COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0330

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

STANLEY SLAVEN,

PLAINTIFF,

V.

JANICE L. GRAEBER AND
AURORA HEALTH CARE, D/B/A
SINAI SAMARITAN MEDICAL CENTER,

DEFENDANTS-RESPONDENTS,

V.

MICHAEL J. COLLARD,

APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Michael J. Collard appeals from a judgment entered in favor of Janice L. Graeber and Aurora Health Care, d/b/a Sinai Samaritan Medical Center (Graeber) for costs and attorneys' fees awarded pursuant to § 814.025, STATS., the frivolous claims statute.

Collard raises three instances of trial court error: (1) the trial court erred as a matter of law in concluding that Stanley Slaven's claim for defamation was frivolous; (2) the trial court erroneously exercised its discretion when it failed to conduct an evidentiary hearing on the question of frivolousness, and the amount and reasonableness of the costs and fees requested; and (3) the trial court erred, as a matter of law, in concluding Slaven's claim was frivolous because Graeber refused to respond to discovery requests. Because the real issue of "frivolousness" was not tried, we reverse and remand for an evidentiary hearing.

BACKGROUND

Collard, counsel for Slaven, filed a claim for defamation against Graeber, who was employed as a psychiatric intern at Sinai Samaritan Medical Center. The claim was based on the contents of a letter dated June 28, 1995, and faxed by Graeber to a case worker for the Illinois Department of Children and Family Services (DCFS). The statement at issue in the claim was that Slaven "sexually molested his 11 day old daughter while she was in the Peds ICU of

Children's Hospital in Milw." (Pediatric Intensive Care Unit).[1] Graeber answered the complaint, raised the affirmative defense that Graeber was immune from liability under § 48.981(4), STATS.,[2] and filed a motion for summary judgment based on statutory immunity. In response to the motion, Collard contended that § 48.981 was inapplicable because: (1) Graeber's report related to a deceased child named Appolonia, a child not seen by Graeber in the course of her professional duties; (2) the report was not made to the proper parties set forth in the statute; (3) Graeber lacked reasonable cause to suspect child abuse; and (4) there was a question of fact as to whether the claimed conditional privilege had been lost by over-publication.

On May 27, 1997, the trial court granted summary judgment to Graeber, based essentially upon the statutory immunity provisions of Chapter 48. The court also concluded that the claim was frivolous, but because the court did

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[1] Victoria Stachelek and Slaven were the biological parents of Appolonia, the alleged victim of Slaven's actions. Appolonia died 11 days after birth at Children's Hospital in Milwaukee as the result of birth defects. At or about the same time, another daughter of Victoria, Vanessa, was being treated at Children's Hospital in the Psychiatric Center. Victoria and her children had lived in Cook County, Illinois. Prior to moving to Milwaukee, a Cook County court had ordered that Victoria not live with violent men. At age two, Vanessa had been beaten by a boyfriend of Victoria and, as a result, required continuing treatment for cognitive and physical disabilities. During Vanessa's stay at Children's Hospital, suspicion arose as to Slaven's physical and sexual abuse of Vanessa and her other sisters, including Appolonia before her death.

[2] Section 48.981(4), STATS., provides:

> IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report, conducting an investigation, ordering or taking of photographs or ordering or performing medical examinations of a child or of an expectant mother under this section shall have immunity from any liability, civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed. The immunity provided under this subsection does not apply to liability for abusing or neglecting a child or for abusing an unborn child.

not have any information concerning costs and attorneys' fees, it adjourned the matter until August 18, 1997. On that date, over the objection of Collard, the court considered the amount of attorneys' fees that would be assessed as a sanction,[3] but delayed ruling on the allocation of costs and fees. Finally, on October 13, 1997, the court ruled that Graeber was entitled to all of its attorneys' fees as submitted, but held open the issue of contribution by Collard from his client Slaven. Collard now appeals.

DISCUSSION

Collard claims that the trial court erred when it did not provide him an evidentiary hearing before concluding that the defamation suit that he filed was frivolous. A claim is frivolous when a party or attorney "knew, or should have known" that the claim lacked "any reasonable basis in law or equity." Section 814.025(3)(b), STATS. A court uses an objective standard to determine whether an action is frivolous, specifically "'whether the attorney knew or should have known that 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.'" ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 241, 517 N.W.2d 658, 666 (1994) (quoting ***Sommer v. Carr***, 99 Wis.2d 789, 799, 299 N.W.2d 856, 860 (1981)).

