**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

February 20, 1997



**NOTICE**



**No. 96-1148**

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

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**ROBERT B. CIARPAGLINI,**

**Plaintiff-Appellant,**

**v.**

**KELLY FLURY and BELOIT DAILY NEWS,**

**Defendants-Respondents.**

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APPEAL from an order of the circuit court for Green County: JAMES E. WELKER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Robert B. Ciarpaglini appeals from an order which dismissed his defamation action, as a sanction for failing to obey a court order, and required him to pay attorney fees, for filing a frivolous lawsuit. Ciarpaglini argues that his failure to obey the order was excusable because he mailed the motion which violated the court's order on the same day that the court issued the order, and that the award of attorney fees was improper

because his lawsuit was meritorious on its face. Because Ciarpaglini's conduct leading to the violation of a court order was egregious and without a clear and justifiable excuse, we determine that the circuit court did not abuse its discretion by dismissing the action. And, although the court did not make factual findings required by § 814.025, STATS., we conclude that an award of attorney fees was proper under § 802.05, STATS., as a matter of law. Therefore, we affirm.

## BACKGROUND

On November 9, 1995, Robert Ciarpaglini filed a defamation action in Rock County against reporter Kelly Flury and the Beloit Daily News for an article in which Flury had commented on Ciarpaglini's history of *pro se* litigation. Ciarpaglini claimed that Flury had knowingly, recklessly, and maliciously made the following statements, which Ciarpaglini claimed were false:

(1) "Ciarpaglini, a former Beloit resident, and now a resident of the Dodge Correctional Institution."[1]

(2) "He has filed 39 civil cases in Dane County circuit court since 1989."

(3) "He has filed 59 civil cases in the U.S. District court in Madison since 1989."

(4) "Ciarpaglini, 27, is serving a 10 year prison term."

(5) "In 1993, he was charged with extortion for trying to get his girlfriend to report a burglary that never happened so he could collect insurance money."

(6) "He was also accused of printing up letterhead stationary bearing the name Pro Say Legal Services of

[1] Ciarpaglini was a prisoner in the custody of the Department of Corrections at the time the complaint was filed and re-filed; however, he was confined at Waupun Correctional Institute.

> Wisconsin and offering his legal services to Rock County Jail inmates for a $20 fee."

(7) "In Rock County circuit court, Ciarpaglini filed three lawsuits last week alone. Two of them concern his removal from community-based intensive sanctions back to minimum security prison and then to medium security prison and then to the maximum security Dodge Correctional Institute."

Ciarpaglini also filed an affidavit of indigency and petitioned the court for leave to proceed *in forma pauperis*, without disclosing the terms of a prior settlement which should have provided him sufficient funds to pay filing fees.[2] The circuit court denied the fee waiver petition on November 10, 1995, on the ground that the complaint failed to state a claim upon which relief could be granted. It reasoned that:

> … taking all of the allegations in the light most favorable to the movant, the moving complaint does not state an arguably meritorious claim upon which relief can be granted. ***State ex rel. Rilla v. Circuit Court for Dodge County***, 76 Wis 2d 429; 251 N.W. 2d 476 (1977); Sec. 814.29, *Wisconsin Statutes*. The activities complained of are protected by the First Amendment to the United States Constitution and Article One, Section Three, of the Wisconsin Constitution. There is no allegation or reasonable inference that can be drawn from the complaint that would take the action complained of outside the ambit of protected speech.

Ciarpaglini never appealed the Rock County order. Instead, on November 29, 1995, Ciarpaglini filed the same defamation suit against Flury and the Beloit Daily News in Walworth County. The complaint alleged the same underlying facts as had been alleged in Rock County, except that it

[2] On December 3, 1993, Ciarpaglini accepted a $4,000 settlement from the Department of Corrections in exchange for which he agreed not to proceed against the state *in forma pauperis* for three years.

claimed Flury was a resident of the City of Delavan, County of Walworth, thereby creating a basis for venue in Walworth County. The Walworth County Circuit Court forwarded the case to Rock County, where the circuit court again denied Ciarpaglini leave to proceed without paying filing fees.

On February 9, 1996, Ciarpaglini filed the same defamation suit for the third time, but in Green County. He alleged that Flury resided in Monroe, creating a basis for venue in Green County. The Green County Circuit Court waived the filing fees. On March 6, 1996, the defendants moved to vacate the order waiving filing fees, to dismiss the complaint for failure to state a claim, to change venue, and to award costs, alleging the action was frivolous. Ciarpaglini requested the substitution of Judge Deininger and the case was again assigned to Judge Welker in Rock County.

