025, STATS., on the ground that the claims of adverse possession, nuisance, trespass, invasion of privacy and intentional infliction of emotional distress were frivolous and filed for the purpose of harassment. The trial court denied these motions and entered judgment on the verdict. On appeal, the Catlins raise the same issues they did in their post-verdict motions.

CHALLENGE TO VERDICT

The Catlins contend there is insufficient evidence to support the jury determination that they damaged or destroyed the plaintiffs' land or things growing on the land. According to the Catlins, the only evidence of such damage is of the land or things growing on the land to which the plaintiffs claimed adverse possession. With the rejection of the adverse possession claim, the Catlins contend, there is no basis for a "yes" answer to question no. 4 or for any compensatory damages in response to question no. 5; and without any compensatory damages, there can be no award of punitive damages.

Motions to change answers in a verdict may be granted on the ground of insufficiency of the evidence to sustain the answer. Section 805.14(5)(c), STATS. Motions challenging the sufficiency of the evidence to support a verdict may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1). This standard applies both to the trial court and to the appellate court reviewing the trial court's determination, although the reviewing court must also give substantial deference to the trial court's better ability to assess the evidence. ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). When there is any credible evidence to support a jury's verdict, even though that evidence is contradicted and the contradictory evidence is stronger and more convincing, the verdict must nevertheless stand. ***Id.*** at 390, 541 N.W.2d at 762.

The trial court applied this standard in deciding the Catlins' motion to change the answer. It acknowledged that the credible evidence and inferences

favoring verdict question nos. 4 and 5 might be slight, and the contrary credible evidence might even be stronger. Nevertheless, it noted that it was for the jury to decide issues of credibility and, given the deferential standard of review of a jury verdict, it decided it should not change the answers. We agree with the trial court's analysis and conclusion.

It is true that much, perhaps even most, of the evidence concerning damage or removal of shrubs, soil, stones and rocks was related to the disputed strip of property. In rejecting the plaintiffs' adverse possession claim, the jury found, in effect, that the Catlins, not the plaintiffs, own this strip of land. However, there was also testimony by both Solheim and Cahill of damage to the land owned by Cahill. Solheim testified that, in putting in the fence, Cory Catlin removed soil and rocks from a retaining wall close to the foundation of the garage, on Cahill's property, and the rocks are now tumbling down. Solheim also testified that in moving a fence post set in concrete, the Catlins dug down under the foundation, on Cahill's property, with the result that there is standing water in the sand and "everything washes." Cahill testified that the removal of soil when the hole was dug and the removal of the rocks used to hold the sand and soil behind the garage caused the soil and sand to shift and sink, and "there is quite a repair situation that has to be done."

Cory Catlin acknowledged that he was on Cahill's property in order to build the fence. He testified that he did remove some rocks that were part of the landscaping behind Cahill's garage and did remove gravel there in order to put in the fence post, but then replaced the rocks and gravel. He also acknowledged that he removed rocks, gravel and soil from the area immediately adjacent to Cahill's garage. Duane Catlin testified that they put the stones back that they removed from Cahill's property.

Each side submitted photographs of the area behind Cahill's garage, near the new fence post, that could be interpreted to support its testimony. In addition, the plaintiffs submitted videotapes that could be interpreted as supporting their testimony. There was also a jury view of the premises. The jury apparently decided to believe Solheim and Cahill on this point rather than the Catlins. When there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury, not the trial court or this court, determines the credibility of each witness and the weight of the evidence. *See* ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993); ***Brian v. Mann***, 129 Wis.2d 447, 453, 385 N.W.2d 227, 230 (Ct. App. 1986). Crediting the testimony of Cahill and Solheim on this point, rather than that of the Catlins and, given the deferential standard for review of jury verdicts, we conclude the trial court correctly denied the motion to change the answers to question nos. 4 and 5.

The Catlins' challenge to the answers to question nos. 13 and 14, relating to punitive damages, is based solely on the insufficiency of evidence to sustain the answers to question nos. 4 and 5. Since we have concluded there is sufficient evidence to sustain the answers to question nos. 4 and 5, the Catlins have presented no basis for changing the answers to question nos. 13 and 14.

SLANDER OF TITLE COUNTERCLAIM

The Catlins contend the trial court erred in dismissing their counterclaim for slander of title under § 706.13(1), STATS. That statute provides:

> (1) In addition to any criminal penalty or civil remedy provided by law, any person who submits for filing, entering in the judgment and lien docket or recording, any lien, claim of lien, lis pendens, writ of attachment or any other instrument relating to the title in real or personal property, knowing the contents or any part of the contents

> to be false, sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1,000 plus any actual damages caused by the filing, entering or recording.

