**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 26, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**

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

**Appeal No. 2014AP287** **Cir. Ct. No. 2010CV428**

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

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**IN THE MATTER OF SANCTIONS IN MINERALS DEVELOPMENT & SUPPLY COMPANY, INC. V. HUNTON & WILLIAMS LLP:**

**DANIEL F. KONICEK AND KONICEK & DILLON, P.C.,**

**APPELLANTS,**

**ALBERT SOLOCHEK, HOWARD, SOLOCHEK & WEBER, S.C. AND MINERALS DEVELOPMENT & SUPPLY COMPANY, INC.,**

**CO-APPELLANTS,**

**V.**

**HUNTON & WILLIAMS, LLP, INSIGHT EQUITY HOLDINGS, LLC AND INSIGHT EQUITY LP,**

**RESPONDENTS.**

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APPEAL from an order of the circuit court for Monroe County: MARK L. GOODMAN, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 BLANCHARD, P.J. Minerals Development & Supply Company, Inc., filed this action against Insight Equity Holdings, LLC, and Insight Equity, LP (the Insight defendants) and the law firm Hunton & Williams (Hunton), in Monroe County circuit court in July 2010, relating to a dispute involving contracts to buy and sell "frac sand."[1] In 2012, following proceedings before an arbitration panel, a federal district court, and a Dane County circuit court in a separate state court action, the parties appeared back before the Monroe County circuit court, which dismissed Minerals' only claim against the Insight defendants and all claims against Hunton with prejudice.

¶2 In addition, the circuit court, on its own motion, sanctioned Minerals and its attorneys, Illinois attorney Daniel Konicek (appearing in this case pro hac vice) and Wisconsin attorney Albert Solochek (collectively "the attorneys" or "the Minerals attorneys"), for violating WIS. STAT. § 802.05 (2013-14)[2] through frivolous commencement and maintenance of this lawsuit. The court awarded the Insight defendants and Hunton their actual and reasonable attorney's fees incurred between September 20, 2012, and August 12, 2013, and ordered the attorneys and Minerals held jointly and severally liable for this award. As an additional sanction, the court revoked attorney Konicek's pro hac vice admission.

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[1] "Frac sand" is "a high-purity quartz sand … used in the hydraulic fracturing process (known as 'fracking') to produce petroleum fluids." ***O'Connor v. Buffalo Cnty. Bd. of Adjustment***, 2014 WI App 60, ¶2 n.1, 354 Wis. 2d 231, 847 N.W.2d 881 (quoting, What is Frac Sand?, http://geology.com/articles/frac-sand/ (last visited by the ***O'Connor*** author, Apr. 15, 2014)).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 Minerals appeals dismissal of the complaint and the sanctions against it. Through separate counsel, the attorneys and their law firms appeal the sanctions against the attorneys, and attorney Konicek appeals revocation of his pro hac vice admission. For the following reasons, we affirm.

## BACKGROUND

¶4 The following summary is derived primarily from the findings of the circuit court in this case during the course of an August 12, 2013 hearing at which the court found that Minerals and the attorneys had violated WIS. STAT. § 802.05 and on that basis ordered sanctions. A relatively extensive background chronology is necessary, given the tortured history of this case and the nature of the sanctions decisions that Minerals and the attorneys now challenge.

¶5 In February 2009, Wildcat Companies II, LLC, and Minerals entered into a supply agreement, obligating Minerals to buy frac sand from Wildcat and Wildcat to supply frac sand to Minerals. At approximately the same time, Minerals and Superior Silica Sands, LLC, entered into a supply agreement, under which Minerals would sell frac sand to Superior.[3] The effect of these two agreements was that Minerals would act as a "middleman," "buying sand from Wildcat and selling the same sand to Superior."

[3] In their briefing to this court, the Minerals attorneys vaguely characterize the Insight defendants as "Superior affiliates," leaving unclear the specific relationship between the Insight defendants and Superior. Contrary to one allegation in Minerals' complaint, the circuit court found that the Insight defendants "are not the parent companies of Superior." In any event, we do not attempt to pin down this issue, because neither Minerals nor the Minerals attorneys argue that the circuit court committed error based on a misunderstanding of a proven relationship between Superior and the Insight defendants, and the nature of the relationship does not appear to matter to any issue we resolve on appeal.

¶6 On or about August 1, 2009, Superior terminated its contract with Minerals, at a time when Superior was represented by Hunton. Also in August 2009, Hunton, on behalf of Superior, "communicated with legal counsel representing Wildcat pertaining to creating an agreement between Superior … and Wildcat" regarding the sale and shipment of frac sand. Hunton told Wildcat's counsel that Hunton had "learned" that "Wildcat might have a contract restricting Wildcat's ability to enter into an agreement with Superior." Hunton "advised Wildcat" that Hunton could not move forward on any potential Superior-Wildcat agreements until Hunton "received Wildcat's assurance" that Wildcat "was not subject to any existing contractual restrictions affecting [Wildcat's] ability to enter into a supply contract with" Hunton's client, Superior.

¶7 On or about August 19, 2009, without participation by Minerals, Wildcat and Superior entered into a contract that "provided for the sale and shipment of the same type of sand that formed part of Wildcat's prior contract with Minerals."

¶8 Minerals invoked an arbitration clause in the Minerals-Superior contract to allege that Superior had breached the Minerals-Superior supply agreement and that Superior had tortuously interfered with the Minerals-Wildcat contract. An arbitration panel was selected and arbitration commenced.

