COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1890 **Cir. Ct. No. 2014CV2644**

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

DAVID O. BRAEGER,

PLAINTIFF-APPELLANT,

VAITYS LAW, LLC AND THOMAS D. VAITYS,

APPELLANTS,

V.

EDITH BRAEGER,

DEFENDANT-RESPONDENT,

JOHN DOE #1 AND ABC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Affirmed*.

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

¶1 PER CURIAM. David Braeger appeals the circuit court's order that: (1) dismissed Braeger's first amended complaint against Edith Braeger; (2) sanctioned David's attorney on grounds that include pursuing this action for an improper purpose; and (3) denied David leave to file a second amended complaint. David also appeals the circuit court's ruling that denied David's motion for a protective order. For the following reasons, we affirm.

¶2 The following are the limited facts pertinent to issues we address on appeal. The parties' disputes here involve only the first and second amended complaints. Our background facts and discussion ignore the initial complaint.

¶3 The first amended complaint, filed on April 2, 2014, by Attorney Thomas Vaitys on behalf of David Braeger, named David as the plaintiff and Edith as one of the defendants. Count one of the first amended complaint alleged that Edith violated WIS. STAT. §§ 146.82 and 51.30 (2013-14)[1] by

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WISCONSIN STAT. § 146.82 provides in pertinent part:

> **(1)** CONFIDENTIALITY. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient. This subsection does not prohibit reports made in compliance with s. 253.12(2), 255.40, or 979.01; records generated or disclosed pursuant to rules promulgated under s. 450.19; testimony authorized under s. 905.04(4)(h); or releases made for purposes of health care operations, as defined in 45 CFR 164.501, and as authorized under 45 CFR 164, subpart E.

(continued)

"disseminat[ing] information that was false against" David, and "without authorization, republish[ing] and disseminat[ing] medical and/or psychological information that was the protected and privileged medical information of" David, causing harm to David. Count one also alleged that Edith "knowingly and willingly [sic] violated" §§ 146.82 and 51.30, by disclosing David's medical information "without his informed consent as that term is defined under [WIS. STAT. §] 146.81(2)" and "without justification."

¶4 Count two of the first amended complaint alleged libel, and count three alleged slander. These two claims were based on allegations that Edith "publish[ed]" and "republished" "false medical information of" David "to third persons," which consisted of "untrue medical condition(s) calling into disrepute and humiliation the name of David O. Braeger," which were "damaging and grossly vicious and unfounded untruths." However, the first amended complaint did not allege what "medical information" was improperly disclosed, nor did it allege how Edith "publish[ed]" and "republished" this information to unidentified "third persons."

WISCONSIN STAT. § 51.30 involves treatment records involving health conditions that include mental illness and provides in pertinent part:

> **(4)** ACCESS TO REGISTRATION AND TREATMENT RECORDS. (a) *Confidentiality of records.* Except as otherwise provided in this chapter and ss. 118.125(4), 610.70(3) and (5), 905.03 and 905.04, all treatment records shall remain confidential and are privileged to the subject individual. Such records may be released only to the persons designated in this chapter or ss. 118.125(4), 610.70(3) and (5), 905.03 and 905.04, or to other designated persons with the informed written consent of the subject individual as provided in this section. This restriction applies to elected officials and to members of boards appointed under s. 51.42(4)(a) or 51.437(7)(a).

¶5 On April 18, 2014, Edith's counsel served a sanctions motion on David's counsel, pursuant to the "safe harbor" feature of WIS. STAT. § 802.05, giving David 21 days to withdraw or correct the first amended complaint. *See* § 802.05(3)(a)1. In the sanctions motion, Edith's counsel argued that: WIS. STAT. § 146.82 addresses "patient health care records" and "Edith Braeger has never had access to and has never seen [David's] 'patient health care records'"; WIS. STAT. § 51.30 addresses "treatment records" and "Edith Braeger has never had access to and has never seen [David's] 'treatment records'"; and, the libel and slander claims "clearly fail[to] meet the basic pleading requirements imposed by Wisconsin law."

¶6 On May 6, 2014, attorney Vaitys responded to the safe harbor notice with a letter that included the following statements: "We will not dismiss Mr. Braeger's case"; "If you file a Sanctions Motion against our client, we believe it would be in bad faith—simply to terminate litigation"; "If you do file for sanctions we will file counter sanctions against you under Wis. Stats. 814.025, which requires no twenty-one day wait period." (Emphasis in original.)

¶7 On May 7, 2014, counsel for Edith filed a motion to dismiss the first amended complaint on grounds that included the following: count one failed to allege that Edith is a custodian of patient "treatment records" under WIS. STAT. § 51.30; and counts two and three failed "to meet the basic pleading requirements imposed by WIS. STAT. § 802.03(6)."

