COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0783

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

IN THE MATTER OF SANCTIONS IN
BARRY HEALTHCARE SERVICES, INC.
V. MIRIAM EISENBERG, SHARON KLETZKE,
AND EISENBERG & KLETZKE, S.C.,
A WISCONSIN CORPORATION:

LAW OFFICES OF ALAN D. EISENBERG,

APPELLANT,

V.

BARRY HEALTHCARE SERVICES, INC.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. The Law Offices of Alan D. Eisenberg (the appellant) appeal from the circuit court's order granting Barry Healthcare Services, Inc.'s (Barry Healthcare) motion for sanctions under WIS. STAT. §§ 802.05 and 814.025,[1] and awarding Barry Healthcare its costs and attorney fees incurred in defending against a motion to dismiss filed by the appellant on behalf of Miriam Eisenberg (Eisenberg), Sharon Kletzke (Kletzke) and Eisenberg & Kletzke, S.C.[2] The appellant argues that the trial court erred in finding appellant's motion to dismiss Barry Healthcare's complaint frivolous and awarding sanctions. In the alternative, the appellant argues that if we conclude that the circuit court's finding of frivolousness was not erroneous, then the appellant submits that the attorney fees awarded were excessive and unreasonable. We conclude that the appellant's motion was frivolous and that the attorney fees awarded were not excessive or unreasonable. Therefore, we affirm the circuit court's order. Finally, Barry Healthcare argues that this appeal is frivolous and asks this court to award it attorney fees and costs. We agree and, therefore, remand this case to the circuit court for a determination of reasonable appellate attorney fees.

I. BACKGROUND.

¶2 In April 1996, Kletzke began receiving private home healthcare services from Barry Healthcare. Barry Healthcare agreed to provide the services to Kletzke based on an oral promise made by Eisenberg to pay for these services. Eisenberg made the payments to Barry Healthcare for Kletzke's treatment from

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

[2] For the sake of clarity, we shall refer to Miriam Eisenberg as "Eisenberg," and The Law Offices of Alan D. Eisenberg as "the appellant."

April 1996 through February 1999.[3] Barry Healthcare received the last payment from Eisenberg on March 2, 1999. Barry Healthcare discontinued services to Kletzke on May 15, 1999, and brought this cause of action to recover the amount owed.

¶3 In its complaint, Barry Healthcare alleged several causes of action. Barry Healthcare sued Eisenberg and Eisenberg & Kletzke for breach of contract, and it sued Kletzke claiming a cause of action for unjust enrichment. In lieu of an answer on behalf of Eisenberg, Kletzke and Eisenberg & Kletzke, the appellant filed a motion to dismiss the complaint, arguing that: (1) Miriam Eisenberg is incompetent and, therefore, "lacks the capacity to sue or be sued and proper service cannot be completed"; (2) the contract was not in writing as required by the Statute of Frauds, WIS. STAT. § 241.02(1)(b), "which states that every special promise to answer for the debt of another person must be in writing"; and (3) without a written contract, Barry Healthcare cannot bring a cause of action for unjust enrichment against Kletzke. Barry Healthcare responded to the motion to dismiss by sending a letter to the appellant, asserting that the motion was frivolous and announcing its intention to seek sanctions if the motion was not withdrawn. The appellant did not withdraw the motion, and Barry Healthcare filed a motion requesting sanctions. Following a hearing, the circuit court denied the motion to dismiss and granted the motion for sanctions.

¶4 Barry Healthcare requested sanctions in the amount of $9,329.52 as reimbursement for fees. The appellant objected to the amount, and the circuit court conducted a hearing regarding the amount of sanctions. Following the

[3] These payments were made with checks drawn from two separate accounts – either an Eisenberg & Kletzke account, or a personal account of Miriam Eisenberg.

hearing, the circuit court reduced the award to $7,959.50. The circuit court also denied a motion for reconsideration filed by the appellant. The circuit court then granted a stay of the judgment pending the outcome of this appeal, but it ordered the appellant to deposit the awarded money with the court.

