

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 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. 99-1695

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF ATTORNEY FEES,
IN RE THE ESTATE OF JAMES V.S. ZINGALE:**

JAMES O'CONNOR,

APPELLANT,

v.

CARMA SUE RAINER, AS PERSONAL REPRESENTATIVE,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
VICTOR MANIAN, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. James O'Connor, *pro se*, appeals from the trial court's grant of summary judgment in favor of Carma Sue Rainer, the personal

representative of the Estate of James Zingale, dismissing O'Connor's claim against the Estate. O'Connor argues that: (1) the trial court erred in granting summary judgment because the statute of frauds did not bar his claim; (2) the trial court should have permitted him to amend his claim to assert that he was a shareholder in the decedent's corporation; and (3) the trial court erred in granting the Estate's motion for attorney's fees. We affirm and remand with directions.

I. BACKGROUND

¶2 O'Connor filed a \$27,012.14 claim against the Estate based on an alleged oral agreement between himself and the decedent that gave O'Connor an interest in various real estate properties owned by the decedent's corporation. O'Connor did not provide the trial court with documentary evidence supporting his claim that he had an ownership interest in any of the properties. In addition, O'Connor moved to amend his claim to assert that he was the sole shareholder in the decedent's corporation, which, he argued, entitled him to the entire value of the properties at issue. As evidence of this claim, he produced a blank stock certificate without his name on it.

¶3 The trial court granted summary judgment in the Estate's favor and dismissed O'Connor's claim "on the basis of the statute of frauds" because "[i]t's an oral, alleged oral agreement involving parcels of real estate." The trial court denied O'Connor's request to amend, finding that the amendment "would increase the amount of the claim substantially" and "change the nature of the basis of the claim." In addition, the trial court awarded attorney's fees and costs to the defense, stating: "It seems to me that there is no basis for filing the claim, and there is no – there was no reasonable expectation that the law would be changed or

that this could be an extension of the law. And on that basis, the motion for frivolous cost is granted.”

II. DISCUSSION

A. *Summary Judgment*

¶4 “The purpose of summary judgment is to determine whether a legal dispute can be resolved without trial.” *United States Oil Co., Inc. v. Midwest Auto Care Servs., Inc.*, 150 Wis. 2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989); *Bulgrin v. Madison Gas & Elec. Co.*, 125 Wis. 2d 405, 407, 373 N.W.2d 47, 49 (Ct. App. 1985). We review the trial court’s grant of summary judgment *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). When reviewing the trial court’s decision, we apply the same standards as did the trial court. See *id.*, 136 Wis. 2d at 315, 401 N.W.2d at 820. We first examine the pleadings to determine whether a proper claim for relief has been stated. See *id.* If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. See *id.* WISCONSIN STAT. § 802.08(2) (1997-98) sets forth the standard by which summary judgment motions are to be judged:¹

The judgment sought 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.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Oral agreements do not satisfy the statute of frauds, which requires that real estate transactions be reduced to writing. *See WIS. STAT. § 706.02; see also Trimble v. Wisconsin Builders, Inc.*, 72 Wis. 2d 435, 441, 241 N.W.2d 409, 413 (1976) (oral contract for conveyance of real estate is void unless there is a memorandum that conforms to the statute of frauds).² Here, there is no written evidence that O'Connor had an ownership interest in any of the decedent's properties. By his own admissions, O'Connor acknowledges that all the alleged agreements between himself and the decedent were oral and that there is nothing in writing to substantiate his contentions. Thus, the trial court correctly determined that O'Connor did not state a proper claim for relief. Accordingly, we affirm the trial court's order granting summary judgment to the Estate.³

² WISCONSIN STAT. § 706.02 provides, in pertinent part:

Formal requisites. (1) Transactions under s. 706.01(1) [conveyances of real property] shall not be valid unless evidenced by a conveyance which:

- (a) Identifies the parties; and
- (b) Identifies the land; and
- (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
- (d) Is signed by or on behalf of each of the grantors; and
- (e) Is signed by or on behalf of all parties, if a lease or contract to convey; and
- (g) Is delivered.
- (h)

³ O'Connor contends that the Estate did not provide factual support for its summary judgment motion, claiming that "the summary judgment ordered by the trial court was not based on affidavits, records and depositions." O'Connor's deposition, however, was attached to the Estate's Brief in Support of Motion for Summary Judgment as Exhibit 2. O'Connor's contention is baseless.

