COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1485 **Cir. Ct. No. 2008SC956**

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

GORDON P. KNUTH,

PLAINTIFF-APPELLANT,

V.

TOWN OF CEDARBURG,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 ANDERSON, J.[1] Gordon P. Knuth contests the circuit court's determination that his small claims action was frivolous and awarding the Town of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Cedarburg $4670.13 in actual attorney fees, costs and disbursements. Knuth is not appealing the circuit court's decision to dismiss the small claims case. "Rather [his] appeal IS about the ruling that the claim is 'Frivolous' and that a money judgment of $4670.13 as awarded to the Town of Cedarburg … is reasonable." He asserts that the underlying action was not frivolous because his actions were not "intentional harassment." He also contends that the Town failed to prove the amount of the actual attorney fees and that the fees were reasonable.

¶2 We conclude that the circuit court appropriately exercised its discretion when it found that Knuth's small claims action was frivolous because "there's no good faith basis to bring the claim," and we affirm in part. We reverse in part because we conclude the circuit court inappropriately exercised its discretion when it awarded actual attorney fees and costs without considering the alternative sanctions provided in WIS. STAT. § 802.05(3).

¶3 After receiving his property tax bill for 2007, Knuth believed that the wrong equalized tax rate for the school district was used and the portion of his property taxes attributable to the school district was too high by $455.32. Knuth filed a three-count, small claims complaint—Count 1 sought a refund of $455.32 under WIS. STAT. § 74.37, Count 2 sought a money judgment of $3300, and Count 3 was labeled a "[r]equest for documentation to support verbal testimony." The Town responded by filing a "Motion To Dismiss, Preliminary Answer and Affirmative Defenses."[2]

[2] The Town complied with the "safe harbor" provisions of WIS. STAT. § 802.05(3)(a)1. by serving Knuth with a copy of the "Motion To Dismiss, Preliminary Answer and Affirmative Defenses" on September 3, 2008, and then filing the document with the circuit court, along with a "Motion for Sanctions, Including Reasonable Expenses and Attorney Fees, Pursuant to [§] 802.05," on October 2, 2008.

¶4 At a hearing on October 9, 2008, the Town argued that Count 1 should be dismissed because Knuth failed to follow the procedure mandated by WIS. STAT. § 74.37; Knuth countered that he could not follow that procedure because the tax bill was mailed after the time limits for acting had expired. The Town asked that Count 2 be dismissed because it was barred by claim preclusion since Knuth was seeking a money judgment relating back to a 2005 small claims action raising the same issue as Count 1 and which was dismissed in favor of the Town. Knuth responded that the town had acknowledged it made an error on his 2002 property tax bill and it promised to file a claim with its insurance carrier and had failed to follow through. Finally, the Town asked that Count 3 be dismissed because it was an "open records" request and not appropriate for a small claims action. The circuit court dismissed Counts 2 and 3 during the hearing on October 9, 2008, and took the motion to dismiss Count 1 under advisement.

¶5 Before the next hearing, the Town filed a letter with the court providing additional information as to the equalized tax rate for the school district. During a hearing on February 6, 2009, Knuth attempted to explain the mathematical error in his property tax bill and the Town responded:

> [T]he absurd thing is Mr. Knuth doesn't understand the process. He raises a question. He concocts a theory. And then he sues the town over it. And the town is left defending it. And there is no basis to it. It clearly is a case of miss—abuse of the judicial process.

¶6 The Town expanded on its theory that Knuth misconstrues information provided to him and argued[3]:

[3] The Town told the court that Knuth had filed a similar claim over his 2008 property tax bill while this challenge to his 2007 property tax bill was pending.

> This is a frivolous case. It never should have been brought in the first place. There's a history there and a pattern that Mr. Knuth follows against the town, and this is a perfect example.

¶7 At the conclusion of the hearing, the court again took the motion to dismiss Count 1 and to impose sanctions under WIS. STAT. § 802.05 under advisement. The Town filed a draft of its attorney fees showing that it had incurred over $4000 in legal fees.

¶8 At a final hearing, the Town again pressed its argument the Knuth's complaint was entirely without merit. "It's frivolous. It wasn't brought for any proper purpose other than to harass or cause needless litigation expense for the Town of Cedarburg. And there's no good faith argument here for a change of law." Knuth responded that his "claim certainly was not with any intent or malice to try and harm the town or the school district in any way."

¶9 The circuit court dismissed Count 1:

> Besides the fact that I believe it's procedurally barred as argued by the [Town] here, the claim simply fails to state any ground on which the Court can grant relief. You know, saying that I'm confused about how the town assessed my property for this school district doesn't equate to being overtaxed, which is what you alleged in Count 1, that there was a mathematical miscalculation. And being confused or having different numbers doesn't make it a miscalculation.

¶10 The circuit court also found that Knuth's small claims action was frivolous:

> And unless you can convince me by some evidence that is not in this file that there's some legitimate basis for this is frivolous. And it isn't because you have malice necessarily. It's because there's no good faith basis to bring the claim. Nor is there any argument in good faith to extend the laws that currently exist to cover this kind of a claim. That's the problem.