¶9 In June 2010, the parties informed the panel that they had reached a settlement. Approximately one month later, however, Minerals alleged to the panel that Superior had made fraudulent representations about Superior's financial condition to induce Minerals to enter into the June settlement. The panel set the matter for a hearing in October 2010.

¶10 On July 30, 2010, with the arbitration "well underway," Minerals filed this action in Monroe County circuit court, naming as defendants Hunton and the two Insight defendants. Konicek moved for and was granted pro hac vice admission.

¶11 Minerals' complaint alleged three causes of action, each relating to the allegation that Hunton and/or the Insight defendants had "demand[ed] that" Wildcat terminate its contract with Minerals or had "aided" Superior in "cut[ting] Minerals out of the supply chain": (1) tortious interference by Hunton; (2) aiding and abetting the commission of a tort by Hunton and the Insight defendants; and (3) civil conspiracy by Hunton.

¶12 On August 27, 2010, the Insight defendants and Hunton caused this action to be removed to federal court. *See* ***Minerals Dev. & Supply Co. v. Hunton & Williams, LLP***, Nos. 10-cv-00488-wmc, 11-cv-00017-wmc, 2011 WL 4585321 (W.D. Wis. Sept. 30, 2011) (hereafter the federal removed action).

¶13 In October 2010, the parties notified the arbitration panel for a second time that they had settled the case. Under this settlement, Superior agreed to pay Minerals $500,000, and Minerals agreed to dismiss with prejudice its claims against the Insight defendants in the federal removed action, leaving in place the claims against Hunton. As the arbitration panel later noted, the terms of the October 2010 settlement and release included the broadest of language: "mutual *global* releases for *all claims and causes of action, known or unknown, accrued or unaccrued*." (Emphasis by arbitration panel.)

¶14 Superior timely tendered the $500,000 that it had agreed to pay Minerals. However, despite accepting this $500,000, Minerals did not perform on its obligation under the settlement and release to dismiss with prejudice its claims

against the Insight defendants. Instead, Minerals *added to* its complaint in federal court a claim that it had been "fraudulently induced" to enter into the October 2010 arbitration settlement and release.

¶15 On January 7, 2011, the arbitration panel ruled that the October 2010 settlement and release was valid and binding on Minerals. We summarize some details of that ruling in the Discussion section below. On March 31, 2011, Minerals commenced a new state court action, in Dane County, assigned to the Hon. Richard Niess, seeking to vacate the arbitration award. As we explain further below, Judge Niess confirmed the arbitration award, and this court eventually affirmed that decision.

¶16 On September 30, 2011, the federal district court dismissed the federal removed action as to all parties, and directed the parties to state court to resolve their dispute about the enforceability of the arbitration settlement agreement. As part of that decision, the federal court determined that all claims against Hunton must be dismissed because, based on the nature of Minerals' allegations against Hunton, Hunton was entitled to qualified immunity from liability because Hunton was acting as counsel to Superior at all pertinent times and did not act in a fraudulent manner. *See* ***Minerals Dev. & Supply Co.***, 2011 WL 4585321. On May 15, 2012, the federal appeals court vacated the decision of the district court in the federal removed action on jurisdictional grounds, without reaching the merits of any issue pertinent to this appeal, and ordered this action remanded to Monroe County circuit court.

¶17 On June 29, 2012, counsel for the Insight defendants sent a letter to the Minerals attorneys proposing a stipulation of dismissal with prejudice of the Insight defendants, stating in part that the Insight defendants should be dismissed

with prejudice based on the October 2010 settlement and release in the arbitration. Also enclosed was a motion for sanctions under WIS. STAT. § 802.05, citing the "safe harbor" feature of the sanctions statute.[4]

¶18 On July 2, 2012, the Insight defendants and Hunton each moved to dismiss this action in the Monroe County circuit court. In support, Hunton argued in part that the complaint failed to state a claim upon which relief may be granted based on Hunton's qualified immunity for actions undertaken as counsel to Superior. The Insight defendants argued in part that dismissal was required under the October 2010 settlement and release, and "there is no connection alleged in the Complaint that ties [either Insight defendant] to any aiding and abetting conduct."

¶19 On August 6, 2012, Minerals filed in this Monroe County action a motion for summary judgment, including voluminous exhibits and deposition excerpts, arguing that the undisputed material facts established that Hunton tortuously interfered with the Minerals-Wildcat contract.

¶20 On September 20, 2012, in the Dane County action, as referenced above, Judge Niess denied Minerals' motion to vacate the arbitration award and granted Superior's motion to confirm the award, and awarded substantial attorney's fees and costs to Superior.

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[4] The safe harbor feature of the sanctions statute requires the objecting party to first serve on the challenged party its motion for sanctions, before filing the motion with the court, in order to give the challenged party 21 days to "withdraw[] or appropriately correct[]" the challenged paper or position. WIS. STAT. § 802.05(3)(a)1. In other words, service of the motion begins the running of the safe harbor period, and only after the 21 days have passed, and after the challenged party has failed to withdraw or correct, may the objecting party file the motion with the court. ***Id.***

¶21 On October 10, 2012, Minerals moved the circuit court in this Monroe County case to voluntarily dismiss *without prejudice* all claims against the Insight defendants, but leave in place claims against Hunton. In a pleading filed in this case on November 30, 2012, Minerals argued that dismissal of the Insight defendants *with prejudice* would be inappropriate, because in the event that Minerals were successful in appealing Judge Niess's decision confirming the arbitration award, a dismissal with prejudice of this action might have negative consequences for Minerals.

