COURT OF APPEALS DECISION DATED AND FILED

January 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP570 **Cir. Ct. No. 2012CV1306**

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

BIERSDORF & ASSOCIATES, P. A.,

PLAINTIFF-APPELLANT,

V.

JULIE A. GOPLIN AND H. DALE PETERSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. This case began as a fee dispute between a law firm, Biersdorf & Associates, and a former client, husband and wife H. Dale Peterson and Julie Goplin. The firm sued Peterson and Goplin for the fees, and, as part of their answer and counterclaim, Peterson and Goplin alleged that the firm

breached its fiduciary duty. The firm then amended its complaint to allege a fraudulent misrepresentation claim against both Peterson and Goplin. The parties' claims proceeded to a bench trial, and the circuit court concluded that the firm was due $46,000 in fees instead of $115,000 in fees that were claimed by the firm. The court further concluded that the firm breached its fiduciary duty to Goplin and Peterson, causing them $1,260 in damages. Finally, the court concluded that the firm's fraudulent misrepresentation claim was frivolous, at least as to Goplin. The court sanctioned the firm by awarding Peterson and Goplin their litigation expenses against the firm, starting from the time the firm amended its complaint, for a total of approximately $142,500 in attorney's fees, plus costs. The firm appeals. We affirm.

Background

¶2 After the trial, the circuit court issued a lengthy written decision containing 143 numbered findings of fact, 26 numbered conclusions of law, and additional discussion. In summarizing the pertinent facts, we draw heavily from the circuit court's findings. As we shall see, the Biersdorf firm challenges some of the circuit court's factual findings, but none of those challenges is persuasive.

¶3 The Biersdorf firm represented Goplin and Peterson in eminent domain proceedings. The proceedings involved DOT's attempt to revoke a driveway permit from land that Peterson and Goplin had previously acquired. In March 2008, Peterson, who is an attorney, arranged for an hourly fee agreement with Attorney Daniel Biersdorf, the Biersdorf firm's sole shareholder.[1] In

[1] In the remainder of this opinion, when we refer to "Biersdorf," we mean Daniel Biersdorf, not the firm.

September 2009, Peterson negotiated a new fee agreement with Biersdorf providing for fees on a contingency basis.

¶4 It appears that the firm's representation of Peterson and Goplin was uneventful until a court-ordered mediation occurred on August 26, 2011. Biersdorf sent another attorney from the firm, Edward Kelly Keady, to represent Peterson and Goplin at the mediation. The mediator proposed a settlement involving a complete sale of the land to DOT that would require Goplin and Peterson to pay their own attorney's fees. This land-sale proposal took Keady, Peterson, and Goplin by surprise.

¶5 In order to determine a settlement figure acceptable to Peterson and Goplin, the parties needed to calculate the attorney's fees they owed the firm. Keady had not brought a copy of either the 2008 or 2009 fee agreement to the mediation, and was apparently unaware of the terms of either agreement.

¶6 The parties dispute what occurred next, but the circuit court found the following: Keady contacted the firm to determine the fee arrangement with Goplin and Peterson; a firm employee mistakenly provided Keady with the earlier, rather than the current, fee agreement; and Keady used that wrong agreement to calculate that Goplin and Peterson owed the firm $46,000 in attorney's fees. This $46,000 figure was then used to determine a final settlement amount of $230,000, out of which Goplin and Peterson would pay the $46,000 in fees.[2]

[2] Keady also calculated that the firm was owed up to $9,000 in costs. The circuit court found that the firm was entitled to $1,549.75 in costs. Because the costs are not pertinent to the issues on appeal, we ignore them moving forward.

¶7 On August 30, 2011, several days after mediation, Keady informed Biersdorf of the outcome, and Biersdorf indicated that the $46,000 amount was incorrect. In subsequent communications between Biersdorf and Peterson, Biersdorf informed Peterson that, under the contingency agreement, the firm was owed $115,000 in fees. Biersdorf also asserted to Peterson that Peterson had misrepresented the fee arrangement to Keady during mediation. In addition, without Peterson's or Goplin's authorization, Biersdorf or Keady contacted the court and opposing counsel in the eminent domain proceedings in an attempt to obtain an agreement to rescind the settlement agreement. On September 6, 2011, in order to ensure that his and Goplin's interests were represented, Peterson discharged the firm and appeared at a hearing scheduled on the settlement. The court enforced the settlement, and denied the firm's request for a lien on the proceeds to cover the firm's claimed attorney's fees.

