COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 98-2963

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

FMN MANAGEMENT SERVICES, INC., ANCILLARY AFFILIATED HEALTH SERVICES, INC., BARBARA STEFONEK AND EDITH POLZIN,

PLAINTIFFS-APPELLANTS,

V.

KOLB, LAUWASSER AND COMPANY, S.C., AND FOX, CARPENTER, O'NEILL & SHANNON, P.C.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed in part and reversed in part.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. FMN Management Services, Inc. (FMN), Ancillary Affiliated Health Services, Inc. (Ancillary), Barbara Stefonek, and Edith Polzin appeal from the circuit court orders granting the motions of Kolb, Lauwasser and Company, S.C. (Kolb), and Fox, Carpenter, O'Neill & Shannon, P.C. (Fox), for summary judgment, and granting Kolb's motion for sanctions.[1] They argue that the circuit court erred by granting summary judgment and by finding their legal counsel liable for sanctions. We affirm the summary judgment but reverse the sanctions.

I. BACKGROUND

¶2 FMN provided comprehensive management and support services to Ancillary, a home health agency. FMN and Ancillary provided services to beneficiaries of the Medicare program. Barbara Stefonek was president and majority shareholder of both FMN and Ancillary; Edith Polzin was vice-president and minority shareholder.

¶3 Fox provided corporate and tax counsel for FMN and Ancillary from 1989 through 1996. Additionally, Fox prepared individual federal income tax returns for Stefonek and Polzin for the years 1990 through 1995.

[1] Although the notice of appeal states that the appeal is from a judgment entered on July 17, 1998, the record reveals that the circuit court entered two orders on that date and entered a judgment on October 14, 1998. It is clear from the record and the appellate briefs that the appeal is actually from the orders. Because this error does not affect the appellants' substantial rights, we will disregard it. *See* WIS. STAT. RULE 809.84 (1997-98) ("An appeal to the court [of appeals] is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result."); WIS. STAT. § 805.18(1) (1997-98) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.").

¶4 Kolb provided comprehensive accounting services to FMN and Ancillary during fiscal years 1990 through 1992. Kolb also prepared amended federal income tax returns for FMN and Ancillary for fiscal 1990, as well as federal income tax returns for fiscal 1991.

¶5 In 1993, Kolb filed an action against four business entities, including FMN and Ancillary, to recover professional accounting and tax service fees and expenses. In October 1994, the parties executed a mutual release; Stefonek signed on behalf of FMN and Ancillary. In November 1994, the circuit court dismissed Kolb's action on the merits, with prejudice, pursuant to a stipulation.

¶6 In March 1997, Stefonek and Polzin were named in an eleven-count indictment alleging, in part, that from about January 1990 to April 1995, they conspired to defraud the United States and its agencies, the Department of Health and Human Services and the Internal Revenue Service, by "impeding, impairing, obstructing and defeating by craft, trickery, deceit and dishonest means, the lawful and legitimate government functions" of the DHHS "in its operation, supervision, and administration of the Medicare program" and of the IRS "in the ascertainment, computation, assessment, and collection of … income taxes."

¶7 Among other things, the conspiracy count of the indictment specifically alleged that Stefonek and Polzin: (1) filed false federal income tax returns for FMN by including as a business expense the labor costs of their personal housekeepers; (2) filed false individual income tax returns by failing to report as income the wages paid by FMN for their personal housekeepers; and (3) filed false Medicare cost reports for FMN and Ancillary, listing as an expense the labor costs of their personal housekeepers. In October 1997, Polzin entered into a plea agreement with the United States in which she pled guilty to the

conspiracy count of the eleven-count indictment and the government agreed to move to dismiss the remaining counts against her. In November 1997, a jury found Stefonek guilty on all nine counts against her.

¶8 In October 1997, FMN, Ancillary, Stefonek, and Polzin filed the action underlying this appeal. Their complaint alleged negligence, breach of contract, and willful and wanton misconduct by Kolb, and negligence and breach of contract by Fox.

¶9 In January 1998, Kolb's counsel wrote to plaintiffs' counsel, advising him of the discovery of the October 1994 mutual release of claims. He enclosed a copy of the release, requested the plaintiffs to voluntarily dismiss the claim against Kolb, and advised that sanctions would be sought if the action continued.

¶10 On June 29, 1998, the circuit court heard Fox's and Kolb's motions for summary judgment and Kolb's motion for sanctions, and, on July 17, 1998, granted them. FMN, Ancillary, Stefonek, and Polzin appeal.

II. DISCUSSION

¶11 Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1997-98).[2] Summary judgment methodology requires:

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> All inferences from the evidence before the court are to be viewed in the light most favorable to the non-moving party, and any reasonable doubt as to the existence of any material fact is to be resolved against the moving party. Where competing inferences arise and the credible evidence will support or deny either inference, it is for the trier of fact to draw the proper inference and not for the court to substitute its judgment summarily.

