

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2913

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES ZIELINSKI AND BETH HOTHAN-ZIELINSKI,

PLAINTIFFS-APPELLANTS,

v.

**KEITH GOVIER, GRANT COUNTY SHERIFF AND
PLATTEVILLE TOWNSHIP,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Affirmed and cause remanded.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. James Zielinski and Beth Hothan-Zielinski appeal from a judgment and an order awarding frivolousness costs and fees to Keith Govier, the Grant County Sheriff, and to Platteville Township. We conclude, as did the trial court, that the Zielinskis initiated and maintained a frivolous

proceeding; therefore, we affirm. We also grant costs and remand to the circuit court to determine reasonable attorney fees which are to be awarded to the respondents for the appeal.

The Zielinskis, residents of Platteville Township, planned a fireworks display for July 4, 1997. On July 3, Sheriff Govier warned them to cancel the display unless the Township issued a permit under § 167.10, STATS. James Zielinski subsequently spoke to the town chairman that day, and was told that the Township would not issue the necessary permit. On July 4, the Zielinskis presented the circuit court with an “*ex parte* motion for temporary restraining order,” seeking to bar the Sheriff from interfering with their scheduled fireworks. Attached to the motion was James’s affidavit stating that James believed he was entitled to a permit under § 167.10(3)(c) that the Township’s denial was arbitrary, capricious and without a reasonable basis, and that he and his wife would suffer irreparable harm without an adequate remedy at law if the injunction did not issue.

The trial court issued an *ex parte* order setting the matter for hearing on July 18 and enjoining Sheriff Govier from interfering with the fireworks display, which then occurred as planned.

Sheriff Govier, through counsel, filed an answer and objection to the order, and moved to substitute the trial court judge. The matter was assigned to a different judge, causing postponement of the July 18 hearing. In September, the Zielinskis filed a motion to voluntarily dismiss the proceeding. The motion was heard in November, and the matter dismissed. However, the court postponed action on a motion for frivolous costs and fees, and at a subsequent hearing determined that:

[T]he plaintiffs had no reasonable chance of succeeding at a temporary or permanent injunction and that their action was indefensible and they should have known that at the time and I believe that actually they were just bringing the action to get fireworks for 1997 without regard to whether they could succeed in their action thereafter....

The court held that the Zielinskis and counsel were each responsible for fifty percent of the defendants' fees and costs. That determination is the subject of this appeal.

Section 167.10(3), STATS., prohibits the use of fireworks without a permit from the local municipality. The permit may be issued to a group of resident individuals. Section 167.10(3)(c). Once obtained, a copy of the permit must be provided to the municipal fire or law enforcement official at least two days before the date of the authorized use. Section 167.10(3)(g). Section 813.02, STATS., provides that when a party's pleading states a cause of action that includes the restraint of some act, and the commission of that act during the litigation threatens to do the party injury, the court may grant a temporary injunction.

Section 814.025(3)(b), STATS., provides that an action is frivolous and a party subject to costs and reasonable attorney fees if the party or the party's attorney knew or should have known that the action lacked 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. Whether an action is frivolous under this section, on a given set of facts, is a question of law. *Stern v. Thompson & Coates, Ltd.*, 185 Wis.2d 220, 241, 517 N.W.2d 658, 666 (1994).

The trial court properly concluded that the Zielinskis engaged in frivolous litigation. A distinctive feature of this proceeding is the fact that the Zielinskis obtained their *ex parte* injunction without filing a pleading or otherwise

commencing an action. Counsel should have known, under the plain language of § 813.02, STATS., that a prerequisite for relief was to file an action.

Even had they properly commenced the action, the Zielinskis should have known that they had no reasonable basis for obtaining temporary or permanent relief. Despite claiming a “right” to a permit, the Zielinskis should have known that they applied too late for the permit. Section 167.10(3)(g), STATS., requires notice of the permit to fire and law enforcement officials at least two days before the date of the authorized use. By necessary implication, a permit application made one day before the planned use of fireworks is untimely, and may be properly denied on that basis alone.

Additionally, injunctive relief is available only if the moving party has no adequate remedy of law and will suffer irreparable harm without the injunction. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 520, 259 N.W.2d 310, 313-14 (1977). Here, the Zielinskis cannot reasonably contend that they were without an adequate remedy at law for the wrong allegedly done them. *Certiorari* was available to review denial of a permit, as was an action in damages to recover the cost of the fireworks. Nothing in their application for injunctive relief identified any potential injury besides the \$2,000 investment in the fireworks.

The Zielinskis might have argued that an award under § 814.025, STATS., was unavailable because that section allows recovery only in an action or special proceeding, where as here no action or proceeding was actually

commenced. However, the Zielinskis could not prevail on that contention because the trial court could have reached the same result under § 802.05, STATS.¹

The respondents are entitled to costs and reasonable attorney fees on appeal, as well. Both respondents contend that this is a frivolous appeal. We need not conclude that the appeal was frivolous, however, in order to award costs and fees. In *Riley v. Isaacson*, 156 Wis.2d 249, 263, 456 N.W.2d 619, 624 (Ct. App. 1990), we concluded that “a party prevailing in the defense of an award of fees under sec. 802.05 is also entitled to a further award on appeal without a finding that the appeal itself is frivolous under RULE 809.25(3), STATS.” We reasoned that if the wronged party must bear its own legal costs on appeal in order to defend its award of attorney fees, it may end up substantially worse off for having received the award in the first place. Therefore, a further award of attorney fees under § 802.05, STATS., was necessary to the remedial purpose of the original award. See *Riley*, 156 Wis.2d at 262, 456 N.W.2d at 624 (citing *Borowski v. DePuy, Inc.*, 876 F.2d 1339, 1342 (7th Cir. 1989)). Although *Riley* concerned an award under § 802.05, we conclude that the rationale applies as well to a determination under § 814.025, STATS. Further proceedings are therefore necessary in the trial court to determine the amount of fees to be awarded to the respondents on this appeal.

By the Court.—Judgment and order affirmed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

¹ Section 802.05, STATS., provides for recovery of costs and fees if a party submits a signed motion or other paper that is not well grounded in fact nor warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law.