¶8 Goplin and Peterson sent the firm a check for $46,000 for attorney's fees. The firm returned the check and commenced a new action against Goplin and Peterson, the one on appeal here, seeking to recover the full $115,000 fee amount claimed. The firm alleged contract theories and unjust enrichment. As indicated above, Goplin and Peterson denied those claims, and counterclaimed for breach of fiduciary duty. The firm then amended its complaint to include a claim of fraudulent misrepresentation against both Peterson and Goplin. That is, the firm alleged that, during the course of the mediation, Peterson and Goplin knowingly misrepresented to Keady that the fee arrangement was hourly, and that Peterson and Goplin made the misrepresentation with the intent to defraud and to induce the firm to act on the misrepresentation.

¶9 Peterson and Goplin moved for sanctions, asserting that there was no factual or legal support for a fraudulent misrepresentation claim, and that the firm

brought the claim to harass and embarrass them. The firm declined to withdraw the claim, which was litigated along with other claims at the bench trial.

¶10 As noted, the circuit court concluded that the firm was entitled to $46,000 in fees. The court also concluded that the firm breached its fiduciary duty when it attempted, without client authorization, to obtain an agreement to rescind the settlement agreement in the eminent domain proceedings. The court found that the firm's breach caused $1,260 in damages, the amount of Peterson's expenses for attending the hearing confirming the settlement. In addition, the court found that the firm failed to prove its fraudulent misrepresentation claim against Peterson or Goplin. Finally, the court imposed the sanction of approximately $142,500 plus costs after determining that the fraud claim, at least as to Goplin, was frivolous.

¶11 We reference additional facts, including facts regarding the circuit court's reasoning for imposing the sanction, in the course of the discussion below.

Discussion

¶12 Most of the firm's arguments can be grouped into three categories. First, the firm challenges the circuit court's conclusion that Peterson and Goplin owed the firm only $46,000 in attorney's fees for representation in the eminent domain proceedings. Second, the firm argues that the circuit court erred in concluding that Peterson and Goplin proved the damages element on their claim for breach of fiduciary duty. Third, the firm challenges the circuit court's imposition of sanctions.

A. $46,000 In Attorney's Fees For Representation In The Eminent Domain Proceedings

¶13 As we read the circuit court's decision, the court relied on three independent and alternative grounds for its conclusion that the firm was due only $46,000 in attorney's fees. First, the court concluded that, during the mediation, the parties voided their two written fee agreements and entered into a new, oral fee agreement based on Keady's calculation that $46,000 was the amount owed. Second, the court concluded that the firm was barred by promissory estoppel from enforcing the written agreements. Third, the court concluded that the firm was equitably estopped from seeking more than $46,000 in fees. We affirm on this issue based on equitable estoppel.

¶14 The elements of equitable estoppel are: "(1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment." ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620. Here, the circuit court determined that Peterson and Goplin reasonably relied on Keady's $46,000 calculation to enter into the eminent domain settlement. This reasonable reliance element is the only element the firm challenges.

¶15 When the relevant facts are disputed, reasonable reliance is a factual determination for the fact finder. *See* ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 732-34, 456 N.W.2d 585 (1990); ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170-72, 601 N.W.2d 14 (Ct. App. 1999). "[W]e will not set aside the circuit court's factual findings unless they are clearly erroneous." ***State v. Going Places Travel Corp.***, 2015 WI App 42, ¶24, 362 Wis. 2d 414, 864 N.W.2d 885. In addition,

when acting as the fact finder, the circuit court is the final arbiter of witness credibility. *See* ***id.***, ¶27.

¶16 The firm points to evidence in its favor to support its argument that the circuit court erred in finding reasonable reliance, but the firm ignores contrary evidence, including Peterson's testimony, supporting the court's fact finding. Given our standard of review, this is a fatally flawed approach.

¶17 The firm relies heavily on the fact that Peterson is an attorney and that it was he who negotiated the 2009 contingency fee agreement. The firm asserts, in effect, that it is not believable that Peterson would not have known that $46,000 was the wrong amount under the agreement Peterson negotiated. The problem for the firm, however, is that the circuit court credited Peterson's contrary testimony. The court accepted Peterson's testimony that, at the time of the 2011 mediation, he had no recollection of the specifics of the 2009 contingency agreement. The court also made a number of underlying findings, none of which the firm challenges, that support the reasonableness of the circuit court's ultimate finding that Peterson had no recollection. Those findings included that the fees were not a "significant focus" for Peterson or Goplin because of a reasonable expectation that they would prevail in the eminent domain proceedings and, therefore, that DOT would be statutorily obligated to cover the fees. Similarly, the circuit court found that Biersdorf at least twice advised Peterson that Peterson would not have to worry about attorney's fees.

