

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1866

Cir. Ct. No. 2003CV162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MELVIN GEORGE AND FLORENCE GEORGE,

PLAINTIFFS,

LARRY GEORGE,

PLAINTIFF-APPELLANT,

v.

DONALD KELBACH AND JOAN KELBACH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waushara County:
LEWIS MURACH, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Larry George appeals from a judgment dismissing this case against Donald and Joan Kelbach.¹ George argues that: (1) the circuit court should have permitted an amendment to the complaint; (2) he was entitled to \$15.97 in costs based on the Kelbachs' failure to provide discovery; and (3) the Kelbachs were not entitled to \$100 in attorney's fees under WIS. STAT. § 814.04 (2003-04).² We affirm.

¶2 George first argues that the circuit court erred in denying the motion to amend the complaint to include Kelby Logging as a defendant. The circuit court denied the motion to add Kelby Logging because Kelby Logging is a business operated by Donald and Joan Kelbach, the defendants, but is not a separate corporation. The circuit court concluded that the action against the Kelbachs would encompass any claims against Kelby Logging.

¶3 George contends that the circuit court should have granted the motion to amend *as a matter of right* because the Kelbachs filed for bankruptcy, which stayed the action. Because the action was stayed, George contends the six-month period during which the complaint could be amended as a matter of right was also stayed. *See* WIS. STAT. § 802.09(1). Therefore, he argues the time to amend the complaint as a matter of right had not elapsed when he attempted to amend the complaint to include Kelby Logging.

¹ Melvin, Florence and Larry George were all plaintiffs in the circuit court. Larry George is the only appellant because Melvin and Florence George did not timely appeal.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 George has not cited any authority for his assertion that the bankruptcy stay tolled the time for amending the complaint as a matter of right. Assuming without deciding that it did, the circuit court's refusal to amend the complaint was harmless error because George lost after a trial on the merits of the case. Because George lost, and is thus not entitled to the recovery he sought, it does not matter whether Kelby Logging was added as a party.

¶5 George next argues that the circuit court should have granted the motion for \$15.97 in costs because the Kelbachs did not comply with discovery requests. *See* WIS. STAT. § 804.12(4). However, this decision is committed to the circuit court's discretion and we will sustain it unless the court misuses its discretion. *Smith v. Golde*, 224 Wis. 2d 518, 532, 592 N.W.2d 287 (Ct. App. 1999). George does not explain how the circuit court misused its discretion.

¶6 George next argues that the circuit court should not have awarded \$100 in attorney fees to the Kelbachs under WIS. STAT. § 814.04, which allows nominal statutory attorney fees to be awarded to a prevailing party.³ George's argument is difficult to follow. He appears to contend that the Kelbachs should not be awarded attorney fees under this statute because, in a prior action between the parties, George was precluded from collecting costs and fees as a prevailing party because the Kelbachs declared bankruptcy. This argument relies on facts outside the appellate record and was not raised in the circuit court. Therefore, we reject it.

³ The bill of costs incorrectly lists WIS. STAT. § 814.03 as the statute under which the fees were allowed.

¶7 Finally, the Kelbachs move for attorney's fees on appeal based on frivolousness. We conclude that the appeal is not frivolous, so we deny the motion.

By the Court.—Judgment affirmed.

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