II. ANALYSIS.

¶5 The appellant first argues that the trial court erred in finding that the motion to dismiss was frivolous under WIS. STAT. §§ 802.05 and 814.025, and imposing sanctions. The appellant maintains that "reasonable and legitimate arguments can be tendered both in favor and against" the positions asserted in the motion to dismiss, but that "this certainly does not mean that the … arguments were frivolous." The appellant asserts that although the motion to dismiss was founded on three separate legal principles involving "convoluted and complex" areas of the law, an analysis of the law surrounding those principles "demonstrates that the … position was not 'without any reasonable basis in law or equity and could … be supported by a good faith argument for an extension, modification or reversal of existing law.'" (quoting WIS. STAT. § 814.025). Therefore, the appellant concludes, the motion to dismiss was not frivolous. We disagree.

¶6 WISCONSIN STAT. § 802.05, in pertinent part, requires an attorney to sign every motion to certify that the motion "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 also that the motion "is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in

the cost of litigation." WISCONSIN STAT. § 814.025 is very similar.[4] Our supreme court has asserted that, "Both §§ 802.05 and 814.025 authorize a circuit court to sanction a party for *commencing* a frivolous action, while § 814.025 alone authorizes the imposition of sanctions upon a party *maintaining* a frivolous action." ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 547, 597 N.W.2d 744 (1999) (emphasis added). However, "[w]here, as here, the circuit court awards sanctions for commencing a frivolous action pursuant to both §§ 802.05 and 814.025, we review the decision as one made pursuant to § 802.05." ***Id.*** (citing WIS. STAT. § 814.025(4) ("To the extent [§] 802.05 is applicable and differs from [§ 814.025(4)], [§] 802.05 applies.")).

¶7 To determine whether the defense was frivolous, the circuit court must first apply an objective standard. ***Id.*** at 549 (asserting that WIS. STAT. § 802.05 is fashioned after Federal Rules of Civil Procedure 11, and, therefore, the same guidelines apply to the circuit courts that apply to the federal district courts). Specifically, "'whether the attorney knew or should have known that the position

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[4] WISCONSIN STAT. § 814.025, in pertinent part, provides:

> **Costs upon frivolous claims and counterclaims. (1)** If … [a] defense … 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 … and reasonable attorney fees.
> …
> **(3)** In order to find … [a] defense … to be frivolous under sub. (1), the court must find one or more of the following:
> (a) The … defense … 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 … defense … 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.

taken was frivolous [is] determined by what a *reasonable attorney* would have known or should have known under the same or similar circumstances.'" ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 241, 517 N.W.2d 658 (1994) (citation omitted). Under § 802.05, a claim is frivolous if it is not well grounded in both the facts and the law. Consequently, the circuit court must apply the objective standard to determine whether an attorney made a reasonable inquiry into both the facts and the law. ***Jandrt***, 227 Wis. 2d at 550.

¶8 Second, the circuit court must consider the issue from the attorney's perspective, given "the circumstances that existed at the time counsel filed the challenged paper." ***Id.*** at 551. The circuit court must determine whether the attorney's position was frivolous by ascertaining whether the position was reasonable at the time it was asserted. ***Id.*** Further, "[a] claim is not frivolous merely because there was a failure of proof or because a claim was later shown to be incorrect. Nor are sanctions appropriate merely because the allegations were disproved at some point during the course of litigation." ***Id.*** (citation omitted). "When made pursuant to Wis. Stat. § 802.05, our review of a circuit court's decision that an action was commenced frivolously is deferential." ***Id.*** at 548. We will uphold the circuit court's discretionary decision as long as 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." ***Id.*** at 549.

¶9 We are satisfied that the circuit court properly determined that the appellant's motion to dismiss Barry Healthcare's complaint was frivolous. As noted, the appellant's motion to dismiss was founded on three separate legal arguments: (1) service of process was improper due to Eisenberg's incompetence; (2) the statute of frauds voided the oral contract between Eisenberg and Kletzke;

and (3) absent a written agreement, Barry Healthcare was precluded from asserting a claim for unjust enrichment. We shall consider each argument in turn.