¶22 On December 5, 2012, the Insight defendants responded, in part:

> Continuing litigation against and filing any further documents other than a dismissal as to [the Insight defendants] is for the improper purposes of harassing, causing unnecessary delay in the dismissal of, and needlessly increasing the cost of this litigation in violation of WIS. STAT. § 802.05, as well as assisting [Minerals] to convert the funds [received as part of the October 2010 settlement and release] by keeping them without performing its obligations under [that settlement].

¶23 On January 17, 2013, the Monroe County circuit court dismissed *with prejudice* Minerals' only claim against the Insight defendants, aiding and abetting the commission of a tort, on multiple grounds, including that Minerals "has acted in bad faith." The court also dismissed all three counts against Hunton *with prejudice* "based on the complaint's utter failure to state any claim upon which relief may be granted."

¶24 Also during the January 17, 2013 hearing, the court addressed motions for sanctions filed by the Insight defendants. However, the court put those motions aside and made the court's own motion for sanctions, after considering "the multifaceted nature of this entire package of litigation." The court expressed concern that "Minerals used this action to ratchet up … the

pressure in the ongoing arbitration hearing" by making an "attack" on "the honesty and integrity of" Hunton, and did so using a complaint that was "an extremely poorly done work product." Based on these and related observations, the court directed the Minerals attorneys "to show cause why the complaint that they filed on July 30, 2010, … did not violate [WIS. STAT. §] 802.05(2) in the manner that I have described," and allowed for extended briefing on this issue.

¶25 On March 1, 2013, Judge Niess, in the Dane County case, denied a motion for reconsideration of the court's September 20, 2012 order granting Superior's motion to confirm the arbitration award and awarding attorney's fees and costs to Superior.

¶26 Back in this Monroe County action, following briefing and arguments on the issue of sanctions, at a hearing on August 12, 2013, the court made findings and reached conclusions that included the following:

- None of the exhibits submitted by the parties in the case, including all those filed while it was a removed federal action, "support the allegation that" Hunton "demanded" that Wildcat "terminate its contract with Minerals." Instead, the exhibits show that Hunton "sought assurances from Wildcat that Wildcat's existing contracts created no restriction prohibiting Wildcat from negotiating with" Superior, Hunton's client.

- The complaint's defects include failing to take into account "Wisconsin's grant of qualified immunity to lawyers" as protection against claims by third parties related to actions taken by the lawyer on behalf of a client, and failing to make clear what the tort that the parties are alleged to have aided and abetted.

- The complaint "was filed for three improper," "repugnant" purposes: (1) to "ratchet up the pressure on" Superior in order "to settle the arbitration proceeding through an attack on the Insight Equity defendants and Superior Silica's legal counsel"; (2) to "denigrat[e] the reputation of" Hunton, in part through use of "inflammatory language in the complaint"; and (3) "to needlessly increase the costs of litigation"

> "after Minerals was thrown out of court first by the arbitration panel, and then by [the federal] District Court, and finally by Judge Niess."

¶27 As sanctions, the Monroe County court awarded the Insight defendants and Hunton their actual and reasonable attorney's fees incurred between September 20, 2012 (the day Judge Niess granted Superior's motion to confirm the arbitration award in the Dane County case, based on the October 2010 settlement and release) and August 12, 2013, the date of the hearing. The court concluded that, no later than September 20, 2012, the attorneys for Minerals "should have come to their senses and said boy, this case is a train wreck and it's time to get out of it." The court ordered that Minerals, Konicek, and Solochek be held "jointly and severally liable" for these fees.

¶28 As an additional sanction, the court revoked Konicek's pro hac vice admission. The court stated, "When I look at the record, I have to conclude that Attorney Konicek was the engineer of the train wreck."

¶29 On November 13, 2013, the court reviewed submissions from the parties and issued an order awarding attorney's fees and costs as sanctions. On January 15, 2014, the court entered a final order and judgment memorializing rulings referenced above.

¶30 Minerals appeals dismissal of the complaint and the sanctions against it. Through separate counsel, Konicek and Solochek appeal the sanctions against them, and Konicek appeals revocation of his pro hac vice admission.

## DISCUSSION

¶31 Minerals and the Minerals attorneys raise, or attempt to raise, many issues and subissues, which we now address under one of two headings: whether

Hunton is protected by attorney qualified immunity from the allegations made by Minerals and whether the sanctions imposed by the circuit court were properly considered or were merited.[5] Some of the arguments of Minerals and the Minerals attorneys are not well developed and the degree of overlap in their arguments is not always clear. If we do not address an argument that Minerals or the Minerals attorneys intended to raise, we surmise that the argument was insufficiently raised and developed, and we reject it on that basis.

## I. IMMUNITY OF HUNTON

¶32 Minerals argues that the circuit court erred in dismissing the claims against Hunton based in part on the court's conclusion that Hunton, acting as Superior's attorney within the scope of the attorney-client relationship, is protected by qualified immunity from liability based on the facts alleged in Minerals' complaint, and therefore that Hunton is immune from the three claims in the complaint. The question of the scope of qualified attorney immunity presents a legal issue that we review de novo. For the following reasons, we conclude that qualified immunity applies here.[6]

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[5] Minerals makes two arguments (in sections VII. and VIII. of its principal brief) that are unclear, but in any case we do not address them because each argument is apparently moot. Each argument seems to depend on Minerals having an opportunity to appear and prevail before the United States Supreme Court, and we have been informed in correspondence that the United States Supreme Court has declined to consider the matter.

