COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0615

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

GORDON K. AARON,

PLAINTIFF-APPELLANT,

V.

BYRON AXEL AND LOWELL GOLDMAN, AS INDIVIDUALS AND D/B/A AXEL AND GOLDMAN,

DEFENDANTS-RESPONDENTS,

GREEN BAY PACKERS, INC., A CORPORATION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed and cause remanded with directions.*

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

¶1 CANE, C.J. Gordon Aaron[1] appeals from an amended judgment dismissing his declaratory judgment action against his former law partners, Byron Axel and Lowell Goldman, in which he sought a declaration of the rightful ownership of certain Green Bay Packers football game tickets.[2] Aaron also appeals the circuit court's determination that Aaron's action was frivolous under WIS. STAT. §§ 802.05[3] and 814.025. Because Aaron is estopped from litigating an issue on which he has already demanded arbitration, we affirm the dismissal. We also affirm the circuit court's decision to award Axel and Goldman actual costs and attorney fees. Additionally, because we conclude that Axel and Goldman are also entitled to actual costs and attorney fees associated with this appeal, we remand the case to the circuit court so that it can determine and assess the actual costs and attorney fees that Axel and Goldman incurred in this appeal. We therefore affirm the judgment and remand for further proceedings.

BACKGROUND

¶2 Aaron, Axel and Goldman were partners in a Milwaukee law firm for approximately thirty years. In April 1998, after arbitrating Aaron's withdrawal from the partnership, the parties entered into a partnership withdrawal agreement. The withdrawal agreement provided that if any dispute arose under the withdrawal agreement, the dispute must be referred to arbitration.

---

[1] Aaron, a licensed Wisconsin lawyer, appeared pro se in proceedings before the trial court and is represented by counsel on appeal.

[2] Aaron also named the Green Bay Packers, Inc., as a party, but the Packers did not actively participate in the proceedings pursuant to a stipulation with Aaron that no claims for relief would be made against the Packers and the Packers would abide by the ultimate decision of the court or arbitrator and transfer the tickets accordingly.

[3] All statutory references are to the 1997-98 version unless otherwise noted.

¶3 On July 9, 1998, Aaron sent Axel and Goldman a demand for arbitration. In this demand, Aaron identified numerous issues requiring arbitration, including whether certain Packers tickets should belong to Aaron or Axel and Goldman. After this demand was filed, Aaron and counsel for Axel and Goldman had numerous communications about selecting an arbitrator, but no arbitration had occurred by June 25, 1999. On that date, Aaron filed this action in Brown County for declaratory judgment on the issue of the Packers tickets' ownership.

¶4 In his complaint, Aaron alleged that after he terminated his association with the law firm, Axel and Goldman retained the Packers tickets without Aaron's permission and refused to return them. Axel and Goldman moved to dismiss the complaint on grounds that the ownership of the tickets was an issue subject to mandatory arbitration pursuant to the withdrawal agreement. In support of their motion, Axel and Goldman indicated that Aaron had served them with a demand for arbitration on the same issue and that the parties were discussing possible arbitrators.

¶5 Axel and Goldman also filed a motion for sanctions, alleging that Aaron had violated WIS. STAT. §§ 802.05[4] and 814.025.[5] Axel and Goldman

[4] WISCONSIN STAT. § 802.05 provides in relevant part:

> **Signing of pleadings, motions and other papers; sanctions.** **(1)** (a) … The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. … If the court

(continued)

argued that (1) the issues addressed in Aaron's complaint were covered by the withdrawal agreement's mandatory arbitration provisions; (2) there was no basis to name the Packers as a party and, even if there was, the action should not have been venued in Brown County; and (3) Aaron's "complete duplication of the arbitration proceeding necessarily raises the inference that the entire purpose of the present lawsuit is to harass [Axel and Goldman] and further inconvenience them by venuing this dispute in Brown County."

