COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2884 **Cir. Ct. No. 2004CV411**

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

CHRIS E. DAVIS,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

JEFFREY W. ROEHL,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 ANDERSON, J. This appeal involves a nuisance and trespass dispute between two adjoining landowners, Jeffry W. Roehl and Chris E. Davis. Roehl appeals from a trial court judgment issuing a permanent injunction against

him and rejecting his contention that Davis' claim for punitive damages was frivolous. Davis cross-appeals, arguing that the trial court erred in refusing to include trespass jury instructions and jury verdict questions. Roehl now insists that Davis' cross-appeal is frivolous.

¶2 Because the trial court failed to support its issuance of the injunction with the requisite findings of fact and conclusions of law, we reverse the portion of the trial court's judgment pertaining to the permanent injunction and remand for the trial court to conduct the proper inquiry. We affirm the trial court's finding that Davis' punitive damages claim was not frivolous. Roehl failed to give Davis the "safe harbor" required under WIS. STAT. § 802.05(3)(a)1. (2003-04).[1] We also reject Davis' cross-appeal. Davis failed to raise his concerns about the jury instructions and jury verdict questions in a postverdict motion and therefore waived the issues. Finally, we decline Roehl's invitation to deem Davis' cross-appeal frivolous.

Facts

¶3 Roehl and Davis own adjoining properties in the Town of Wilson, Sheboygan County, Wisconsin. Roehl purchased his property in 1995 and shortly thereafter began operating on the property an auto body repair business called Mild & Wild Custom Auto. Roehl's property is zoned light industrial and Roehl's auto body repair shop is in compliance with the town zoning ordinances. In 2000, Davis purchased the property directly to the north of Roehl's property. Davis' property is a rectangular lot with a house and other improvements.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Shortly after Davis purchased the property, the relationship between the neighbors soured. On June 2, 2004, Davis filed a complaint alleging that Roehl: (1) trespassed on his property by allowing Roehl's dogs to wander free and by parking cars on his property; (2) interfered with his use and enjoyment of his property; (3) intentionally interfered with his use and enjoyment of his property by removing survey stakes he had placed on the property line for the purposes of erecting a fence; and (4) created a nuisance by revving car engines, flashing car lights and creating excessive noise. Davis asked the court for an order establishing the boundary line between the two properties, for a permanent injunction requiring Roehl to remove any property which encroached on his property, for a permanent injunction requiring Roehl to cease and desist from creating a nuisance and to refrain from removing the survey markers, for compensatory damages and for punitive damages.

¶5 Roehl filed an answer in which he contended that Davis' claim for punitive damages was frivolous. Roehl also counterclaimed, arguing that Davis: (1) interfered with his use and enjoyment of his property by engaging in boisterous, disruptive and unreasonably loud behavior; (2) intentionally interfered with his use and enjoyment of his property; and (3) created a nuisance. Roehl sought an order determining the boundary line between the two properties, a permanent injunction requiring Davis to stop harassing his customers and creating a nuisance and an award of compensatory damages.

¶6 Prior to trial, both parties submitted their proposed jury instructions and special verdict forms. Davis included the trespass and nuisance instructions and special verdict questions.

¶7 A two-day jury trial was held on August 17 and 18, 2005. At the jury instruction and special verdict form conference held following the close of all evidence, the trial court acknowledged that Davis had requested a separate claim for trespass. The court indicated that it included the trespass "contention under the rubric of nuisance either intentional or negligent." Thus, the court did not specifically instruct the jury on trespass or include a separate question on trespass on the special verdict form.

¶8 Following deliberations, the jury found that Roehl had not negligently or intentionally created or maintained a nuisance. The jury also found that Davis had intentionally created and maintained a nuisance by his conduct. The jury did not award Roehl any damages on the nuisance claim. The court then set a hearing for August 31 for the purpose of considering the requests for injunctive relief. On August 26, Roehl mailed to Davis copies of his postverdict motion for frivolous costs and reasonable attorney fees based on Davis' punitive damages claim. On August 31, Roehl filed the motion with the court.