¶18 The firm argues that Peterson's failed recollection was negligent as a matter of law, and asserts that negligent reliance cannot be reasonable reliance. The firm cites case law for the proposition that a person is negligent for failing to ascertain the contents of an agreement before signing it. But failing to ascertain

the contents of an agreement before signing it is different from failing to recall an agreement's contents two years later. Here, it is clear that the circuit court effectively found that Peterson was not negligent but instead reasonably relied on Keady, and, for reasons already discussed, we cannot say that that finding is clearly erroneous.

¶19 Seeing no other developed arguments regarding the $46,000 fees issue, we move on.[3]

B. Damages For Breach Of Fiduciary Duty

¶20 As noted above, the circuit court concluded that the firm breached its fiduciary duty to Peterson and Goplin by attempting, without their authorization, to obtain an agreement to rescind the eminent domain settlement. And, the court found that this breach caused $1,260 in damages, the amount of Peterson's expenses for attending the court hearing confirming the settlement. The court found that Peterson needed to appear at the hearing to ensure that the firm would not act contrary to his and Goplin's interests at the hearing, and the court further found that Peterson's expenses directly resulted from the firm's breach.

¶21 The firm challenges the $1,260 figure, and argues that Peterson and Goplin failed to prove breach-of-fiduciary-duty damages. We perceive only one damages argument that has even arguable merit. We address and reject that

[3] In its briefing, the firm includes a short, separate argument section asserting that the $46,000 was not a reasonable amount of attorney's fees for the firm's services. As far as we can tell from the firm's limited briefing, the circuit court's conclusion as to equitable estoppel disposes of this argument. And, regardless whether equitable estoppel applies to bar it, the firm's argument is insufficiently developed, and we reject it for that reason. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

argument and then briefly give examples of the firm's remaining meritless arguments.

¶22 The firm argues that the circuit court allowed Peterson to submit additional evidence after trial to support the court's damages calculation. Assuming without deciding that this was error, we conclude that it was harmless because the trial record already included evidence supporting a $1,260 damages finding. *See* WIS. STAT. § 805.18 (setting forth harmless error standards).[4] In particular, the $1,260 amount was supported by an admission that Peterson was a practicing attorney with offices in Madison; by trial evidence that the hearing Peterson attended was in Waupaca County; and by trial evidence that Peterson's normal hourly rate at the time was between $290 and $300. The circuit court took judicial notice of the approximately four-hour round-trip travel time between Madison and Waupaca. The firm does not challenge this use of judicial notice.

¶23 We acknowledge that the circuit court appeared to calculate the $1,260 figure by using a later-submitted hourly rate of $315 for Peterson, multiplying that rate by four hours of travel time, and disregarding whatever time Peterson spent at the hearing. However, that does not change the fact that the trial record supports the $1,260 figure, or that this $1,260 figure was a reasonable approximation of damages based on the trial evidence alone. Accordingly, we see no reversible error as to the court's calculation. *See* ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 125, 479 N.W.2d 557 (Ct. App. 1991) (damages must be proven with "reasonable certainty," but "there is no absolute requirement of mathematical precision").

[4] All references to the Wisconsin Statutes are to the 2013-14 version.

¶24 We turn to examples of the firm's remaining, meritless damages arguments.

¶25 The firm argues that litigation expenses cannot be recovered as damages. For support, the firm cites two cases stating the general prohibition on recovering one's litigation expenses from an adversary for litigating *claims against that adversary*. *See* ***Artvale, Inc. v. Rugby Fabrics Corp.***, 232 F. Supp. 814, 825-26 (S.D.N.Y. 1964), *aff'd*, 363 F.2d 1002 (2d Cir. 1966); ***St. Catherine v. Turner***, No. 84-779, unpublished slip op. (WI App Apr. 9, 1985). However, this general prohibition says nothing about whether Peterson can recover his $1,260 in litigation expenses from the firm for having to appear in *the eminent domain proceedings* as a result of the firm's breach of duty.[5]