¶6 Both motions were originally scheduled to be heard October 12 but were postponed, at Aaron's request, to November 10. On November 8, Aaron

---

> determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

[5] WISCONSIN STAT. § 814.025 provides in relevant part:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ….
>
> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

filed a petition for appointment of arbitrators in Milwaukee County Circuit Court, indicating that "there have been difficulties and disagreements regarding the parties' rights under the agreement" and seeking resolution of "critical issues that require resolution." On the same day, Aaron filed a response to Axel and Goldman's motion to dismiss this action in which he asked the circuit court to deny the motion to dismiss and to defer any further action "until there shall be a decision by the Trial Court of Milwaukee County in the annexed petition for arbitration."

¶7 On November 10, the day of the scheduled motion, Aaron did not appear. The circuit court heard brief argument on Axel and Goldman's behalf and granted their motion to dismiss, with prejudice. The court also concluded that Aaron's suit was frivolous under WIS. STAT. §§ 802.05 and 814.025 and ruled that Axel and Goldman were entitled to actual costs and attorney fees.

¶8 On November 16, Aaron filed a motion for relief from judgment or order, pursuant to WIS. STAT. § 806.07(1)(a), (g) and (h).[6] In his attached affidavit, Aaron provided a detailed explanation of his failure to appear on November 10. In short, a computer problem resulted in the scrambling or

[6] WISCONSIN STAT. § 806.07 provides in relevant part:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
> ….
> (g) It is no longer equitable that the judgment should have prospective application; or
> (h) Any other reasons justifying relief from the operation of the judgment.

obliteration of Aaron's computerized entries of calendared events, which led to Aaron's mistaken belief that the hearing was scheduled for November 12. Aaron argued this was grounds for relief from the judgment and order because it constituted excusable neglect under § 806.07(1)(a). Aaron's motion did not specify why he was entitled to relief under § 806.07(1)(g) and (h).

¶9 On November 23, Axel and Goldman again filed a motion for sanctions against Aaron on grounds that Aaron's motion for relief from the November 10 ruling had no basis in either law or fact and was to harass Axel and Goldman. On November 29, Aaron also filed a motion for sanctions against Axel and Goldman on grounds that they made "false, fraudulent and frivolous allegations" in their answer to his complaint. On December 2, both Aaron and respondents' counsel appeared and argued their positions to the circuit court. The court refused to grant Aaron's WIS. STAT. § 806.07 motion and also ordered that Aaron pay Axel and Goldman's actual costs and attorney fees associated with the December 2 motion hearing. Finally, the court denied Aaron's motion for sanctions against Axel and Goldman.[7]

DISCUSSION

A. MOTION FOR RELIEF FROM JUDGMENT

¶10 After the circuit court dismissed Aaron's complaint, Aaron filed a WIS. STAT. § 806.07 motion for relief from judgment. Although Aaron did not

[7] In his opening brief, Aaron failed to argue that his motion should have been granted. In his reply brief, he offers two sentences on the topic, without any authority or record cites. It is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Accordingly, this court will not disturb the circuit court's denial of Aaron's motion for sanctions.

articulate why he chose to bring a motion pursuant to § 806.07, he apparently believed that because he was not present for the November 10 hearing, he was not given an adequate opportunity to argue against dismissal of his case. Thus, if he was successful in his motion for relief, the issues could again be debated before the court.

¶11 Despite having moved for relief from judgment on three bases at the circuit court, on appeal Aaron fails to make any argument that the court erroneously exercised its discretion when it denied his WIS. STAT. § 806.07 motion and awarded Axel and Goldman actual costs and attorney fees associated with the second hearing. For example, Aaron never addresses why the court was wrong to conclude that his computer problem did not constitute excusable neglect. Because Aaron failed to argue why his motion was wrongfully denied, we need not consider the matter further. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (reviewing court will not consider undeveloped arguments). We affirm the court's denial of Aaron's motion for relief from judgment. The practical effect of this affirmance is that Aaron will not have another opportunity to argue the issues before the circuit court.[8]

B. DISMISSAL OF THE CASE

¶12 Axel and Goldman moved to dismiss Aaron's case on grounds that the ownership of the Packers tickets was an issue subject to mandatory arbitration pursuant to the withdrawal agreement. During the hearing, the trial court considered matters outside the pleadings, *i.e.*, affidavits and other materials

[8] We note that as part of Aaron's motion for relief from judgment, he was able to present limited argument on the case's merits in order to justify his motion for relief.

submitted by both parties. A motion to dismiss shall be treated as a motion for summary judgment when the trial court considers matters outside the pleadings. *See* WIS. STAT. § 802.06(3). Therefore, we treat this case as a review of a summary judgment.

