COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-1564

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

IN RE THE MATTER OF THE GUARDIAN AD LITEM FEES
RE THE MARRIAGE OF:

EMMETT JOHN FREDERICK, PETITIONER,

V.

JANE A. FREDERICK, RESPONDENT

ROBERT M. HESSLINK, JR. AND HESSLINK LAW OFFICES, S.C.,

APPELLANTS,

V.

JANE A. FREDERICK, EMMETT JOHN FREDERICK, ROBERT A. RAMSDELL,

RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Reversed and cause remanded with directions.*

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

DYKMAN, P.J. Attorney Robert Hesslink appeals from an order requiring him to pay a portion of Robert Ramsdell's compensation for serving as guardian ad litem in a custody dispute. Hesslink represented Jane Frederick in defense of a motion by her ex-husband to change the physical placement and custody of their son, and Ramsdell served as the son's guardian ad litem during the proceeding. The trial court assessed a portion of Ramsdell's fees against Hesslink on the grounds that Hesslink overtried the case and frivolously moved to remove Ramsdell as the guardian ad litem. Hesslink contends that the trial court erred in so ruling. We agree. Accordingly, we reverse the order and remand for the trial court to reallocate the guardian ad litem's fees.

BACKGROUND

Jane Frederick and Emmett John Frederick were divorced in 1986. They were awarded joint legal custody of their only child, Jason, and Jane was awarded primary physical placement. In February 1993, Emmett filed a motion to revise the divorce judgment, requesting that the court give him sole legal custody and primary physical placement of Jason. Robert Hesslink represented Jane during the post-divorce proceedings, and Robert Ramsdell was appointed as guardian ad litem to represent Jason's best interests.

In May 1993, Hesslink filed a motion to remove the guardian ad litem. The court denied the motion. Emmett eventually withdrew his motion to

change placement and custody in April 1996. The court ordered the dismissal of the motion, but reserved to the guardian ad litem the right to seek an order regarding the payment of his fees.

The guardian ad litem requested the parties to stipulate to the reasonableness of his fees, but Hesslink refused to do so. The guardian ad litem moved the court to find Hesslink's opposition to the reasonableness of his fees frivolous pursuant to § 814.025, STATS. The court found that Hesslink's motion to remove the guardian ad litem was frivolous, but did not find that the challenge to the reasonableness of the guardian ad litem's fees was frivolous. Instead, the court stated:

> Regardless of whether individually these motions rise to a level that constitutes frivolous actions, taken as a whole they represent overtrial of a case that resulted in unnecessary litigation and obscene fees. Therefore, due to the overtrial of these issues, this court determines that [Hesslink] shall contribute to the [guardian ad litem's] fee.

The court ordered Hesslink to pay thirty-eight percent of the guardian ad litem's fees and costs, stating:

> Attorney Hesslink shall be responsible for the fees incurred by the [guardian ad litem] to defend Hesslink's frivolous motion to remove the [guardian ad litem]. In addition, due to the overtrial and litigious nature of this case, attorney Hesslink shall be responsible for one-half of the fees incurred by the [guardian ad litem] to defend the reasonableness of his fees.

Hesslink appeals.

DISCUSSION

Hesslink argues that the trial court erred in assessing a portion of the guardian ad litem's fees against him pursuant to § 814.025, STATS. This section allows the trial court to assess the prevailing party's reasonable attorney fees against the opposing party or the opposing party's attorney when it finds "an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant" to be frivolous. Section 814.025(1).

We conclude that the trial court erred in assessing attorney's fees against Hesslink pursuant to § 814.025, STATS., because Hesslink's motion to remove the guardian ad litem and his challenge to the guardian ad litem's fees were not actions, special proceedings, counterclaims, defenses or cross-complaints covered by § 814.025. This case is analogous to ***Gagnow v. Haase***, 149 Wis.2d 542, 439 N.W.2d 593 (Ct. App. 1989), in which the sole issue was whether § 814.025 applied when a lawsuit itself was meritorious, but the plaintiff's attorney took actions in prosecuting the suit that were frivolous. We concluded:

> By its plain language, [§ 814.025] directs its fire against the "action"—the lawsuit itself—not against the tactics of the lawyer in concededly nonfrivolous lawsuits…. It penalizes a plaintiff or plaintiff's attorney for bringing a frivolous lawsuit; it does not penalize him or her for conduct in prosecuting an otherwise meritorious action.

Id. at 546, 493 N.W.2d at 595. Similarly, the statute does not penalize Hesslink for his allegedly frivolous tactics in conducting a meritorious defense of the ex-husband's motion to change placement.