¶26 Another example of a meritless argument is the firm's contention that Peterson's discharge of the firm, not the firm's breach of fiduciary duty, caused Peterson to incur the $1,260 in litigation expenses for the eminent domain proceedings. This argument fails to come to grips with the circuit court's express and implicit findings supporting the view that Peterson justifiably discharged the firm because Peterson reasonably doubted whether the firm was pursuing his and Goplin's best interests. It also ignores the well-established Wisconsin tort law principle that tortious conduct need only be a "substantial factor" in producing injury. *See, e.g.*, ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶24, 277 Wis. 2d 21, 690 N.W.2d 1. Here, there can be no serious dispute that the

[5] We advise the firm's counsel that its citation to ***St. Catherine v. Turner***, No. 84-779, unpublished slip op. (WI App Apr. 9, 1985), violates our rules of procedure. *See* WIS. STAT. RULE 809.23(3).

breach of fiduciary duty the circuit court identified was a substantial factor in producing Peterson's $1,260 in expenses.

C. Sanctions

¶27 We turn to the firm's challenge to the circuit court's sanction for the firm's fraudulent misrepresentation claim. We begin our discussion with additional legal background and a summary of the circuit court's reasoning. We then turn to the firm's arguments, all of which we reject.

¶28 As to applicable sanctions law, there is no dispute that two sanctions statutes apply here, WIS. STAT. § 802.05 and WIS. STAT. § 895.044. Although these statutes contain a number of standards, we perceive agreement that the standards that matter here can be shorthanded as follows: (1) whether a claim was brought or continued without any reasonable basis in fact or law, and (2) whether a claim was brought or continued for an improper purpose, such as harassment. *See* §§ 802.05(2)(a)-(c) and 895.044(1). Only one standard need be met to justify the imposition of a sanction.

¶29 Also undisputed are the elements of the firm's fraudulent misrepresentation claim. For purposes pertinent here, fraudulent misrepresentation (i.e., intentional misrepresentation) requires proof of knowledge and intent: "[T]he defendant must have made the misrepresentation with knowledge that it was false or recklessly without caring whether it was true or false; and [] the defendant must have made the misrepresentation with intent to deceive and to induce the plaintiff to act on it to his detriment or damage." *See* ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233.

¶30 In its trial decision, the circuit court found against the firm on the merits of its fraudulent misrepresentation claim. Crediting Peterson's testimony, the court found that Peterson did not misinform or mislead Keady into believing that the parties' fee agreement was hourly instead of contingent.[6] The court rejected Keady's testimony to the contrary. The court further found that it was "absurd" to think that Peterson would have tried to intentionally mislead Keady as to fees when the applicable contingency fee agreement should have been readily available to Keady. In the circuit court's view, Peterson and Goplin would not have known that a firm employee would mistakenly provide Keady with the wrong agreement. In addition, the circuit court found that, when Keady calculated the $46,000 fee amount, Keady relied on the mistakenly sent hourly agreement, not on any misrepresentation by Peterson or Goplin.

¶31 When the circuit court turned to the sanctions issue, the court focused on the particular lack of evidence as to Goplin. The court observed that the firm based its fraudulent misrepresentation claim on the theory that *both* Peterson and Goplin made a fraudulent misrepresentation as to the fee arrangement with the firm.[7] Thus, the firm effectively pursued a claim that *both*

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[6] Although the circuit court refers only to Peterson in this and some other findings, it is obvious from the court's findings as a whole that the court found that Goplin as well as Peterson made no misrepresentations.

[7] The firm's complaint allegations included that:

> 50. Defendants knowingly made a false representation to Mr. Keady that their representation was governed by an hourly agreement.
>
> 51. Defendants had either actual knowledge or recklessly asserted that the Original [hourly] Agreement was controlling.

(continued)

Peterson and Goplin made knowing, false representations with the intent to deceive the firm. The court concluded that there was never any basis to assert that *Goplin* made a fraudulent misrepresentation. Thus, the court determined that the fraudulent misrepresentation claim was frivolous as against Goplin.

¶32 As we understand the court's reasoning in deciding the sanction amount for this frivolous claim against Goplin, the court considered several factors. That is, although the frivolousness determination as to Goplin is what triggered the court's statutory authority to impose a sanction, the court considered a number of additional factors in deciding the *amount* of the sanction. We list the main factors.

