

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-3310

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE FINDING OF CONTEMPT IN DORENE A.
GOSWITZ V. HARLAN R. HEINZ ET AL:**

DAVID L. NICHOLS,

APPELLANT,

v.

**CHARLES D. WINGROVE, BRUCE P. CANDLIN AND
THOMAS K. GUELZOW,**

RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Affirmed.*

¶1 CANE, C.J.¹ The trial court found attorney David Nichols in contempt for failure to pay his share of costs and reasonable attorney fees awarded to Harlan Heinz and St. Paul Fire and Marine Insurance Company (respondents) pursuant to a previous court order under the frivolous claims statute, WIS. STAT. § 814.025. Nichols appeals the order, contending that the circuit court lacks authority to enter a contempt order when the judgment or order is only for the payment of money. The order is affirmed.

¶2 Initially, Nichols filed a malpractice claim on behalf of his client against Heinz, a psychologist, because of Heinz's testimony in a child custody hearing. The trial court dismissed the claim in a summary judgment and also found the malpractice claim frivolous. It ordered Nichols, as the attorney for the plaintiff, to pay a 60% share of the awarded costs and reasonable attorney fees. The client was ordered to pay the remaining 40% of the costs and fees. That judgment was affirmed on appeal.

¶3 After that judgment was affirmed on appeal, the client paid her share of the assessed costs and attorney fees, but Nichols refused to pay his share. The respondents then proceeded with a remedial contempt proceeding under WIS. STAT. § 785.03(1) against Nichols, who failed to appear at the noticed hearing. Relying on WIS. STAT. § 785.01(1)(b),² the trial court found Nichols in contempt

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² WISCONSIN STAT. § 785.01 provides in pertinent part:

Definitions. In this chapter:

(1) "Contempt of court" means intentional:

....

(b) Disobedience, resistance or obstruction of the authority, process or order of a court.

because of his refusal to pay his share of the costs and attorney fees. The contempt order committed Nichols to jail for a period not to exceed forty days or until he purged himself by paying the sum of \$10,090.91.

STANDARD OF REVIEW

¶4 The sole basis of Nichols' appeal is that the circuit court lacks statutory authority to find him in contempt for failure to pay the costs and attorney fees awarded against him because of his participation in the frivolous malpractice claim. Whether the court has statutory authority to issue the contempt order in this situation presents an issue of statutory interpretation, which is a question of law this court reviews independently of the trial court. *Wisconsin Fin. Corp. v. Garlock*, 140 Wis. 2d 506, 515, 410 N.W.2d 649 (Ct. App. 1987). The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. *Columbia County v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980). In determining legislative intent, first resort must be to the language of the statute itself. *Id.* If the meaning of the statute is clear on its face, this court will not look outside the statute in applying it. *WEPCO v. PSC*, 110 Wis. 2d 530, 534, 329 N.W.2d 178 (1983). Also, this court will consider the parts of a statute in relation to the whole and to related sections. *See Elliott v. Employers Mut. Cas. Co.*, 176 Wis. 2d 410, 414, 500 N.W.2d 397 (Ct. App. 1993).

DISCUSSION

¶5 Nichols equates the assessment under the frivolous claim statute as no more than a money judgment and argues that contempt is not a means available to collect a money judgment for fees and costs. He reasons that WIS. STAT. chs. 815 and 816 provide the roadmap of rules and procedures governing collections upon judgments. He notes that § 815.02 specifically states that contempt may be

utilized only when the judgment requires the performance of any act other than the payment of money or the delivery of property.³ Nichols concludes that because the assessment under the frivolous claims statute is merely an award for payment of money, it may be enforced only in accordance with the rules of collecting money judgments, none of which permit a contempt proceeding.

¶6 On the other hand, the respondents reason that under WIS. STAT. § 785.01(1)(b), the legislature has given courts the power to punish for contempt any disobedience to a lawful order or process of the court. They reason that the assessment for costs and fees pursuant to WIS. STAT. § 814.025⁴ is akin to a court

³ WISCONSIN STAT. § 815.02 provides:

Judgments, enforced by execution. A judgment which requires the payment of money or the delivery of property may be enforced in those respects by execution. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party, person or officer who is required to obey the same, and if he or she refuse he or she may be punished for contempt, and his or her obedience enforced.

⁴ WISCONSIN STAT. § 814.025 provides in 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.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and 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:

(continued)

sanction for Nichols having maintained a frivolous malpractice claim. They contend that Nichols' refusal to pay the sanction falls under this statute as disobedience to a lawful order of the court. Thus, they conclude that remedial contempt procedures can be used to compel compliance with the court's sanction for Nichols' filing the frivolous malpractice action. This court agrees.

