COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-2729

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

LAPORSCHA HAMILTON, A MINOR, AND TERRI POWELL, A MINOR, BY THEIR GUARDIAN AD LITEM, JEFFREY A. REITZ, CLARA HAMILTON, SHIRLEY POWELL, LATANYA MATTHEWS, LINDA MATTHEWS AND ALMA MATTHEWS,

PLAINTIFFS-APPELLANTS,

EISENBERG, WEIGEL, CARLSON, BLAU, REITZ & CLEMENS, S.C.,

JOINT-APPELLANT,

V.

LAWRENCE OLSON AND CLASSIFIED INSURANCE COMPANY, INC., A DOMESTIC INSURANCE CORPORATION,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

MELVIN T. MATTHEWS,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. The law firm of Eisenberg, Weigel, Carlson, Blau, Reitz & Clemens, S.C. (Eisenberg) appeals from a judgment denying a motion to open an order and judgment and vacate the same. It also challenges the trial court's finding that the motion was frivolous, which resulted in an award of costs, fees and reasonable attorney fees. It contends that the trial court erroneously exercised its discretion in denying its motion and imposing sanctions. Because the trial court did not erroneously exercise its discretion, we affirm.

I. BACKGROUND

¶2 The subject of this appeal has its genesis in a jury verdict wherein defendant, Lawrence Olson, was found not negligent in an automobile collision that occurred on November 2, 1994, between a vehicle he was driving and a vehicle driven by third-party defendant, Melvin T. Matthews. The plaintiffs were passengers in Matthews's vehicle. They sued both Olson and Matthews. The jury found Matthews 100% negligent and totally absolved Olson. Subsequently, Olson and his insurer, Classified Insurance Company, Inc., moved for sanctions pursuant

to WIS. STAT. § 814.025, (1997-98)[1] against the plaintiffs' law firm, Eisenberg.[2] The Honorable Robert C. Cannon granted the motion awarding attorney fees and costs of $6,500 against the law firm. Eisenberg moved to reconsider the order granting sanctions. The trial court denied the request because it was untimely pursuant to WIS. STAT. § 805.17(3).[3] Eisenberg then moved to open, vacate and dismiss the judgment pursuant to WIS. STAT. § 806.07(1)(g), and (h). The motion court denied the motion and ordered further sanctions pursuant to § 814.025 in the sum of $320 for attorney fees. Eisenberg now appeals from the decision denying its motion to open and vacate, and the judgment assessing additional sanctions.

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[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 814.025(1) provides:

> 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.

[3] WISCONSIN STAT. § 805.17(3) provides:

> RECONSIDERATION MOTIONS. Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly. The motion may be made with a motion for a new trial. If the court amends the judgment, the time for initiating an appeal commences upon entry of the amended judgment. If the court denies a motion filed under this subsection, the time for initiating an appeal from the judgment commences when the court denies the motion on the record or when an order denying the motion is entered, whichever occurs first. If within 90 days after entry of judgment the court does not decide a motion filed under this subsection on the record or the judge, or the clerk at the judge's written direction, does not sign an order denying the motion, the motion is considered denied and the time for initiating an appeal from the judgment commences 90 days after entry of judgment.

II. ANALYSIS

¶3 A trial court's order denying a motion for relief pursuant to WIS. STAT. § 806.07 will not be reversed on appeal unless there has been an erroneous exercise of discretion. *See* ***Shuput v. Lauer***, 109 Wis. 2d 164, 177, 325 N.W.2d 321 (1982). We shall not conclude that an erroneous exercise of discretion has occurred if the record demonstrates that the trial court exercised its discretion and that there is a reasonable basis for the court's determination. *See* ***Howard v. Duersten***, 81 Wis. 2d 301, 305, 260 N.W.2d 274 (1977). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 542, 363 N.W.2d 419 (1985).

¶4 Eisenberg's motion to open and vacate is based upon WIS. STAT. § 806.07(1)(g), and (h). Those subsections read:

> **(1)** On motion and upon such terms as are just, the court … may relieve a party or legal representative from a judgment, [or] order … for the following reasons:
>
> ….
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

¶5 Subsection (g) provides relief from a judgment if it is no longer equitable for the judgment to have future application. The application of this relief provision has received sparse treatment in our case law. As noted in ***State ex rel. M.L.B.***:

> Commentators have concluded that Rule 60 (b) (5) [the federal analogue to 806.07(1)(g)] was intended to preserve for the courts the power to alter final judgments having an ongoing impact when the facts as determined in the original action have changed to a degree that the final judgment must also be changed to comport with the new conditions.