The Catlins assert that the plaintiffs filed a lis pendens on all four lots to which the Catlins hold record title—lots 10, 11, 41 and 42—when the boundary dispute concerned only the two lots bordering Cahill's property—lots 10 and 41. This conduct, according to the Catlins, shows the plaintiffs filed a lis pendens knowing part of the contents to be "false, sham, or frivolous."

Based on the materials presented by counsel and their argument, the court concluded that the inclusion of all four lots owned by the Catlins, with a "home straddling two … of the lots" provided reasonable notice to people who may have an interest in the property and did not constitute slander of title. We conclude the trial court properly dismissed the counterclaim.

Although the plaintiffs described their motion as one to dismiss the counterclaim, it is evident that the trial court considered matters outside the pleadings in deciding the motion, and the parties referred to matters outside the pleadings before the trial court, as they do on appeal.[1] We therefore treat the plaintiffs' motion as one for summary judgment. *See* ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis.2d 605, 608-609, 345 N.W.2d 874, 876-77 (1984).

[1] Somewhat inconsistently, the Catlins contend on appeal that we should apply the standards applicable in a motion to dismiss a pleading for failure to state a claim, even though they refer to matters outside the pleadings. We are persuaded that summary judgment methodology is more appropriate to what actually happened in the trial court. At the hearing, the Catlins' counsel referred to an affidavit of Duane Catlin concerning damages, acknowledged the relationship of the Catlins' four lots and the placement of their house, as described by plaintiffs' counsel, and asked the court to "grant[] the counterclaim with attorney's fees and costs."

When we review a summary judgment, we apply the same methodology as the trial court, and we consider the issues de novo. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The remedy is appropriate in cases where there is no genuine issue of material fact and the moving party has established his or her entitlement to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). Whether a factual inference may be drawn and whether it is reasonable are questions of law for this court to decide. ***Groom v. Professionals Ins. Co.***, 179 Wis.2d 241, 249, 507 N.W.2d 121, 124 (Ct. App. 1993).

These facts are undisputed.[2] The four lots owned by the Catlins and referred to in the lis pendens were each 50 feet by 150 feet. Lots 10 and 11 fronted the street and contained the house. Lots 41 and 40, respectively, were behind each of the two front lots, served as the backyard of the residence and were bounded in back by railroad tracks. We agree with the trial court that based on these undisputed facts, it is reasonable to include all four lots in the lis pendens.

It appears that the Catlins' position on appeal is that these undisputed facts give rise to a reasonable inference that the plaintiffs knew the information in the lis pendens was "false, sham or frivolous," thereby entitling them to a trial. We

[2] Along with the motion to dismiss the counterclaim, the plaintiffs filed a motion for summary judgment on the encroachment claim and the adverse possession claim. The trial court granted summary judgment on the former and denied it on the latter. Included in the materials submitted by the plaintiffs was an affidavit of William Eastman, who averred that his father erected a single-family dwelling on lots 10 and 11; the property was 100 feet in width and 300 feet in depth and was comprised of four 50 x 150 foot lots. Duane Catlin's affidavit, which was apparently submitted in opposition to the motions, contained, among other averments, that Duane, Marjorie and Cory Catlin hold record title to Lots 10, 11, 40, and 41, Lakeview Park Addition, City of Portage, Columbia County, Wisconsin; each lot is 50 feet by 150 feet; and their house is built on the southern end of the lots 10 and 11, with the eastern boundaries of lots 10 and 41 being the western boundaries of lots 9 and 42. The plat of survey submitted by plaintiffs shows the railroad tracks bordering the back of the Catlins' property.

conclude they do not. There are no reasonable inferences from the evidence to support slander of title. The plaintiffs were therefore entitled to a judgment of dismissal as a matter of law.

THE CATLINS' MOTION FOR ATTORNEY FEES

The Catlins argue that the trial court erred in denying their motion for attorney fees under § 814.025, STATS.,[3] for the claims of adverse possession, nuisance, invasion of privacy, intentional infliction of emotional distress and trespass. In denying this motion, the court stated that, while it was "not overly impressed with various causes of action that were brought," there was evidence submitted on all causes of action that "at least makes them appropriate for litigation and defeats any kind of argument for frivolousness."

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[3] Section 814.025, STATS., provides in part:

> **Costs upon frivolous claims and counterclaims**. (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant 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.
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> ….
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> (3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
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> (a) The action, special proceeding, counterclaim, defense or cross complaint 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, special proceeding, counterclaim, defense or cross complaint 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.

