COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1630 **Cir. Ct. No. 2002CV3094**

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

IN RE IMPOSITION OF COSTS ON ATTORNEY, IN TMJ V, LLP V. GLEN A. SKILLRUD:

EDWARD A. HANNAN,

APPELLANT,

V.

ROBERT E. CHRITTON AND GODFREY & KAHN, S.C.,

RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed and cause remanded for further proceedings.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Edward Hannan appeals an order that dismissed as frivolous an attempted fourth-party contribution or indemnification claim he filed

on behalf of one attorney against another attorney involved in a flawed real estate transaction. The appealed order directs Hannan to pay the opposing parties' costs and attorney fees for failing to make a reasonable inquiry into the law before filing the claim. Hannan challenges both the frivolousness determination and the amount of the award. For the reasons discussed below, we affirm and remand for a determination and award to the respondents of their costs and attorney fees for this appeal.

BACKGROUND

¶2 Although the procedural posture of this case is complicated, the facts relevant to this appeal are easily summarized. Attorney James Bakken represented the sellers in a real estate transaction and Attorney Robert Chritton represented the buyers. After the transaction was completed, an error was discovered in the legal description used on the warranty deed, revealing that the sellers did not own all of the land they had purported to sell to the present buyers.

¶3 The buyers and a title insurance company sued the sellers. The sellers filed third-party complaints against a surveyor, two insurance companies, and their own attorney, Bakken. Bakken, in turn, filed a fourth-party complaint against the buyer's attorney, Chritton, Chritton's law firm, and the firm's insurer (collectively, Chritton). Bakken's fourth-party complaint was prepared and filed by Attorney Edward Hannan.

¶4 The fourth-party complaint, which is the subject of this appeal, made claims for contribution or indemnification on behalf of Bakken. It alleged that Chritton prepared a commercial offer to purchase containing an erroneous legal description. The description Chritton used in the offer was based on an outdated survey provided by Bakken's clients, the sellers. Pursuant to an agreement

between the attorneys, Chritton made the arrangements to obtain title insurance. When Chritton reviewed the title company's proposed title commitment, he noticed a discrepancy between the legal description contained in the commitment and the description from the survey which he had used in the offer.

¶5 Chritton acknowledged in an affidavit that he had instructed a paralegal from his firm to ask the title insurance company to either conform its proposed commitment to the legal description from the survey, or to "verify that the survey legal and the title commitment legal describe the same land." Chritton did not notify Bakken of the discrepancy or of his communication with the title company. The title company issued a revised title commitment utilizing the erroneous legal description from the survey. Meanwhile, Bakken used the erroneous legal description when drafting the warranty deed for the transaction.

¶6 Chritton moved to dismiss the attempted fourth-party complaint and requested frivolousness sanctions against Bakken and his attorney, Hannan. The circuit court concluded that the contribution and indemnification claims were frivolous, and it sanctioned Hannan for filing the complaint without having conducted an adequate investigation into the applicable law as required by WIS. STAT. § 802.05 (2003-04).[1]

DISCUSSION

¶7 WISCONSIN STAT. § 802.05(1)(a) provides in relevant part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading,

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If the circuit court determines that an attorney has violated his duty to reasonably investigate a pleading under this section, it may impose sanctions including "an order to pay the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees." ***Id.***

¶8 Our standard for reviewing a circuit court's determination that an attorney filed a frivolous claim without proper investigation is mixed.

> Determining what and how much prefiling investigation was done are questions of fact that will be upheld unless clearly erroneous. "Determining how much investigation should have been done, however, is a matter within the trial court's discretion because the amount of research necessary to constitute 'reasonable inquiry' may vary, depending on such things as the particular issue involved and the stakes of the case." A circuit court's discretionary decision will be sustained if it 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.

Jandrt ex rel. Brueggeman v. Jerome Foods, Inc., 227 Wis. 2d 531, 548-49, 597 N.W.2d 744 (1999) (citations omitted). In considering whether an attorney made a reasonable inquiry into the law, a court should take into account:

> the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the

> document was a good faith effort to extend or modify the law.

