COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0583

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

FRANCESCA POULIN AND RAMONA D. MARTINEZ,

PLAINTIFFS-RESPONDENTS,

V.

INDIAN COMMUNITY SCHOOL,

DEFENDANT-APPELLANT,

STELLA WINTERS, MARK FISCHER AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Indian Community School appeals from an order denying its motion for frivolous-action fees. The school claims that plaintiffs' cause of action for "negligent or intentional infliction of emotional distress" was clearly barred by the exclusive remedy provided by the Wisconsin Worker's Compensation Act, and that plaintiffs' cause of action for "negligent retention and failure to train or discipline" was actually a non-actionable wrongful-termination claim based on whistle-blowing. We affirm.

I. Background

¶2 Two former employees of the school, Francesca Poulin and Ramona Martinez, originally commenced an action against two of their superiors, Mark Fischer and Stella Winters, for tortious interference with their contract of employment. Later, the plaintiffs filed an amended complaint, adding the school as a defendant, and adding claims against the school and the other defendants for negligent hiring, retention and failure to train and discipline in connection with Fischer and Winters, and adding claims for negligent or intentional infliction of emotional distress and defamation against all of the defendants.[1] The school then moved for dismissal, as well as frivolous-action fees. In response, the plaintiffs moved to voluntarily dismiss the school from the case. Over objection from the school, the trial court granted the motion for voluntary dismissal.

[1] The parties disagree on whether the school was added as a defendant to the emotional distress and defamation causes of action. The plaintiffs admit that the amended complaint was ambiguous and could be read that way, but assert that the school was not intended as a defendant with respect to those causes of action. Although it is arguable that the plaintiffs did not include the school in the emotional distress and defamation causes of action, the trial court nevertheless addressed all claims that potentially included the school as a defendant. For purposes of this appeal, we assume that the school was added as a defendant to the emotional distress and defamation causes of action. The school's appeal, however, only concerns the claims of negligent hiring and retention and emotional distress.

¶3 The trial court concluded that the claims in this case were not frivolous. It noted that a reasonable lawyer would be "aware of the standards and preemptive exclusivity provisions of the [Worker's Compensation Act]" and that the allegations here supported the argument that Worker's Compensation Act exclusivity did not apply. Specifically, the court determined that Fischer could be deemed an "alter ego" of the school, rather than a co-employee of the school, thus imposing liability on the school for Fischer's actions. The trial court also determined that ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 580 N.W.2d 233 (1998), which recognized the tort of negligent retention, gave support to the plaintiffs' legal theories.

II. Analysis

¶4 Whether an action is frivolous presents a mixed question of law and fact. *See* ***Riley v. Lawson***, 210 Wis. 2d 478, 491, 565 N.W.2d 266, 272 (Ct. App. 1997). The question of what a reasonable attorney knew or should have known is a factual issue. *See* ***Juneau County v. Courthouse Employees***, 221 Wis. 2d 630, 639, 585 N.W.2d 587, 590–591 (1998). A trial court's factual findings will not be reversed on appeal unless they are clearly erroneous. *See* ***id.***, 221 Wis. 2d at 639, 585 N.W.2d at 591. The question of whether the trial court's findings support its legal determination on the issue of frivolousness, however, is a question of law that we review *de novo*. *See* ***id.***, 221 Wis. 2d at 639, 585 N.W.2d at 591.

¶5 A claim is frivolous if the attorney or party "knew or should have known" that a claim had no reasonable basis in law or equity and could not be supported by a good faith argument for extension, modification, or reversal of

existing law. WIS. STAT. § 814.025(3)(b) (1997-98).[2] In determining whether an action is frivolous, we use an objective standard and ask whether a reasonable attorney facing the same or similar circumstances knew or should have known that the action was frivolous. *See* ***Brueggeman v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 550, 597 N.W.2d 744, 754 (1999); *see* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 241, 517 N.W.2d 658, 666 (1994). "When a party claims that an attorney has commenced and continued a frivolous action, the party must overcome the presumption that the action is not frivolous." ***Kelly v. Clark***, 192 Wis. 2d 633, 659, 531 N.W.2d 455, 464 (Ct. App. 1995). Moreover, any doubts regarding frivolousness should be resolved in favor of the attorney subject to the sanctions motion. *See* ***Brueggeman***, 227 Wis. 2d at 573, 597 N.W.2d at 764.[3]

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

[3] In ***Brueggeman***, plaintiffs' law firm filed a lawsuit on behalf of plaintiffs within one week of a significant change in the law that would affect plaintiffs' recovery, alleging causation "upon information and belief." *See* ***Brueggeman v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 537–538, 597 N.W.2d 744, 749 (1999). The causation allegation was made "upon information and belief" because plaintiffs' law firm needed discovery before causation could be conclusively determined. *See* ***id.***, 227 Wis. 2d at 538, 597 N.W.2d at 749. Nine months later, however, plaintiffs' law firm moved to voluntarily dismiss the case after it concluded that a causal connection was tenuous, and that it did not wish to pursue more expensive investigation techniques. *See* ***id.***, 227 Wis. 2d at 538, 545, 597 N.W.2d at 749, 752. The trial court held that plaintiffs' firm "failed to make a reasonable inquiry into the facts underlying the allegation of causation," that no scientific or medical support existed for the allegations, and awarded the defendant $716,081 in attorney fees. ***Id.***, 227 Wis. 2d at 538, 546, 597 N.W.2d at 749, 752. The supreme court stated that the cornerstone of its conclusion affirming the trial court's decision was that causation "was the critical element of the plaintiffs' claims" and, "for nine months [plaintiffs' firm] did nothing to try to establish this causation." ***Id.***, 227 Wis. 2d at 574, 597 N.W.2d at 765. Here, however, the school does not dispute that plaintiffs provided adequate factual support for the allegations made in the amended complaint but, instead, asserts that those facts do not support a legally cognizable claim. *See* Appellant's Brief at 21 (concluding that amended complaint "was not supported by the law").

