COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1002 **Cir. Ct. No. 2008SC1841**

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

STEPHANIE M. KRAMSCHUSTER, N/K/A STEPHANIE PRZYTARSKI,

PLAINTIFF-APPELLANT,

V.

MARC J. ACKERMAN, PH.D.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed*.

¶1 BRENNAN, J.[1] Stephanie M. Kramschuster, n/k/a Stephanie Przytarski, *pro se*, appeals a judgment awarding Dr. Marc J. Ackerman $1855.61[2]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The trial court awarded Ackerman $1750 plus costs, for a total judgment of $1855.61.

in attorney fees based on the trial court's finding that Przytarski's $1000 claim was frivolous. Because the trial court did not, and could not, make the safe harbor finding required by WIS. STAT. § 802.05(3), we conclude that the trial court erred. Przytarski also claims the trial court erred in denying her motion to reopen; however, the record on appeal shows no evidence that the trial court denied a motion to reopen or that Przytarski even filed one. Accordingly, we reverse and remand to the trial court for further proceedings.[3]

BACKGROUND

¶2 As part of a Waukesha County paternity action, Przytarski and the father of her child stipulated, and the trial court ordered, that each would undergo a psychological evaluation and that Przytarski would bear the costs. Przytarski hired Ackerman to perform the evaluations. Przytarski and Ackerman executed and signed a contract, in which Przytarski agreed to pay Ackerman $2400 upfront for the evaluations but which allowed Ackerman to charge Przytarski extra for any necessary court appearances and preparation. The parties agree that Przytarski paid the $2400 due.

¶3 Ackerman was subpoenaed to appear at a December 2007 hearing in the paternity action, and Ackerman charged Przytarski $1000 to prepare for and

[3] Przytarski filed a notice of appeal on April 16, 2009, seeking to appeal judgments entered on October 14, 2008 (dismissing Przytarski's claims) and on March 4, 2009 (awarding Ackerman attorney fees). In an October 22, 2009 order, we concluded that we lacked jurisdiction to review the October 14, 2008 judgment because the notice of appeal was untimely. Accordingly, only the March 4, 2009 judgment is presently before us.

attend the hearing. Przytarski paid the $1000 by credit card. However, the parties do not dispute that Przytarski's lawyer contacted Ackerman before the December 2007 hearing and cancelled his appearance and that Ackerman remained available for telephone testimony. The parties also do not dispute that after the conclusion of the paternity matter, Przytarski charged-back to her credit card the $1000 she had paid Ackerman for preparation and attendance at the December 2007 hearing. Ackerman never received or sought payment of the $1000.

¶4 In January 2008, Przytarski filed a Milwaukee County Small Claims Summons and Complaint, in which she demanded $2400 in damages from Ackerman, alleging Ackerman violated the parties' contract. In her complaint, she claimed that:

> Dr. Ackerman demanded and received $1000[][4] as an advanced payment for his presence at a court hearing on Dec. 21, 2007, in Waukesha County Circuit [C]ourt (case 06PA350). Dr. Ackerman failed to show up at the hearing preventing my attorney from calling him as a witness and to answer questions in a timely manner relative to his report on psychological evaluations he performed.

¶5 In February 2008, Przytarski re-filed the complaint, marking it as "Amended" and demanding $4900 in damages instead of the original $2400. Przytarski attached a signed statement to the amended complaint, stating that, in addition to her original $1000 claim, she sought $2400 for the psychological evaluations performed by Ackerman because Ackerman's invoices did not provide the proper diagnostic codes.[5]

[4] Przytarski's complaint only accounts for $1000 of her $2400 damages demand. The remaining $1400 is left unexplained.

[5] Przytarski's attached explanation only accounts for $3400 of the $4900 she requests. The additional $1500 is left unexplained.

¶6 A court commissioner conducted a pretrial on the amended complaint in February 2008 and an evidentiary hearing in June 2008. At the conclusion of the pretrial and evidentiary hearing, the commissioner dismissed Przytarski's amended complaint. Neither the pretrial nor evidentiary hearing was recorded, and the record contains no written findings or order.

¶7 Following the commissioner's decision, Przytarski asked for a trial *de novo*, and a court trial was held in October 2008.[6] Przytarski mentioned the $1000 claim for Ackerman's failure to appear at the December 2007 hearing in her opening statement and questioned Ackerman and the guardian *ad litem* about the claim. Ackerman did not, by pretrial motion or at trial, request the court find the claim frivolous.

¶8 At the conclusion of the court trial, the court dismissed Przytarski's amended complaint and specifically found that the $1000 claim was "obviously[,] clearly … without merit." The court made no finding regarding whether the claim was frivolous, nor did Ackerman ask the court for such a finding. Instead, the court found as follows:

> There is also reference in the amended complaint to a $1,000 bill, and it is my understanding at least from the testimony and evidence that in previous statements that that bill is no longer in dispute since, while it may have been initially credited within about 60 days, ultimately it was reversed, and Dr. Ackerman was not in effect paid for that, that the court finds related to what he required for his appearance and testimony and/or consultation with the attorneys concerning an appearance he was subpoenaed for before Judge Bohren in the paternity case previously represented.

