COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2216

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

KIM WILLIAMS,

PLAINTIFF-APPELLANT,

v.

ANTHONY MORGAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Kim Williams, pro se, appeals an order dismissing her lawsuit and awarding Anthony Morgan actual fees and costs pursuant to § 814.025(3), STATS. She contends the trial court erred (1) by granting Morgan's motion to dismiss and awarding fees and costs despite the fact she had filed a motion to voluntarily dismiss the case on the day preceding the hearing on

Morgan's motion; (2) by dismissing the complaint based on findings of defective summons, lack of personal jurisdiction and failure to state a claim upon which relief could be granted; and (3) by awarding attorney fees and costs pursuant to § 814.025(3). We conclude that the trial court properly addressed Morgan's motion and properly dismissed the action for failure to state a claim upon which relief can be granted. We also conclude, however, based on our de novo review, that the trial court had jurisdiction over Morgan despite the defective summons and the improper service. Although the summons was defective and the service was indeed improper, the trial court nevertheless had personal jurisdiction because of Morgan's failure to object to both at the time he filed his pro se motion for a more definite statement. Even though we reach a different conclusion from the trial court on the personal jurisdiction question, we agree that Williams's complaint fails to state a claim upon which relief can be granted and, therefore, conclude that Williams's suit was properly dismissed. We also conclude that the fees and costs awarded under § 814.025, STATS., was appropriate and therefore affirm.

Williams filed an initial complaint alleging slander, libel and defamation of character; breach of contract; and a claim entitled "consensual civil sexual assault" with malice and intentional psychological and physical abuse. She alleged that she entered into an agreement with Morgan, a professional football player, to have an exclusive, long-term sexual and social relationship and that she suffered psychological and economic damages when he broke his promise and ended the relationship after their first and only sexual encounter. She also alleged that Morgan falsely stated to teammates and others that she was stalking him.

Morgan, then pro se, filed a motion for a more definite statement, which was granted. Williams complied by filing a more lengthy, but not

necessarily more legally precise, document, which enumerated her claims as: intentional and negligent infliction of emotional distress, defamation, and civil sexual assault. Shortly thereafter, Morgan obtained counsel and promptly filed a motion to dismiss, or for summary judgment, based on defective summons, lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. One day before Morgan's motion was scheduled to be heard, Williams filed a "Motion to Dismiss this Case without Prejudice."

Williams did not respond to Morgan's motion to dismiss, nor did she appear at the hearing. The trial court proceeded to hear argument from Morgan and found grounds to dismiss the case based upon insufficiency of the summons, failure to effectuate service, and because the complaint was without a legal basis in Wisconsin law. It also found the action frivolous because the suit was without foundation in Wisconsin law and was pursued with the intent to harass Morgan and it granted Morgan's request for fees and costs.

Williams first contends that the trial court was without authority to proceed on Morgan's motion to dismiss. She argues that the filing of her motion to voluntarily dismiss the case required the court to rule on her motion and refrain from further proceedings on Morgan's motion. Her argument is without legal support. Whether the trial court had the authority to hear the motion and whether it had an obligation to dismiss the case based on Williams's motion are questions of law we review de novo. *See* ***Price v. Hart***, 166 Wis.2d 182, 192, 480 N.W.2d 249, 253 (Ct. App. 1991). Williams did not comply with the rules governing motion practice set forth in §§ 801.14(1) and 801.15(4), STATS. Furthermore, the court had no obligation to unilaterally dismiss the proceedings based on Williams's motion at that stage of the proceedings. *See* § 805.04(2), STATS.; ***Gowan v. McClure***, 185 Wis.2d 903, 913, 519 N.W.2d 692, 696 (Ct. App. 1994). We

therefore conclude the trial court acted properly by hearing Morgan's motion despite Williams's motion to voluntarily dismiss the case.