¶9 At the August 31 hearing, the court outlined each of the parties' requests with regard to the injunction, and then "[a]s a result of the information elicited during the course of the jury trial," proceeded to set forth the provisions of the permanent injunction. The court also summarily denied "all other motions and claims … includ[ing] the defendant's motion for declaration of frivolous lawsuit in the case." In its written decision, the court ordered Hinze & Associates, Inc. to perform a survey to determine a property line for the purpose of establishing a fence line. The cost of the survey was to be divided equally between the two parties. The court ordered Davis to install a fence along the property line. Again, the parties were to split the cost. The court ordered Roehl to take reasonable steps to keep his dogs off Davis' property and curtailed the hours of Roehl's business.

According to the injunction, Roehl could operate his business between the hours of 7:00 a.m. and 8:00 p.m. on weekdays and 8:00 a.m. and 4:00 p.m. on Saturdays and Sundays, and could not take delivery of any vehicles outside the described hours unless it was an emergency. The court also summarily rejected Roehl's frivolous claim assertion.

Discussion

Permanent Injunction

¶10 Roehl contends that the trial court erred when it granted a permanent injunction against him without the support of the requisite findings of fact and conclusions of law. Davis concedes that the trial court did not formally recite findings of fact, but urges this court to affirm the injunction anyway. Davis fails to fully appreciate our standard of review.

¶11 "Injunctive relief is not ordered as a matter of course, but instead rests on the sound discretion of the court, to be used in accordance with well-settled equitable principles and in light of all the facts and circumstances of the case." ***Forest County v. Goode***, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998). Thus, we will not overturn a trial court's decision granting injunctive relief absent a showing that the trial court has erroneously exercised its discretion. ***Sunnyside Feed Co. v. City of Portage***, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). With respect to injunctive relief, an erroneous exercise of discretion occurs when the trial court: (1) fails to consider and make a record of the factors relevant to its determination, (2) considers clearly irrelevant or improper factors, or (3) clearly gives too much weight to one factor. ***Id.*** at 471. In addition, we may find an erroneous exercise of discretion when the trial court makes an error of law. ***Id.*** at 471-72.

¶12 To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. ***Pure Milk Prods. Co-op. v. National Farmers Org.***, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Moreover, to invoke the remedy of injunction the plaintiff must establish that the injury is irreparable, i.e., not adequately compensable in damages. ***Id.*** Finally, injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction. ***Id.***

¶13 Here, the court neither made explicit findings of fact nor articulated the factors driving its decision. The court chose to lay out the various requests for injunctive relief and then, without discussion, describe the conditions of the permanent injunction. Because the court failed to make a record, we have no way of assessing the court's application of the ***Pure Milk Products*** considerations. Thus, while the provisions of the injunction are clear, the factual basis for those provisions and the legal reasoning supporting them are not.

¶14 Our supreme court has cautioned that permanent injunctions are not to be issued lightly. The cause must be substantial. ***Id***. Because an injunction is enforceable by the contempt power, it is "an extremely powerful instrument." ***Id.*** (citation omitted). Bearing this in mind, we remand the case so that the trial court may explain its decision on the record with appropriate factual findings and legal conclusions. *See* ***Kastelic v. Kastelic***, 119 Wis. 2d 280, 285, 350 N.W.2d 714 (Ct. App. 1984) (stating that when the trial court has failed to manifest the exercise of discretion with findings, the reviewing court may reverse and remand); ***Minguey v. Brookens***, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981) (when faced with

inadequate findings of fact and conclusions of law, appellate court may reverse and remand for further findings and conclusions).

Frivolousness of Davis' Claim for Punitive Damages

¶15 Roehl argues that the trial court failed to make the requisite findings when it denied his postverdict motion, which alleged that Davis' claim for punitive damages was frivolous under WIS. STAT. §§ 802.05 and 814.025. Roehl directs us to the trial court's summary denial of "all other motions and claims … includ[ing] the defendant's motion for declaration of frivolous lawsuit in the case." Roehl asks us to remand the matter and order the trial court to enter the appropriate findings. Although the court failed to address with any specificity Roehl's frivolous action claim, his claim nonetheless fails under our recent decision, ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2006 WI App 219, No. 2005AP2837. The interpretation and application of statutes and case law to facts of a particular case present questions of law which appellate courts decide de novo. *See* ***Welin v. American Family Mut. Ins. Co.***, 2006 WI 81, ¶16, __ Wis. 2d __, 717 N.W.2d 690.