¶7 Initially, it must be understood that an award of costs and fees under WIS. STAT. § 814.025 is not a "taxation of costs" under WIS. STAT. § 814.10, which governs taxation of costs. Section 814.10(1) provides, "The clerk shall tax and insert in the judgment ... the sum of the costs and disbursements as above provided, verified by affidavit." The costs and disbursements referred to are those set forth in WIS. STAT. § 814.04. Section 814.025(1) allows not only costs under § 814.04 but also an award of reasonable attorney fees. However, the court must first make findings and conclusions as to whether the criteria under § 814.025 for establishing frivolousness have been met. See *In re Estate of Bilsie*, 100 Wis. 2d 342, 354, 302 N.W.2d 508 (Ct. App. 1981).

¶8 Thus, an award of costs and attorney fees under WIS. STAT. § 814.025 is "uniquely separable" from the cause of action to be tried because the issue on a motion for costs and fees under the statute does not depend upon the trial result; frivolousness is not determined by whether a party's position at trial carries the day but whether the party presents an issue to the court or jury that is

(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.

"fairly debatable." See *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 247 n.11, 517 N.W.2d 658 (1994). In fact, a party may not know whether he or she has a claim under § 814.025 until the trial is completed.

¶9 Importantly, the assessment of costs and attorney fees to the victim of a frivolous action or defense furthers an interest essential to the system of justice. The obvious purpose of WIS. STAT. § 814.025 is to deter litigants and attorneys from commencing or continuing frivolous actions and to punish those who do so. Our appellate courts have held that the trial court must enforce § 814.025 “for the purpose of maintaining the integrity of the judicial system and the legal profession.” *Ford Motor Credit Co. v. Mills*, 142 Wis. 2d 215, 219, 418 N.W.2d 14 (Ct. App. 1987) (quoting *Stoll v. Adriansen*, 122 Wis. 2d 503, 511, 362 N.W.2d 182 (Ct. App. 1984)). Thus, the burden is on the courts to impose and enforce its sanctions whenever a frivolous action is commenced or continued. As stated in *Aspen Servs., Inc. v. IT Corp.*, 220 Wis. 2d 491, 498, 583 N.W.2d 849 (Ct. App. 1998), the authority to impose sanctions is essential if circuit courts are to enforce its orders and ensure prompt dispositions of lawsuits.

¶10 Hence, this court views the assessment of costs and fees pursuant to WIS. STAT. § 814.025 as more than a mere money judgment. It is a court-imposed sanction against the litigant and attorney for violating the integrity of the judicial system. As such, the trial court not only should, but also must enforce that sanction to maintain the integrity of the judicial system and legal profession.

¶11 In *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 597 N.W.2d 744 (1999), the Wisconsin Supreme Court recently discussed the purpose and function of sanctioning of frivolous claims. Notably, the court spoke in terms of sanctions imposed against the party because of its frivolous actions. *See id.* at ¶27 (Once a party knows or should have known that a claim is not supported by fact or law, it must dismiss or risk sanctions.). It again pointed out that a significant purpose of WIS. STAT. § 814.025 is to help maintain the integrity of the judicial system and the legal profession. *Id.* at ¶72. The court recognized that while compensation to the wronged party is an appropriate consideration, it repeated the holding in *Stoll* that the underlying purpose of § 814.025 is to deter and punish those who file or continue frivolous actions. *See id.* at ¶79. Importantly, compensating those who are forced to defend frivolous litigation is only a secondary purpose of the frivolous claims statute. Finally, the court observed that once it is determined the action is frivolous, the sanction is mandatory. *Id.* at ¶78.

¶12 Therefore, this court agrees with the respondents and the trial court that the award of costs and fees awarded to a wronged party in a frivolous action is akin to a sanction or court order to deter persons from filing or continuing a meritless action.⁵ Hence, when the trial court imposes such a sanction and the

⁵ The respondents filed a motion with this court arguing that Nichols' appeal is frivolous pursuant to WIS. STAT. 809.25(3). This statute provides in part:

(continued)

party refuses to comply with the sanction, the party has disobeyed an order of the court. This refusal falls under the definition of contempt in WIS. STAT. § 785.01(1)(b). Consequently, the court may enforce its sanction under the remedial contempt procedures of ch. 785.

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The 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.

This court is not persuaded that the Nichols' appeal was filed in bad faith or without any reasonable basis in law. Consequently, this court denies the respondents' motion for costs under WIS. STAT. § 809.25(3).

By the Court.—Order affirmed. Respondents' motion for costs under WIS. STAT. § 809.25(3) is denied.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

