COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 97-0932

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

CARL H. CREEDY,

PLAINTIFF-APPELLANT,

V.

AXLEY BRYNELSON, FRANK J. BUCAIDA, BRADLEY D. ARMSTRONG, JOHN S. SCHMID, JR., TIMOTHY D. FENNER, JOHN C. MITBY, DANIEL T. HARDY, JOHN E. WALSH, BRUCE L. HARMS, DAVID W. EASTON, CURTIS C. SWANSON, MICHAEL S. ANDERSON, PATRICIA M. GIBEAULT, MICHAEL J. WESTCOTT, LARRY K. LIBMAN, RICHARD E. PETERSHACK, STEVEN A. BREZINSKI, STEVEN M. STRECK, JOY L. O'GROSKY, ARTHUR E. KURTZ, AND EDITH F. MERILA,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. Carl Creedy, an attorney formerly employed by the Axley Brynelson law firm in Madison, sued the firm after his employment was terminated. He advanced several claims: wrongful discharge, breach of an employment contract, negligence, quasi-contract, *quantum meruit*, defamation, and invasion of privacy. The trial court granted summary judgment dismissing the action after Creedy declined to respond to discovery requests for factual information underlying his claims. The court also assessed frivolous-action costs totaling $27,670.13 under § 814.025(3)(a) and (b), STATS.

Creedy argues on appeal that the trial court erred in dismissing his action because the information sought by the firm's discovery requests is privileged under the law. We reject the argument and affirm the judgment in all respects.

Creedy worked for Axley Brynelson as an "incentive associate" under annual contracts compensating him on the basis of an established percentage of receipts the firm collected for his work. In his last year with the firm, he worked without a contract.

Two years after he was fired, Creedy brought this action. He alleged, among other things, that members of the firm were negligent, breached his employment agreement and otherwise wrongfully fired him because of their "failure … to carry on the profession of the practice of law, in full compliance with all applicable federal and state laws and requirements, including, but not limited to, Wisconsin Supreme Court Rules Chapter 20, Rules of Professional Conduct for Attorneys." Creedy's *quantum meruit* and quasi-contract claims are

based on assertions that he was underpaid.[1] He also alleged that members of the firm defamed him when they issued a statement indicating that he and the firm "have agreed he will terminate his employment at Axley Brynelson."[2] His invasion-of-privacy claim is based on allegations that, after his departure, employees of the firm opened mail addressed to him.

Axley Brynelson served interrogatories on Creedy attempting to ascertain the factual basis for his several claims. Creedy declined to respond, arguing that the sought-after information was privileged and confidential under SCR 20:1.6(a) (West 1996), which precludes a lawyer from "reveal[ing] information relating to representation of a client" without the client's consent. After several hearings on the firm's motion to compel discovery—to which Creedy responded with a motion to limit the scope of the firm's inquiries—the trial court ordered him to disclose the information. When he continued to refuse, the firm moved for summary judgment dismissing the action. Finding that no genuine issue of material fact was in dispute, the court granted the motion. As indicated, the court also found that Creedy's action was frivolous under § 814.025, STATS., and awarded costs and attorney's fees to the firm.

I. Summary Judgment

In summary judgment cases, we apply the same methodology as the trial court, considering the issues *de novo*. ***In re Cherokee Park Plat,*** 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983); § 802.08, STATS. While the

[1] The *quantum meruit* and quasi-contract claims were apparently satisfied, either during or after the action, and do not appear to be at issue on appeal.

[2] Creedy also claimed various Axley Brynelson partners defamed him when they stated that he had resigned from the firm "because he had other plans" and "because he did not fit in."

party moving for summary judgment has the burden of establishing the absence of genuine issues of material fact in the litigation, it is also incumbent upon the plaintiff to demonstrate that sufficient evidence exists to go to trial in order to survive a motion for summary judgment. ***Kaufman v. State St. Ltd. Partnership,*** 187 Wis.2d 54, 58, 522 N.W.2d 249, 251 (Ct. App. 1994).