Inquiries about frivolousness involve a mixed question of law and fact. *See* ***id.*** The determination of what a party or attorney "knew or should have known" is a factual question, *see* ***id.***, and the trial court's findings of fact will not

[3] Collard disputed whether he had been properly notified about what matters would be considered at the adjourned hearing.

be reversed by an appellate court unless the findings of fact are clearly erroneous. *See* § 805.17(2), STATS. The ultimate conclusion of whether the trial court's fact determinations support the legal conclusion of frivolousness is, however, a question of law, which this court reviews independently. *See* ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666.

In determining whether an action is frivolous, a court should keep in mind that a significant purpose of § 814.025, STATS., is to help maintain the integrity of the judicial system and the legal profession. *See* ***Sommer***, 99 Wis.2d at 799, 299 N.W.2d at 860. Courts and litigants should not be subjected to actions without substance. A determination of frivolousness, however, is "an especially delicate area"; a court must be cautious in declaring an action frivolous, lest it stifle the "ingenuity, foresightedness and competency of the bar." ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis.2d 605, 613, 345 N.W.2d 874, 878 (1984). "The question of frivolousness is not determined in the same manner as motions for summary judgment." ***Stoll v. Adriansen***, 122 Wis.2d 503, 509, 362 N.W.2d 182, 186 (Ct. App. 1984). "Because it is only when *no* reasonable basis exists for a claim or defense that frivolousness exists, the statute resolves doubts in favor of the litigant or attorney." ***In re Estate of Bilsie***, 100 Wis.2d 342, 350, 302 N.W.2d 508, 514 (Ct. App. 1981). This court may remand to the trial court if the real controversy has not been fully tried. *See* § 752.35, STATS. Here, the procedure followed by the trial court did not allow for the real issue of frivolousness to be tried.

The trial court granted summary judgment to Graeber on the basis of the immunity provisions contained in Chapter 48. Also contained in the motion for summary judgment was a request for reasonable attorneys' fees and costs under the frivolous claims statute, because the suit was without a reasonable basis

in law or equity. *See* §§ 814.025, 802.05 and 802.08, STATS.[4] At the first hearing on May 27, 1997, the trial court concluded that the claim for defamation was frivolous. The adjourned hearing of August 18 also dealt with the substantive issue of "frivolousness." A chronological excerpt of the relevant court colloquy at these two hearings places this claim of error in proper context.

The May 27 hearing consisted of twenty-one pages of transcript. Eighteen pages of the transcript contain an exchange between the court and counsel concerning the merits of the summary judgment motion. After concluding that summary judgment was appropriate, the court then went on to state:

> Court finds that this case shouldn't have come this far without the clear indication of the immunity and conditional privilege not attaching.
>
> ….
>
> … Court finds that was a frivolous action as that term is used in section 814 of the Wisconsin Statute. We'll put this off for another day for hearing on attorney fees and cost.

At the August 18 hearing, further implementation of the court's order of "frivolousness" took place. The following excerpts are relevant.

> THE COURT: … The Court found that this was a case which was appropriate for 814 remedies -- .025 (2) I should say -- and it's my understanding that Mr. Arnold is here today to establish the amount that is owed pursuant to the penalty section that allows for actual attorney fees to be awarded ….
>
> … [W]hat is is [sic] the plaintiff's response to this motion?
>
> ….

[4] Because the trial court imposed its sanction based solely on § 814.025, STATS., we confine our decision to a consideration of that statute.

> MR. COLLARD: Well, it's my position Your Honor, that the order cannot be entered without a further evidentiary hearing on whether sanctions are appropriate.

The court acknowledged this position when it observed:

> THE COURT: Not the amount of the sanctions but the case law requires the court to hold an evidentiary hearing before determining whether sanctions will be awarded in a case like this.