¶10 The appellant first argues that service of process on Eisenberg was ineffective. The appellant maintains that the function of serving a copy of the summons and complaint on the defendant is to inform her of the allegations against her. Because Eisenberg was allegedly incompetent, the appellant asserts it was impossible to inform her of the impending lawsuit and, thus, service was not perfected. Specifically, the appellant contends the motion to dismiss "reasoned that if a defendant has not been adequately informed of the suit against her, process has not been served effectively, which could warrant dismissal under a novel but reasonable reading of … [WIS. STAT.] § 802.06(2)."[5] We are not persuaded and we agree with the circuit court that the appellant's argument is precluded by WIS. STAT. § 801.11.[6]

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[5] WISCONSIN STAT. § 802.06(2), in pertinent part, provides:

> (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
> 1. Lack of capacity to sue or be sued.
> ….
> 4. Insufficiency of summons or process.

[6] The circuit court correctly stated:

> [WISCONSIN STAT. §] 802.06 isn't the statute that entitled you to dismissal for lack of capacity. It simply provides the shopping list of the types of dispositive motions. It tells when they shall be presented and how they shall be presented. It isn't authority for you to obtain dismissal of the complaint on the grounds of incompetency. It is one of a number of motions that may be asserted in a responsive pleading. These defenses may, at the option of the pleader be made by motion. That is all this is saying. …The fact that you raise lack of capacity to be sued

(continued)

¶11 WISCONSIN STAT. § 801.11(2) provides for the service of process upon a person under a disability.[7] Although the appellant alleges that Eisenberg was incompetent at the time Barry Healthcare served her with the summons and complaint, it is undisputed that Barry Healthcare was not aware of her alleged

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> under [§] 802.06(2) doesn't then entitle you to dismissal of the complaint on the grounds of incompetency. Incompetency is covered in [§] 803.01. That is where you have to go and rely on your law for dismissal
>
> [WISCONSIN STAT. §] 802.06 is just your shopping list and tells you how and under what circumstances you present certain motions to the court and in what order. It is the procedure for presenting the motions. I think the reasonable attorney is chargeable with knowledge of the contents of Section 803.01. There is nothing in that statute from which a good faith argument can be made for an extension of the terms of that statute to allow for a dismissal in the circumstances of this case. So that I am going to find that that portion is frivolous.

[7] WISCONSIN STAT. § 801.11, in pertinent part, provides:

> **Personal jurisdiction, manner of serving summons for.** A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction … may exercise personal jurisdiction over a defendant by service of a summons as follows:
> **(1)** NATURAL PERSON. Except as provided in sub. (2) upon a natural person:
> (a) By personally serving the summons upon the defendant either within or without this state
> …
> **(2)** NATURAL PERSON UNDER DISABILITY. Upon a natural person under disability by serving the summons in any manner prescribed in sub. (1) upon such person under disability and, in addition, where required by par. (a) or (b), upon a person therein designated. …
> (a) Where the person under disability is a minor under the age of 14 years …
> (b) Where the person under disability is known by the plaintiff to be under guardianship of any kind, a summons shall be served separately upon the guardian in any manner prescribed in sub. (1), (5) or (6). If no guardian has been appointed when service is made upon a person known to the plaintiff to be incompetent to have charge of the person's affairs, then service of the summons shall be made upon the guardian ad litem after appointment under [WIS. STAT. §] 803.01.

incompetence.[8] Further, that at the time process was served, a guardian had not been appointed for Eisenberg. Thus, under § 801.11(2), Barry Healthcare was not prohibited from serving Eisenberg with the summons and complaint and, under the plain language of § 801.11(2), service upon Eisenberg was both effected and proper.

¶12 Consequently, we conclude that a reasonable inquiry into the facts and the law would have led a reasonable attorney to determine that the argument offered by the appellant – that service on Eisenberg was neither effective nor proper – was frivolous. Therefore, we conclude that the circuit court properly found that the appellant's argument on this issue was frivolous.