On April 3, 1996, Judge Welker issued an order requiring Ciarpaglini to file affidavits explaining his basis for believing that Flury resided in Delavan or in Monroe, and listing all funds he had received and dispersed since the December 1993 stipulation. It also ordered that no further motions or other pleadings be filed pending Ciarpaglini's compliance with its order.

On April 8, 1996, Ciarpaglini filed a motion, which he dated April 3, 1996, requesting that Judge Welker recuse himself because Ciarpaglini planned to name him as a codefendant in an amended complaint. The motion set forth no facts to explain any possible connection between the judge and the defamation action. The court dismissed the action two days later, stating:

> The filing of [the recusal] motion is a disobedience of the prior order of the court. Based upon [Ciarpaglini's] conduct in this case and his history of flagrant disregard of court orders, it is apparent to this court that the plaintiff will not comply with the orders of this court.

In addition, the court awarded the defendants $1,221 in attorney fees, reasoning that Ciarpaglini should have known that the lawsuit was frivolous after his petitions to proceed *in forma pauperis* were twice denied for failure to state a

claim upon which relief could be granted. Ciarpaglini appeals both the order dismissing his defamation action and the award of attorney fees.

## DISCUSSION

### Standard of Review.

A circuit court has discretionary authority to dismiss an action when a participant fails to obey the court's orders. ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). We will sustain a discretionary dismissal, "if the circuit court has 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." ***Id.***

The circuit court's determination that an action was frivolous presents a mixed question of fact and law. ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 187 (Ct. App. 1984). What a litigant knew or should have known is a factual finding which will not be reversed unless clearly erroneous. ***Kelly v. Clark***, 192 Wis.2d 633, 646, 531 N.W.2d 455, 459 (Ct. App. 1995). Whether knowledge of the relevant facts would lead a reasonable litigant to conclude that the action was without a reasonable basis in law is a question of law to be reviewed *de novo.* ***James A.O. v. George C.B.***, 182 Wis.2d 166, 184, 513 N.W.2d 410, 416 (Ct. App. 1994).

### Dismissal.

The circuit court has both statutory and inherent authority to sanction parties for failure to comply with its orders. ***Johnson***, 162 Wis.2d at 273-74, 470 N.W.2d at 863. The "court has the inherent power to resort to a dismissal of an action in the interest of the orderly administration of justice.… [because] general control of the judicial business before it is essential to the court if it is to function." ***Latham v. Casey & King Corp.***, 23 Wis.2d 311, 314, 127 N.W.2d 225, 226 (1964). And, § 805.03, STATS., provides additional authority for dismissal when court orders are not obeyed.

The Judicial Council Committee's Notes to the predecessor of § 805.03, STATS., advise that "[b]ecause of the harshness of the sanction, a dismissal under this section should be considered appropriate only in cases of egregious conduct by a claimant." Once egregious conduct is shown, an aggrieved party must establish a "clear and justifiable excuse" for the conduct in order to avoid the court's dismissal power. *See* ***Trispel v. Haefer***, 89 Wis.2d 725, 733, 279 N.W.2d 242, 245 (1979).

The circuit court in this case properly exercised its discretionary dismissal authority based on relevant facts, the proper standard of law, and a demonstrated rational process. Whether Ciarpaglini received the court's order directing him to file no further motions before defying it, is a question of fact. Ciarpaglini claims that his recusal motion and the order precluding filing further motions must have passed in the mail. However, five days passed after the order's issuance before the motion was filed. The trial court had the file and would have seen the postmark on the envelope containing the plaintiff's motion. It was in the best position to decide whether the date Ciarpaglini placed on the document was accurate. Implicitly, it found the date was not accurate. *See* ***State v. Echols***, 175 Wis.2d 653, 672, 499 N.W.2d 631, 636 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the trial court."). In light of the evidence suggesting that Ciarpaglini had falsified his complaint to establish venue, and the frivolous nature of the recusal motion itself, we cannot say that the court's implicit finding that Ciarpaglini knowingly filed his motion in defiance of the court's order was clearly erroneous.

Furthermore, it was rational for the court to conclude that Ciarpaglini's filing of the recusal motion represented an egregious and unjustified attempt to manipulate the judicial process because there was an absence of any information in the record explaining Ciarpaglini's factual basis for naming the judge as a defendant. Therefore, the court could reasonably interpret the recusal motion as an attempt to avoid compliance with the court's prior orders. The court properly exercised its discretion when it dismissed the case.