Id. at 543-44.

¶6 From our review of the record, we can find no showing to even suggest that new conditions have come into existence giving rise to any inequity. The facts as determined in the original action have not changed one smidgen. In the absence of adequate grounds, WIS. STAT. § 806.07(1)(g) does not apply.

¶7 Eisenberg posits that the second basis for its WIS. STAT. § 806.07 motion was subsection (h), which provides relief from a judgment for "any other reasons justifying relief from the operation of the judgment." Although this relief provision appears to be open-ended, our supreme court in ***State ex rel. M.L.B.*** severely limited its application to only "extraordinary circumstances" requiring the court's conscience to respond to the incessant command that justice be achieved. *See* ***id.*** at 549-50; ***Nelson v. Taff***, 175 Wis. 2d 178, 188, 499 N.W.2d 685 (Ct. App. 1993). Here, lack of diligence in preserving one's rights formed the basis for denying the subsection (h) motion. This does not constitute "extraordinary circumstances." The trial court's rationale was reasonable:

> This is the case that is like Dracula. No matter how many times you drive a stake through it's heart, it keeps coming back at you. The fact of the matter is you can't take the court's time on something that could have been resolved by your filing an appeal on a timely base [sic].

¶8 The trial court reasoned that Eisenberg's avenue of relief from the original order and judgment was an appeal, which it failed to pursue. This does not constitute an erroneous exercise of discretion.

¶9 The WIS. STAT. § 814.025 motion for sanctions called for fact-finding determinations.[4] The twenty-day appeal limit provided in WIS. STAT. § 805.17(3) applies to an order resulting from a § 814.025 motion. *See* ***Schessler v. Schessler***, 179 Wis. 2d 781, 508 N.W.2d 65 (Ct. App. 1993). The trial court did not err in denying the motion to open and vacate.

¶10 Finally, Eisenberg contends that the trial court erroneously exercised its discretion in assessing additional sanctions against it under WIS. STAT. § 814.025 for bringing its WIS. STAT. § 806.07 motion. Citing ***Wengerd v. Rinehart***, 114 Wis. 2d 575, 338 N.W.2d 861 (Ct. App. 1983), Eisenberg argues that § 814.025(1) does not apply to motions. Reliance on ***Wengerd*** is misplaced. In ***Wengerd***, we concluded: "[A]n order on a motion for relief from a judgment under sec. 806.07 (1) (d), Stats., is entered in a special proceeding. Accordingly, if the motion is frivolous, costs and reasonable attorneys fees may be awarded under sec. 814.025 (1), Stats." ***Id.*** at 582. In other words, if the motion which precipitates the special proceeding is found to be frivolous, sanctions may be levied. In addition, we note the following trial court finding:

> The court finds your motion today is frivolous. And as a matter of fact, because there's nothing about what you're saying today that is any different than what you said before, and the court has already took [sic] cognizance of the fact

[4] WISCONSIN STAT. § 814.025(3) provides:

> 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:
>
> (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.

> that equitable relief is what you are seeking and the court wasn't granting it, the court today again denies your motion, and grants actual attorney fees and costs to the defense.

¶11 Stated otherwise, the trial court declared that this was the second time around with the same argument originally presented and rejected. Therefore, it was deemed frivolous. There is a proper basis in the record for the trial court to exercise its discretion in the manner it did. There was no error.

¶12 As a final note, Olson requests that we conclude that this appeal is frivolous under WIS. STAT. § 809.25(3), and award it costs, fees and reasonable attorney fees. To this request, Eisenberg has filed no response. We deem this waiver of any defenses. Thus, as a matter of law, we conclude that Eisenberg "knew, or should have known," that this 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." WIS. STAT. § 809.25(3)(c)2; *see also* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619, 624 (Ct. App. 1990) (ruling that appeal is per se frivolous where trial court's finding of frivolousness is affirmed). Accordingly, we remand to the trial court for a determination of costs, fees and reasonable attorney fees.

By the Court.—Judgment affirmed and cause remanded with directions.

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