Id. at 550-51 (citation omitted).

¶9 Hannan first contends that the circuit court failed to properly exercise its discretion because it did not "inquire into or determine" Hannan's knowledge and beliefs at the time of filing, or make explicit factual findings regarding what legal research Hannan actually performed. As the circuit court properly observed, however, the standard for reasonable investigation is an objective one—that is, what a reasonable attorney would understand after adequate investigation. ***Id.*** at 549. Because Hannan did not present any affidavit or argument regarding the amount of research he had performed prior to filing, the circuit court was not required to make an explicit finding on the point. The circuit court was also not required to comment on the amount of time Hannan had to prepare the fourth-party complaint, when it was plain from the record that the underlying case had been filed over six months earlier. Instead, the circuit court properly focused its discussion on other relevant factors, such as whether the fourth-party complaint contained a plausible view of the law or represented a good faith effort to extend or modify the law.

¶10 Hannan disputes the circuit court's determinations that the fourth party complaint lacked a reasonable basis in law and failed to represent a good faith effort to extend or modify the law. The circuit court based its decision on the well-settled rule of qualified immunity for attorneys.

¶11 The qualified immunity rule is that "an attorney is not liable to a third person for acts performed in good faith, and mere negligence on the part of an attorney is insufficient to give a right of action to a third party injured thereby

… [unless] the attorney has been guilty of fraud or collusion, or of a malicious or tortious act." ***Goerke v. Vojvodich***, 67 Wis. 2d 102, 105, 226 N.W.2d 211 (1975) (citation omitted). Applying this rule, the court in ***Goerke*** held an allegation that an attorney had willfully failed to disclose the incompetency of one of the parties to a real estate transaction (which omission it concluded could constitute a misrepresentation by conduct) was insufficient to state a claim for liability against the attorney, absent any allegation that the attorney acted "for the purpose of misleading or misinforming the other party"—one of the three required elements of fraud. ***Id.*** at 108. In ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 321-22, 401 N.W.2d 816 (1987), the Wisconsin Supreme court reaffirmed that "***Goerke*** requires affirmative proof of fraudulent conduct on the attorney's part before that attorney may be held liable to a nonclient," and that '[a]n attorney may not be held liable [to a nonclient] for mere negligence."

¶12 Hannan concedes that Wisconsin courts have recognized that an attorney has qualified immunity from suits brought by nonclients. He offers several theories, however, as to why Chritton's alleged actions should fall within an exception to that rule. Hannan appears to argue that: (1) the allegation that Chritton failed to inform Bakken about the discrepancy between the legal descriptions was sufficient to state a claim for fraud within the already recognized exception to the qualified immunity rule; (2) even if not fraudulent, Chritton's alleged failure to disclose the discrepancy constituted a "tortious act" within the meaning of the stated exception to the qualified immunity rule; and (3) based on cases from other jurisdictions and/or public policy, the exception to the qualified immunity rule should be expanded to include a situation such as the one presented here. We conclude that none of these contentions has merit.

¶13 Regardless whether Chritton's failure to disclose the discrepancy could be deemed a misrepresentation by conduct, as Hannan contends, we agree with the circuit court that the complaint failed to state a claim for fraud because Hannan failed to allege that Chritton acted for the purpose of misleading or misinforming the other party. *See* ***Goerke***, 67 Wis. 2d at 108. Hannan argues that an intent to deceive could be inferred from the other allegations of the complaint. We disagree. Aside from the requirement that fraud allegations must be made with specificity under WIS. STAT. § 802.03(2), the only reasonable inference that can be made from Chritton's request that the title company resolve the discrepancy is that Chritton did not know which of the conflicting legal descriptions was accurate. He cannot be deemed to have an intent to deceive if he did not know that he was relying on an inaccurate legal description. Finally, we note that the erroneous description originated not from Chritton or his clients but from a survey provided by the sellers, Bakken's clients, who were in the best position to know exactly what land they owned and were able to sell.

