

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP1765

Cir. Ct. No. 2007SC1083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TREVOR RICHARDSON,

PLAINTIFF-APPELLANT,

V.

ROBERT W. HENDERSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
SANDY A. WILLIAMS, Judge. *Reversed.*

¶1 NEUBAUER, P.J.¹ Trevor Richardson appeals from a circuit court order granting Richard Henderson's motion for sanctions and ordering Richardson

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

to pay \$2500 toward Henderson's attorney fees. Richardson challenges the circuit court's order on grounds that Henderson and the circuit court did not follow proper procedure under WIS. STAT. § 802.05 and that the court's award of \$2500 in attorney fees was not reasonable. We conclude that Henderson failed to comply with the safe harbor provisions of § 802.05 when seeking sanctions against Richardson and therefore the circuit court erred in granting his request. We reverse the circuit court's order for sanctions.

BACKGROUND

¶2 This is Richardson's second appeal in this small claims action. *See Richardson v. Henderson*, No. 2009AP345, unpublished slip op. (WI App Jan. 13, 2010). Richardson originally brought this action against Henderson in an attempt to recover marital property left by Richardson's then-wife at the apartment she leased from Henderson. *Id.*, ¶1. At the time Richardson filed this small claims action in Ozaukee county, the divorce proceedings between Richardson and his wife were still pending in Milwaukee county. In his small claims action against Henderson, Richardson claimed that his wife's disposal of the property violated a temporary order entered in the divorce action which enjoined either party from giving away, transferring or disposing of property. Richardson's small claims action was dismissed by the circuit court for lack of jurisdiction to enforce the family court order, and we affirmed that ruling on appeal. *Id.*

¶3 On January 29, 2010, Richardson filed a motion for relief from judgment under WIS. STAT. § 806.07(1)(b) & (h). In support, he submitted an order dated July 29, 2009, from the Milwaukee county family court reopening the divorce judgment and awarding him the marital property which was left at the apartment and which is the subject of his small claims action against Henderson.

Richardson argued that the order presented new evidence for consideration in the small claims action. Henderson opposed the motion on various grounds, including that the small claims action had been dismissed and that dismissal had been affirmed on appeal. Henderson additionally requested monetary sanctions against Richardson under WIS. STAT. § 802.05 as a means of foreclosing Richardson “from further mis-use of the judicial system” to Henderson’s financial detriment. On March 15, 2010, Richardson filed a response to Henderson’s request for sanctions in which he asserted that his conduct had not met the requirements of § 802.05 and that Henderson had failed to comply with the procedural requirements of the statute.

¶4 The circuit court held a hearing on both the motion to reopen and the request for sanctions on May 27, 2010. The court first denied Richardson’s motion to reopen the judgment; Richardson does not appeal that ruling. However, the circuit court then addressed Henderson’s request for sanctions. After hearing lengthy statements from both parties, the court granted Henderson’s request for sanctions and, after considering the attorney fees expended in responding to Richardson’s motion, imposed monetary sanctions in the amount of \$2500. Richardson appeals the circuit court’s order for sanctions.

DISCUSSION

¶5 The circuit court expressly awarded sanctions against Richardson under WIS. STAT. § 802.05(2). Section 802.05 provides that a person who signs a pleading makes three warranties: (1) the paper is not being presented for any improper purpose; (2) to the best of the signer’s knowledge, based on reasonable inquiry, the paper is well grounded in fact; and (3) the signer has conducted a reasonable inquiry and the paper is warranted by existing law or a good faith

argument for a change in it. *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). If the circuit court finds that any of the three requirements has been disregarded, it may impose an appropriate sanction; however, the signer must be given notice and an opportunity to respond. Sec. 802.05(3).

¶6 WISCONSIN STAT. § 802.05(3)(a)1. includes a “safe-harbor” provision that requires a person seeking sanctions for frivolous litigation to serve the nonmoving party at least twenty-one days before filing a motion for sanctions and allows the motion to be filed only if the nonmoving party does not withdraw or appropriately correct the offending pleading.² *Trinity Petroleum, Inc. v. Scott*

² WISCONSIN STAT. § 802.05 provides in relevant part:

(3) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

(a) *How initiated.* 1. “By motion.” A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but 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 paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion....

....

(continued)

Oil Co., 2007 WI 88, ¶27, 302 Wis. 2d 299, 735 N.W.2d 1. Whether Henderson complied with § 802.05 in seeking sanctions against Richardson presents a question of law we review de novo. See *Welin v. American Family Mut. Ins. Co.*, 2006 WI 81, ¶16, 292 Wis. 2d 73, 717 N.W.2d 690 (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).

¶7 Richardson contends on appeal that Henderson failed to provide him with the requisite safe harbor period and failed to serve him with a separate motion for sanctions. Henderson does not point to, nor have we uncovered, a motion in the record providing Richardson with the requisite safe harbor period under WIS. STAT. § 802.05(3) prior to Henderson’s request for sanctions. Instead, Henderson references a 2008 letter to Richardson in which he warns Richardson that the property claim was frivolous and that Henderson would file a motion to dismiss “within 21 days” of the letter. Henderson contends that the letter demonstrates substantial compliance with the safe harbor provision.³ However, *Trinity*

(b) *Nature of sanction; limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subds. 1. and 2., the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation subject to all of the following:

³ Much of Henderson’s brief addresses the merits of both Richardson’s original small claims action and the motion for relief from judgment. Because our decision is based only on Henderson’s failure to comply with the procedural requirements of WIS. STAT. § 802.05, we need not address Henderson’s arguments as to whether Richardson’s pursuit of relief from judgment was in fact frivolous. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of an appeal, we will not decide other issues raised).

Petroleum teaches that only service of a motion will trigger the mandatory safe harbor provision. *Trinity Petroleum v. Scott Oil Co.*, 2006 WI App 219, 296 Wis. 2d 666, 724 N.W.2d 259, *rev'd on other grounds by* 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1.⁴ In *Trinity Petroleum*, we explained that “[w]arnings are not motions” and § 802.05 explicitly provides 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 violate the rule.” *Trinity Petroleum*, 296 Wis. 2d 666, ¶33 (citation omitted). Additionally, the statute requires that the motion may not be filed with or presented to the court unless “within 21 days after the service of the motion,” the challenged pleading is not withdrawn. Accordingly, the 2008 letter, which was not accompanied by the service of a motion, much less followed by the filing of the motion after a twenty-one-day period, did not satisfy the mandatory safe harbor provision.

⁴ Our supreme court has held that “when the supreme court overrules a court of appeals decision, the court of appeals decision no longer possesses any precedential value, unless this court expressly states otherwise.” *Blum v. Ist Auto & Cas. Ins. Co.*, 2010 WI 78, ¶42, 326 Wis. 2d 729, 786 N.W.2d 78. Because the supreme court reversed *Trinity Petroleum v. Scott Oil Co.*, 2006 WI App 219, 296 Wis. 2d 666, 724 N.W.2d 259, *rev'd on other grounds by* 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1, but did not expressly overrule the case, *Blum* does not apply.

CONCLUSION

¶8 We conclude that Henderson did not comply with the procedural requirements of WIS. STAT. § 802.05 in requesting sanctions against Richardson. As such, the circuit court erred in granting Henderson's request. We reverse the order imposing sanctions.

By the Court.—Order reversed.

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