Borneman v. Corwyn Transp., Ltd., 212 Wis. 2d 25, 32, 567 N.W.2d 887 (Ct. App. 1997) (citation omitted), *aff'd*, 219 Wis. 2d 346, 580 N.W.2d 253 (1998). Applying the same methodology, we review a circuit court's summary judgment decision *de novo*. *See* ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

A. *In Pari Delicto*

¶12 Granting summary judgment to Fox and Kolb, the circuit court utilized the doctrine of *in pari delicto.* The supreme court has explained:

> *In pari delicto potior est conditio defendentis* is a doctrine which states that in the case of equal fault, the position of the defendant is stronger. The doctrine of *in pari delicto* is an application of the principle of public policy that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

Evans v. Cameron, 121 Wis. 2d 421, 426-27, 360 N.W.2d 25 (1985) (citations omitted). The supreme court also has recognized, however, that "circumstances of oppression, imposition, hardship, undue influence, great inequality of condition or the like" may constitute an exception to the doctrine. *See* ***id.*** at 427-28. The appellants argue that, in this case, "unusual circumstances and great inequality of condition" should "defeat the absolute defense" of the doctrine.

¶13 In their brief-in-chief to this court, the appellants allege five "facts" regarding Fox that, they claim, demonstrate "inequality of condition and special circumstances," and seven "facts" regarding Kolb that, they claim, demonstrate

"inequality of condition or unusual circumstance." The appellants fail, however, to provide corresponding record references for these "facts," as mandated by WIS. STAT. RULE 809.19(1). We are not required to "sift the record for facts to support counsel's contentions." *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). As this court has noted, "[t]he rules of appellate procedure require briefed arguments to contain citations to portions of the record relied on" and "an argument violating that rule 'is inadequate.'" ***M.P. v. Dane County Dep't of Human Servs.***, 170 Wis. 2d 313, 335, 488 N.W.2d 133 (Ct. App. 1992). Accordingly, we decline to consider this argument.[3] *See* ***id.*** (court of appeals will refuse to consider briefed argument that does not "contain citations to portions of the record relied on").

¶14 The appellants argue that "[t]he policy decision before this court is whether any individual or business that engages professional counsel is entitled to call these professionals to account for the quality of their work product if an error or negligence of that professional advisor directly contributes to a criminal prosecution." They support their argument by relying heavily on the dissenting

[3] In their reply brief, the appellants contend that the record "confirms that any number of material facts were in dispute." The only record references in support of this argument, however, are citations to Stefonek's affidavit and, further, the portions of the affidavit on which the appellants seem to primarily rely are inadmissible. *See* WIS. STAT. chs. 908, 909. Although we acknowledge that there are some disputed "facts," we conclude that *there are no genuine issues of material fact* with respect to the application of the doctrine of *in pari delicto*.

In their reply brief, the appellants also present a curious and, perhaps, paradoxical argument—that "the pleadings confirm that the parties were not acting together" and that "[n]otwithstanding Polzin's Plea Agreement and Stefonek's conviction, these parties were not *in pari delicto*." This, however, appears to be an undeveloped repetition of an undeveloped argument, or an argument presented for the first time in the reply brief. Accordingly, we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review inadequately briefed issue); ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) ("We will not, as a general rule, consider arguments raised for the first time in a reply brief.").

opinion in ***Evans***. As this court has pointed out, however, "[a] dissent is what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Notably, the appellants fail to cite any Wisconsin case law supporting their argument, relying instead on cases from other jurisdictions. We are not persuaded. The record does not establish that this case involves "circumstances in which the advice given by an attorney is so complex that the client would be unaware of the wrongfulness involved in following that advice." *See* ***Evans***, 121 Wis. 2d at 428. Thus, as the appellants have not demonstrated the existence of any special circumstances warranting exception under the doctrine of *in pari delicto*, we conclude that the doctrine bars their claims against Fox and Kolb. Accordingly, we affirm the circuit court's summary judgment decision.[4]

B. Sanctions

¶15 One of the circuit court orders stated: "In addition to taxable costs, … Kolb is entitled to recover and shall recover from Plaintiff's counsel, … pursuant to [WIS. STAT. § 814.025(3)(b)], … all reasonable costs, expenses and attorneys' fees incurred in connection with the defense of this action since January 15, 1998."[5] The appellants argue that the order holding counsel "liable for

[4] Affirming the summary judgment under the doctrine of *in pari delicto* obviates the need to address the appellants' other theories. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

[5] The order repeatedly and mistakenly refers to WIS. STAT. § 814.025(2)(b), a nonexistent paragraph. Section 814.025(3) of the Wisconsin Statutes states:

> In order to find an action … to be frivolous under sub. (1), the court must find one or more of the following:
>
> ….
>
> (b) The party or the party's attorney knew, or should have known, that the action … was without any reasonable basis in law or equity and could not be supported by a good faith

(continued)

sanctions based on continuing to pursue this case after receiving a copy of the [October 1994] release is error." We agree.