¶33 First, although the circuit court stopped short of concluding that the fraudulent misrepresentation claim was frivolous as to Peterson, the court plainly viewed that question as a close call given the "absurd" nature of the firm's fraud theory. Second, the court concluded that the fairness and deterrence principles that justify sanctions required a significant sanction here given the serious nature of the fraud allegations. Third, the court found that, but for the fraud claim, Peterson and Goplin would have been represented by Peterson's own law firm; the fraud claim required them to hire outside counsel and incur that expense. In addition, the court concluded that, given the intertwined nature of the parties' claims, it was difficult to separate expenses on a claim-by-claim basis. Finally, although the court stopped short of finding that the firm commenced or continued

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> 52. Defendants falsely asserted that their representation was subject to an hourly rate with intent to defraud [the firm] and to induce Mr. Keady, as an agent of [the firm], to act on the false representation.

its fraud claim for an improper purpose, such as harassment or bad faith, the court pointed out several facts and reasonable inferences that would have supported such a finding. We choose not to detail them here, but they are contained in the circuit court's oral decision.

¶34 We turn to the firm's arguments. Those arguments are problematic from the outset because the firm fails to acknowledge the complexities of our standard of review in the sanctions context. *See, e.g.*, ***Wisconsin Chiropractic Ass'n v. Wisconsin Chiropractic Examining Bd.***, 2004 WI App 30, ¶16, 269 Wis. 2d 837, 676 N.W.2d 580 (explaining that our standard of review for sanctions under WIS. STAT. § 802.05 varies depending on the particular issue). We agree with the firm that we review de novo whether a claim lacks a reasonable basis in law. *See* ***id.***; *see also* ***Keller v. Patterson***, 2012 WI App 78, ¶22, 343 Wis. 2d 569, 819 N.W.2d 841. However, many of the firm's sanctions arguments appear to be challenges to the circuit court's factual findings or discretionary determinations. Regardless, we conclude for the reasons stated below that the firm's arguments fail to demonstrate error.

¶35 To begin, many of the firm's arguments are directed at whether the firm's fraudulent misrepresentation claim was frivolous *as to Peterson*. We need not address those arguments because, as already explained, the circuit court did not conclude that the fraud claim was frivolous as to Peterson. At the same time, the firm does not argue that the court could not consider the weakness of that claim, even if not frivolous, as one of many factors in deciding the amount of the sanction.

¶36 Of what remains of the firm's arguments, the most significant has to do with the concept of agency. The firm argues that the circuit court erred by

failing to address frivolousness as to Peterson because Peterson was acting as Goplin's *agent*. That is, the firm argues that it does not matter whether the fraudulent misrepresentation claim was frivolous as to Goplin personally because any statement that Peterson made or failed to make was attributable to her. Like the circuit court, we are not persuaded.

¶37 The circuit court addressed the firm's agency theory in some detail in its sanctions decision and provided two independent and alternative reasons for rejecting it. First, the court concluded that there was no reasonable factual or legal basis for asserting an agency theory. Second, the court concluded that, even if there was, the firm had not pled or pursued an agency theory as part of its fraudulent misrepresentation claim, but at best merely hinted at this theory during trial. In effect, the court concluded that the firm could not save its fraud claim from being frivolous as to Goplin by belatedly asserting an agency theory.

¶38 On appeal, the firm appears to focus on the first of the circuit court's two alternative conclusions. The firm points to law stating that spouses may sometimes be agents for one another, and the firm argues that there is evidence to support a finding that Peterson was acting as Goplin's agent.

¶39 Regardless whether the firm is correct about the law and the evidence, the problem we see is that the firm fails to make a developed argument addressing the court's *second* alternative conclusion. That is, we see no developed argument explaining why the circuit court was wrong to conclude that the firm failed to allege and pursue an agency theory until it was too late. The closest the firm comes to addressing this topic are isolated assertions that fail to persuade us. For example, the firm makes a bald assertion that "there is no legal requirement that the Firm had to *separately* plead an agency theory." As another noteworthy

example, the firm cites the general rule of notice pleading, requiring that pleadings be liberally construed. However, as Peterson and Goplin point out, fraud is a type of claim that requires pleading with particularity. *See* WIS. STAT. § 802.03(2); ***John Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶52, 284 Wis. 2d 307, 700 N.W.2d 180. This particularity requirement "'protects persons from casual allegations of serious wrongdoing.'" ***John Doe***, 284 Wis. 2d 307, ¶52 (quoted source omitted). Here, as the circuit court in effect reasoned, Goplin was subjected to the type of "casual allegations of serious wrongdoing" that the particularity requirement and the sanctions statutes are intended to deter.

