COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3658

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

WILLIAM J. MARTH,

PLAINTIFF-APPELLANT,

v.

ROBERT JAHN AND NORTHWESTERN MUTUAL LIFE,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Washington County: THOMAS R. WOLFGRAM, Judge. *Affirmed and cause remanded with directions.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. William J. Marth appeals from judgments dismissing his action and awarding actual attorney's fees pursuant to § 814.025, STATS., the frivolous claims statute. On appeal, Marth raises a host of challenges

to both the dismissal and the finding of frivolousness. We reject all of his challenges, affirm the judgments of the circuit court, determine his appeal to be frivolous and remand the cause for a determination of actual attorney's fees on appeal.

¶2 In 1997, Marth, an attorney, filed a claim against Robert Jahn and Northwestern Mutual Life Insurance Company, claiming that NML refused to pay to Marth "full death benefits upon and after the death of the said insured Robert D. Marth," William's brother. NML answered, claiming that William, not Robert, was the insured. Hence, no benefits were due to William as a result of the death of Robert.

¶3 Marth then retained Attorney Ross R. Kinney, who filed an amended complaint. The amended complaint modified certain paragraphs of the original, but still alleged a refusal to pay on NML's part. It further alleged that "it is William J. Marth's present recollection" that he ordered through Robert Jahn in 1987 a life insurance policy on Robert's life, payable to William as beneficiary. The amended complaint went on to state that "William J. Marth presently has uncertainties concerning the precise nature and extent of his legal rights and obligations with respect to the aforementioned life insurance policy on his life which was issued and the aforementioned life insurance policy on his brother's life which NML and Robert Jahn now assert was never issued and was never even ordered by William J. Marth back in 1987."[1] The complaint then requested "that appropriate Declarations be made by this Court pursuant to § 806.04, Wis. Stats., Wisconsin's Uniform Declaratory Judgment Act." The answers from NML and

[1] We note that Marth does not aver, allege or even suggest that any such policy was ever issued.

Jahn asserted that no such policy was ever issued nor had Marth ever requested one. Later, Jahn and NML moved for summary judgment. Following a hearing, the circuit court granted summary judgment. Marth appeals.

¶4 We are both perplexed and troubled by Marth's briefs on appeal, which are both tortured and tortuous. Rather than address his issues as presented, we simply address the core questions presented by the appeal: the propriety of the grant of summary judgment and of the granting of costs and fees for a frivolous claim. We conclude that the circuit court committed no error in either determination.

¶5 We first address the propriety of the summary judgment. We conclude that it was properly granted. Between the original and the amended complaint, two modes of relief were sought. The first, coming from the original complaint, apparently sounded in either tort or contract in that Marth claimed that NML failed to pay upon an insurance contract issued in 1987.[2] NML's answer, as well as the plain language of the contract itself, establishes that Marth was the insured, not the beneficiary, on that policy—a fact that Marth's briefs on appeal appear, at least at times, to recognize. Summary judgment was plainly proper respecting the actual contract in existence.

¶6 We turn now to the summary judgment as regards Marth's prayer for declaratory relief. Much of Marth's brief on appeal is devoted to how opposing counsel somehow failed to establish a basis for summary judgment on the

[2] In addition to seeking a declaratory judgment, his amended complaint may or may not reallege this apparent tort or contract claim.

declaratory judgment aspect of Marth's claim, and how the circuit court failed to recognize this. We are unpersuaded that such is the case.

¶7 "[T]he granting or denying of relief in a declaratory judgment action is a matter within the sound discretion of the circuit court ...." ***Tooley v. O'Connell***, 77 Wis.2d 422, 433, 253 N.W.2d 335, 339 (1977). Discretion to deny relief arises when a judgment or decree would not terminate the controversy. *See* ***id.*** at 433, 253 N.W.2d at 340. We first consider the actual contract which listed William Marth as the insured. The circuit court opined at the summary judgment motion hearing that "[t]here is no controversy. The policy says what it says. Everyone agrees it's unambiguous. And asking the Court to declare an unambiguous policy unambiguous is absurd." We agree wholeheartedly.