> And, you know, as an American citizen you can hold any belief that you want to about the appropriateness of the numbers that the town is using to assess your property. But when you undertake to file a lawsuit which causes the other side to incur substantial expenses and there's no basis for the claim then it becomes more problematic. Because I'm not saying you have to accept what they say in your heart or adopt it as your belief. But at some point there needs to be a recognition that it's accurate. This is frivolous. All—none of the counts—not any part of this lawsuit stated any good faith claim upon which this Court could grant relief. Grant the defendant's motion to dismiss. Grant actual attorney's fees and costs because I did find the matter to be frivolous. All right. Thank you.

¶11 Knuth does not challenge the reasons the circuit court gave for dismissing each individual count; rather, he is challenging the court's decision that the small claims action was frivolous because a good faith claim could not be made that, under the existing facts, Knuth was entitled to relief. Also, he argues that the Town failed to prove the amount and reasonableness of the actual attorney fees awarded as a sanction. Finally, while Knuth does not raise the issue, we conclude that the circuit court failed to demonstrate the reasoning process it employed to select the sanction of actual attorney fees, skipping a plethora of other sanctions.

¶12 Whether Knuth commenced a frivolous action in this case presents a mixed question of law and fact. ***Juneau County v. Courthouse Employees***, 221 Wis. 2d 630, 639, 585 N.W.2d 587 (1998). What Knuth knew or should have known before commencing this action is a question of fact that we will not disturb unless clearly erroneous. ***Id.*** Similarly, "[t]he findings by the circuit court of what was said, what was done, what was thought, and reasonable inferences drawn therefrom, are questions of fact" that we uphold unless against great weight of evidence. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). However, whether the facts in the record meet the legal standard of

frivolousness is a question of law that we review without deference to the circuit court. ***Juneau County***, 221 Wis. 2d at 639. In reviewing a WIS. STAT. § 802.05 decision, our review is deferential. ***Riley v. Isaacson***, 156 Wis. 2d 249, 256, 456 N.W.2d 619 (Ct. App. 1990).

¶13 A claim is frivolous when the claim lacks "any reasonable basis in law or equity." ***Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 563, 597 N.W.2d 744 (1999) (citation omitted). In determining whether an action is frivolous, a court should keep in mind that a significant purpose of the frivolous action statute is to help maintain the integrity of the judicial system and the legal profession. ***Sommer v. Carr***, 99 Wis. 2d 789, 799, 299 N.W.2d 856 (1981). "[C]ourts and litigants should not be subjected to actions without substance." ***Jandrt***, 227 Wis. 2d at 572. A determination of frivolousness, however, is "an especially delicate area"; a court must be cautious in declaring an action frivolous, lest it stifle the "ingenuity, foresightedness and competency of the bar." ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 613, 345 N.W.2d 874 (1984). "Because it is only when no reasonable basis exists for a claim or defense that frivolousness exists, the statute resolves doubts in favor of the litigant or attorney." ***Swartwout, III v. Bilsie***, 100 Wis. 2d 342, 350, 302 N.W.2d 508 (Ct. App. 1981).

¶14 WISCONSIN STAT. § 802.05(2) requires the person who signs a complaint to make three warranties: (1) the complaint was not filed for an improper purpose; (2) the information contained therein is well grounded in fact based on knowledge, information and belief formed after reasonable inquiry; and (3) a reasonable inquiry has been conducted and the complaint is supported "by existing law or a good faith argument for a change in it." ***Jandrt***, 227 Wis. 2d at

548. If any of the warranties turns out to be untrue, the complaint can be deemed to be frivolous.

¶15 *Count 1*. The crux of Knuth's theory is the Town used the wrong equalized tax rate to compute the taxes for the school district and he was over assessed $455.32. Knuth insists that the correct equalized tax rate is $8.9010 per $1000 of equalized valuation. The record before this court fails to support Knuth's theory. It is clear that the equalized tax rate was $11.61188 and the rate Knuth obsessed on is the 2007 lottery credit amounts.

¶16 Knuth brought Count 1 under WIS. STAT. § 74.37. Section 74.37 is one of "three ways to obtain relief from a tax assessment following a board of review's determination." ***Trailwood Ventures, LLC v. Village of Kronenwetter***, 2009 WI App 18, ¶4, 315 Wis. 2d 791, 762 N.W.2d 841, *review denied*, 2009 WI 23, 315 Wis. 2d 724, 764 N.W.2d 533. Knuth is not challenging the assessment of the value of his property, he is challenging the appropriate tax rate to apply to that assessment; thus, the statute is not available to him and he has failed to state a claim for relief. Therefore, we affirm the circuit court's conclusion that Count 1 was frivolous.

¶17 *Count 2*. We agree with the circuit court that this count was frivolous from the commencement of this action. First, Knuth was seeking to relitigate an issue that was decided against him in ***Knuth v. Town of Cedarburg***, Ozaukee county case No. 2005SC988, and any such attempt is blocked by claim

preclusion.[4] Second, Knuth argued to the circuit court that an email he received from the Town administrator was a stipulation that the Town and its insurance carrier agreed that Knuth's theory was correct and he was due a refund on his earlier property tax payments. No reasonable person could make a good faith argument that the email Knuth hangs his hat on supports an interpretation that his claim was allowed.