Williams's next contention is that the trial court erred by granting Morgan's motion to dismiss. She argues the summons was not defective, the service was proper, and that her complaint was legally sufficient. We are not persuaded that dismissal was improper. We review a trial court's dismissal of an action de novo. ***Paskiet v. Quality State Oil Co.***, 164 Wis.2d 800, 805, 476 N.W.2d 871, 873 (1991). Whether personal jurisdiction exists is also a question of law we review de novo. ***Capitol Fixture & Woodworking Group v. Woodma Distrib.***, 147 Wis.2d 157, 160, 432 N.W.2d 647, 649 (Ct. App. 1988).

As previously stated, we determine the summons was indeed defective[1] and Morgan was not properly served.[2] However, Morgan did have actual notice of the proceeding and filed his pro se motion for a more definite statement. Upon our de novo review, we conclude that Morgan did not follow the procedures set forth in § 802.06, STATS., and cannot be heard to complain about the defective summons or service. We therefore conclude the trial court's dismissal on these two grounds was improper.

[1] The summons does not substantially conform to the requirements of § 801.095, STATS.; it fails to provide the address of the defendant, inaccurately states the time for response, and does not advise the defendant of the ramifications for failure to provide an answer to the complaint.

[2] The Brown County sheriff's document reflects the manner of service was substituted service on Jerry Parins. Section 801.11, STATS., requires personal service on the defendant or, after the exercise of reasonable diligence, by service at the defendant's usual place of abode on a competent family member or adult resident of the defendant's abode. Neither of these requirements was met.

Section 802.06, STATS., sets forth the procedures for making objections and asserting defenses. Section 802.06(5) allows a party to move for a more definite statement and provides in part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.

Section 802.06(7) addresses consolidation of defenses in motions and allows a party who makes a motion under § 802.06 to join with it any other motions provided for and then available to the party. It further provides that:

> If a party makes a motion under this section *but omits therefrom any defense or objection then available to the party which this section permits to be raised by motion*, *the party shall not thereafter make a motion based on the defense or objection so omitted*, except a motion as provided in sub. (8)(b) to (d) on any of the grounds there stated. (Emphasis added.)

Section 802.06(8)[3] clearly states that a defense of lack of personal jurisdiction is waived if the defense is omitted from a motion in the circumstances described in § 802.06(7). That is the case here. At the time Morgan made his motion for a more definite statement, he had available to him the defense of defective summons and lack of personal jurisdiction based on improper service. He did not assert either defense at that time. His later challenges to the summons and lack of

[3] Section 802.06(8), STATS., provides in part:

> A defense of lack of jurisdiction over the person … is waived only if any of the following conditions is met:
>
> 1. The defense is omitted from a motion in the circumstances described in sub. (7).

personal jurisdiction are improper in light of his failure to join them in his motion for a more definite statement and therefore cannot serve as a proper basis for dismissal of the action.

The defense of failure to state a claim upon which relief can be granted, however, was not waived because Morgan could not know whether the defense was available to him until the more definite statement was filed. Morgan did assert the defense in his answer to Williams's amended complaint and thus it can properly be considered as a basis for dismissing the case.

Whether a complaint states a claim upon which relief can be granted presents a question of law we review de novo. ***Blue Cross & Blue Shield United v. Fireman's Fund Ins. Co.***, 132 Wis.2d 62, 64-65, 390 N.W.2d 79, 80 (Ct. App. 1986), *aff'd*, 140 Wis.2d 544, 411 N.W.2d 133 (1987). On review, we confine ourselves to the face of the pleadings and construe them liberally with an eye toward doing substantial justice between the parties. ***Onderdonk v. Lamb***, 79 Wis.2d 241, 245, 255 N.W.2d 507, 509 (1977). A complaint should be dismissed as legally insufficient only if it is clear that under no circumstances can the plaintiff recover. ***Quesenberry v. Milwaukee County***, 106 Wis.2d 685, 690, 317 N.W.2d 468, 471 (1982). We will affirm an order dismissing a complaint for failure to state a claim only if it appears to a certainty that no relief can be granted under any set of facts which the plaintiff could prove in support of them. ***Id***.

Williams's amended complaint contains a lengthy recitation of facts and four claims: intentional infliction of emotional distress; negligent infliction of emotional distress; defamation; and civil sexual assault. Section 802.02(1)(a), STATS., requires a complaint to contain a "short and plain statement of the claim, identifying the transaction or occurrence ... out of which the claim arises and

showing that the pleader is entitled to relief." Based on our review of Williams's complaint, we conclude she has failed to state a cause of action on any of her four claims.