We have several concerns with the dissent's analysis of this issue. First, the case relied upon by the dissent, ***Gardner v. Gardner***, 190 Wis.2d 216,

527 N.W.2d 701 (Ct. App. 1994), does not hold that § 814.025, STATS., can be applied to motions. ***Gardner*** discussed, in sections titled "VIOLATION OF § 802.05(1), STATS.," and "FRIVOLOUS COSTS UNDER § 814.025, STATS.," the applicability of those statutes to the facts of the case. *See* ***id.*** at 246-51, 527 N.W.2d at 711-13. Nowhere in the court's discussion of § 814.025 does the word "motion" appear. The court determined that "arguments" made by one of the parties were frivolous. The court neither cited nor discussed ***Gagnow***.

Second, while we agree that certain language in ***Gardner*** is in conflict with the holding in ***Gagnow***, we conclude that ***Gardner*** is not controlling. This court has previously said that when we encounter two of our prior decisions which are "in clear conflict," "we are free to follow the decision which we conclude is correct." ***State v. Kuehl***, 199 Wis.2d 143, 149, 545 N.W.2d 840, 842 (Ct. App. 1995). The dissent apparently comes to a different conclusion than we do regarding which decision is correct. But we question whether the "pick the one you like" approach remains viable after ***Cook v. Cook***, 208 Wis.2d 166, 560 N.W.2d 246 (1997). In ***Cook***, the supreme court held that the court of appeals lacks the power to overrule, modify or withdraw language from its published opinions. ***Id.*** at 190, 560 N.W.2d at 256. And in ***Hemberger v. Bitzer***, 216 Wis.2d 508, 518, 574 N.W.2d 656, 660 (1998), the court wrote: "Only the supreme court, and not the court of appeals, 'has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.'" (Citation omitted.)

Thus, we conclude that ***Gagnow*** is controlling, in part because we believe it is the correct law applicable to the present facts, and more so, because, under the holding in ***Cook***, the ***Gardner*** court lacked the power to modify or overrule the ***Gagnow*** holding. Even were we to conclude, however, as does the

dissent, that Hesslink's tactics in support of his client's ultimately successful opposition to the custody motion are subject to a finding of frivolousness, we would conclude that the trial court's order is not supported by a proper finding of frivolousness under § 814.025, STATS.

Ramsdell's motion requested the trial court to "find and adjudge the opposition of [Hesslink] to the reasonableness of the fees and disbursements of the guardian ad litem herein to be frivolous pursuant to Wis. Stat. 814.025." The court, however, did not make this finding, but instead concluded that "[Hesslink's] motion to terminate the [guardian ad litem's] appointment constituted a frivolous action in violation of § 814.025, Stats." Hesslink argues that it was improper for the court to *sua sponte* find frivolous a motion which had been filed and decided almost four years earlier, without providing notice to Hesslink that the court was considering that issue, and with no opportunity provided for him to respond with either testimony or argument on the matter. We agree.

A motion seeking sanctions under § 814.025, STATS., "initiates a special proceeding." ***Kelly v. Clark***, 192 Wis.2d 633, 653, 531 N.W.2d 455, 461 (Ct. App. 1995). It may well be that a court "may find frivolousness on its own motion," *see* ***Leske v. Leske***, 185 Wis.2d 628, 633, 517 N.W.2d 538, 540 (Ct. App. 1994), but where there is a dispute regarding whether grounds for a finding of frivolousness under § 814.025(3) exist, a party or attorney accused of commencing a frivolous action (or of using a frivolous defense) is entitled to an evidentiary hearing on the matter. ***Kelly***, 192 Wis.2d at 653-55, 531 N.W.2d at 461-62. Hesslink makes it clear in his brief that, had he known the trial court was contemplating a finding of frivolousness regarding the 1993 motion to remove the guardian ad litem, the factual and legal basis for such a finding would have been vigorously disputed, and Ramsdell does not contend otherwise. Our review of the

record indicates that Hesslink was never given the opportunity to be heard regarding the asserted frivolousness of the 1993 motion.

The dissent also relies upon § 802.05, STATS., in its analysis. However, neither Hesslink nor Ramsdell argue that § 802.05 is applicable to this case. Neither cites that statute in their arguments. The trial court's decisions do not cite § 802.05, or use the language of that statute. Instead, the trial court concluded that Hesslink's motion to terminate the guardian ad litem's appointment "failed to articulate a reasonable basis in law," a phrase found in § 814.025, STATS. And the trial court concluded that "[Hesslink's] motion to terminate the [guardian ad litem's] appointment constituted a frivolous action in violation of § 814.025, STATS." It is clear that the parties did not raise the applicability of § 802.05 in either the trial court or in this court.