[6] In an argument that overlaps with this Minerals argument, the Minerals attorneys effectively argue that the court erred in determining that sanctions were merited in part because the attorneys should have recognized that attorney immunity was an insurmountable impediment to this action. We explain later in the text why we affirm on the sanctions issue. As we say in the separate section on sanctions, while it appears to us that the circuit court was free to consider whether, in filing the complaint and in pursuing the action, the attorneys sufficiently took into account the potential availability of attorney immunity as a defense, that does not matter, because there were other sufficient factors supporting sanctions in this case.

¶33 We find persuasive pertinent portions of the federal district court's decision in the removed action, applying Wisconsin attorney immunity law to the complaint in this action. ***Minerals Dev. & Supply Co.***, 2011 WL 4585321, at *12. In particular, we conclude that the district court correctly applied ***Tensfeldt v. Haberman***, 2009 WI 77, 319 Wis. 2d 329, 768 N.W.2d 641, to reach the conclusion that Minerals' allegations against Hunton are not sufficient to fall within the fraud exception to attorney-client immunity. ***Minerals Dev. & Supply Co.***, 2011 WL 4585321, *12.

¶34 The district court cogently and we believe accurately summarized the immunity doctrine and its primary purpose as follows:

> Under Wisconsin law, an attorney is not generally liable to a third party for an act committed "within the scope of an attorney-client agency relationship" absent certain exceptions. *See, e.g.*, *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 321-22, 401 N.W. 2d 816, 823 (1987). This "immunity" does not apply when an attorney "acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled." *Tensfeldt v. Haberman*, 2009 WI 77, ¶63, 319 Wis. 2d 329, 768 N.W.2d 641 (quoting *Strid v. Converse*, 111 Wis. 2d 418, 429-30, 331 N.W.2d 350, 456 (1983)). The Wisconsin Supreme Court has described this as an exception for fraud. *See Goerke v. Vojvodich*, 67 Wis. 2d 102, 107-08, 226 N.W.2d 211, 215 (1975) (finding immunity where plaintiff failed to allege that attorney committed fraud because complaint did not allege that the attorney withheld certain information "for the purpose of misleading or misinforming the other party"). Courts grant attorney immunity out of recognition that imposing liability on an attorney acting within the scope of a client relationship would unduly strain an attorney's undivided duty to his or her client. *See Auric v. Cont'l Cas. Co.*, 111 Wis. 2d 507, 513, 331 N.W.2d 325, 328 (1983) ("Where courts have shied away from allowing the imposition of liability, concern has been expressed that such liability may conflict with the duty an attorney owes to his client."). In a commercial setting, there would seem no greater strain on an attorney's loyalty to his or her client than the potential

> (indeed likely) exposure to suit by a client's direct competitor.

***Id.***, *10.

¶35 We agree with the district court that the complaint explicitly describes all of the conduct allegedly engaged in by Hunton as falling within the scope of the firm's "attorney-client agency" with Superior, and that this leaves only the question whether the complaint alleges that Hunton acted in a fraudulent manner of the type that deprives an attorney of immunity for liability to third parties. We conclude that the complaint does not allege such conduct.

¶36 In particular, like the district court, we are guided by discussion in ***Tensfeldt***, following ***Strid v. Converse***, 111 Wis. 2d 418, 429-30, 331 N.W.2d 350 (1983). Our supreme court explained in ***Tensfeldt*** that attorney immunity to third parties is appropriate in cases that involve the "client's breach of a contract or fiduciary duty," but not in cases involving "the client's commission of an unlawful act," such as a decision to violate a court-imposed obligation. ***Tensfeldt***, 319 Wis. 2d 329, ¶65 & n.26. Among the persuasive authority that the court in ***Tensfeldt*** noted that it had "carefully" reviewed, and favorably cited, on this point were two opinions that the ***Tensfeldt*** court characterized as follows:

> *McDonald v. Stewart*, 289 Minn. 35, 182 N.W.2d 437 (1970) (concluding that an attorney is not liable to third parties for counseling the client to commit a breach of contract, but noting that immunity may not be invoked by attorneys who participate in the perpetration of a fraudulent or unlawful act); *D. & C. Textile Corp. v. Rudin*, 41 Misc.2d 916, 246 N.Y.S.2d 813 (1964) (holding that an attorney is not liable to third parties for inducement to breach of contract, and noting that the dismissed complaint failed to state any facts to show any acts by the attorneys in furtherance of a tortious conspiracy).

***Tensfeldt***, 319 Wis. 2d 329, ¶65 n.26. ***McDonald*** involved a claim that an attorney had tortiously interfered with a contractual relationship. ***McDonald***, 182 N.W.2d at 438. As to ***Rudin***, the court in that case noted that the plaintiff alleged that the attorney defendants had knowledge of the existing contract that was breached and had "devised" a transaction that allegedly resulted in the breach. ***Rudin***, 246 N.Y.S.2d at 816. Given the nature of the allegations in ***McDonald*** and ***Rudin***, it is notable that the court in ***Tensfeldt*** stated, "None of these cases involves the client's commission of an unlawful act. Instead, they involve the client's breach of a contract or fiduciary duty." ***Tensfeldt***, 319 Wis. 2d 329, ¶65. Following ***Tensfeldt***, allegations of the type made here, as in ***McDonald*** and ***Rudin***, do not qualify as acts that are "'malicious, fraudulent or tortious'" that either "'frustrate[] the administration of justice,'" or are intended to "'obtain something for the client to which the client is not entitled.'" *See* ***Tensfeldt***, 319 Wis. 2d 329, ¶63.