A. Negligent or Intentional Infliction of Emotional Distress

¶6 The school contends that the Wisconsin Supreme Court has determined that claims of negligent and intentional infliction of emotional distress, such as the plaintiffs', are barred by the exclusive remedy provided by the Worker's Compensation Act. *See* ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 559 N.W.2d 588 (1997) (barring a claim by an employee against an employer of negligent infliction of emotional distress); *see also* ***Jenson v. Employer's Mut. Cas. Co.***, 161 Wis. 2d 253, 468 N.W.2d 1 (1991) (barring a claim by an employee against an employer of intentional infliction of emotional distress). The plaintiffs, however, distinguish ***Weiss*** and ***Jenson*** from the present case, claiming that ***Weiss*** and ***Jenson*** dealt with pre-termination conduct, while the present claim alleges that the act of termination itself was tortious. The trial court "recognize[d] the distinction that's attempting to be made here." Although the trial court ultimately held that the plaintiffs' emotional distress claim was barred by the Worker's Compensation Act, concluding "I don't think … that the actionable wrong is the termination," it noted that this possible distinction was not clear and was something that an appellate court was "going to have to clarify."

¶7 None of the parties, however, has asked this court to clarify the issue.[4] Instead, we need only determine whether the trial court properly denied the school's motion for frivolous-action fees. We find that it did. The plaintiffs supported their claim of negligent or intentional infliction of emotional distress with a good faith argument attempting to distinguish pre-termination conduct from the act of termination itself. *See* WIS. STAT. § 814.025(3)(b). Although ***Tatge v.***

[4] The school only appeals from the trial court's denial of the motion for frivolous-action fees. Plaintiffs did not cross-appeal for the trial court's dismissal of their complaint.

Chambers & Owens, Inc., 219 Wis. 2d 99, 579 N.W.2d 217 (1998), held that, with limited exceptions, at-will employees have no tort remedy against an employer for actions arising out of their employment, the present situation is distinguishable because the plaintiffs in this case did not allege "improper performance of an employment contract," as was the case in Tatge's misrepresentation claim. ***Tatge***, 219 Wis. 2d at 107, 579 N.W.2d at 220.[5] In addition, although the plaintiffs' claim may have lacked some clarity, any doubts regarding frivolousness should be resolved in favor of the attorney subject to the sanctions motion. *See* ***Brueggeman***, 227 Wis. 2d at 573, 597 N.W.2d at 764. Thus, the school has not shown that the trial court's decision to deny frivolous-action fees was wrong.

B. Negligent Hiring and Failure to Train or Discipline

¶8 The school also asserts that the plaintiffs' cause of action for negligent hiring and retention was really a thinly-disguised claim of wrongful-termination based on whistle-blowing, which is not actionable in Wisconsin. *See* ***Hausman v. St. Croix Care Ctr.***, 214 Wis. 2d 655, 666, 571 N.W.2d 393, 397 (1997) (rejecting the inclusion of wrongful-termination actions based on whistle-blowing in public policy exception to the employment-at-will doctrine). In response, plaintiffs' counsel contends that he "knows how to state a claim for wrongful discharge and how to assert its recognized elements, but no attempt was

[5] Tatge's employer wanted him to sign a covenant-not-to-compete agreement. Tatge testified that he asked his employer what would happen if he refused to sign the agreement and the employer allegedly replied, "Nothing." *See* ***Tatge v. Chambers & Owens, Inc***., 219 Wis. 2d 99, 103, 579 N.W.2d 217, 219 (1998). Tatge further "testified that [his employer] told him his employment would be ongoing and terminable only for what amounted to good cause." ***Id.***, 219 Wis. 2d at 103, 579 N.W.2d at 219. Tatge refused to sign the agreement, was terminated, and brought suit, claiming, "Plaintiff, but for the misrepresentation, would have changed his position on signing and remaining employed…." ***Id.***, 219 Wis. 2d at 108, 579 N.W.2d at 221.

made to do so here." Instead, plaintiffs claim that their cause of action for negligent hiring and retention "can be supported by a good-faith argument for modification or extension" of ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d at 267, 580 N.W.2d at 241 ("[T]he tort of negligent hiring, training or supervision is a valid claim in Wisconsin."). In ***Miller***, a store security guard injured a store patron, allegedly because Wal-Mart negligently hired and supervised him. *See* ***Miller***, 219 Wis. 2d at 258, 580 N.W.2d at 237. Here, the plaintiffs claim that they were injured by the school's failure to discipline two employees. Although the primary injury alleged by the plaintiffs is their termination, they also allege "personal injury arising from the act of termination." Plaintiffs argue that it was not frivolous to attempt to expand the facts upon which negligence is recognized pursuant to the ***Miller*** holding. We agree and conclude that the plaintiffs made a good faith attempt to expand ***Miller***.

¶9 Plaintiffs seek frivolous-appeal costs. *See* WIS. STAT. RULE 809.25(3). Although we affirm the trial court's denial of the school's motion for frivolous-action fees, the school's appeal presented a fairly close question and was far from frivolous. Accordingly, we deny the plaintiffs' motion for frivolous-appeal costs.

By the Court.—Order affirmed.

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