The supreme court has spoken to the advisability of this court raising and deciding issues not properly raised before the trial court. In ***Vollmer v. Luety***, 156 Wis.2d 1, 10-11, 456 N.W.2d 797, 802 (1990), the court said:

> "One of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal."
>
> There are many justifications for this rule. First, it is the role of an appellate court to correct errors made by the trial court, not to rule on matters never considered by the trial court. Second, requiring objections at trial allows the trial judge an opportunity to correct or to avoid errors, thereby resulting in efficient administration and eliminating the need for an appeal…. Third, if attorneys are not required to raise issues at the trial court level, there is less of an incentive for attorneys to diligently prepare their cases for trial. In fact, some attorneys might be induced to build in an error to ensure access to the appellate court, notwithstanding their deficient performance at trial. Finally, this court will not consider an issue for the first time on appeal because it may result in hardship to one of

> the parties and deprives the appellate court of the benefit of informed thinking of the trial judge.

(Citations omitted.)

The foregoing rule also applies to issues not properly raised before an appellate court. "It is a 'well-established rule' in Wisconsin that appellate courts need not and ordinarily will not consider or decide issues which are not specifically raised on appeal." ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). The court of appeals cannot serve as both advocate and judge. ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). The court of appeals will not develop an appellant's argument. ***State v. West***, 179 Wis.2d 182, 195-96, 507 N.W.2d 343, 349 (Ct. App. 1993), *aff'd*, 185 Wis.2d 68, 517 N.W.2d 482 (1994). To this we add: Courts must not only act fairly, but should be perceived as acting fairly. When courts address matters not raised by either party, they can be perceived as favoring one party or the other, even though, as here, fairness in fact exists. If courts are to command respect as impartial decisionmakers, they should avoid the perception of impartiality. We therefore decline to decide whether § 802.05, STATS., could apply to this case, had the issue been raised in the trial court or here.

Hesslink also argues that the trial court erred in assessing a portion of the guardian ad litem's fees against him on the grounds that he overtried the case. We agree. Section 767.045(6), STATS., directs a trial court, after determining a rate of compensation for a guardian ad litem that is "reasonable," to "*order either or both parties to pay* all or any part of the compensation of the guardian ad litem." (Emphasis added.) If both parties are indigent, the county may be ordered to pay the guardian ad litem's compensation. ***Id.*** Under § 767.262(1)(a), STATS., a court may, "after considering the financial resources of

both parties," order one of them to pay to the other "a reasonable amount for the cost … of maintaining or responding to an action affecting the family," which presumably could include a party's share of the guardian ad litem's compensation. Neither of these statutes allows the court to order one party's attorney to pay the fees of the guardian ad litem. And although ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 483-84, 377 N.W.2d 190, 196 (Ct. App. 1985), allows the court in its discretion to order one party to pay the opposing party's attorney's fees on the grounds of "overtrial," that case does not allow the trial court to order one party's *attorney* to pay the other party's attorney's fees or a portion of a guardian ad litem's fees.

Because neither § 814.025, STATS., nor the concept of "overtrial" provide a legal basis for the trial court's assessment of the guardian ad litem's fees against Hesslink, we conclude that the court erred in apportioning the guardian ad litem's fees as it did. We therefore reverse the order and remand the matter for the trial court to reallocate the guardian ad litem's fees pursuant to § 767.045(6), STATS.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

No. 97-1564(D)

ROGGENSACK, J. *(dissenting)*. The circuit court made its decision after a full hearing and significant briefing which addressed three motions by Attorney Hesslink[1] and two motions by the guardian ad litem, Attorney Ramsdell.[2] The circuit court denied Hesslink's motions and granted Ramsdell's motions. The majority concludes that the circuit court based its decision on § 814.025, STATS., and thereby erred because § 814.025 can be applied only to frivolous counterclaims, defenses or cross-complaints and cannot be applied to Hesslink's motions. It cites ***Gagnow v. Haase***, 149 Wis.2d 542, 439 N.W.2d 593 (Ct. App. 1989). While I agree that in ***Gagnow***, we concluded that § 814.025 is not applicable to motions, that determination is not dispositive of this appeal for at least four reasons. First, the circuit court did not base its decision to sanction Hesslink on § 814.025; rather, it appears to have been based on § 767.262, STATS.; second, in ***Gardner v. Gardner***, 190 Wis.2d 216, 249-51, 527 N.W.2d 701, 713 (Ct. App. 1994), we determined that § 814.025 *could* be applied to motions; third, this court has ample precedent which permits us to affirm a circuit court which

[1] Hesslink moved the court: (1) to require Emmett Frederick to contribute to Jane Frederick's attorney's fees; (2) to determine that the guardian ad litem's fees were unreasonable; and (3) to require Emmett to pay all of the guardian ad litem's fees.