In response to Axley Brynelson's summary-judgment motion, Creedy filed an affidavit stating simply that he "verifies that all of the allegations contained [in his complaint] are true and correct" based on his review of "files and related business records regularly maintained by him." Not only is this a non-evidentiary document—which, under § 802.08(3), STATS., is an inadequate response to a summary-judgment motion[3]—it is black-letter law that a party may not rely on pleadings to raise a disputed issue of fact sufficient to defeat a motion for summary judgment. ***Southern Wis. Cattle Credit Co. v. Lemkau***, 140 Wis.2d 830, 839, 412 N.W.2d 159, 162 (Ct. App. 1987).

Creedy, attempting to save his action in the face of these principles, states that his claims are based on evidence that he is unable to disclose to opposing counsel—information, he says, related to his and the firm's representation of clients—and is thus subject to the proscriptions of SCR 20:1.6(a).

[3] Section 802.08(3), STATS., states that "opposing affidavits shall be made on personal knowledge and shall set forth *such evidentiary facts as would be admissible in evidence.*" (Emphasis added.) Citing the statute, we said in ***Larson v. Kleist Builders, Ltd.***, 203 Wis.2d 341, 345, 553 N.W.2d 281, 283 (Ct. App. 1996), "If the party opposing summary judgment fails to offer specific evidentiary facts to demonstrate a genuine issue for trial in response to the movant's submissions, then summary judgment shall be entered against such party." (Quotations and quoted source omitted.)

We note first that some of his claims—defamation and invasion of privacy, to name two—do not appear to bear any relationship to client matters at the firm; yet, Creedy failed to put forth any information regarding the nature of these claims in response to the interrogatories, or to the firm's motion for summary judgment. Nor did he suggest in any manner how his "secret" information might relate to his primary claims of breach of contract, wrongful termination and negligence. Indeed, at the hearing on his motion for a protective order, Creedy would say only that the information the firm sought was "confidential," and that he would "stand mute as to the essential facts." It was on this basis that the trial court directed him to comply with the discovery requests or face dismissal of his action.

Under § 804.01(3), STATS., the court may, "for good cause shown," limit the scope of discovery. But the party asserting privilege as a reason for limiting discovery bears the burden of showing that the privilege exists, ***Franzen v. Children's Hosp.,*** 169 Wis.2d 366, 386, 485 N.W.2d 603, 610 (Ct. App. 1992), and Creedy has failed to meet this burden. Not all attorney-client communications are privileged, *see* ***Jax v. Jax,*** 73 Wis.2d 572, 579-80, 243 N.W.2d 831, 835-36 (1976), and nothing in the record suggests that Creedy ever asked the trial court to conduct an *in camera* review of the materials to determine which, if any, were privileged. *See, e.g.,* ***Borgwardt v. Redlin,*** 196 Wis.2d 342, 357-58, 538 N.W.2d 581, 587 (Ct. App. 1995).[4]

The trial court was faced with a complaint alleging numerous claims—from wrongful discharge to defamation to invasion of privacy—based

[4] In its decision on frivolous-action costs, the trial court noted that defendants' counsel had suggested that the "confidential" materials be submitted to the court for *in camera* review.

largely on very general allegations of wrongdoing on the part of Axley Brynelson partners, and with Creedy's failure to identify any fact or piece of admissible evidence to support any of his assertions. Nor, as Axley Brynelson points out, did he offer any cogent explanation as to how the confidential client information he allegedly possessed might possibly support his claims, at least some of which, as we noted above, appear to bear no connection to attorney-client relationships within the firm.

We agree with Axley Brynelson that, on this record, "the [trial] court had no choice but to grant summary judgment against him."

II. Frivolous-Action Sanctions

Section 814.025(3)(a), STATS., states that an action is frivolous when it is "commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another." An action is also frivolous if it is "without any reasonable basis in law or equity and ... not … supported by a good faith argument for an extension, modification or reversal of existing law." Section 814.025(3)(b). As indicated, the trial court found Creedy's action to be frivolous under both subsections.

Whether an action is frivolous under the statute is a question of mixed law and fact. ***Stern v. Thompson & Coates, Ltd.,*** 185 Wis.2d 220, 236, 517 N.W.2d 658, 664 (1994). We will not upset the trial court's findings of historical fact—and the inferences to be drawn from those facts—"unless they are against the clear weight and preponderance of the evidence"—that is, unless they are clearly erroneous. ***Id***. Whether those facts satisfy the statutory definition of frivolousness is a question of law which we review *de novo.* ***Id***.