B. Motion to Amend Claim

¶5 O'Connor next asserts that the trial court erred when it denied his request to amend his claim to assert that he was a shareholder in the decedent's corporation. "The general rule for amendment of claims is that amendment is to be liberally permitted, but not after the expiration of the time for filing claims so as to increase the amount or materially change the nature of or basis for the claim."⁴ *In Matter of Estate of Alexander*, 75 Wis. 2d 168, 187, 248 N.W.2d 475, 485 (1977). Here, O'Connor's motion to amend his claim was beyond the time set for filing claims and substantially increased the value of the claim, from \$27,012.14 to \$139,000. Whether to permit an amendment of a claim is within the trial court's discretion. *See Lavine v. Hartford Accident & Indem. Co.*, 140 Wis. 2d 434, 446, 410 N.W.2d 623, 629 (Ct. App. 1987). A trial court acts within its discretion when its decision is one that a reasonable judge could make under governing legal principles. *See Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57, 62 (1993).

¶6 O'Connor's original claim asserted that he was entitled to a portion of the sale proceeds from properties owned by the decedent's corporation; in

⁴ WISCONSIN STAT. § 859.01 provides:

Time For Filing Claims. When an application for administration is filed, the court, or the probate registrar under informal administration proceedings, shall by order set a date as the deadline for filing a claim against the decedent's estate. The date shall be not less than 3 nor more than 4 months from the date of the order.

In this case, the order setting time and notice to creditors was filed on April 10, 1996. O'Connor's original claim was timely filed on June 13, 1996. The motion to amend his claim, however, was not filed until April 26, 1999, which is clearly beyond the expiration of the time for filing claims against the Estate.

contrast, the amendment stated that O'Connor was the sole shareholder in the corporation and was entitled to all of the sale proceeds.⁵ The trial court correctly observed that O'Connor's motion to amend his claim would "increase the amount of the claim substantially" and "change the nature of the basis of the claim." Moreover, O'Connor presented no colorable evidence that he was, in fact, a shareholder of the corporation, and did not adequately explain why he did not assert his alleged shareholder status in his original claim. The trial court did not erroneously exercise its discretion.

C. Trial Court's Award of Frivolous Fees and Costs

¶7 O'Connor also asserts that the trial court erred in granting the Estate's motion for frivolous-action attorney's fees. 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 or party 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.*

¶8 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

⁵ As evidence of his amended claim, O'Connor produced only a blank stock certificate without his name on it, while tax returns indicate that the decedent was the sole shareholder of the corporation from its inception until his death.

supported by a good faith argument for extension, modification, or reversal of existing law. *See WIS. STAT. § 814.025(3)(b).* In this case, O'Connor failed to provide a writing to support his claim of an interest in the real estate and should have known that his claim would fail under existing law. We conclude that the trial court properly awarded attorney fees and costs, pursuant to WIS. STAT. §§ 802.05 and 814.025, after it determined that O'Connor did not have a “basis for filing the claim,” or a reasonable expectation that the law would be changed or extended.

D. Frivolous Appeal Fees and Costs

¶9 Finally, the Estate requests frivolous appeal attorney fees and costs. This court decides, as a matter of law, whether an appeal is frivolous. *See NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 841, 520 N.W.2d 93, 98 (Ct. App. 1994). “Our conclusion that the trial court correctly adjudged the matter frivolous renders the appeal frivolous *per se.*” *Belich v. Szymaszek*, 224 Wis. 2d 419, 435, 592 N.W.2d 254, 262 (Ct. App. 1999). We therefore grant the motion for costs and reasonable attorney’s fees and remand to the trial court to determine the proper amount to be awarded. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W.2d 1, 5 (Ct. App. 1998).⁶

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

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

⁶ O’Connor, too, asks for frivolous appeal costs, claiming that many of the Estate’s arguments were “not based on affidavits, records and depositions.” For reasons that are obvious from this opinion, we deny his motion.