[2] Ramsdell moved the court: (1) to find his fees reasonable and (2) to require Hesslink to contribute to the fees incurred by Ramsdell, as the guardian ad litem.

reaches the right conclusion for the wrong reason;[3] and fourth, § 802.05(1)(a), STATS., provides ample authority for the imposition of sanctions against counsel for the needless increase in the costs of litigation, on the court's own motion or on the motion of any party. Therefore, because I would affirm the circuit court, I must respectfully dissent.

The circuit court imposed sanctions based on the overall conduct of Hesslink in regard to motions he filed during the course of the litigation.[4] In regard to Hesslink's motion to find Ramsdell's fees unreasonable, Ramsdell moved the court to conclude that that motion violated § 814.025, STATS. The circuit court did not grant Ramsdell's motion. However, it found that prior to Hesslink's litigation of the reasonableness of Ramsdell's fees, those fees were a bit over $10,000 and that after they were litigated, they exceeded $18,700.

The circuit court did describe Hesslink's motion to remove Ramsdell as a violation of § 814.025, STATS. It based that conclusion on its review of each of the reasons Hesslink stated in his motion and its analysis of why his stated reasons had no reasonable basis in the law. For example, one of Hesslink's

[3] This court has consistently held that we may affirm on grounds different from those relied upon below in order to advance judicial economy. *See, e.g.,* ***Buchanan v. General Cas. Co.***, 191 Wis.2d 1, 8, 528 N.W.2d 457, 460 (Ct. App. 1995). We have accordingly acknowledged the distinction between an appellant's duty to raise all objections at the circuit court level and the respondent's freedom to raise new arguments for the first time on appeal. *See, e.g.,* ***State v. Holt***, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

[4] As authority for the sanction it ordered, the circuit court cited ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 484, 377 N.W.2d 190, 196 (Ct. App. 1985). In ***Ondrasek***, the husband acted as his own attorney for a portion of the proceedings and handled the case in a manner which significantly increased the costs of the litigation and the circuit court based its award of fees on that conduct. However, while the overtrial issue was certainly the focus of our decision in respect to the award of attorney's fees, the circuit court's authority came from § 767.262, STATS., which permits it to assign such fees as between the parties. Because Hesslink was not a party in the proceedings before the circuit court, I agree with the majority that its decision cannot be sustained under § 767.262.

reasons for attempting to remove Ramsdell was that he had requested Jane's medical records. The court found that Ramsdell had sought medical information from both parties, pursuant to § 767.24(5)(e), STATS., and that Hesslink's use of that request as grounds for his motion to remove the guardian ad litem had no reasonable basis in law. Based on its review of all the reasons Hesslink stated for removing Ramsdell, it concluded Hesslink's motion was frivolous[5] because it "failed to articulate a reasonable basis in law to support a motion to terminate the GAL's appointment. … [That Hesslink] lacked a good faith basis because [he] knew or should have known there was no reasonable basis in law to support a good faith argument for an extension, modification or reversal of a law."

It evaluated the impact of Hesslink's litigation choices on the case before it and concluded that Hesslink's conduct "taken as a whole … represent[s] overtrial of a case that resulted in unnecessary litigation and obscene fees. Therefore, due to the overtrial of these issues, this court determines that [Hesslink] shall contribute to the GAL's fee." In so stating, the circuit court did not base its sanction of Hesslink on its determination that his motion to remove the guardian ad litem was frivolous; rather, it concluded that the frivolous nature of Hesslink's motion to remove Ramsdell was one factor in the needless increase in the costs of this litigation for both parties and that his conduct in challenging Ramsdell's fees to the extent that those fees almost doubled was another factor.

The majority adopts Hesslink's argument that he had no opportunity to respond to testimony or argument that his attempting to remove the guardian ad litem was frivolous. I have concluded that Hesslink's argument is a red herring

[5] Hesslink conceded that his motion to remove Ramsdell was "extraordinary."

for at least two reasons. First, he had ample notice that his motion to remove the guardian ad litem would be a focus of Ramsdell's motion to hold Hesslink responsible for a portion of the guardian ad litem's fees. Hesslink, himself, presented expert witness testimony on that very issue.[6] And second, as I have explained above, the circuit court found the frivolous nature of Hesslink's motion was only one factor which supported its conclusion that Hesslink overtried the case. It did not rely on § 814.025, STATS., for the authority to sanction Hesslink.