¶37 In sum, ***Tensfeldt*** dictates rejection of the arguments now advanced by the attorneys and Minerals. Our supreme court was explicitly weighing public policy considerations in making the statement that conduct of the type at issue here does not qualify as "malicious, fraudulent or tortious." *See* ***id.***, ¶¶62-65 (referring to "public policy" considerations); *see also* ***State v. Schumacher***, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988) (supreme court develops law; court of appeals corrects errors in individual cases).

¶38 For these reasons, we conclude that Minerals' allegation that Superior's attorneys, on behalf of Superior, encouraged Wildcat to enter into a

Wildcat-Superior contract in lieu of its existing contract with Minerals does not describe "malicious, fraudulent or tortious" conduct so as to deprive Hunton of immunity, and on this basis the claims against Hunton were properly dismissed.[7]

## II. SANCTIONS

### *A. Safe Harbor Notice Issues*

¶39 Through a brief reference, the attorneys apparently intend to argue that the circuit court erred in failing to recognize that it is a bar to the court-initiated sanctions against the attorneys regarding allegations or claims against Hunton that Hunton did not in its own right serve Minerals or its counsel with a "safe harbor" notice pursuant to WIS. STAT. § 802.05(3)(a)1. Pertinent to this apparent argument, we summarized the safe harbor provision in footnote 4.

¶40 In response to the attorneys' argument, Hunton and the Insight defendants explain that, when a court initiates the possibility of sanctions under WIS. STAT. § 802.05(3)(a)2., the safe harbor provision does not apply. The attorneys fail to reply to this assertion, which we accept as a form of concession, and we reject the attorneys' argument on this ground. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838.

¶41 On a related note, in a single paragraph of their principal brief, the attorneys assert that, because they filed a motion for voluntary dismissal of the Insight defendants without prejudice on October 10, 2012, they should be

[7] Based on our resolution of the immunity issue, we need not address the separate, extensive arguments that both Minerals and Minerals' attorneys make that the claims against Hunton should not have been dismissed by the court on other grounds.

protected by the safe harbor feature of the sanctions statute. We could treat this assertion as an undeveloped argument and reject it on that basis. *See* ***State v. Petitt***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶42 Instead, we reject this assertion on the following grounds: (1) as explained above, the attorneys fail to respond to Hunton's argument that there is no safe harbor protection when, as here, the court issues an order to show cause on its own motion; (2) this assertion appears to rest on a misreading of the safe harbor provision, which addresses only events occurring during a defined 21-day period related to motions for sanctions, and not subsequent events. As Hunton and the Insight defendants note, Minerals' motion to voluntarily dismiss all claims did not occur within the 21 days after the Minerals attorneys received the safe harbor motion with the letter of June 29, 2012. Therefore, even if it applied here, the safe harbor provision would provide no protection from a sanctions motion. *See* WIS. STAT. § 802.05(3)(a)1.

*B. Notice of Sanctions Against Minerals*

¶43 Minerals argues that it was error for the court to sanction it because the court failed to provide Minerals, as opposed to providing its attorneys, with prior notice and a reasonable opportunity to respond to the January 17, 2013 order to show cause why sanctions should not be imposed. That is, while Minerals does not dispute that the court could sanction it pursuant to WIS. STAT. § 802.05(3) ("the court may impose an appropriate sanction upon the attorneys, law firms, or parties"), Minerals points to the fact that the court directed its order to show cause at the attorneys only, and argues that for this reason the court erred in imposing sanctions against Minerals. We reject this argument on the grounds that Minerals failed to preserve it before the circuit court.

¶44 A party forfeits a legal argument or theory by failing to preserve it before the circuit court and attempting to raise it for the first time on appeal, in a way that would "blindside" the circuit court if it served as the basis for reversal. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶24-26, 338 Wis. 2d 114, 808 N.W.2d 155 (forfeiture rule aims to use judicial resources efficiently and treat opposing parties fairly); ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702 ("[f]orfeiture is a rule of judicial administration"); ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (the forfeiture rule requires parties to "make all of their arguments to the trial court").

¶45 The record reflects that Minerals had many opportunities, stretching over the course of months, to raise the argument it now raises. Minerals not only failed to raise its current argument through counsel at any juncture, but it acted in a way that suggested that it had no such argument to make. During the course of the extensive hearings on these issues, attended by multiple counsel representing Minerals, the court repeatedly characterized offending conduct of Minerals itself. At both the January 17, 2013 and August 12, 2013 hearings, the court expressed the view that Minerals had "acted in bad faith." This is not a case in which the parties and the court consistently focused narrowly on sanctionable conduct of an attorney only, as distinct from any responsibilities of the attorney's client.

¶46 Further, when the court explained at the August 12, 2013 hearing that Minerals and the attorneys would be "jointly and severally liable" for the monetary sanctions award, counsel for Minerals posed no objection based on notice, either at that time or following the hearing. Indeed, on December 4, 2013, four months after the August hearing, counsel for Minerals himself proposed to the court a final order containing the joint and several liability language.

¶47 We conclude that on this record it would improperly blindside the circuit court to reverse on the basis now argued by Minerals, and the argument is thus forfeited.