¶13 We review the trial court's decision to grant summary judgment de novo. *See* ***Barillari v. City of Milwaukee***, 194 Wis. 2d 247, 256, 533 N.W.2d 759 (1995). First, the pleadings are examined to determine whether they state a claim for relief. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993). If so, the court must then examine the evidentiary record to determine whether there is a genuine issue as to any material fact and, if not, whether a party is entitled to judgment as a matter of law. *See* ***id.*** In this case, the crucial facts are undisputed.

¶14 It is undisputed that several months after the parties completed the withdrawal agreement, Aaron filed a demand for arbitration on several issues, including Aaron's assertion that the Packers tickets "should be restored to Aaron, not only for this year, but in the future." It is also undisputed that after that demand, the parties discussed the appointment of arbitrators. In Aaron's November 1999 petition to the Milwaukee County Circuit Court for the appointment of an arbitrator, he indicates that "there has been disagreement about the appointment of arbitrators, one arbitrator having declined to accept the assignment, and the arbitrator agreed-to [sic] in discussions between [Aaron and counsel for Axel and Goldman] was subsequently rejected by [Axel and Goldman]." Aaron's actions indicate an indisputable intent to arbitrate the ownership of the Packers tickets, so we proceed to the legal question whether Axel and Goldman are entitled to judgment as a matter of law.

¶15 The trial court properly granted summary judgment on Aaron's claim for declaratory judgment because Aaron is estopped from seeking declaratory judgment on an issue on which he has already demanded arbitration. *See* ***Pilgrim Inv. Corp. v. Reed***, 156 Wis. 2d 677, 685-86, 457 N.W.2d 544 (Ct. App. 1990). In ***Pilgrim*** we concluded:

> [A]bsent a reservation of rights, "partial participation" in the arbitration process can serve to estop a party from challenging the arbitration agreement. Even though an arbitration process has not proceeded to a hearing on the merits, substantial time, money and effort in preparation may well have been invested in the undertaking. Absent a reservation of objection to the arbitration process, when one party participates in preliminary arbitration procedures prepatory to the hearing on the merits, that party is signaling to the other side that full participation in the process is intended.

Id. Here, Aaron not only participated in the preliminary arbitration process, but demanded it and has moved the circuit court in Milwaukee County to appoint an arbitrator. Accordingly, he is estopped from seeking a declaratory judgment of the same issue in this action. *See* ***id.***

C. SANCTIONS AWARDED AT THE FIRST HEARING

¶16 The circuit court concluded that Aaron's action was frivolous under WIS. STAT. §§ 802.05 and 814.025. We affirm the circuit court's finding that Aaron's action was frivolous because it violated § 814.025(b) (party knew or should have known that the action was without any reasonable basis in law). We therefore need not examine the other bases upon which the circuit court found the matter frivolous. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

¶17 Whether a claim is frivolous under WIS. STAT. § 814.025(3)(b) involves a mixed question of law and fact. *See* ***Zinda v. Krause***, 191 Wis. 2d 154, 176, 528 N.W.2d 55 (Ct. App. 1995). Determining what the party knew or should have known is a question of fact. *See* ***id.*** However, whether those facts would lead a reasonable attorney to conclude that the claim is frivolous is a question of law that we review de novo. *See* ***id.*** The issue is not whether a party can or will prevail, but whether the claim is so indefensible that the party's attorney should have known it to be frivolous. *See* ***Stoll v. Adriansen***, 122 Wis. 2d 503, 517, 362 N.W.2d 182 (Ct. App. 1984). In determining this issue we resolve all doubts in favor of the attorney. *See* ***Estate of Bilsie***, 100 Wis. 2d 342, 350, 302 N.W.2d 508 (Ct. App. 1981).