As the basis for her intentional and negligent infliction of emotional distress claims, Williams asserts Morgan's refusal to meet the terms of their agreement to have an exclusive social and sexual relationship with her. Intentional infliction of emotional distress requires the plaintiff to show: (1) that the defendant's conduct was purposeful and intended for the purpose of causing the plaintiff emotional distress; (2) that the conduct was extreme and outrageous and the average member of the community would regard the defendant's conduct as a complete denial of the plaintiff's dignity as a person; (3) that the conduct was a cause-in-fact of the plaintiff's injury; and (4) that the plaintiff suffered an extreme disabling emotional response to the conduct. ***Alsteen v. Gehl***, 21 Wis.2d 349, 359-60, 124 N.W.2d 312, 318 (1963). Negligent infliction of emotional distress requires a showing that: (1) the defendant's conduct fell below the applicable standard of care; (2) the plaintiff suffered an injury; and (3) the defendant's conduct was a cause in fact of the plaintiff's injury. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 632, 517 N.W.2d 432, 434 (1994).

Williams states she had consensual sex with Morgan. She claims that Morgan would not see her or date her after their first and only sexual encounter. The underlying transaction of her claims is a consensual sexual encounter and ensuing events that did not meet her expectations. Distressing as this experience may have been for her, the conduct and events described in her complaint fail to show that she is entitled to relief on either claim. Williams provides no legal authority to support her contention that a breach of this agreement gives rise to a claim based on an intentional tort, and we decline to

address it further. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 377-78 (Ct. App. 1980).

Williams's complaint also fails to state a defamation claim upon which relief can be granted. Section 802.03(6), STATS., provides: "In an action for libel or slander, the particular words complained of shall be set forth in the complaint." Williams's complaint only states in general terms that Morgan communicated to present and former teammates and others that Williams was stalking him. She has failed to meet this requirement. Furthermore, Williams concedes that her complaint should have been voluntarily dismissed because her civil sexual assault claim had no basis and that her other claims could not exist without the sexual assault claim.

Williams's last claim is for "civil sexual assault," and she states Morgan "sexually assaulted me on July 30, 1995." In her original complaint she states that the sex was consensual. Wisconsin does not recognize such a claim. Some of Williams's allegations suggest a breach of a contract to marry, but Wisconsin has refused to recognize such an action in ***Brown v. Thomas***, 127 Wis.2d 318, 324-25, 379 N.W.2d 868, 870-71 (Ct. App. 1985). We conclude Williams's claim for civil consensual sexual assault is not legally recognized in Wisconsin.

From our review of Williams's complaint, we conclude that it fails to state claims for either intentional or negligent infliction of emotional distress, defamation, or civil sexual assault. We also consider her concessions in her brief that she knew her civil sexual assault claim was without legal merit. We therefore affirm the trial court's dismissal of her lawsuit.

Last, Williams challenges the trial court's award of actual costs and attorney fees under § 814.025, STATS., arguing that her suit was not frivolous. Morgan counters that Williams's suit was indeed frivolous as defined in § 814.025(3)(a) and (b) because Williams commenced and continued the case in bad faith with the sole purpose of harassing him and that Williams knew or should have known that the case was without any reasonable basis in the law. Because we determine that the award of costs and fees in this case was warranted, we affirm the trial court.

Section 814.025, STATS., provides in part:

> **(1)** If an action or special proceeding commenced or continued by a plaintiff … is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ….
>
> **(3)** In order to find an action … to be frivolous under sub. (1), the court must find one or more of the following:
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> (a) The action … was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney 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.

The question of whether a claim is 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). The trial court is required to determine what the facts are in order to determine what a reasonable litigant or attorney would or should have known with regard to those facts. ***Id***. at 513, 362 N.W.2d at 187-88. Findings of fact will not be set aside on appeal unless they are clearly erroneous.