A claim is frivolous under § 814.025(3)(b), STATS., and entitles the moving party to costs and attorney fees if the other party's attorney or the other party knew or should have known that the claim had no reasonable basis in law or in equity, and could not be supported by the good faith extension, modification or reversal of existing law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 240-41, 517 N.W.2d 658, 665-66 (1994). *See also* ***Kelly v. Clark***, 192 Wis.2d 633, 654, 531 N.W.2d 455, 462 (Ct. App. 1995). Whether the attorney knew or should have known that a position is frivolous is determined by what a reasonable attorney would have known or should have known under the same or similar circumstances and is based on an objective standard. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666. This is a mixed question of law and fact. ***Id.*** The trial court determines what the facts are when determining what an attorney knew or should have known, and the trial court's finding of fact will not be overturned on appeal unless they are clearly erroneous. ***Id.*** However, whether knowledge of those facts would reasonably lead an attorney to conclude the claim is frivolous is a question of law. ***Id.***

We must resolve all doubts in favor of finding a claim nonfrivolous. ***Id.*** at 235, 517 N.W.2d at 663. This is because an attorney has an obligation to represent his or her client's interest zealously, and this may include making some claims which are not entirely clear in the law or facts, at least when commenced. ***Id.*** The fact that a party may not succeed on a claim does not make the claim frivolous. ***Id.*** at 244 n.9, 517 N.W.2d at 667.

Because the Catlins' argument on frivolousness is based on their contention that there was no evidence on the five claims, we must first decide whether that is the case. This inquiry does not depend on any factual findings of the trial court, but, instead, presents a question of law: whether the evidentiary

facts available to or propounded by the plaintiffs provide any reasonable basis to meet their burden of proof on the challenged claims. *See* ***Stern***, 185 Wis.2d at 245, 517 N.W.2d at 667. While our review is de novo, we agree with the trial court that there was evidence on each claim such that none were frivolous under § 814.025(3)(b), STATS.

To prevail on an adverse possession claim, the claimant must show notorious, exclusive, continuous and hostile possession of the land claimed for a continuous period of twenty years. *See* § 893.25(1), STATS.; ***Harwick v. Black***, 217 Wis.2d 691, 699, 580 N.W.2d 354, 357-58 (Ct. App. 1998). Margaret Heberlein Brunt testified that she had lived at 1301 for twenty years immediately prior to Cahill's purchase and that the 10.5 foot strip of ground between her garage and the Catlins' cement driveway slab was her property. She knew this because a realtor had pointed out the lot lines. She testified that she had mowed and cared for this strip and planted there and walked through it to use the steps to her lower backyard. Although the Catlins introduced deposition testimony of two former owners of the Catlins' property who disputed Brunt's testimony, on rebuttal she denied that either had ever maintained this strip as they claimed. Brunt did not testify at trial that her husband asked permission of their neighbor to park his car on the disputed strip, as the Catlins assert. Rather, she testified he asked permission to park on the cement slab driveway on their neighbor's property: he did not ask for permission when he parked it on the grassy area, she testified, because "it was our yard that we were parking it on."

The Catlins also argue there was no evidence defining the boundaries of the land the plaintiffs claimed through adverse possession. However, as the jury was instructed, "absolute precision or utilization of a surveyor is not required to establish lines of occupancy, [although] the evidence

must provide a reasonably accurate basis upon which to determine the boundary of the land adversely possessed." *See* WIS J I—CIVIL 8060. Several witness testified to the location, description and measurements of the grassy strip between the two properties. It is true that Brunt testified she owned the entire ten-and-one-half-foot wide strip, while Solheim's testimony was she believed she (her daughter) owned "just past the middle … [a]bout five-and-one-half feet." This dispute may affect the jury's determination of the boundaries of the land adversely possessed if it were to find adverse possession. But it does not mean there is insufficient evidence to support the claim.

The Catlins' argument on adverse possession boils down to their assessment of the weight and credibility of the evidence. However, that is not the test for frivolousness. *See* ***Stern***, 185 Wis.2d at 245, 517 N.W.2d at 667. Brunt's testimony, coupled with the testimony of Cahill and Solheim, provided a reasonable basis to meet the plaintiffs' burden of proof on the adverse possession claim.[4]

On the trespass claim, Cory Catlin acknowledged that he did trespass in building the fence. Nevertheless, the Catlins claim the trespass claim was frivolous because there was no evidence of damages. However, a trespass claim may be successful even though only nominal damages are awarded: the law infers some damage from every direct entry upon the land of another. *See* ***Jacque v. Steenberg Homes, Inc.***, 209 Wis.2d 605, 619, 563 N.W.2d 154, 160 (1997). Moreover, the plaintiffs did present evidence that would have provided a reasonable basis for compensatory damages for the trespass claim—the same

[4] We observe that two of the twelve jurors dissented on the "no" answer concerning the adverse possession claim.

evidence that the jury apparently relied on in awarding compensatory damages for the destruction of the plaintiffs' land or things growing on the land.

We do not discuss each of the other claims in detail because the Catlins' arguments that they are frivolous under § 814.025(3)(b), STATS., suffer from the same deficiency as their argument that the adverse possession claim is frivolous: the Catlins are weighing the evidence and making credibility assessments. We are satisfied that the testimony of Cahill and Solheim was sufficient to meet their burden of proof on the claims of nuisance, intentional infliction of emotional distress and invasion of privacy.

