COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3834-FT

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

DAVID A. ROEMING, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF AUDREY ROEMING,

PLAINTIFF-APPELLANT,

KATHLEEN M. ARTHUR,

APPELLANT,

V.

PETERSON BUILDERS, INC., ROGER PINKERT, AMERICAN GASKET COMPANY, CARL NEUBAUER, AND GERALD KUCHLER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Door County: PHILIP M. KIRK, Judge. *Affirmed and cause remanded.*

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

PER CURIAM. David and Audrey Roeming and their appellate counsel, Kathleen Arthur, appeal a judgment dismissing their action and finding it frivolous.[1] The Roemings were third party-defendants in a 1992 contract dispute. They inexplicably settled the claim by paying $12,160 to Peterson Builders, Inc., even though Peterson indicated a willingness to settle for $8,000. Roeming then commenced this lawsuit against the parties to the previous action, a corporate officer and their respective attorneys. In an earlier appeal, this court determined that the complaint stated a claim for breach of contract, abuse of process, injury to business and tortious interference with contracts. We remanded the case for the trial court to apply summary judgment methodology. The circuit court struck the affidavit of Ronald Arthur, the Roemings' attorney in the initial action and the husband of their present attorney, on the ground that he was too biased to be an expert witness. The court then concluded that the Roemings had no evidence to support the allegations made in the complaint. It dismissed the action and found it frivolous.

On appeal, the Roemings argue that the trial court failed to follow this court's instructions on remand, erred by striking Ronald Arthur's affidavit and improperly imposed frivolousness costs to punish Roeming because the court found the action "personally distasteful." We conclude that the trial court properly granted summary judgment and correctly determined that the matter was frivolous. We affirm the judgment and remand the cause for the trial court to enter judgment for the reasonable costs and attorneys' fees the respondents incurred in this appeal.

[1] This is an expedited appeal under RULE 809.17, STATS.

The trial court did not disregard this court's remand instructions by granting summary judgment. Our previous decision specifically invited the court to do so. This court merely held that the complaint stated a claim for which relief could be granted based on the minimal, notice pleadings required to state a claim. When a motion for summary is made and discovery has been completed, the plaintiff may not thereafter rely on the pleadings. *See* § 802.08(3), STATS. It is appropriate for the trial court to grant summary judgment to the defendants if the plaintiff is unable to establish an evidentiary basis for the allegations contained in the complaint. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 291-92, 507 N.W.2d 136, 139-40 (Ct. App. 1993). This court's conclusion that the complaint stated a claim for which relief could be granted does not prevent the trial court from granting summary judgment when it appears that the plaintiffs will be unable to substantiate their allegations.

We need not determine whether the trial court properly struck Ronald Arthur's affidavit on the ground that he was too biased to be an expert witness. Even if his affidavit is considered, Roeming has not presented sufficient proof to allow this case to be presented to a jury. To survive summary judgment, Roeming must demonstrate issues of material fact sufficient to allow a reasonable jury to return a verdict in their favor. *See* ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991). Arthur's affidavit, rather than stating specific facts, states that every factual assertion, statement of fact and/or fact-based contention contained in the second amended complaint and in a memorandum of law is true and accurate. Arthur's affidavit refers to matters not attached to the affidavit, attempts to incorporate by reference hundreds of paragraphs from other documents without properly identifying them and recites facts not within Arthur's personal knowledge. Much of his affidavit is therefore

appropriately disregarded. *See* ***Commercial Disc. Corp. v. Milwaukee Western Bank***, 61 Wis.2d 671, 678, 214 N.W.2d 33, 36-37 (1974).

More significantly, however, Arthur's affidavit draws unreasonable inferences from the underlying facts and engages in pure speculation and conjecture. Arthur infers the existence of a conspiracy and misconduct by the attorneys from underlying facts that are innocent, benign and unremarkable.[2]

The trial court properly found the action frivolous. The court found that the action was commenced and continued in bad faith for the purpose of harassment and that Roeming knew or should have known that it was without any reasonable basis in law or equity. *See* § 814.025, STATS. Roeming does not directly challenge the trial court's findings of fact on this question. Furthermore, the record supports the trial court's findings. Before the action was commenced, Ronald Arthur sent a letter to the parties in the initial action that the trial court reasonably described as an "I'll get you" letter. Arthur was aware of all of the facts upon which this lawsuit is based at the time he settled the initial action. He "masqueraded" as an expert witness and attempted to circumvent the ethical difficulty presented by being both a lawyer and an expert witness by having his wife pretend to prosecute the case. He actually took control of the litigation. His wife, although an attorney, was employed as an administrator of a nursing home

[2] Arthur infers attorney misconduct and conspiracy from the defendants' decision to pursue a lawsuit instead of initiating arbitration proceedings, the attorneys' filing of claims before they completed their investigation, and American Gasket's admission that Peterson received a product that did not conform to the contract. Arthur also points to the filing of a third-party complaint requesting indemnification because Roeming supplied American Gasket with the wrong materials, the parties' mistaken identification of David Roeming as a real party in interest, the parties' "uncharacteristic degree of cooperation and familiarity," their whispering and refusal to hold discussions on the record, and their suggestion that Roeming implead its supplier. These actions, individually and collectively, do not raise a reasonable inference of actionable conspiracy or attorney misconduct.

and took instruction from her husband throughout the case. Roeming has no legitimate evidence of conspiracy or attorney misconduct upon which to base this action.

Finally, we award reasonable attorneys' fees and expenses for this appeal. Our conclusion that the trial court correctly adjudged the matter frivolous renders the appeal frivolous per se. *See* ***Riley v. Isaacson***, 156 Wis.2d 249, 262, 456 N.W.2d 619, 624 (Ct. App. 1990). The respondents have requested the imposition of double costs as well as attorney's fees for this appeal. We conclude that requiring the appellants to pay the respondents' actual attorneys' fees and expenses constitutes an adequate response to continuation of this frivolous matter.

By the Court.—Judgment affirmed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.