Later in the hearing the following exchange took place:

> THE COURT: What precisely are you contesting?
>
> MR. COLLARD: With respect to the amount.
>
> THE COURT: With respect to whether or not it is appropriate to award attorney fees in this case? Let's start with that.
>
> MR. COLLARD: In the case of Kelly v. Clark, the Court of Appeals made it very clear the court MAY not award attorney fees or sanctions under 814.025 without an evidentiary hearing.
>
> The question of what the person against whom sanctions are requested knew or should have known at the time of pleading was filed. So it's my position Your Honor that the question, a sufficient record has not been made to enable the court to determine whether or not to award sanctions. That matter shall be addressed before the amount.
>
> THE COURT: At our last appearance, it would seem to me that that matter has been determined. I went through the record carefully and everything you've submitted and the law that applies to whether or not there is any basis for claim, for relief, and already made a determination that in that record, that there wasn't. And therefore, the 814.025 penalties naturally attach.
>
> … And I think from the context of what I had to say, it was my opinion that counsel should have not filed this action in the first place. And after having filed it, should not have continued it given the fact that I asked you specifically if you had taken a look at the statutes which cover child abuse and neglect in the state of Wisconsin, and you said you hadn't.
>
> 48.13 is a particularly important statute with regard to what is necessary for people to communicate and whether they're privileged when they're in the pursuit of protecting

> the safety of a child who may be in need of protection and services.
>
> MR. COLLARD: But Your Honor, I did look at 48.981 which is a section that specifically deals with a reporting of this type, and that's the section on which the defendants relied in their summary judgment motion.
>
> And I did look at that before filing the case and I did believe there was a good faith argument to be made that that statute did not apply.
>
> THE COURT: But your belief is not the operative point. It is what a reasonable person would have believed after looking at all of the relevant law and case law, not just statutory law, and there was nothing that favored you.
>
> MR. COLLARD: I don't agree, Your Honor. I think the arguments I made are quite reasonable, that there is no case directly on point.
>
> THE COURT: Well, there may not be a case directly on point when this has to do with this kind of reporting, but the fact of the matter is, the issues of privilege are very clear.
>
> And the court already made a determination you did not conduct the necessary inquiry that would have been sufficient to dissuade you from filing a summons and complaint in this case, and then once you had, there was enough information here for you to realize that the case should have been voluntarily dismissed.

From this review of the record, it is manifest that the trial court decided the question of "frivolousness" on the basis of the submissions of the parties by affidavit in support of, and in opposition to, Graeber's motion for summary judgment and her motion for costs and attorneys' fees under § 814.025(1) & (3)(b), STATS. A trial court may make a determination of "frivolousness" at any time during the proceeding. *See* ***Stoll***, 122 Wis.2d at 509, 362 N.W.2d at 186. That determination may be made without an evidentiary hearing where the facts are undisputed and only a question of law remains. If however, "there is not enough in the record for the trial judge to make such findings leading to a conclusion of frivolousness … then the trial court must

conduct a hearing for the purpose of reaching such findings and resulting conclusion." ***Sommer***, 99 Wis.2d at 793, 299 N.W.2d at 857.

> Normally, this court would require a special and separate hearing before the trial court on the issue of frivolousness. At that hearing, legal arguments could be made or the attorney or litigant could call other persons or professionals to testify regarding their knowledge of the law and their opinions, well explained and documented as to the proposition of whether the rule of law relied on is either presently the rule or whether if the rule has never been considered, it is a probable and predictable extension, modification or calls for a permissible reversal of existing law. The trial court would then make the finding of frivolousness or lack of it applying the reasonable attorney standard.

Radlein, 117 Wis.2d at 629, 345 N.W.2d at 886.

It is clear from the record, Graeber's defense of immunity and conditional privilege notwithstanding, Collard set forth four reasons to support the basis for the defamation claim: (1) that § 48.981, STATS., was inapplicable because Graeber's report related to a deceased child named Appolonia, a child not seen by Graeber in the course of her professional duties; (2) the report was not made to the proper parties set forth in the statute; (3) Graeber lacked reasonable cause to suspect child abuse as evidenced by her admission to an interrogatory that she had no knowledge or information that Collard's client sexually molested Appolonia; and (4) Graeber was not entitled to a conditional privilege because of over-publication of the alleged defamatory statement.

The trial court, in part, based its conclusion of "frivolousness" on Collard's failure to adequately inquire whether there was a basis for the claim before filing the complaint, and then continuing prosecution of the action. Collard, however, respectfully disagreed with the trial court for reasons of substance and strategy that appear in the transcripts and in his brief. There is no

dispute as to the absence of case law regarding the applicability of Chapter 48 and conditional privilege to the facts. Lastly, from a reading of the complete hearing transcript, it is impossible to sort out where the trial court's analysis of the merits of the summary judgment argument ended and where consideration of the "frivolousness" issue began.

For all of these reasons, we conclude that under § 752.35, STATS., the real issue has not been tried. Consequently, we remand this issue to the trial court with instructions to consider the growing body of law offering guidance in making a § 814.025(3)(b), STATS., determination.

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

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