¶8 We turn now to the summary judgment concerning Marth's recollection that he had requested in 1987 that Jahn draw up a policy with the insured and the beneficiary reversed. We are at something of a loss, as evidently was the circuit court, to understand just what rights Marth would have had the circuit court declare. At the motion hearing, Marth's counsel stated, "I think we are getting to the nub of what needs to be addressed in the Court's declarations. It has to do with what rights, if any, under tort common law, judge-made law." Further, one of Marth's issues on appeal appears to acknowledge that "plaintiff's complaint [sought] judicial declarations concerning plaintiff's claims of tort and contract rights."

¶9 From those contentions, the only fair surmise is that Marth was seeking a declaration of what tort or contract rights might accrue to him in 1997 for having requested, but not received, a policy back in 1987. Here, again trying to construe Marth's labyrinthine brief as fairly as we can, we can only conclude

that Marth sought the court's opinion about whether he had a viable contract or tort claim against either NML or Jahn or both, despite the fact that the only existing policy is unambiguous on its face and that neither party alleges or avers that any other policy ever existed.

¶10 All parties look to the four-part test for a declaratory judgment set out in ***State ex rel. Lynch v. Conta***, 71 Wis.2d 662, 669, 239 N.W.2d 313, 322 (1976), and elsewhere. A declaratory judgment may be issued only if the action measures up to the following requirements: (1) There must exist a justiciable controversy, one in which a claim or right is asserted against one who has an interest in contesting it. (2) The controversy must be between persons whose interests are adverse. (3) The party seeking declaratory relief must have a legally protectible interest in the controversy. (4) The issue involved in the controversy must be ripe for judicial determination. Here, the third and fourth requirements show that summary judgment was properly granted on the prayer for declaratory judgment.

¶11 Given the allegations of Marth's complaint, we are unpersuaded that he had a legally protectible interest in the controversy. The only policy involved is plainly not payable to Marth. Marth's complaint and affidavit allege only that he recalls directing Jahn to issue a policy on his brother's life. Marth avers that NML claims that it never issued such a policy. Marth acknowledges that he has no such policy. Marth nowhere alleges or avers that such a policy ever existed. We are unconvinced that merely averring that a policy was requested some ten years ago establishes in Marth a legally protected interest.

¶12 Also, Marth's claim was not ripe for determination. Ripeness "requires that the facts be sufficiently developed to avoid courts entangling

themselves in abstract disagreements." ***Miller Brands-Milwaukee, Inc. v. Case***, 162 Wis.2d 684, 694, 470 N.W.2d 290, 294 (1991). A court may refuse to decide a declaratory judgment claim when the facts are not sufficiently developed; facts may not be "so contingent and uncertain." *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 412, 320 N.W.2d 175, 183 (1982). Here, we are unpersuaded that even further discovery could make Marth's circumstances sufficiently certain.

¶13 In any event, a matter is not ripe for declaratory relief unless the declaration is conclusive upon the controversy submitted to the court. *See* ***id.*** at 411, 320 N.W.2d at 182. Here, the declaration sought could not have terminated the controversy, if there were one. In his brief on appeal, Marth contends[3] that the "'material' issues [before the circuit court] were: (1)what did W. Marth request from Jahn in 1987? (2) what was W. Marth given by Jahn in 1987? (3) why did W. Marth *not* receive an N.M.L. life insurance policy on his brother, with himself as to sole beneficiary?" From the record before the circuit court, any answers to these questions reveal the hypothetical nature of Marth's claim. The facts and allegations before the circuit court at the time of the summary judgment motion show that any answers to these questions resolve no controversy: (1) Marth recollected he asked for a particular policy; Jahn avers that he did not. (2) In 1987, Jahn gave Marth a policy on his own life, not his brother's. (3) In 1987, Marth did not receive the other policy because Jahn avers that he never asked for it. Even fuller discovery[4] would not change the fact that Marth never claims that

[3] This argument is made as part of Marth's contention that the summary judgment was erroneous because genuine issues of material fact still existed.