¶18 *Count 3*. We also agree that Knuth's demand for documents to support verbal testimony is frivolous. We interpret this issue as being a demand for the production of public records. It is frivolous because a small claims action is not the proper way to secure the production of public records[5]. Further, Knuth had been informed by the attorney general and the Washington county district attorney that there had been no "open records" violations in responding to his multiple demands for information on the equalized tax rate.

¶19 *Sanction*. We now turn to the awarding of actual attorney fees as a sanction for commencing and pursuing a frivolous small claims action. In 2005, the supreme court put in place extensive revisions to Wisconsin's frivolous action rule, WIS. STAT. § 802.05. *See* Janine P. Geske & William C. Gleisner III, *Frivolous Sanction Law in Wisconsin*, 79 WIS. LAWYER 16 (Feb. 2006). One of the major changes to the frivolous sanction rule was how sanctions were awarded and what sanctions could be awarded. Geske points out that gone from the old

[4] "Under claim preclusion, a final judgment in an earlier matter is conclusive upon the parties in that earlier matter *and those in privity* with those parties, and the final judgment governs all issues that were either litigated or might have been litigated." ***Isaacs Holding Corp. v. Premiere Prop. Group, LLC***, 2004 WI App 172, ¶38, 276 Wis. 2d 473, 687 N.W.2d 774.

[5] The procedure to be followed to obtain public records is detailed in WIS. STAT. §§ 19.31-19.39.

rule "is the suggestion that an aggrieved party can automatically use frivolous action rules to secure full compensation for the actual costs and attorney fees incurred due to allegedly frivolous conduct." ***Id.*** at 19.

¶20 The changes to WIS. STAT. § 802.05 give the court a larger arsenal of sanctions that can be employed against offenders. As Geske points out, in the commentary accompanying the revisions to § 802.05, the supreme court quoted extensively from the Federal Notes to the equivalent federal rule:

> The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities ….

Janine P. Geske & William C. Gleisner III, *Frivolous Sanction Law in Wisconsin*, 79 WIS. LAWYER at 19. In this case, the circuit court erred when it went right to awarding actual attorney fees; it did not consider the lesser sanctions that are now in its arsenal.[6]

¶21 Further, the circuit court failed to engage in a reasoning process to demonstrate what factors supported the award of actual attorney fees. In the Federal Notes, cited by the supreme court when adopting the revisions to WIS. STAT. § 802.05, it was mentioned:

> The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction

[6] The amount and reasonableness of the attorney fees was never proven by the Town. The Town submitted a draft of the attorney fees and costs incurred, but never introduced evidence into the record—either through testimony or an affidavit—to support its request for actual attorney fees and costs. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶¶31, 34, 275 Wis. 2d 1, 683 N.W.2d 58.

> or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations.

Janine P. Geske & William C. Gleisner III, *Frivolous Sanction Law in Wisconsin*, 79 WIS. LAWYER at 19 (citation omitted).

¶22 In this case, the court explained why it was dismissing all three counts and why it found the action frivolous; however, it failed to explain the factors it relied upon to support the levying of actual attorney fees as a sanction. All the court said was "*[g]rant actual attorney fees and costs because I did find the matter to be frivolous*."

¶23 Mere conclusions reached by the circuit court do not form an adequate basis for review.

> Appellate review of discretionary decisions is virtually impossible where there is no record of the trial court's reasoning in reaching a particular conclusion. Our supreme court has explained that the exercise of discretion is more than simply making a decision: it requires a reasoning process dependent upon facts in, or reasonable inferences from, the record and a conclusion based on proper legal standards. "There should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." The failure to set forth the reasoning used to reach a decision is an abuse of discretion.

Holbrook v. Holbrook, 103 Wis. 2d 327, 339-40, 309 N.W.2d 343 (Ct. App. 1981) (footnote omitted). Furthermore, as our supreme court stated in ***Hartung v. Hartung***, 102 Wis. 2d 58, 67, 306 N.W.2d 16 (1981): "It is not enough that the relevant factors upon which discretion could have been based may be found obscurely in the record. If the exercise of discretion is to be upheld, it must be demonstrated on the record that those factors were considered in making the discretionary determination." From this court's review of the record, the circuit court's failure to demonstrate which, if any, factors were relied upon is, according to ***Holbrook*** and ***Hartung***, an erroneous exercise of discretion.

¶24 *Conclusion*. We agree with the circuit court that Knuth lacked a good faith basis to bring the claims contained in the small claims action and affirm the conclusion that they are frivolous. We conclude that the trial court erroneously exercised its discretion when it awarded actual attorney fees because it failed to consider what factors supported the award of a sanction and what sanction would be appropriate. Therefore, we remand to the circuit court to consider what, if any, sanctions are appropriate for Knuth's proceeding with his small claims action.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.