The Catlins also argue that the plaintiffs continued their claim for adverse possession in bad faith. They contend that the insufficiency of the evidence and the plaintiffs' failure to instruct their surveyor to revise his survey map to correct his initial error in the boundary line support a determination of bad faith. The question of whether a reasonable attorney or litigant "commenced, used or continued" a claim "in bad faith, solely for purposes of harassing or maliciously injuring another," under § 814.025(3)(a), STATS., is analyzed under a subjective standard. ***Stern***, 185 Wis.2d at 235-36, 517 N.W.2d at 663. The trial court must determine what was in the person's mind and whether his or her actions were deliberate or implicitly intentional with regard to harassment or malicious injury, and its findings must be specific. ***Id.*** at 236, 517 N.W.2d at 663-64. Whether the facts as found by the trial court meet the statutory standard is a question of law, which we review de novo. ***Id.*** at 236, 517 N.W.2d at 664.

Since we have already concluded there was sufficient evidence to avoid a finding of frivolousness under § 814.025(3)(b), STATS.,[5] we address here only the argument that the plaintiffs' conduct regarding the survey shows bad faith. We cannot find any indication in the motion papers or the transcript of the post-verdict hearing that the Catlins presented this argument to the trial court. We find one conclusory statement to the court at the hearing—that the plaintiffs brought the adverse possession claim "solely for the purpose of harassing the Defendants for which we are claiming reasonable attorney's fees and actual reasonable costs." The trial court made no findings with respect to § 814.025(3)(a), presumably because it understood the Catlins' argument on harassment to be premised solely on their argument that there was an inadequate factual basis.

Whether the plaintiffs' conduct regarding the survey shows harassment involves factual findings on the plaintiffs' subjective intentions. *See* ***Stern*** at 236, 517 N.W.2d at 663-64. If the Catlins wished the court to make factual findings of harassment on any basis other than their contention that the claim lacked an adequate factual basis, they had a duty to bring this to the attention of the court and explain the evidence supporting the findings they wished the court to make. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). Since they did not do so, there are no factual findings for us to review, and we may not find facts. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107, 293 N.W.2d 155, 159 (1980).[6] *See also* ***Evjen***, 171 Wis.2d at 688, 492

[5] Even if a claim is frivolous under § 814.025(3)(b), STATS., it does not necessarily mean there is a violation of § 814.025(3)(a). *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 239, 517 N.W.2d 658, 665 (1994).

[6] To the extent the Catlins are arguing on appeal that claims other than the adverse possession claim were brought for purposes of harassment, our conclusion is the same.

N.W.2d at 365 (we generally do not decide issues not properly raised in trial court; this is especially true when issue involves questions of fact not brought to trial court's attention). We therefore do not consider further the Catlins' arguments under § 814.025(3)(a), STATS.

CAHILL'S AND SOLHEIM'S MOTION FOR

ATTORNEY FEES ON APPEAL

Cahill and Solheim move this court for an order granting their actual costs and attorney fees incurred in responding to the appeal under § 809.25(3), STATS.,[7] on the ground that the appeal was filed or continued in bad faith solely for purposes of harassing or maliciously injuring them, *see* § 809.25(3)(c)1, and that the Catlins' counsel knew or should have known that the appeal 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. *See*

[7] Section 809.25(3), STATS., provides in part:

> (3) FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section. A motion for costs, fees and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, the cross-respondent's brief.
>
> ….
>
> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal 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.

§ 809.25(3)(c)2. Because the motion contains only one conclusory statement regarding harassment, we do not further consider an award of fees under that subsection. With respect to whether there is a reasonable basis in law or equity for the appeal, we conclude there is a reasonable basis in law for appeal of the jury's award of compensatory damages.

It is true that our scope of review of a jury verdict for sufficiency of the evidence is very narrow. However, as the trial court pointed out, and as plaintiffs' counsel conceded at the hearing on post-verdict motions, it is possible the jury did consider growing things and landscaping materials on the disputed strip in awarding compensatory damages, even though the jury decided against the plaintiffs on their claim of adverse possession to that strip. We also agree with the trial court's assessment that the evidence supporting the jury verdict on compensatory damages was probably not as strong as the countervailing evidence. While we did decide, after a searching review of the record, that there was sufficient evidence to support the compensatory damage award, we are not persuaded the appeal on this ground lacks a reasonable basis in the law.

Since we may not award attorney fees under § 809.25(3), STATS., unless the entire appeal is frivolous, *see* ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994), *aff'd* 199 Wis.2d 268, 544 N.W.2d 428 (1996), we need not discuss the merits of the other issues raised on appeal. We deny the motion for actual costs and attorney fees on appeal.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.