¶14 Hannan spends a good portion of his brief attempting to establish that Chritton assumed a duty of care to Bakken and his clients by agreeing to obtain the title insurance, and that Chritton breached that duty, thereby committing a "tortious act" that falls outside the scope of an attorney's qualified immunity. Regardless of the types of tortious acts other than fraud that might qualify for the "tortious act" exception, however, Hannan ignores the fact that Wisconsin courts have repeatedly concluded that an attorney's liability to non-clients for allegedly *negligent* acts is precisely what the qualified immunity rule precludes. Thus, Chritton enjoys immunity for any negligent breach of an assumed duty to Bakken or his clients, even if such an assumed duty could be proven to exist.

¶15 Hannan asserts that courts in other jurisdictions have recognized claims against lawyers by nonclient buyers or sellers in real estate transactions. None of the cases Hannan cites is directly on point, however. ***Mullen v. Cogdell***, 643 N.E.2d 390 (Ind. Ct. App. 1995), is inapposite because it deals with a constructive fraud claim, not mere negligence. ***Stinson v. Brand***, 738 S.W.2d 186 (Tenn. 1987) is inapposite because of a factual finding that the attorney in that case actually represented both the buyers and sellers because he planned to charge both for his services. While ***Collins v. Binkley***, 750 S.W.2d 737 (Tenn. 1988), ***Petrillo v. Bachenberg***, 655 A.2d 1354 (N.J. 1995), and ***Century 21 Deep South Properties, Ltd. v. Corson***, 612 So.2d 359 (Miss. 1992), all allow claims against attorneys by nonclients to proceed, the nonclients in these cases were all parties to underlying real estate transactions, not attorneys representing those parties, and the principle applied in each instance was some variation of the "foreseeable reliance" rule. That is, suit was allowed where an attorney could reasonably foresee that a nonclient would be relying on information or legal work that the attorney provided.

¶16 The Wisconsin Supreme Court has recognized a similar foreseeable reliance exception to an attorney's qualified immunity in the will-drafting context. S*ee, e.g.,* ***Auric v. Continental Cas. Co.***, 111 Wis. 2d 507, 514, 331 N.W.2d 325 (1983). The court has explicitly declined, however, to extend the exception to the real estate transaction context where arm's length negotiations were involved, noting that when parties have retained separate counsel, there is a strong indication that arm's length negotiations have occurred. ***Green Spring Farms***, 136 Wis. 2d at 328-29. As in ***Green Spring Farms***, the parties in this case were involved in an arm's length transaction with separately retained counsel. Nothing in the cases

Hannan cites provides a reasonable basis for adopting a theory that the supreme court rejected in ***Green Spring Farms***.

¶17 In sum, we are satisfied that the circuit court applied the correct legal standard to the facts before it. The court did not err by determining that a reasonable attorney who had investigated the relevant law should have known that a claim for negligence against an attorney on behalf of an opposing attorney in an arm's length real estate transaction was not viable, and that no reasonable basis existed to argue in good faith for a modification of the current rule.

¶18 Finally, Hannan argues that the court should have awarded the "least severe" amount of attorney fees necessary to achieve the purpose of WIS. STAT. § 802.05. Hannan cites no Wisconsin authority to support this proposition, however, and we are aware of none. Rather, Hannan relies on cases interpreting Federal Rule 11, which contains significantly different language. Again, we see no misuse of discretion on the circuit court's part in granting the relief that it did.

¶19 Chritton requests attorneys fees and costs for this appeal. Because Hannan has unsuccessfully appealed a determination that he filed a frivolous complaint, we deem the appeal frivolous *per se*. *See* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). We therefore remand with directions that the circuit court determine and award the respondents their costs and reasonable attorney fees for this appeal.

By the Court.—Order affirmed and cause remanded for further proceedings.

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