[4] For example, Marth contends that there "had been *no* formal discovery *vis a vis* N.M.L. [at the time of the summary judgment motion.] What if it would have disclosed some documentary evidence to corroborate what was stated in W. Marth's affidavit?"

he received such a policy, or even that such a policy ever existed. We are persuaded that even the answers most favorable to Marth's contention would result in a declaration that would be advisory only. The circuit court did not, therefore, err in denying the relief. *See* ***Tooley***, 77 Wis.2d at 433-34, 253 N.W.2d at 340.[5]

¶14 We turn now to the circuit court's determination of frivolousness. We conclude that the circuit court did not err in this determination. Whether an action is frivolous is a mixed question of fact and law. *See* ***Juneau County v. Courthouse Employees***, 216 Wis.2d 284, 295, 576 N.W.2d 565, 569 (Ct. App.), *aff'd*, 221 Wis.2d 630, 585 N.W.2d 587 (1998). The legal question to be resolved under § 814.025, STATS., the frivolous claims statute, is whether the claim is so indefensible that the party or his or her attorney should have known it to be frivolous. *See* ***Juneau County***, 216 Wis.2d at 295-96, 576 N.W.2d at 569. We conclude that any reasonable attorney should have known the claim to be frivolous.

¶15 On appeal, Marth argues from what he perceives as a lack of a factual basis upon which to find frivolousness. He labels meritless NML's notion that "it had established in this civil action that '...there was *no* set of facts which could satisfy the elements of a claim...' seeking *judicial declarations!*" He further argues that he "had, and has, a legal right to have the circuit court resolve all of his controversies, uncertainties and disagreements with Jahn and NML via appropriate *judicial declarations*." Again, we can only understand this contention to mean

[5] We will uphold a circuit court's discretionary determination if there is any reasonable basis to sustain it. *See* ***Domain Indus., Inc. v. Thomas***, 118 Wis.2d 99, 103, 345 N.W.2d 516, 518-19 (Ct. App. 1984).

that, given enough discovery, the circuit court should have judicially declared whether Marth had a claim against NML or Jahn or both based upon Marth's recollected request for a different policy. Given the tenuous nature of the allegations in Marth's complaint, we believe, as did the circuit court, that this claim is so indefensible as to be frivolous. Accordingly, we not only affirm the circuit court's frivolousness determination,[6] but also deem the appeal frivolous as well. We therefore remand the cause for a determination of appellate costs, fees and attorney's fees pursuant to RULE 809.25(3), STATS.

¶16 Finally, this court feels constrained to address some troubling aspects of Marth's briefs on appeal. Although the briefs are professional looking and are laden with authorities and elaborate arguments, they nonetheless are unorthodox, and even puzzling, in many ways. For example, the statement of facts is labeled "Statement of Facts (e.g. Evidence) from Plaintiff's Point of View, Fact Issues, and Other Matters 'Material' – 'Relevant' to the Summary Judgment and 'Frivolous' Legal Issues Posed in this Appeal." What follows is a statement of facts entirely devoid of citations to the record and containing, at least in part, material beyond the record itself. Further, in the argument sections of the briefs, NML's arguments are countered with unnecessarily vituperative language and a multitude of exclamation points.[7]

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[6] Marth also raises an argument on appeal challenging the evidentiary basis for the attorney's fees granted below. We need only point out that the circuit court's determination of the value of attorney's fees is a finding of fact, and it will be sustained unless there is an erroneous exercise of discretion. *See* ***Milwaukee Rescue Mission, Inc. v. Redevelopment Auth.***, 161 Wis.2d 472, 494, 468 N.W.2d 663, 672 (1991). Here, the court stated its reasons for finding the fees reasonable; there was no erroneous exercise of discretion.

[7] For example, "N.M.L.'s contention, ungraced by the citation of any legal authorities ... was nothing short of legal nonsense!"

¶17 Most troubling, however, is the briefs' failure to articulate exactly what the sought after "judicial declarations" might be. As we have noted above, we can only surmise that Marth and his counsel expected the declarations to announce whether they could base a cause of action upon Marth's ten-year-old recollection and nothing more.

¶18 In the circuit court, all of the costs and fees attendant to the determination of frivolousness were assessed to Marth directly. However, Marth was represented both here and below by Attorney Ross Kinney, whose briefs on appeal reiterate almost exactly what was raised in the circuit court. For that reason, we direct the circuit court, upon remand, to make a determination of the costs and fees attendant to this court's holding of frivolousness. We further direct that they shall be assessed equally between William J. Marth and Ross R. Kinney.

By the Court.—Judgments affirmed and cause remanded with directions.

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