¶16 In ***Trinity Petroleum***, we held that the recently recreated WIS. STAT. § 802.05, which governs frivolous claims, applied retroactively to litigation begun while the former frivolousness statutes, WIS. STAT. §§ 802.05 and 814.025, were still in effect. ***Trinity Petroleum***, 2006 WI App 219, ¶¶1-2. Thus, even though

Roehl filed his claim before the effective date of the recreated § 802.05, the new version of § 802.05 applies.[2]

¶17 In ***Trinity Petroleum***, we further concluded that the new "safe harbor" provision of WIS. STAT. § 802.05 precludes a party from serving its motion for sanctions postjudgment. ***Trinity Petroleum***, 2006 WI App 219, ¶2. We reasoned that the language of the new rule is unequivocal, "The motion … shall not be filed with or presented to the court *unless*, within 21 days after service of the motion or such other period as the court may prescribe, the challenged [pleading] is not withdrawn or appropriately corrected." *See* ***id.***, ¶28; § 802.05(3)(a)1. We explained that the purpose of the mandatory twenty-one day safe harbor provision is to give the offending party the opportunity to withdraw or amend the challenged claim. *See* ***Trinity Petroleum***, 2006 WI App 219, ¶29. Thus, the safe harbor provision is meaningless if the party does not serve its motion for frivolous costs, fees and reasonable attorney fees until after the court has already rendered its judgment in the case. *See* ***id.***, ¶28.

¶18 Here, Roehl did not serve and file his motion until over one week after the jury entered its verdict. Roehl should have served Davis with the motion prior to the jury trial. Had Roehl done so, he would have provided Davis with the opportunity to withdraw or amend the punitive damages claim. Because Roehl did

[2] WISCONSIN STAT. §§ 802.05 and 814.025, addressing frivolous claims, were repealed and § 802.05 was recreated effective July 1, 2005. ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2006 WI App 219, ¶1, No. 2005AP2837. The effective date of S. CT. ORDER 03-06 was March 31, 2005. ***Trinity Petroleum***, 2006 WI App 219, ¶1 n.2. The order announced that the changes to §§ 802.05 and 814.025 would become effective on July 1, 2005. ***Trinity Petroleum***, 2006 WI App 219, ¶1 n.2. In this case, Davies filed his complaint in June 2004. The court held the jury trial and the permanent injunction hearing in August 2005, after the effective date of the recreated § 802.05.

not serve Davis with his motion in accordance with the safe harbor provision, he forfeited the opportunity to seek frivolous costs, fees and reasonable attorney fees.

¶19 Roehl contends that he substantially complied with the safe harbor provision by arguing that Davis' claim for punitive damages was frivolous as an affirmative defense in his answer, at the close of Davis' case-in-chief and at the close of all evidence. However, ***Trinity Petroleum*** teaches that only service of a motion will trigger the mandatory safe harbor provision. There, we rejected an argument that the moving party, in effect, had complied with the safe harbor provision when it invoked WIS. STAT. § 814.025 in a prejudgment brief. ***Trinity Petroleum***, 2006 WI App 219, ¶¶32-33. We explained that "[w]arnings are not motions" and the revised statutes explicitly provide that the "'safe harbor' period begins to run *only* upon service of the motion" in order to "stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to have violated the rule." ***Id.***, ¶33 (emphasis added; citation omitted). Accordingly, the actions Davis claims substantially complied with the statute did not trigger the mandatory twenty-one day safe harbor provision. We affirm the trial court's order denying Roehl's motion for sanctions.

Cross-Appeal

¶20 Davis contends that the trial court erred in refusing to instruct the jury on trespass and include questions regarding trespass on the special verdict form. Davis points out that he submitted proposed verdict questions and instructions on trespass and objected to their absence from the final instructions and special verdict form. However, Davis failed to file a postverdict motion raising his concerns. In order to preserve the matter for appeal, Davis had to raise the alleged error on a motion after verdict with sufficient particularity to

demonstrate that the trial court understood the objection. ***Roach v. Keane***, 73 Wis. 2d 524, 535-36, 243 N.W.2d 508 (1976). This rule applies even if the defendant has disputed the instructions and special verdict form before they were submitted. *See* ***id.*** at 536. Therefore, Davis is foreclosed from complaining now about the jury instructions and questions on the special verdict form.