*C. Court "Lacked Authority" to Impose Sanctions on its own Motion and was "Prohibited" From Doing so by WIS. STAT.§ 802.05(3)(b)2.*

¶48 The attorneys argue that the circuit court "lacked authority to impose monetary sanctions on its own motion with respect to the claims against Insight" after Minerals "strenuously sought to voluntarily dismiss all claims against Insight," and that, under these circumstances, WIS. STAT. § 802.05(3)(b)2. "prohibits an award of monetary sanctions." Hunton and the Insight defendants argue, in part, that the attorneys failed to raise this legal argument in the circuit court and therefore failed to preserve it for appeal. The attorneys fail to reply to the substance of this forfeiture argument, which we construe as a concession, which we accept.[8] *See* ***Shadley***, 322 Wis. 2d 189, ¶26.

*D. Frivolously Continued Actions*

¶49 In their principal brief, the attorneys make the argument that, with the 2005 repeal of WIS. STAT. § 814.025,[9] continuing or maintaining a frivolous action, as opposed to filing a complaint to commence a frivolous action, "is no

[8] More precisely, the attorneys reply to this forfeiture argument in form but not in substance. In a one-sentence purported argument, they change the subject. The attorneys cite to record passages in which they objected to the circuit court imposing sanctions and referred to Minerals' motion to voluntarily dismiss Insight, but none of these cited passages would have sufficiently alerted the court to their current legal argument, namely, that the court "lacked authority" to impose sanctions on its own motion or that WIS. STAT. § 802.05(3)(b)2. "prohibited" an award. Instead, the attorneys spoke in terms of what the court might determine was "warranted" or "appropriate" under the circumstances.

longer sanctionable." For this reason, the attorneys' argument continues, the circuit court's sanction decision was flawed because the court considered conduct that occurred after Minerals filed its complaint. Minerals adopts this argument. However, the attorneys and Minerals retreat significantly from this argument in their reply brief. Focusing our attention on the more limited argument to which they retreat, we reject the argument because it made for the first time in the reply brief and because it is premised on a misreading of the record.

¶50 Hunton and the Insight defendants point out that this court has stated that the new statute applies to papers filed with a court to continue a lawsuit. *See* ***Keller v. Patterson***, 2012 WI App 78, ¶21 n.10, 343 Wis. 2d 569, 819 N.W.2d 841; *see also* WIS. STAT. § 802.05(2) ("By presenting to the court, … by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney … is certifying that" the paper is not presented for an "improper purpose" and the claims stated in the paper are warranted by law or an argument for the extension of the law.). In reply, the attorneys, with Minerals following, retreat to a position that rests on the premise that "the 2010 Complaint was the only filing the circuit court found frivolous here."

¶51 As noted, we reject this fall back argument because it appears for the first time in the reply briefs. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256. We additionally reject it because it rests on an incorrect premise. The circuit court explained in its sanctions decision

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[9] Effective July 1, 2005, WIS. STAT. §§ 802.05 and 814.025 (2003-04) were repealed, and WIS. STAT. RULE 802.05 (2005-06) was recreated. S. Ct. Order 03-06, 2005 WI 38, 278 Wis. 2d xiii (eff. March 31, 2005).

that it had concluded in part that, after the complaint was filed, Minerals continued to file papers and make arguments—even past the point at which the arbitration panel and federal and state courts had each "thrown out" the claims—with the intent "to needlessly increase the costs of litigation." Indeed, the attorneys acknowledge at one point in their principal brief on appeal that the "focus" of the circuit court in evaluating the sanctions issue was on events that occurred after they commenced this action, undermining the premise of their fall back argument. If the intended argument is that Minerals did not file any papers in this action after filing the complaint that the circuit court found frivolous, it is sufficient to point to Minerals' October 10, 2012 motion for voluntarily dismissal *without prejudice* of the Insight defendants, which as we discuss below the court had a basis to find was frivolous.

*E. Grounds for Finding a Violation of WIS. STAT. § 802.05(2)(a)*

¶52 Although it is at times unclear what standard of review they ask us to apply to various aspects of their arguments, the attorneys generally contend that the circuit court should not have found that they violated WIS. STAT. § 802.05, because the complaint they filed in 2010 "stated tenable claims under Wisconsin law" and because "none of the court's three stated bases" for finding violations "supports [the court's] conclusion that Counsel filed the 2010 Complaint for improper purposes." We reject these general arguments for the following reasons.

¶53 Regarding our standard of review, our supreme court has explained that, before the repeal of WIS. STAT. §§ 802.05 and 814.025 (2003-04) and recreation WIS. STAT. § 802.05 (2005-06), differing standards of review were applied to commencing, as opposed to continuing, frivolous claims, but the statutory change has put this in doubt. *See* ***Storms v. Action Wis. Inc.***, 2008 WI

56, ¶35 & n.7, 309 Wis. 2d 704, 750 N.W.2d 739. However, we will assume without deciding, in favor of the attorneys, that the old standard applies here, so that a less deferential standard applies to circuit court decisions on issues related to continuing the pursuit of claims. Under the standard of review we apply:

> [T]he nature and extent of investigation undertaken prior to filing a suit are issues of fact, and a circuit court's determinations on such questions will be upheld unless clearly erroneous. The determination of how much investigation should have been done … will be sustained where the court "examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach."
>
> … [R]eviewing a circuit court's determination … that an action was continued frivolously involves a mixed question of law and fact. … [W]hat an individual or attorney knew or should have known is a question of fact that will be sustained unless clearly erroneous. Whether the circuit court's determinations of fact support a conclusion that a lawsuit was continued frivolously, however, is a question of law that this court reviews independently of the determinations rendered by the circuit court or court of appeals.