We begin by noting that Creedy does not dispute the reasonableness of the fee award. He argues only that the trial court erred in concluding that his conduct came within the statutes' purview.

A claim or an action is frivolous under § 814.025(3)(a), STATS., if "the sole motivation for the suit was harassment or malicious injury." ***Id***. at 239, 517 N.W.2d at 665. The inquiry is subjective, and the subsection imposes a "high standard" which "typically would require a finding of bad faith based upon some statements and actions, including, for example, threats." ***Id***. at 239-40, 517 N.W.2d at 665 (citations omitted). The inquiry under § 814.025(3)(b) is objective: whether a reasonable attorney "knew or should have known that the position taken was frivolous." ***Id***. at 241, 517 N.W.2d at 666 (citations omitted).

Because we are satisfied that the trial court correctly concluded that Creedy's action was frivolous under § 814.025(3)(b), STATS., we need not consider whether it was brought solely for purposes of harassment, other than to note that Axley Brynelson argues persuasively that the court's determination that the action was also frivolous under § 814.025(3)(a) finds support in the record.[5]

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[5] As the trial court noted in granting Axley Brynelson's motion, Creedy's complaint made "very serious allegations that th[e] firm had committed some heinous actions … violations of the statutes, both state and federal, and Supreme Court rules," and that even after the passage of several years, he still had not obtained client releases for the alleged confidential information, and had failed to offer any factual basis for the claims. Then, referring to the purpose of § 814.025, STATS., as "maintaining the integrity of the judicial system and the legal profession," ***Stoll v. Adriansen***, 122 Wis.2d 503, 511, 362 N.W.2d 182, 187 (Ct. App. 1984), the court continued:

> That's what we have here. You've got an action commenced, in which you allege serious, almost defamatory statements against Axley Brynelson. Yet, a year later, you have nothing to back it up with, or at least if you do have, you're not going to provide it to anybody.…
>
> ….

(continued)

Creedy argues, essentially, that his action should not be held frivolous because, in essence, it put him between a rock and a hard place. He states that, had he complied with the trial court's discovery ruling, it "would have caused [him] to involuntarily violate his Professional Responsibility under SCR 20:1.6(a)" and thus subject himself to disciplinary action and "civil liability for the unauthorized disclosure of confidential and privileged information." Other than that assertion, his argument on the point is limited to a statement that "it is clear that [his] claims could be supported by a good faith argument for an extension of the existing law," and a reference to out-of-state cases holding that attorney-employees may bring an action for wrongful discharge for "whistle-blowing" under local statutes, or when they are fired "for refusing to violate ethical norms."[6]

We are not persuaded. The trial court found that although Creedy filed his action two years after the events in dispute arose, he had never—even a year later—obtained the consent of any client to release the alleged privileged information. And, as the trial court noted, he continued to hold to his non-disclosure position throughout.

> The Court, therefore, finds under the record here, that the plaintiff has violated 814.025(3)(b) as well as (a), because there is no other purpose that I can see of one's commencing this lawsuit and continuing with it, that it is not meant except to harass the defendants.

[6] We assume the "extension" he seeks is a broadening of the rule of ***Brockmeyer v. Dun & Bradstreet***, 113 Wis.2d 561, 335 N.W.2d 834 (1983), which recognizes a limited public-policy-based exception to the Wisconsin rule of employment-at-will where the employee is fired for refusing to violate a state law or regulation. The ethical considerations raised in SCR chapter 20 are not grounded on the constitution or statutes as ***Brockmeyer*** requires. ***Id***. at 573-74, 335 N.W.2d at 840-41. ***Bushko v. Miller Brewing Co***., 134 Wis.2d 136, 146, 396 N.W.2d 167, 172 (1986).

"A claim is not frivolous merely because there is a failure of proof," or because it is later shown to be incorrect. ***Stern,*** 185 Wis.2d at 243, 517 N.W.2d at 667.

> However, a claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed. That is, if the attorney knows or should reasonably know that the facts necessary to meet the required elements of an allegation … cannot be produced, then the attorney has no cause of action.

Id. at 244, 517 N.W.2d at 667 (citations omitted). We agree with the trial court that is precisely the case here, and we conclude that the court properly decided Axley Brynelson's frivolous-costs motion.

By the Court.–Judgment affirmed.

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