COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3438

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

SCHAMS JOINT REVOCABLE TRUST BY DAVID F. SCHAMS, TRUSTEE,

PLAINTIFF-RESPONDENT,

V.

WILLIAM M. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed in part and reversed in part.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. William M. Evans, the losing party in this quiet title action, challenges the circuit court's award of attorney fees and punitive damages to the prevailing party, David F. Schams.[1] Specifically, he argues that:

[1] Schams is the trustee of the Schams Revocable Trust, the actual owner of the property.

(1) attorney fees may not be awarded in an equitable action; and (2) even if allowable, such a fee award does not constitute the type of "actual damages" necessary to support an award of punitive damages. We conclude that, while the court could properly assess fees against Evans, it erred in awarding punitive damages to Schams. We therefore affirm in part and reverse in part.

In 1965, Evans purchased two non-adjoining parcels of land. The parcels were connected by a thirty-foot easement running across property now owned by Schams. Evans, who had become increasingly dissatisfied over the years with what he claimed were encroachments on the easement by Schams's predecessor in title and eventually Schams himself, began recording various land and title documents which, according to Schams, clouded the title to his property. When Evans refused to retract the documents, Schams sued for slander of title and for a judgment declaring the documents recorded by Evans to be void.[2]

The circuit court granted judgment to Schams. With respect to the quiet title claim, the court ordered Evans to withdraw the recorded documents affecting Schams's title. On the slander of title claim, the court, finding that Schams had not interfered with Evans's easement, and that Evans's refusal to remove the documents in response to Schams's request constituted "outrageous conduct in wanton, willful or reckless disregard of [Schams's] rights," concluded that Schams should receive his attorney fees, and punitive damages of $500.

Schams's attorney, informing the court that, in his opinion, attorney fees could not be awarded in a slander-of-title action (because they are not allowed

[2] The circuit court and the parties characterize this second cause of action as one to quiet title, and we have adopted that usage in this opinion.

by the applicable statute), argued that they could be awarded under rules generally applicable to equitable proceedings such as quiet title actions. After further hearings, the circuit court agreed, awarding Schams $5,028.23 in "taxable costs and attorney fees plus $500 as punitive damages."

Attorney Fees[3]

Neither party disputes that when a trial court is sitting in equity—as it is in an action to quiet title—it may, in exercise of its discretion, fashion a remedy which includes an award of attorney fees. ***Estate of Pirsch***, 148 Wis.2d 425, 433, 435 N.W.2d 317, 321 (Ct. App. 1988). To do so, however, the party's conduct must be "fraudulent, shocking or in bad faith." ***Id.***, *quoting* ***In re P.A.H.***, 115 Wis.2d 670, 675, 340 N.W.2d 577, 580 (Ct. App. 1983). We review the court's determination under the erroneous-exercise-of-discretion standard: whether the court 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. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

The circuit court made the following findings supporting its award of attorney fees: (1) "that at no time has [Schams] impeded, hindered or interfered

[3] Schams asks that we deem all the issues raised by Evans waived due to his failure to first raise them in the circuit court. Generally, issues not presented to the trial court will not be considered for the first time on appeal. ***State v. Gove***, 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989). However, waiver is "a rule of judicial administration" which we may, in the proper exercise of our discretion, choose not to employ in a given case. ***Department of Revenue v. Mark***, 168 Wis.2d 288, 293 n.3, 483 N.W.2d 302, 304 (Ct. App. 1992). As such, in cases where, as here, the appellant appeared *pro se* at trial, and both parties have fully briefed all the issues, we may consider them, notwithstanding the fact that they were never raised before the trial court. ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 146 (1980); ***Arsand v. City of Franklin***, 83 Wis.2d 40, 55, 264 N.W.2d 579, 586 (1978). We elect to do so in this case.

with [Evans]'s use of the easement in any way"; (2) nevertheless, "[Evans] prepared and recorded several documents which impair[ed] the title to [Schams's] real estate"; (3) "that [Schams] warned [Evans] on at least two occasions that if [Evans] would not voluntarily remove the documents he filed which impaired [Schams]'s title, [Schams] would sue [Evans] to force him to do so and would ask the Court for punitive damages, attorneys fees and costs"; and (4) that, although Evans did not know at the time he filed the documents that they were "false, a sham, or frivolous," Evans's refusal to remove the documents from Schams's title "constitutes outrageous conduct, in wanton, willful or reckless disregard of [Schams]'s rights."

While the court didn't use the exact words "fraudulent," "shocking" or "in bad faith" in its findings, we agree with Schams that those findings—specifically that Evans's conduct was "outrageous" and "in wanton, willful or reckless disregard of [Schams]'s rights"—are the virtual equivalent and therefore suffice. We are satisfied that the court properly exercised its discretion in awarding attorney fees in this case.

Punitive Damages

Punitive damages may not be awarded absent an award of compensatory, or "actual," damages. Indeed, the supreme court said in ***Tucker v. Marcus***, 142 Wis.2d 425, 438-39, 418 N.W.2d 818, 823 (1988), that the "general and perhaps almost universally accepted rule is that punitive damages cannot be awarded in the absence of actual damage."

> The term "damage" has an accepted meaning in the law. It is
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> > [a] pecuniary compensation or indemnity, which may be recovered … by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act of omission or negligence of another.… It is legal compensation for past wrongs or injuries.

Shorewood School Dist. v. Wausau Ins. Cos., 170 Wis.2d 347, 368, 488 N.W.2d 82, 89 (1992) (indenting and quoted sources omitted).

Here, while the circuit court, acting on principles of equity and fairness, determined that attorney fees were appropriate in this quiet title action,[4] it never found that Evans's conduct "damaged" Schams in any way. There was no evidence of, and no findings on, any monetary loss or other injury suffered by Schams as a result of the clouds Evans had placed on his title which could be quantified in dollars and cents. Nor has Schams offered any authority to suggest that the "no-actual-damage-no-punitive-damages" rule is relaxed or negated in equitable actions, as opposed to actions at law.

Finally, we agree with Evans that the court's attorney-fee award does not constitute the type of "actual" damages necessary to sustain a punitive damage award. "In Wisconsin, attorney's fees are not an element of damages absent a statutory or contractual provision to the contrary." ***Oakley v. Wisconsin Fireman's Fund***, 162 Wis.2d 821, 830-31, 470 N.W.2d 882, 886 (1991).[5] We

[4] As indicated above, when counsel convinced the court that attorney fees could not be awarded in an action for slander of title, the court ignored that claim and instead based the award on the general equitable principles applicable to Schams's "declaration of interest" or quiet title claim.

[5] The ***Oakley*** court went on to acknowledge that a plaintiff in a tort action is "made whole" by a recovery "even if … attorney's fees, in effect, decrease the amount the insured recovers from a tort-feasor …." ***Oakley v. Wisconsin Fireman's Fund***, 162 Wis.2d 821, 831, (continued)

have not been referred to any statute or contract provision to the contrary, and we thus conclude that the circuit court erred in awarding punitive damages in this case.

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

Not recommended for publication in the official reports.

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470 N.W.2d 882, 886 (1991). This is so, said the court, "because attorney's fees are not an element of damages." ***Id***.