***Id.***, ¶¶34-35 (quoted sources omitted).

¶54 We begin by noting that we reject a number of the attorneys' arguments on this topic for reasons that we have already explained. Some of their arguments rest on the premise that the circuit court was limited to considering only their filing of the complaint, and other arguments rest on the premise that attorney immunity is not available in this context. For reasons we have explained, the circuit court was free to consider their conduct subsequent to filing the complaint and also free to consider whether, in filing the complaint and in pursuing the action, they sufficiently took into account the potential availability of attorney immunity as a defense.

¶55 Given these infirmities in the attorneys' arguments, we will be brief in explaining why we conclude that: (1) the attorneys fail to persuade us that the court clearly erred in finding an improper purpose in filing the action, that purpose being to "rachet up the pressure" on the Superior-Hunton relationship; and (2) the court's determinations of fact regarding continuation of the suit support a conclusion as a matter of law that the lawsuit was continued frivolously. Either ground would be adequate to support the circuit court's sanctions decision, but we choose to address both.

¶56 To repeat, one "improper purpose" found by the circuit court was that the attorneys filed this action in order to "ratchet up the pressure" on Superior to settle the arbitration by attempting to undermine, or "sever," the attorney-client relationship between Hunton and Superior.[10] The attorneys do not provide us with a persuasive reason to conclude that the circuit court clearly erred in finding this intent constituting an undoubtedly improper purpose. The only argument the attorneys offer to the contrary is that, if they had intended to use the complaint "as settlement leverage in the Arbitration Proceeding, one would expect that the

[10] Sanctions may be available if a party can show that an opponent has presented a paper "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." WIS. STAT. § 802.05(2)(a). In addition, "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." S. Ct. Order 03-06, 278 Wis. 2d xix.

Separately, as noted above, the circuit court considered as one "improper purpose" an intent to "denigrat[e] the reputation" of Hunton through the choice of words that the attorneys used in the complaint, which is closely related to the alleged improper purpose to undermine the attorney-client relationship between Hunton and Superior. However, we assume without deciding that this alleged denigration-through-complaint-drafting factor was not a proper factor, and focus instead on the other factors that were before the court, concluding that they were sufficient to merit sanctions.

parties' subsequent settlement [in the arbitration, in October 2010] would have released Hunton from liability," but instead Minerals "expressly carved out and preserved [its] claims against" Hunton in the settlement.

¶57 This is a weak argument on its face to rebut the court's finding. In any case, this argument could only make sense if the attorneys had in fact promptly treated the October 2010 arbitration settlement and release as a complete resolution of the dispute, leaving only the claims against Hunton to resolve. The circuit court found that this is not what happened. The circuit court was entitled to conclude, based on a record that includes the findings of the arbitration panel, some of which we now highlight, that the attorneys participated in persistently *dishonoring* the October 2010 settlement and release.

¶58 As this court explained in the course of appellate review of Judge Niess's decision to confirm the arbitration award,

> The arbitrators' award included detailed findings and conclusions. Among the arbitrators' conclusions were:
>
> (1) Minerals could not do all of the following: retain the $500,000 in settlement proceeds, fail to perform its obligations under the October 2010 settlement agreement, and pursue a fraud claim. The arbitrators recognized case law allowing a party either to rescind a contract or to affirm a contract and pursue fraud damages, but the arbitrators concluded that Minerals had failed to affirm the October 2010 settlement agreement by failing to perform its obligations under the agreement.
>
> (2) Even if Minerals could pursue its fraud claim, the claim lacked merit because Minerals could not prove each of the required elements.
>
> (3) The October 2010 settlement agreement was therefore not induced by fraud and was enforceable.
>
> As to their second conclusion regarding the merits of Minerals' fraud claim, the arbitrators expressly found

> that "no one associated with Superior made any false statements to [Minerals]." The arbitrators further found and concluded that, even if someone had made a false statement, Minerals could not show justifiable reliance:
>
> > Given the fact that [Minerals] justified its refusal to proceed with the [first,] June [2010] settlement by claiming that it was fraudulently induced ... and thereafter filed interrogatory responses identifying specific allegedly false statements ..., [Minerals'] assertion that it relied on similar representations in [the] October [2010 settlement agreement] is patently absurd. No rational trier of fact could find that [Minerals] justifiably relied on the same type of statements which allegedly induced it to enter into the June settlement agreement.... For sophisticated businessmen and their counsel to make such a claim speaks only to their credibility.
>
> The arbitrators ordered Minerals to comply with the settlement agreement, and awarded Superior approximately $284,000 in attorney's fees and other expenses as the prevailing party pursuant to provisions in the parties' contract. In addition, the arbitrators ordered Minerals to pay certain arbitration expenses. Finally, the arbitrators imposed a $10,000 sanction on Minerals, concluding that Minerals' arguments were mostly frivolous.[11]

***Minerals Dev. & Supply Co., Inc. v. Superior Silica Sands, LLC***, No. 2012AP2328, unpublished slip op. ¶¶13-15 (WI App Nov. 7, 2013), *review denied* (WI May 22, 2014) (No. 2012AP2328) (affirming circuit court judgment confirming an arbitration award in favor of Superior and against Mineral and awarding Superior additional expenses).