¶8 In response, on May 21, 2014, David's counsel filed documents that included a brief and an affidavit by David, arguing that Edith made improper use of "treatment records" in allegedly telling police that David was on medication and suffered from a bipolar disorder, which "constitutes a disclosure of medical

records." David's brief did not address the question of whether the libel and slander counts had met basic pleading requirements.

¶9 In a reply filed on June 2, 2014, Edith called the court's attention to David's counsel's failure to address the basic pleading requirements issue. In addition, Edith argued that David had "failed to provide this Court with any case precedent holding that Wisconsin's statutory protections for medical *records* confidentiality somehow apply to a spouse's alleged mention of her husband's diagnoses to the police where there is no accompanying allegation that she inspected or accessed … her husband's medical *records* themselves." (Emphasis in original.)

¶10 At a June 4, 2014 hearing, the circuit court granted Edith's motion to dismiss count one on the grounds that the first amended complaint failed to allege that Edith had disclosed medical records to anyone, as opposed to merely making statements that included information regarding David's alleged medical condition. The court dismissed without prejudice counts two and three on the grounds that the first amended complaint failed to include the statements that were alleged to be libelous or slanderous. The court explained that "the [first] amended complaint simply does not state a claim for which relief can be granted even construing the facts in favor of the plaintiff."

¶11 On June 6, 2014, Edith filed with the court the motion for sanctions that her counsel had previously served on attorney Vaitys pursuant to the safe harbor procedure. With this motion, Edith's counsel filed an affidavit averring in part that David and Edith had been involved in a divorce action, and that "a reasonable inference can be drawn" that "the sole reason" for David to file "this

action was to harass, intimidate, and coerce Edith … into agreeing to a divorce settlement that would be more favorable to David."

¶12 On June 11, 2014, David filed a second amended complaint. On July 2, 2014, David filed a motion opposing the motion for sanctions.

¶13 On July 17, 2014, the court held a hearing on pending matters, including the motion for sanctions. After noting that Edith had satisfied the safe harbor aspect of the sanctions statute, the court concluded that the claims filed by David's counsel were "completely frivolous and ungrounded and unfounded," and therefore not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," contrary to WIS. STAT. § 802.05(2)(b). The court noted the following as additional circumstances supporting the imposition of sanctions: (1) "the real motives behind the filing of this tort case" appeared to include an attempt to create "leverage" in the divorce proceedings; (2) David's counsel filed with the court documents purportedly "under seal" without requesting authorization from the court to file them under seal; (3) David's counsel made an "unfounded allegation of perjury" against Edith; (4) David's second amended complaint did not cure the problems reflected in the first amended complaint, "completely ignoring the Court's ruling that these allegations under Chapter 146 and 51 are not sustainable. Simply re-filing the same thing is not appropriate and ignores the Court's ruling."

¶14 As a sanction, the court ordered attorney Vaitys individually, and his law firm, to pay Edith her reasonable attorneys' fees and costs in the amount of $13,230.03. As an additional sanction, the court denied David's motion to file the second amended complaint, noting that the case was "months along into this

litigation, and there have been two complaints that have been filed [previously], none of which are legally sufficient."

¶15 Separately, during the course of this hearing, the court denied David's motion for a protective order addressed to submissions that David had made to the court that included references to David's alleged mental health. The court concluded that David's motion for a protective order was insufficiently "specific in terms of the relief sought."

Motion to Dismiss the First Amended Complaint

¶16 Our standard of review and the substantive standard for consideration of a motion to dismiss for failure to state a claim for which relief may be granted are well established:

> Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review;….
>
> When we review a motion to dismiss, factual allegations in the complaint are accepted as true for purposes of our review. However, legal conclusions asserted in a complaint are not accepted, and legal conclusions are insufficient to withstand a motion to dismiss.
>
> "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom. However, a court cannot add facts in the process of construing a complaint. Furthermore, legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss.

Data Key Partners v. Permira Advisers LLC, 2014 WI 86, ¶¶17-19, 356 Wis. 2d 665, 849 N.W.2d 693 (quoted sources and subheadings omitted).

¶17 Our discussion on this topic is limited because, as we now explain, Edith's arguments are persuasive and David effectively concedes these arguments by failing to come to grips with their substance and by making only off-point references in lieu of developed arguments. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

¶18 We begin by clarifying that David does not argue on appeal that the circuit court erred in dismissing counts two and three of the first amended complaint, the libel and slander claims. Instead, as best we can discern, all of his arguments challenging dismissal of the first amended complaint are directed to the court's dismissal of count one.