¶40 In sum, the firm fails to persuade us that the circuit court erred in rejecting this agency theory as a belated attempt to avoid frivolousness.[8]

¶41 Moving on from the agency topic, the firm asserts that the circuit court erred by awarding a sanction that was greater than the litigation expenses attributable solely to the firm's fraudulent misrepresentation claim as against Goplin. Once again, the firm's argument is undeveloped. The firm fails to explain, or cite any legal authority explaining, why the circuit court's approach was unreasonable in light of the factors cited by the court that we summarized above. The firm also fails to suggest a method by which the court might have reasonably separated expenses. Indeed, the firm's position seems to be that, even

[8] Before leaving the topic of agency, we note that the firm also relies on its agency theory for an argument that does not relate to sanctions. We address that argument here because it relates to agency. Specifically, the firm argues, based on its agency theory, that the circuit court erred by granting judgment as a matter of law to Goplin on its fraudulent misrepresentation claim. This argument leads nowhere because the fraud claim against Goplin still required that Peterson made a misrepresentation regarding fees to Keady and, as noted in the text, the circuit court found that Peterson made no such misrepresentation to Keady. Thus, even if the court had applied the firm's agency theory at trial, the end result would have been the same: a judgment in Goplin's favor on the fraud claim.

if its fraud claim was frivolous as to Goplin, the only reasonable sanction here was *no* sanction, apparently based on the firm's view that Peterson's and Goplin's litigation expenses would have been the same without the fraud claim as to Goplin. This argument, like others, is unsupported by legal authority and, if accepted, would provide a free pass for frivolous allegations. In effect, the firm takes the unpersuasive position that there is no harm in a frivolous claim against one spouse as long as that same claim would not have been frivolous against the other.[9]

¶42 The firm appears to argue that the circuit court erred by finding that the firm brought its fraud claim for an improper purpose, such as harassment. The firm argues that there were competing facts and inferences on this topic, and that all doubts as to frivolousness must be resolved against a frivolousness finding. We agree that there are competing facts and inferences as to harassment, but, as noted above, the court did not conclude that the firm's claim was frivolous based on harassment. Rather, the court considered facts supporting harassment as one factor in the court's overall sanctions award.

¶43 Finally, the firm argues that the circuit court's sanctions decision was based on other irrelevant or inappropriate factors. Some of these factors pertain to the firm's agency theory that we have already addressed, and we do not revisit that issue. What remains are two arguments.

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[9] The firm asserts that its no-sanctions position finds support in ***Benkoski v. Flood***, 2001 WI App 84, 242 Wis. 2d 652, 626 N.W.2d 851. We disagree. If anything, ***Benkoski*** provides indirect support for the circuit court's decision because ***Benkoski*** is another example of closely intertwined claims. *See* ***id.***, ¶¶35-37.

¶44 First, the firm complains that the circuit court used the sanction to "compensat[e]" Peterson and Goplin instead of analyzing the sanction in terms of deterrence, as required by WIS. STAT. § 802.05. We disagree. Although the circuit court made reference to Peterson and Goplin being "compensated" by the sanction, the circuit court's use of the term, in context, does not show that the court considered an inappropriate factor. At worst, the court spoke imprecisely. Elsewhere in its decision, the court made clear that it applied the deterrence standard in § 802.05. In particular, the court stated that the sanction was "an appropriate measure to deter similarly situated attorneys, or these particular attorneys, from continuing in this type of behavior."

¶45 Second, the firm argues that the circuit court erred by considering the firm's fee disputes with other clients. According to the firm, its positions in the other disputes were never shown to be frivolous. We are not persuaded that consideration of other disputes was error, at least not error warranting relief. We agree with Peterson and Goplin that these other disputes were a relatively insignificant factor in the court's decision. For that matter, the court acknowledged that the disputes involved different circumstances, and did not conclude that the firm had taken a frivolous position in those disputes.

D. Attorney's Fees For Appeal

¶46 Peterson and Goplin request the attorney's fees they incurred in this appeal, citing ***Riley v. Isaacson***, 156 Wis. 2d 249, 456 N.W.2d 619 (Ct. App. 1990). ***Riley*** states a per se rule that, "if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal." ***Id.*** at 262. However, Peterson and Goplin do not explain why this per se rule from ***Riley*** applies here to entitle them to *all* of their attorney's fees on appeal when the firm has made non-

frivolous appellate arguments on some issues. Accordingly, we decline to grant their attorney's fees request.

Conclusion

¶47 For the reasons stated above, we affirm the judgment against the firm.

By the Court.—Judgment affirmed.

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