[6] Judge William Sosnay presided over the small claims court trial, but the case was reassigned after trial to Judge John Siefert due to judicial rotation.

> I do find clearly that, number one, the evidence is clear on the record that this payment was reversed, that in effect, the plaintiff was credited back the $1,000 by her credit card company and that Dr. Ackerman ultimately did not pursue that, and I also find from Dr. Ackerman's testimony as well as Attorney Mistrioty [Przytarski's counsel in the paternity matter] that it was Attorney Mistrioty who had called the doctor off as a result of the direction from Judge Bohren that they were not going to take his testimony on the date that he was subpoenaed. Despite that, the doctor remained available by phone in the event there was a need for his testimony. But he has not recovered any fees for that, and *I find that obviously*[,] *clearly that portion of* [*Przytarski's*] *claim … is without merit*, based upon the clear and overwhelming evidence on the record to support that. It ultimately was not paid, despite the doctor making himself available.

(Emphasis added.)

¶9 After the trial, Ackerman filed a motion for attorney fees, pursuant to WIS. STAT. § 802.05(2) and (3), seeking "attorney fees and costs for the appeal, *de novo* review and court trial [Przytarski] requested after [the court commissioner] found no basis of fact or law supporting the claims alleged in her complaint." In his supporting affidavit, Ackerman's counsel stated that at the hearing before the court commissioner:

> Attorney … Mistrioty, and the guardian *ad litem* in the Waukesha child custody case, testified as follows: Ackerman was appointed by the court to conduct evaluations, which [Przytarski] and her attorney had agreed to pay for; he conducted those evaluations; he prepared a report and submitted it per the court's order; and he was ready to testify regarding his report, *until* [*Przytarski's*] *lawyer told him not to come to court.*

(Emphasis added.)

¶10 Przytarski filed a written objection to the motion, and a hearing was held in February 2009.[7] Based on argument and the trial transcript, the trial court found that Przytarski's $1000 claim, founded upon Ackerman's non-appearance at the December 2007 hearing, was frivolous under WIS. STAT. § 814.025 (2003-04) because: (1) she pursued it at the court trial; and (2) she knew that the claim lacked merit before the trial began.[8]

¶11 No written or oral motion to reopen appears in the record, and our review of the February 2009 hearing transcript did not reveal that the court addressed any such motion.

STANDARD OF REVIEW

¶12 Przytarski first argues that the trial court erred when it found her $1000 claim frivolous. A finding of frivolousness "'is based on an objective standard, requiring a determination of whether the party … knew or should have known that the position taken was frivolous.'" *See* ***Osman v. Phipps***, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701 (citation omitted). The trial

[7] The February 2009 hearing on Ackerman's Motion for Award of Actual Attorney Fees was heard by Judge John Siefert.

[8] The only written order or judgment in the record from the February 2009 hearing is the pre-printed small claims judgment form, stating the amount of the judgment against Przytarski. The judgment form makes no reference to findings or conclusions, and makes no reference to frivolousness or a motion to reopen. We rely on the hearing transcripts for the details of the trial court's order. We note that Ackerman's attorney offered to draft a written order at the conclusion of the hearing, but the trial court told him he did not have to because the clerk's office would prepare one. We caution against that practice in the future.

court's determination of what a reasonable party "knew or should have known presents a question of fact, and we will uphold the [trial] court's determination unless it is clearly erroneous." ***Id.*** "Whether what was known or should have been known supports a finding of frivolousness, however, presents a question of law subject to our *de novo* review." ***Id.***

¶13 Przytarski's second argument is that the trial court erred when it denied her motion to reopen. We review a motion to reopen under the erroneous exercise of discretion standard. *See* ***Kovalic v. DEC Int'l***, 186 Wis. 2d 162, 166, 519 N.W.2d 351 (Ct. App. 1994).

DISCUSSION

A. Frivolous Finding

¶14 In concluding as a matter of law that Przytarski pursued a frivolous claim under WIS. STAT. § 814.025 (2003-04), the trial court made two critical findings of fact: (1) that Przytarski had continued to pursue the $1000 claim at trial; and (2) that she knew at trial that her claim had no merit. The parties do not dispute that the $1000 claim was without merit. They dispute whether Przytarski continued to pursue that claim at trial. Przytarski argues that she abandoned that claim after the pretrial and only mentioned it at trial to show that Ackerman generally disregarded his contractual responsibilities. Ackerman responds that Przytarski was still pursuing the claim at trial even after she knew and admitted that it was meritless. We need not determine whether the trial court properly exercised its discretion when finding that Przytarski continued to pursue the claim

at trial because we conclude that the trial court erred as a matter of law in relying on a repealed statute when finding that the claim was frivolous.