¶19 As summarized above, the circuit court agreed with Edith that the allegations in count one of the first amended complaint failed to raise a reasonable inference regarding the existence of particular "patient health care records" that might be protected under WIS. STAT. § 146.82, or of particular "treatment records" under WIS. STAT. § 51.30, which were allegedly improperly released by Edith.

¶20 In support of this position, Edith relies on ***State v. Thompson***, 222 Wis. 2d 179, 585 N.W.2d 905 (Ct. App. 1998), and ***State v. Straehler***, 2008 WI App 14, ¶16, 307 Wis. 2d 360, 745 N.W.2d 431, which established, in the words of ***Straehler***, that WIS. STAT. § 146.82 "does not reach beyond protection of health care records."[2] As we pointed out in ***Thompson***, the plain language of § 146.82

[2] ***State v. Thompson***, 222 Wis. 2d 179, 585 N.W.2d 905 (Ct. App. 1998), and ***State v. Straehler***, 2008 WI App 14, 307 Wis. 2d 360, 745 N.W.2d 431, interpreted earlier versions of (continued)

protects as confidential only "patient health care records," and "defines a patient health care record to include 'all records related to the health of a patient prepared by or under the supervision of a health care provider....' Section 146.81(4), STATS. By its terms, the statute applies to only records, …." ***Thompson***, 222 Wis. 2d at 188.

¶21 It is true that both ***Thompson*** and ***Straehler*** were criminal cases that involved facts that can be distinguished in various ways from the instant case. However, the rationale of these cases, based on plain language interpretations of WIS. STAT. § 146.82, appears to us to apply here, and appears to apply equally to the similar language used in both § 146.82 and WIS. STAT. § 51.30. We need not delve into potential nuances in the statutes as they apply to the various ways medical records or treatment records might be disclosed. Here, there is no reasonable inference from the allegations contained in the first amended complaint that Edith released any medical record or treatment record in any manner whatsoever.[3]

WIS. STAT. § 146.82, but neither party suggests that revisions to the statute matter to any issue in this appeal.

[3] We also need not, and do not, address the question of whether liability under WIS. STAT. §§ 146.82 or 51.30 is limited to any category of persons, such as providers of medical treatment and custodians of medical records or treatment records. *See* ***Hofflander v. St. Catherine's Hosp. Inc.***, 2003 WI 77, ¶102, 262 Wis. 2d 539, 664 N.W.2d 545 (when resolution of one issue is dispositive, appellate courts will ordinarily not address additional issues).

As a side note, in the course of discussing this issue that we do not address, David improperly cites to a per curiam opinion of this court. We remind attorney Vaitys, who continues to represent David on appeal, that unpublished per curiam opinions of the court of appeals may not, with limited exceptions not applicable here, be cited as precedent or authority in any court of this state. *See* WIS. STAT. RULE 809.23(3)(a) and (b).

¶22 Moreover, in his reply brief David makes only off-point attempts to distinguish ***Thompson*** or ***Straehler***. David focuses on irrelevant factual differences in these cases, and fails to address the substance of our legal conclusion in both opinions that "only records" are treated as confidential under the terms of WIS. STAT. § 146.82.

¶23 In addition, David makes two arguments on this issue not involving the holdings of ***Thompson*** or ***Straehler***. Neither argument is well developed and neither comes to grips with the substance of Edith's arguments. First, David cites WIS. STAT. §§ 146.836 and 51.30(4)(g), which contain identical language providing that WIS. STAT. §§ 146.82 and 51.30, respectively, "apply to all patient health care records, including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics." This language serves to *support*, not to undermine, the view that the legislature intends to create liability only for the release of medical or treatment records, not for oral statements that include information that could be found in unidentified medical records. David argues that when others wrote down what Edith allegedly said about David's alleged medical conditions, the reports of the others containing her statements became confidential medical or treatment records that could not be released. This is an absurd argument that does not merit further discussion.

¶24 Second, David states that "both [WIS. STAT.] § 146.82 *et. Seq.* [sic] and [WIS. STAT.] § 51.30 are replete with the term 'information,' which can be found multiple times in each." However, David fails to develop an argument that the legislature intended to equate the words "records" and "information," and the language of the statutes suggests the contrary. So far as David directs us in this argument, the pertinent language in both statutes is directed at the release of

"records," not "information." *See, e.g.,* § 146.82(1) ("Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient."). For these reasons, David's reference to the word "information" does not undermine our conclusion about the statutory meaning of the word "records" for purposes of resolving this appeal.

Sanctions

¶25 We turn now to the circuit court's sanctions decisions.