Section 805.17(2), STATS.; ***Stoll***, 122 Wis.2d at 513, 362 N.W.2d at 188. The legal significance of the trial court's findings, in terms of whether knowledge of those facts would lead a reasonable litigant or attorney to conclude the claim is frivolous, presents a question of law. ***Stoll***, 122 Wis.2d at 513, 362 N.W.2d at 188. We do not owe deference to the trial court's decision on such an issue, but we do value the trial court's decision on the matter. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993).

In determining whether an action is frivolous, we employ the objective standard of "whether the attorney knew or should have known the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances." ***Sommer v. Carr***, 99 Wis.2d 789, 797, 799, 299 N.W.2d 856, 860 (1981). This same objective test can also be applied to a party. ***Id***.

The trial court dismissed the defamation claim because Williams did not specifically plead a particular defamatory statement as required by § 802.03(6), STATS., despite the trial court's order that Williams restate her pleading in a "form which conforms to the Wisconsin Rules of Civil Procedure and sets out in exact detail the nature of the allegations and the facts which support them."[4]

[4] We do not address here the question whether Williams's insufficiently-pled defamation claim precludes a finding of frivolousness on her claims of intentional and negligent infliction of emotional distress and civil sexual assault. Williams does not raise or argue this issue, and we decline to address it further. We confine our holding to a determination that the trial court properly found frivolousness based on the infliction of emotional distress and civil sexual assault claims.

The trial court also dismissed Williams's claims of intentional and negligent infliction of emotional distress and civil sexual assault because the claims were based on allegations of breach of an agreement for a long-term consensual sexual and social relationship. This group of claims is specious on its face. Williams's continued contentions that the events gave rise to a legally-recognized cause of action in the face of consultations with lawyers, their refusals to take her case and her unwillingness to research or acknowledge legal authority contrary to her position are sufficient for the court to reasonably infer that Williams knew or should have known that those claims were baseless and could therefore find they were frivolous and award costs and fees. These circumstances, coupled with her eleventh hour attempt to voluntarily withdraw the case without notice to the parties, her failure to appear on either her own or Morgan's motion, and her assumption that the trial court would automatically grant her motion without any further action on her part and ignore Morgan's previously-filed motion to dismiss also suggest her indifference to legal requirements and procedures and give rise to the reasonable inference that she had continued her lawsuit in bad faith.

The trial court also found that Williams's suit presented a clear case of an attempt to harass Morgan. The record supports this finding as well. Williams filed her claims and persisted in litigating them without conducting the preliminary legal research necessary to establish that her claims had merit. She boldly states twice in her amended complaint that "Anthony Morgan sexually assaulted me on July 30, 1995," yet admits in her first complaint and motion to voluntarily dismiss the case that she consented to sex. She reiterates her consent

in her brief.[5] The trial court could reasonably infer that Williams's continued assertions of sexual assault, phrased as civil or otherwise, were made and continued in bad faith and for the purpose of harassing Morgan by publicly alleging a sexual assault based on a consensual sexual encounter, resulting in significant negative publicity and potential detriment to Morgan's professional football career.

Based on our review of the record, we cannot conclude that the trial court's finding of frivolousness was clearly erroneous. Williams points to nothing in the record to show that the trial court's findings were clearly erroneous. Rather, our review of the record demonstrates ample facts, and reasonable inferences drawn therefrom, on which the trial court could properly base its findings that Williams knew or should have known that her claims were without legal basis and that she commenced and continued her lawsuit in bad faith for the purpose of harassing Morgan.

We agree with the trial court that a sufficient basis exists for finding that Williams's claims of intentional and negligent infliction of emotional distress and civil sexual assault were indeed frivolous within the meaning of § 814.025, STATS. We therefore affirm the trial court's order for costs and fees under § 814.025.

Morgan's request for fees and costs for a frivolous appeal pursuant to § 809.25(3), STATS., is denied.

[5] Williams also incongruously continues to maintain her claim of civil sexual assault on appeal while admitting it is baseless by stating that Morgan "did sexually assault me but not according to Wisconsin law."

By the Court.—Order affirmed.

Not recommended for publication in the official reports.