¶15 The trial court based its frivolous finding on WIS. STAT. § 814.025 (2003-04), which was repealed July 1, 2005, long before this case was filed. *See* S. CT. ORDER, 2005 WI 86 (eff. July 1, 2005). The supreme court order repealing § 814.025 also replaced § 814.025 with an amendment to WIS. STAT. § 802.05 (2004-05). S. CT. ORDER, 2005 WI 86; *see* ***Trinity Petroleum v. Scott Oil Co.***, 2007 WI 88, ¶¶25-26, 302 Wis. 2d 299, 735 N.W.2d 1. Section 802.05 differs significantly from § 814.025 because § 802.05 includes a "safe harbor notice provision." Pursuant to § 802.05(3):

> [a] party alleging frivolous conduct and seeking sanctions *must* serve on the non-moving party its motion for sanctions at least 21 days *before filing* the motion with the [trial] court, providing the non-moving party an opportunity to correct or withdraw its allegedly offending paper. The motion for sanctions *may not* be filed with the [trial] court unless within 21 days the non-moving party does not withdraw or appropriately correct the offending matter.

Trinity, 302 Wis. 2d 299, ¶27 (emphasis added).

¶16 WISCONSIN STAT. § 802.05, as amended, was the only statute addressing frivolous claims in existence at the time of the trial court's order. It requires a movant requesting attorney fees incurred responding to a frivolous claim to give the opposing party twenty-one days notice and an opportunity to remedy its frivolous claim—the so-called safe harbor provision. Section 802.05(3) does not permit a movant to file the motion for attorney fees until he or she has complied with the safe harbor provision.

¶17 Here, the trial court never even addressed the correct statute, WIS. STAT. § 802.05, much less its safe harbor provision.[9] When the court made its findings, it awarded "actual attorney[] fee[s] for the trial work only and only as to … the $1,000 [claim] pursuant to [WIS. STAT. §] 814.025." At no point during the hearing did counsel or the court mention the safe harbor requirements or § 802.05(3).

¶18 Our review of the record shows that Ackerman did not comply with WIS. STAT. § 802.05(3)'s safe harbor provision. In fact, Ackerman did not even file his motion for attorney fees until *after* judgment was entered. There is no evidence in the record that Ackerman served Przytarski with notice twenty-one days before filing his motion or that Przytarski failed to comply with the warning. Under § 802.05(3), the trial court may not grant a motion for attorney fees based upon a frivolous claim unless the movant has complied with the safe harbor provision. *See* ***Trinity***, 302 Wis. 2d 299, ¶27 ("The motion for sanctions may not be filed with the [trial] court unless within 21 days the non-moving party does not withdraw or appropriately correct the offending matter."). Accordingly, we conclude that the trial court erred as a matter of law in finding that Ackerman was entitled to an award of actual attorney fees for Przytarski's frivolous pursuit of the $1000 claim.

[9] We note that Ackerman referenced the correct statute, WIS. STAT. § 802.05, in his Motion for Award of Actual Attorney Fees. But when appearing before Judge Siefert at the February 2009 hearing, Ackerman's counsel stated he could not remember the statute number. Counsel advised the court that the former frivolous statute, WIS. STAT. § 814.025 (2003-04), had been repealed, but told the court that the new statute contained the same language. The court, after it acknowledged it was using a "slightly dated" statute book, then read the repealed statute, § 814.025, aloud.

B. Denial of Motion to Reopen

¶19 Przytarski argues that the trial court erred in denying her motion to reopen. We have reviewed the record and can see no motion to reopen and no order denying a motion to reopen. The record shows that after the trial, Ackerman filed the motion for attorney fees. In response, Przytarski filed a document entitled "Objection to Motion for Award of Actual Attorney Fees," but the motion did not ask the court to reopen the case. The transcript of the February 2009 hearing reveals no oral motion or conversation about any motion to reopen.

¶20 We are bound by the record before us. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). It is Przytarski's burden to review the record and ensure that it is sufficient for appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Nowhere in her submissions to this court has Przytarski provided us with a record cite directing us to a motion to reopen or a court order denying that motion. The law requires Przytarski to identify the order from which she appeals in a manner that leaves "no doubt what is appealed from." *See* ***State v. Avery***, 80 Wis. 2d 305, 309, 259 N.W. 2d 63 (1977), *reversed on other grounds by* ***State v. Montgomery***, 148 Wis. 2d 593, 436 N.W.2d 303 (1989). She did not do so here. Consequently, this issue is not before us because Przytarski has failed in her burden of providing proof in the record that a motion to reopen was filed or denied.

By the Court.—Reversed.

Not recommended for publication in the official reports.