> Pursuant to WIS. STAT. § 802.05, a person who signs a pleading makes three warranties:
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> First, the person who signs a pleading, motion or other paper certifies that the paper was not interposed for any improper purpose. Second, the signer warrants that to his or her best "knowledge, information and belief formed after reasonable inquiry" the paper is "well grounded in fact." Third, the signer also certifies that he or she has conducted a reasonable inquiry and that the paper is warranted by existing law or a good faith argument for a change in it.
>
> If the circuit court finds that any one of the three requirements set forth under the statute has been disregarded, it may impose an appropriate sanction on the person signing the pleading or on a represented party or both.

Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999) (quoted sources omitted).

¶26 As the supreme court explained in ***Jandrt***, we defer to factual aspects of sanctions determinations:

> When made pursuant to WIS. STAT. § 802.05, our review of a circuit court's decision that an action was commenced frivolously is deferential. Determining what and how much prefiling investigation was done are

> questions of fact that will be upheld unless clearly erroneous. "Determining how much investigation *should* have been done, however, is a matter within the trial court's discretion because the amount of research necessary to constitute 'reasonable inquiry' may vary, depending on such things as the particular issue involved and the stakes of the case." A circuit court's discretionary decision will be sustained if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

Id. at 548-49 (quoted sources omitted). However, the issue of whether arguments were warranted by existing law or a good faith argument for a change in the law presents a legal question to be reviewed de novo. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶29, 264 Wis. 2d 318, 667 N.W.2d 14.

¶27 Here, as summarized above, the circuit court based its sanctions decision in part on concern that the first amended complaint was filed for an improper purpose, namely, as "leverage" in the pending divorce case, which is a sufficient grounds as a single factor to justify imposition of sanctions, even putting aside the additional grounds for sanctions identified by the court. *See* ***Puchner v. Hepperla***, 2001 WI App 50, ¶8, 241 Wis. 2d 545, 625 N.W.2d 609 (constitutional right of access to the courts is not absolute or unconditional, and may be limited where a litigant has commenced litigation to harass, as with a defamation action and other proceedings and filings in an "attack" "bent on harassing and punishing" a party and her attorney for post-divorce judgment proceedings).

¶28 David fails to present a coherent response on this issue, thus conceding it. The only reference he makes to the divorce in his principal brief is off topic. David seems to say that he considered this action to be his only legal vehicle to bring these allegations because he was not able to raise them in the divorce proceedings. This is not even the beginning of an argument that the

circuit court lacked a basis to find that this action was filed for the improper purpose of "leverage" in the divorce case.

¶29 In a disjointed fashion, David spends a substantial portion of his briefing on the sanctions issue, asserting that his statutory-records-release claim was well supported by facts he submitted to the circuit court in the form of affidavits. From this, David may mean to argue that the court lacked a basis to find that this action was filed for the purpose of gaining leverage in the divorce case because the claim was viable and filed in pursuit of remedies that were merited based on improper conduct by Edith, and that the records release claim would have been filed regardless of the divorce proceedings. David's argument misses the mark because his discussion presupposes that his first amended complaint alleged a valid statutory claim against Edith, something we have explained is not true.

¶30 As for libel and slander allegations, as noted above, David does not attempt on appeal to justify the claims he made in counts two and three of the first amended complaint. Moreover, an entirely new theory of libel and slander surfaced in the second amended complaint, involving allegations that Edith had accused David of having committed art theft and insurance fraud. This addition of an entirely new theory supports the concern of the circuit court that the first amended complaint did not consist of well-supported claims, but was instead motivated by an attempt to create leverage in the divorce proceedings.

¶31 As to the circuit court's decision not to allow David to file the second amended complaint as a sanction, David fails to reply to Edith's substantial argument that the record supported the court's decision, in part because the second amended complaint failed to meaningfully address significant shortcomings in

count one of the first amended complaint that the court had explicitly identified during the course of the June 4, 2014 hearing. *See* ***United Coop.***, 304 Wis. 2d 750, ¶39.

Protective Order

¶32 David briefly suggests that the circuit court "err[ed] in not issuing a protective order to safeguard [David's] medical and/or psychological information." (Capitalization and formatting altered.) We reject whatever argument David intends to make on this topic for two reasons. First, David fails to develop an argument that addresses the court's basis for denying his motion for a protective order, namely that the motion lacked clarity as to how an order could or should be fashioned. *See* ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999) (circuit courts exercise broad discretion in determining whether to issue protective orders). Second, David fails to explain why we should address this issue if we reject his other arguments on appeal, as we do. Put differently, he fails to develop an argument that alleged court error in denying his request for a protective order prejudiced him in any way that would justify, much less require, reversal and a remand for further proceedings, despite our other decisions explained above.

By the Court.—Order affirmed.

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