¶13 Second, the appellant argues that the statute of frauds voided Eisenberg's oral agreement to pay for services rendered to Kletzke as an agreement to pay for the debt of another. WISCONSIN STAT. § 241.02(1)(b) requires that "[e]very special promise to answer for the debt, default or miscarriage of another," must be in writing or the agreement is void. However, Wisconsin case law draws a distinction between a collateral promise, which falls within the statute of frauds, and an original undertaking, which does not. *See, e.g.,* ***Mann v. Erie Mfg.***, 19 Wis. 2d 455, 458, 120 N.W.2d 711 (1963) (an "original undertaking" is also referred to as an "unconditional" or "primary promise"). The appellant argues that "Eisenberg's promise to pay the bills that … Kletzke would

[8] Barry Healthcare asserts that prior to suit, it was "[a]ware that [Eisenberg] may have health concerns," and based on these concerns, Barry Healthcare "in order to ensure someone in [Eisenberg's] family was made aware of the action, took the additional … step of attempting to serve the Summons and Complaint upon Alan Eisenberg [Eisenberg's son]." However, "Alan [Eisenberg] specifically denied that he maintained power of attorney over … Eisenberg's affairs and refused service." Alan Eisenberg would later contradict this assertion in a sworn affidavit filed in support if the appellant's motion to dismiss.

incur with Barry Healthcare was indeed a collateral promise, unenforceable under the statute of frauds." Therefore, the appellant concludes that the circuit court erred in finding that this argument was frivolous. We disagree.

¶14 For more than one hundred and twenty-five years, Wisconsin courts have recognized an exception to the statute of frauds' requirement that special promises to answer for the debt of another must be in writing. Case law demonstrates that the statute of frauds will not void an oral promise to answer for another's debt, if the oral promise amounts to an "original undertaking." ***Champion v. Doty***, 31 Wis. 190, 194 (1872). Under this exception, the plaintiff must establish that it rendered performance to a third party "at the defendant's request, and upon his absolute promise to pay for [the performance]." ***Id.*** ("In this view the promise of the defendant would be an original undertaking, and [the third party] would not be liable for the same debt."). In its complaint, Barry Healthcare alleged that the oral agreement was "made prior to any services being performed and upon the faith of which the services were undertaken, Defendant Eisenberg agreed to compensate [it] for all home healthcare services provided to Defendant Kletzke." We must accept the facts alleged in the complaint as true when considering the appellant's motion to dismiss. ***Miesen v. D.O.T.***, 226 Wis. 2d 298, 301, 594 N.W.2d 821 (Ct. App. 1999). Therefore, we agree with Barry Healthcare's assertion that the facts of this case were "specifically pled as an original undertaking which, under Wisconsin law, falls outside the Statute of Frauds."

¶15 Further, the circuit court correctly informed the appellant that:

> If you were going to bring a motion to dismiss on the grounds of failure to comply with the statute of frauds, you would be chargeable of (sic) the knowledge of the case law that has construed that statute and has determined what situations fall within the statute and what situations fall outside the statute.

We conclude, as did the circuit court, that the appellant apparently failed to make the requisite inquiry into the law and the facts. We are satisfied that a reasonable attorney should have known that the facts alleged in the complaint clearly fit within a long-recognized exception to the statute of frauds, and a motion to dismiss the complaint based on the statute of frauds was frivolous. Therefore, the circuit court properly found that the appellant's arguments on this issue were also frivolous.

¶16 Third, the appellant argues that Wisconsin case law supports its argument that Barry Healthcare is precluded from making a claim for the recovery of the cost of Kletzke's healthcare, under the doctrine of unjust enrichment.

> The essential elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him or her to retain it without paying the value thereof.

WIS JI—CIVIL 3028; ***Ramsey v. Ellis***, 163 Wis. 2d 378, 381, 471 N.W.2d 289 (Ct. App. 1991). The appellant argues that, "It has been recognized that the doctrine of unjust enrichment may not apply to cases where a third party agrees to pay for some benefit which is conferred to another individual where there is no agreement

between the recipient of the benefit and the provider of the benefit." We reject the appellant's argument.