¶16 As we have explained:

> Whether an action is frivolous is a mixed question of fact and law. Ascertaining what the party knew or should have known is a question of fact and whether the facts, once established, would lead a reasonable party or attorney to conclude that the claim is frivolous is a question of law. The legal question to be resolved in a [WIS. STAT. § 814.025(3)(b)] analysis is not whether one can prevail on his claim, but whether the claim is so indefensible that the party or his attorney should have known it to be frivolous.
>
> When a party's claim can be determined only after research and deliberation, it is not frivolous.

Juneau County v. Courthouse Employees, Local 1312, 216 Wis. 2d 284, 295-96, 576 N.W.2d 565 (Ct. App.) (citations omitted), *aff'd*, 221 Wis. 2d 630, 585 N.W.2d 587 (1998). Moreover, "when a frivolous action claim is made, all doubts are resolved in favor of finding the claim nonfrivolous." ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994).

¶17 The circuit court found that since January 15, 1998, the date on which appellants' counsel received the letter from Kolb's counsel (advising of the discovery of the release), the action against Kolb had been maintained contrary to WIS. STAT. § 814.025. In reaching this conclusion, the circuit court relied on its findings of fact regarding the scope of the release. The scope of the release, however, was in dispute and, we conclude, reasonably so.

> argument for an extension, modification or reversal of existing law.

It is clear that the circuit court order should have referred to § 814.025(3)(b). Because this error does not affect the adverse parties' substantial rights, we will disregard it. *See* WIS. STAT. RULE 809.84; WIS. STAT. § 805.18(1).

¶18 Arguing that Stefonek's and Polzin's individual claims against Kolb are not barred by the language of the October 1994 "mutual release," the appellants rely on the following portion of the release:

> IT IS FURTHER UNDERSTOOD AND AGREED that Kolb and *FMN* do hereby each represent, warrant and acknowledge to the other that it is *the only real party in interest with respect to its respective claims described in this release*, and further represent and warrant that it has not jointly or individually sold, assigned, transferred, conveyed, encumbered or otherwise disposed of any actions, claims, causes of action, controversies or demands described herein; and that the individuals executing this agreement have full power and authority to do so.

(Emphases added.) Noting that the release collectively refers to FMN Management, Inc., Ancillary Affiliated Health Service, and two other business entities as "FMN," the appellants argue that the release, governed by its plain language, does not encompass Stefonek and Polzin, individually.

¶19 Kolb responds that the appellants ignore the portion of the release stating: "IT IS FURTHER UNDERSTOOD AND AGREED that this Mutual Release expresses the full and complete settlement of any and all liabilities and claims of the parties to this agreement, their agents and employees, heirs and personal representatives, successors and assigns, each and all of them." Noting that both Stefonek and Polzin were officers of FMN, Kolb asserts that "all corporate officers are 'agents' of the corporation" and that the release "expressly applies to any individual claims of Stefonek and Polzin."

¶20 Kolb's response misses the mark, legally and factually. As our supreme court has stated:

> In construing a release the court must read the instrument in its entirety. The intent of the parties must be sought from the whole and every part of the instrument and from the surrounding conditions and circumstances. While great liberality is allowed in construing releases, the operation

> will be limited to those things within the contemplation of the parties at the time of execution of the release.

Brown v. Hammermill Paper Co., 88 Wis. 2d 224, 233-34, 276 N.W.2d 709 (1979). Moreover, the supreme court declared that "'a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received such full compensation that he is no longer entitled to maintain it.'" ***Id.*** at 237-38 (citation omitted).

¶21 Further, the general rule is that "where an agent merely contracts on behalf of a disclosed principal, the agent does not become personally liable to the other contracting party." *See* ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 848, 470 N.W.2d 888 (1991). Similarly, shareholders of a corporation "are generally not personally liable for the contractual obligations of the corporation." *See* ***id.*** at 849-50; *see also* ***Capsavage v. Esser***, 224 Wis. 2d 404, 418, 591 N.W.2d 888 (Ct. App.), *review denied*, 599 N.W.2d 408 (1999). If a party contracting with a business entity knows that the agent for that entity is contracting on behalf of a corporation, "the agent would not be [personally] liable on the contract unless he or she expressly assumed such liability." ***Benjamin Plumbing***, 162 Wis. 2d at 850. "The fact that the agent might also be a director or officer of the corporation is generally irrelevant under agency principles." ***Id.***

¶22 Polzin did not sign the release; Stefonek signed on behalf of FMN and Ancillary. Additionally, the record does not indicate that either Polzin or Stefonek received any consideration for release of individual rights. Thus, while we need not determine the intended scope of the release, *see* ***Brown***, 88 Wis. 2d at 234 (intent of parties to a release and scope of release are questions of fact for the trier of facts), we do determine that the release, unquestionably, was subject to differing, reasonable readings regarding its scope and whether it encompassed

Stefonek and Polzin *individually*. Thus, counsel's pursuit of the action, despite the release, was not frivolous. We conclude, therefore, that the circuit court erred in finding that the appellants' claims against Kolb were frivolous and, accordingly, we vacate the award of costs, expenses and attorneys' fees.

By the Court.—Orders affirmed in part and reversed in part.

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