**Attorney Fees.**

The trial court awarded attorney fees to the defendants because it determined Ciarpaglini's defamation action was frivolous. Under § 814.025(1), STATS., the circuit court shall award costs for frivolous claims commenced or continued by a plaintiff. In order to find an action frivolous under subsec. (1), the court must find either:

> (a) The action … was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another; [or]
>
> (b) The party … knew, or should have known, that the action … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Section 814.025(3), STATS. Thus, a determination that an action is meritless is insufficient to conclude that it is frivolous. ***Lamb v. Manning***, 145 Wis.2d 619, 628, 427 N.W.2d 437, 441 (Ct. App. 1988). Rather:

> The statute does not allow the trial judge to conclude frivolousness or lack of it without findings stating which statutory criteria were present, harassment or knowledge or imputed knowledge that there was not "any reasonable basis in law or equity" for the position taken.

***Sommer v. Carr***, 99 Wis.2d 789, 792, 299 N.W.2d 856, 857 (1981).

The trial court's order in this case does not mention which subsection of the statute it was applying. This court could infer that the trial court intended to apply § 814.025(3)(b), STATS., since it found that "the plaintiff knew or should have known based upon two prior times when he filed this

same lawsuit that there was no reasonable basis upon which he could have prevailed and that this action is frivolous." However, the original denial of Ciarpaglini's indigency fee waiver did not constitute judgment on the merits of his defamation action. Had Ciarpaglini paid the filing fees within thirty days, his action could have proceeded. Or, had Ciarpaglini sought review of the Rock County order through the proper channels instead of playing venue games, this court could have directly addressed the sufficiency of his complaint.

The order awarding attorney fees made no analysis of the actual merit of the defamation action. The only discussion of the merits of the complaint occurred in the prior orders denying the plaintiff's motions to waive filing fees, but these orders are insufficient to sustain the trial court's award of attorney fees based on § 814.025(1) and (3)(b), STATS.

However, our conclusion on the § 814.025, STATS., issue does not end our analysis of whether the award of attorney fees was proper. This court "may affirm a lower court's decision on different grounds than those relied upon by the lower court." ***Koestler v. Pollard***, 162 Wis.2d 797, 809 n.8, 471 N.W.2d 7, 12 n.8 (1991), *citing* ***Saenz v. Murphy***, 162 Wis.2d 54, 57 n.2, 469 N.W.2d 611 (1991).

Our independent review of the record persuades us that the undisputed evidence would support the trial court's award of attorney fees under § 802.05(1)(a), STATS. That section provides, in part:

> The signature of a … party constitutes a certificate that the … party has read the pleading … [and] that to the best of the … party's knowledge, information and belief, formed after reasonable inquiry, the pleading … is well-grounded in fact …. If the court determines that … [a] party failed to read or make the determinations required under this subsection before signing any [pleading] … the court may, … upon its own initiative, impose an appropriate sanction on the person who signed the pleading …. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that

> party because of the filing of the pleading, … including reasonable attorney fees.

If any one of the three prongs[3] of § 802.05(1)(a) has been violated, sanctions may be imposed. ***Riley v. Isaacson***, 156 Wis.2d 249, 255, 456 N.W.2d 619, 621 (Ct. App. 1990).

We conclude that the undisputed facts of record demonstrate Ciarpaglini's pleadings were not well-grounded in knowledge formed after a reasonable inquiry. They alleged that Flury resided in Monroe and in Delavan, while her affidavit establishes that she resided in Janesville. Ciarpaglini has provided no basis for the inconsistent allegations he made in the three filings of his defamation action. Instead, Ciarpaglini attempted to rid himself of the judge who was calling him to account. The record provides sufficient evidence to conclude that Ciarpaglini knew the allegations he made in his complaints, in regard to Flury's residence, were not well-grounded in fact. We are satisfied that the result reached by the trial court—an award of attorney fees—was supported by uncontradicted evidence in the record; and therefore, we affirm the award.

## CONCLUSION

The circuit court's discretionary determination that Ciarpaglini's conduct merited dismissal was rational and based on appropriate law and facts of record. However, the court's finding that Ciarpaglini should have known that his defamation action was without a reasonable basis in law because the court had previously issued an unappealed order denying a fee waiver on that basis, was insufficient to support the conclusion that the lawsuit was frivolous. Nonetheless, we conclude that the award of attorney fees was a proper sanction under § 802.05(1)(a), STATS., because Ciarpaglini failed to explain any basis for the inconsistent facts which he alleged in his attempts to establish venue in three different counties.

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[3] The three obligations § 802.05(1)(a), STATS., imposes on the signatory of pleadings are: (1) proper purpose, (2) knowledge formed after a reasonable inquiry, and (3) a good faith belief the pleading is warranted under the law.

*By the Court* – Order affirmed.

Not recommended for publication in the official reports.