¶17 It is axiomatic that application of the doctrine of unjust enrichment comes about only when there is no written agreement. "A claim of unjust enrichment does not arise out of an agreement entered into by the parties, but rather depends on the law that as between the parties a person, unjustly enriched by the conduct or efforts of the other, must pay for the benefit conferred or return it." WIS JI—CIVIL 3028; ***Ramsey***, 163 Wis. 2d at 381 ("Recovery is based on the defendant's duty to return the benefit and not on a promise or agreement to pay for the benefit."). The circuit court correctly asserted:

> [The appellant] sought dismissal of that claim for unjust enrichment on the grounds that there was no written contract. The essence of unjust enrichment is to provide an equitable remedy where there is no contract. [The appellant] can't get an unjust enrichment claim dismissed on the basis of no contract.

The appellant's argument in its motion to dismiss – that Barry Healthcare was precluded from stating a claim for unjust enrichment absent a written agreement – clearly lacked any reasonable basis in law or fact. Therefore, the circuit court properly found this argument to be frivolous.

¶18 For the reasons stated, we conclude that the circuit court properly determined that the appellant's motion to dismiss Barry Healthcare's complaint was frivolous under WIS. STAT. § 802.05.

¶19 Next, the appellant argues that if the motion to dismiss was frivolous, then the amount of attorney fees awarded as sanctions by the circuit court were excessive and unreasonable. Again we disagree. The amount of

attorney fees awarded by the circuit court will be upheld unless the trial court has erroneously exercised its discretion. ***Standard Theatres, Inc. v. D.O.T.***, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). We conclude that the circuit court did not erroneously exercise its discretion in awarding the attorney fees.

¶20 The trial court awarded $7,959.50 in attorney fees to Barry Healthcare as sanctions against the appellant. The record reflects that in awarding the attorney fees, the circuit court considered the proper factors: "the time and labor required," the complexity of the issues and the skill necessary to address them, the customary fee, the amount at issue and the results, time limitations, and the experience of the attorney. ***Standard Theatres***, 118 Wis. 2d at 749-50 n.9 (citing then SCR 20.12, currently SCR 20:1.5). Specifically, the circuit court considered the fee in relation to the experience of the lawyers. The court also considered the itemized billing. In fact, the court reduced the requested amount for several reasons: the court approved the fees for one lawyer, but not two; the court deleted the fees requested for a pending motion; the court corrected a mathematical error in the appellant's favor; and the court reduced the amount of time billed on a telephone conference. It is clear that the circuit court considered the proper factors and, therefore, the amount of attorney fees in this case was neither excessive nor unreasonable.

¶21 Finally, Barry Healthcare argues that if this court upholds the trial court's finding of frivolousness, the appellant's pursuit of this appeal is also, *per se*, frivolous. WISCONSIN STAT. § 809.25(3) allows this court to award costs and attorney fees upon a finding that an appeal is frivolous if the appeal was filed in bad faith for the purpose of harassment or malicious injury, or if the appellant knew or should have known that the appeal lacked a reasonable basis in law or equity and could not be supported by a good faith argument for the extension,

modification or reversal of existing law. Barry Healthcare also cites ***Belich v. Szymaszek***, 224 Wis. 2d 419, 592 N.W.2d 254 (Ct. App. 1999), for the proposition that our decision affirming the circuit court's finding that the action taken below was frivolous renders the appeal frivolous *per se*. Barry Healthcare is correct. Because we affirmed the circuit court's determination that the motion to dismiss was frivolous, it follows that appellant's appeal is also frivolous. Moreover, the appellant failed to refute this assertion or offer an argument to the contrary. ***Charolais Breeding Ranches, Ltd. v. FPC Secs.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (an assertion that is not disputed is deemed admitted).

¶22 Therefore, we conclude that the appeal is frivolous, *per se*, and we remand this case to the circuit court for a determination of the amount of reasonable appellate attorney fees.

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

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