¶18 The circuit court found that in light of the withdrawal agreement's arbitration clause, the parties' conduct in conformity with the agreement and Aaron's previous submission to arbitration of the precise issue on which the complaint in this action is premised, the complaint has no basis in either fact or law. The court's findings that the agreement contained an arbitration clause, that Aaron has demanded arbitration of the Packers tickets' ownership and that the parties had acted in conformity with the agreement will be sustained unless they are clearly erroneous. *See* ***Tennyson v. School Dist. of Menomonie Area***, 2000 WI App. 21, ¶28, 232 Wis. 2d 267, 606 N.W.2d 594. Our review of the record shows that there is evidence to support the circuit court's findings. Indeed, these facts are indisputable.

¶19 Next, we examine de novo whether the facts would lead a reasonable attorney to conclude that the claim is frivolous. *See* ***Zinda***, 191 Wis. 2d at 176. We conclude that Aaron knew or should have known that this action was without any reasonable basis in law because he had already sought arbitration of the

Packers tickets issue when he filed this action. This court decided ***Pilgrim*** in 1990; Aaron should have known when he filed this action in 1999 that he would be estopped from seeking resolution of an issue on which he was demanding arbitration.

¶20 Moreover, Aaron's complaint fails to even mention that he had already demanded arbitration on the same issue, so it would be fruitless to argue that he planned to make a good faith argument for an extension, modification or reversal of existing law. Finally, Aaron's act of seeking a Milwaukee County Circuit Court order compelling arbitration at the same time he pursued this action indicates that he did not intend to abandon his attempts to arbitrate the same issues. For these reasons, we affirm the circuit court's determination that Aaron violated WIS. STAT. § 814.025(b) and its sanctions against Aaron.

D. SANCTIONS AWARDED AT THE SECOND HEARING

¶21 Next, we must consider whether the circuit court erred when it awarded actual costs and attorney fees related to the second (December 2) hearing. The court concluded:

> I believe that based on my earlier finding, that the action was frivolous, that the costs attributable to today's hearing ought to be imposed as well. Actual costs. The earlier finding, it seems to me, if I don't vacate that, then it necessarily follows that today's hearing was also frivolous and brought under circumstances where under Section 814.025 the defendants are entitled to costs and attorneys fees.

We agree. We have previously held that if a party appeals a ruling of frivolousness to this court and we affirm, the appeal is per se frivolous. *See* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). The

reasoning behind this rule is that if the wronged party must bear its own legal costs on appeal in order to defend its award of attorney fees, it may end up substantially worse off for having received the award in the first place. *See* ***Chase Lumber & Fuel Co. v. Chase***, 228 Wis. 2d 179, 213, 596 N.W.2d 840 (Ct. App. 1999). Therefore, a further award of attorney fees is necessary to preserve the effectiveness of the remedial purpose of the original award. *See* ***id.***

¶22 We conclude that the same reasoning should apply to unsuccessful WIS. STAT. § 806.07 motions brought before the circuit court. Aaron was completely unsuccessful in his motion for relief from judgment, such that the court affirmed the action's dismissal and its frivolousness finding. Consistent with the reasoning in ***Riley***, Axel and Goldman should not have to bear the costs of an unsuccessful challenge to the first ruling of frivolousness. Accordingly, we affirm the court's conclusion that Aaron must pay actual costs and attorney fees associated with the December 2 hearing.

E. SANCTIONS ON APPEAL

¶23 Finally, Axel and Goldman have moved for actual costs and attorney fees associated with this appeal. For the reasons discussed above, we grant this motion. *See* ***Riley***, 156 Wis. 2d at 262. We remand the case so that the court can determine the proper amount of actual costs and attorney fees.

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

Not recommended for publication in the official reports.