¶21 In the alternative, Davis asks us, in our discretion, to address his concerns in the interests of justice. *See* WIS. STAT. § 752.35. Davis contends that filing a postverdict motion would not have served any purpose since the court summarily denied all motions not pertaining to injunctive relief. The trial court's summary denial of the parties' motions does not prompt us to disregard Davis' waiver and invoke our power under § 752.35. Davis could have, and should have, filed a postverdict motion.

¶22 WISCONSIN STAT. § 805.16 outlines the procedure for filing motions after verdict. Paragraph (1) states that motions after verdict shall be filed and served within twenty days after the verdict is rendered. Paragraph (2) provides that a hearing on any motions after verdict must occur not less than ten nor more than sixty days after the verdict is rendered. Here, the jury returned its verdict on August 18, 2005. Following the verdict, the court informed both parties that it would take up other issues at a hearing on August 31, which falls squarely within the statutory time frame. Roehl filed his own postverdict motion on August 31. Similarly, Davis could have filed a postverdict motion prior to or on the date of the hearing, but for whatever reason he chose not to take any action. Because Davis did not file a postverdict motion, the trial court had no reason to consider with any specificity his concerns pertaining to the jury instructions and special verdict form. Furthermore, after the hearing, Davis still had several days left in the twenty-day period in which to file a postverdict motion to preserve his appeal rights and to

prompt the trial court to take a closer look at the jury instructions and special verdict form.

¶23 The purpose of the postverdict motion is to alert the court to the alleged error and give it an opportunity to correct the error, thereby avoiding a costly and time-consuming appeal. ***Calero v. Del Chem. Corp.***, 68 Wis. 2d 487, 497, 228 N.W.2d 737 (1975). By not filing a postverdict motion detailing his concerns with the jury instructions and special verdict form, Davis deprived the court of the opportunity to closely review the alleged error. We deny Davis' request for relief in the interests of injustice and hold that waiver bars his argument on appeal.

Frivolousness of Davis' Cross-Appeal

¶24 Finally, we address Roehl's request that we find Davis' cross-appeal frivolous. WISCONSIN STAT. RULE 809.25(3) authorizes this court to award costs and attorney fees upon determining that a cross-appeal is frivolous. A cross-appeal is frivolous if this court determines: (1) the cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another or (2) "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal 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." ***Id.*** An appellate court considers "what a reasonable party or attorney knew or should have known under the same or similar circumstances." ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. Whether an appeal is frivolous is a question of law. ***Id.***

¶25 The circumstances here do not merit a finding of frivolousness. First, Davis' procedural oversight in not filing a postverdict motion before filing

his cross-appeal does not rise to the level of using the cross-appeal in bad faith solely for purposes of harassing or maliciously injuring Roehl. Second, Davis' cross-appeal, while unsuccessful, has some reasonable basis in law and finds support in the record. The trial court acknowledged Davis' request for separate instructions and questions regarding trespass, but responded that it had included Davis' trespass "contention under the rubric of nuisance either intentional or negligent conduct." However, trespass and nuisance are two distinct claims, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS, § 821D cmts. d and e (1979), and so Davis had an arguable issue on the merits. Finally, Davis prays for relief in the interests of justice. Although he is unsuccessful, it was reasonable for him to think that we would exercise our discretion and overlook his waiver of the trial court's alleged error. Accordingly, we deny Roehl's motion seeking frivolous costs, fees and reasonable attorney fees under WIS. STAT. § 809.25(3).

Conclusion

¶26 We remand the matter to the trial court so that it may make a record of its legal conclusions and findings of fact with regard to the permanent injunction. Roehl's claims pertaining to frivolous costs, fees and reasonable attorney fees fail. Finally, Davis waived his objection to the jury instructions and special verdict form.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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