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[11] As we noted elsewhere in our opinion, in awarding the $10,000 sanction, the arbitrators stated, "It is difficult to imagine a case, other than one involving blatant perjury, where the imposition of sanctions would be more appropriate." ***Minerals Dev. & Supply Co., Inc. v. Superior Silica Sands, LLC***, No. 2012AP2328, unpublished slip op. ¶53 (WI App Nov. 7, 2013).

¶59 The circuit court here had a reasonable basis to conclude, for the reasons we explained in our prior decision, that the attorneys should have understood from October 2010 forward that Minerals was unquestionably barred from both retaining the $500,000 and pursuing its fraud claim against Superior, "because Minerals otherwise failed to perform on obligations imposed on Minerals by the settlement agreement," "[r]egardless whether Minerals could pursue a fraud claim in an effort to undo the settlement agreement." ***Id.***, ¶¶82-86. This defeats the only argument the attorneys make to support their position that the circuit court erred in determining that the attorneys filed this action for the improper purpose of pressuring Superior to settle the arbitration proceeding.

¶60 The same factors support the court's conclusion that the attorneys "needlessly increas[ed] the costs of litigation," by failing to "have had the good sense to pull the plug on this action" in a timely manner after learning of defects in their case. As a benchmark, the circuit court in this case pegged its assessment to the day on which Judge Niess granted Superior's motion to confirm the arbitration award, based on the October 2010 settlement and release, but we are not limited to this date. *See* ***Correa v. Farmers Ins. Exch.***, 2010 WI App 171, ¶4, 330 Wis. 2d 682, 794 N.W.2d 259 ("[W]e may affirm a circuit court for any reason, even if not relied on by either the circuit court or raised by the lawyers."). The attorneys effectively argue that their October 10, 2012 motion to voluntarily dismiss the complaint without prejudice against the Insight defendants followed so quickly on the heels of Judge Niess's September 20, 2012, confirmation of the arbitration award that the circuit court here lacked a basis to reach the conclusion that sanctions were merited on this ground. However, even without reference to other record evidence supporting the view that the attorneys litigated in a manner intended to increase costs, the findings of the arbitration panel again provide a

reasonable basis for the circuit court to have concluded that, whatever else Minerals and its attorneys were required to do to avoid sanctions, one thing they should have done was to move for dismissal, *with prejudice*, of all claims against the Insight defendants before October 10, 2012.[12]

*F. Revocation of Pro Hac Vice Admission*

¶61 As stated above, Konicek was granted pro hac vice admission in this case, but the court revoked that admission as an additional sanction. The attorneys argue that the circuit court did not "afford Konicek the procedural due process to which he is entitled" because Konicek lacked both prior notice that this admission might be revoked and an opportunity to respond before revocation. This argument is wholly without merit because it ignores pertinent record facts.

¶62 As summarized above, on January 17, 2013, the circuit court ordered that the attorneys show cause why sanctions were not appropriate, and permitted

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[12] In the course of the Dane County circuit court's March 1, 2013 decision denying Minerals' motion for reconsideration, Judge Niess focused in part on the persistent refusal of Minerals and its attorneys to honor the October 2010 settlement and release, characterizing the conduct of the Minerals attorneys as being

> beyond aggressive, raising virtually every argument conceivable, viable or otherwise. Mindboggling motions challenging venue and subject matter jurisdiction together with pointless parallel litigation in various jurisdictions and venues were just the beginning salvos in their campaign to fight absolutely everything in this case, right up to and including their reconsideration motion which essentially posits that both the arbitration panel and this court got absolutely everything wrong in this case. *Meanwhile, they continue to wrongfully violate their [October 2010] settlement agreement [in the arbitration proceeding] by keeping defendant's money and reneging on their own clear contractual obligations*.

(Emphasis added.)

extensive time for briefing on these issues. In a brief submitted on March 6, 2013, Insight explicitly requested that Konicek's pro hac vice admission be revoked. In a reply brief submitted on May 16, 2013, Konicek *explicitly acknowledged* that this request had been made, and suggested a reason why it should not be granted.

¶63 We think it likely that Konicek forfeited an appellate argument on the notice and opportunity to respond issue by failing to call the argument to the attention of the circuit court. Without dwelling on that topic, however, we reject the argument on the grounds that Konicek now fails to point to any authority suggesting that the history we recite does not demonstrate ample notice and opportunity to be heard on this issue. Nothing in the authority he cites is to the contrary. He relies on ***Jensen v. Wisconsin Patients Compensation Fund***, 2001 WI 9, ¶¶16-20, 241 Wis. 2d 142, 621 N.W.2d 902, where the court opined that attorneys should receive some sort of notice and some opportunity to respond before pro hac vice admission is revoked. *See* ***id.***, ¶20. However, in addressing this issue, the ***Jensen*** court explained that circuit courts are allowed "some flexibility of procedure, recognizing that the decision is discretionary in the trial court and some circumstances may not require formal notice and full hearing." ***Id.***, ¶18. The ***Jensen*** court held that revocation of pro hac vice status was inappropriate on the facts presented there because "the attorney's pro hac vice admission was *never mentioned* as a possible sanction for his conduct." ***Id.***, ¶22 (emphasis added). That is not the case here.

## CONCLUSION

¶64 For these reasons, we affirm dismissal of the complaint and the sanctions against Minerals, the sanctions against Konicek and Solochek, and revocation of Konicek's pro hac vice admission.

*By the Court*.—Order affirmed.

Not recommended for publication in the official reports.