I would rely on § 802.05(1)(a), STATS., to affirm the circuit court.[7] Section 802.05(1)(a) states in relevant part:

> The signature of an attorney … constitutes a certificate that the attorney … has read the pleading, motion or other paper; that to the best of the attorney's … knowledge, information and belief, formed after reasonable inquiry, the

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[6] Attorney William Abbott testified in response to Hesslink's questions:

> Q: Are you also familiar with the way family law is practiced in Dane County?
>
> A: Yes.
>
> Q: During your — are you familiar with whether or not motions to remove a guardian ad litem are made in Dane County?
>
> A: They are not common, but I know they are made.
>
> Q: And under what circumstances are they made?
>
> A: Generally if the party believes the guardian is not doing the job.

The testimony of Abbott continues for many, many pages in regard to all aspects of the motions then pending before the circuit court.

[7] The majority expresses concern because neither party has mentioned § 802.05(1)(a), STATS., as a basis for the circuit court's award of attorney's fees. However, each side had the opportunity to do so. The issue of whether the court properly exercised its discretion was squarely raised. Therefore, I cannot agree with the proposition that this court is obligated to disregard applicable law of which it is aware, merely because it was not cited.

> 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 court determines that an attorney … failed to read or make the determinations required under this subsection … the court may, upon motion *or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper* …. (emphasis added).

Our standard of review of a circuit court's conclusion that an attorney has violated § 802.05(1)(a), STATS., is deferential. ***Gardner***, 190 Wis.2d at 247, 527 N.W.2d at 712. Section 802.05(1)(a) creates a three-pronged obligation for an attorney who signs motions or other papers throughout the course of litigation that each signed paper: (1) is not interposed for an improper purpose; (2) is well-grounded in fact; and (3) is warranted by existing law or a good faith argument for a change in the law. ***Riley v. Isaacson***, 156 Wis.2d 249, 256, 456 N.W.2d 619, 621 (Ct. App. 1990). The determination of the amount of investigation conducted by an attorney is a question of fact, which this court will not disturb unless it is clearly erroneous. ***Id.*** at 256, 456 N.W.2d at 622. Whether that investigation constituted reasonable inquiry given the facts of the case is a discretionary determination, which we will not disturb so long as the circuit court applied a proper standard of law to the facts of record to reach a rational conclusion. ***Id.***

The circuit court's decision describes the factual and legal predicate for contravention of the third prong of the standard set by ***Riley***, *i.e.*, signing motions which were not warranted by existing law or a good faith argument for a change in the law. It also evidences its concern about the attorney's fees both

parties[8] would be required to pay because of Hesslink's conduct. Therefore, it structured a sanction which would relieve the parties of a part of that burden. The amount of the sanction was linked to the two most offensive motions Hesslink made:

> Attorney Hesslink shall be responsible for the fees incurred by the GAL to defend Hesslink's frivolous motion to remove the GAL. In addition, due to the overtrial and litigious nature of this case, [A]ttorney Hesslink shall be responsible for one-half of the fees incurred by the GAL to defend the reasonableness of his fees.

Therefore, because I conclude that the facts found by the circuit court are not clearly erroneous and are sufficient to support the circuit court's conclusion that Hesslink needlessly increased the cost of the litigation, *i.e.*, overtried the case, I conclude that they are sufficient to sustain the exercise of its discretion in assessing fees against Hesslink under the standard we set in ***Gardner*** and in ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis.2d 278, 528 N.W.2d 502 (Ct. App. 1995), for determinations made under 802.05(1)(a), STATS. Accordingly, I must respectfully dissent.

[8] The fact that all parties had incurred outrageous attorney's fees due to Hesslink's litigation tactics is a matter about which the circuit court should have been concerned. Furthermore, although the majority believes my dissent may create the appearance of unfairness to Hesslink, ignoring the application of § 802.05, STATS., is unfair to the parties, Emmett and Jane Frederick. Their interests actually underlie this appeal because to the extent Hesslink prevails they will lose. However, no one has filed a brief for Emmett or Jane. Indeed, one wonders how Attorney Hesslink can represent himself in the same action in which he represented Jane because prevailing on this appeal will require Jane, his client, to pick up at least some portion of what he is excused from paying. His interests are in direct conflict with her interests in that regard.