COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2394 **Cir. Ct. No. 2003CV1682**

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

JEFFREY A. COOPER,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

AMERICAN FAMILY MUTUAL INSURANCE CO.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Reversed; cross-appeal dismissed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Jeffrey Cooper appeals from a judgment awarding sanctions to American Family Mutual Insurance Company for Cooper's continuation of a frivolous lawsuit. The circuit court concluded the provisions of

the new WIS. STAT. § 802.05 (2005-06)[1] did not apply retroactively to this case and, if the new statute did apply, American Family's failure to comply with the new rule's safe harbor notice provision was harmless. American Family cross-appeals, contending the court erred in not awarding sanctions from the commencement of the lawsuit. We conclude that § 802.05 applies retroactively given the facts of this case and that American Family did not comply with the statute's safe harbor provisions. Accordingly, we reverse the judgment and dismiss the cross-appeal.

¶2 This case arises out of an alleged burglary of Cooper's home in December 2002. Cooper made a claim under a homeowner's insurance policy issued by American Family for personal property purportedly stolen. After American Family declined to pay on the claim due to suspicious circumstances surrounding the alleged burglary, Cooper filed a summons and complaint on December 22, 2003, and an amended complaint on April 8, 2004. In its affirmative defenses, American Family asserted that Cooper's claim was "frivolous as that term is used in § 814.025, Stats."

¶3 While the matter was in pretrial discovery, the supreme court issued Order 03-06 on March 31, 2005, changing the rules governing sanctions for frivolous conduct. Effective July 1, 2005, WIS. STAT. §§ 802.05 and 814.025 (2003-04) were repealed and a new version of § 802.05 was adopted.

¶4 Cooper's lawsuit went to trial on February 28 and March 1, 2006, and a jury found that the alleged burglary did not occur. American Family

[1] References to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

subsequently filed a postjudgment motion for sanctions against Cooper, individually, "pursuant to §§ 814.025 and 802.05, Wis. Stats. (2004)." The circuit court granted the motion, concluding that the new § 802.05 did not have retroactive application and, further, that if the statute had retroactive application, no harm was done to Cooper for American Family's failure to comply with the safe harbor notice provision. The court found the lawsuit frivolous from June 17, 2005, the date two detectives were deposed, and awarded attorney fees and costs against Cooper totaling $42,154.96. Cooper now appeals that award, and American Family cross-appeals.

¶5 We first address the issue of whether the new WIS. STAT. § 802.05 applies retroactively to this case. In ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶¶51-53, ___ Wis. 2d ___, 735 N.W.2d 1, our supreme court concluded § 802.05 was a procedural statute. There is a presumption of retroactivity in cases like the present one, in which the conduct occurred prior to the new rule's effective date but the motion was brought after the effective date. ***Id.***, ¶52. However, a procedural statute will not have retroactive application if it diminishes a contract, disturbs vested rights, or imposes an unreasonable burden on the party charged with complying with the new rule's requirements. ***Id.***, ¶53.

¶6 It is undisputed that no contract right was diminished in this case. In addition, we conclude no vested right was disturbed. As the court stated in ***Trinity Petroleum***, "until a circuit court made a finding of frivolousness under WIS. STAT. § 814.025 (2003-04), no right of relief accrued." ***Trinity Petroleum***, 735 N.W.2d 1, ¶62. Because the court in the present case did not make any finding of frivolousness before the effective date of the new WIS. STAT. § 802.05, American Family did not have a vested right in a particular remedy or in rules of procedure that relate to a remedy. *See* ***Trinity Petroleum***, 735 N.W.2d 1, ¶62.

¶7 The issue thus becomes whether retroactive application imposes an unreasonable burden upon American Family. ***Id.***, ¶65. It is true the present action was commenced before the July 1, 2005 effective date of the new WIS. STAT. § 802.05, raising the possibility that American Family proceeded properly under the old sanction rules. However, although American Family asserted in its affirmative defenses that the lawsuit was frivolous pursuant to WIS. STAT. § 814.025 (2003-04), it did not file a motion under the prior statutes before the effective date of the new rules. American Family had numerous opportunities to file a motion seeking sanctions under the prior statutes if it believed Cooper had commenced or maintained a frivolous lawsuit, but it failed to do so. American Family, through its counsel, would have been aware that the new statute was effective July 1, 2005, but it did not file a motion until the jury concluded there was no burglary, approximately eight months after the effective date of the new rule. American Family does not adequately explain why it failed to file a motion for sanctions prior to the judgment. [2]

¶8 We are not persuaded that American Family has rebutted the presumption of retroactivity by waiting until after the jury verdict and judgment to file its motion seeking sanctions, notwithstanding any affirmative defenses it may have pled. Accordingly, we conclude American Family has not demonstrated that

[2] We note American Family did not seek summary judgment. Indeed, the circuit court found, during the postjudgment hearing on the sanctions motion, that this case came down to "whether you believe Mr. Cooper or not." American Family also states in its brief, "As the trial court indicated, this case turned on the issue of whether a burglary had occurred. A judge was not the proper arbiter of that issue: it was a question for the jury. As such, there was no way the issue of sanctions for frivolity could have been determined prior to the trial." This highlights an apparent issue of fact that existed until the jury reached its verdict and resolved the issue of fact. Therefore, sanctions prior to the jury's verdict are questionable. Because we reverse the judgment, we need not reach the issue of when sanctions would be appropriate.

retroactive application of the new statute would impose an unreasonable burden upon it.

¶9 The next issue involves whether the circuit court erred by concluding that American Family should be excused from the mandates of the safe harbor provisions of the new statute. The new WIS. STAT. § 802.05 requires the party seeking sanctions to first serve a motion on the potentially sanctionable party, who then has twenty-one days to withdraw or appropriately correct the claimed violation. *See* § 802.05(3)(a)1. The movant may not file the motion for sanctions unless the twenty-one-day time period has expired without a withdrawal or correction of the offending matter. ***Id.*** It is undisputed that American Family did not comply with the twenty-one-day safe harbor provision.

¶10 At the outset, we note that the issue of whether postjudgment sanctions motions comply with the safe-harbor provision is separate from the retroactivity issue addressed by the supreme court in ***Trinity Petroleum***. In the earlier ***Trinity Petroleum*** decision, we held that a postjudgment sanctions motion did not comply with the safe-harbor provisions. *See* ***Trinity Petroleum***, 296 Wis. 2d 666, ¶¶26-35. The supreme court did not reach that issue on review because it remanded the case for further proceedings on retroactivity. Therefore, our earlier holding concerning complying with the safe-harbor provisions retains its precedential value.

¶11 We therefore reject American Family's argument that it complied with the safe harbor provision by putting Cooper on notice with its affirmative defenses. The defendant in ***Trinity Petroleum*** also argued that it complied with the substance of the safe harbor provision by putting the plaintiff on notice "at virtually every juncture and every opportunity to put that in the pleadings …." ***Id.***,

¶32 n.7. In rejecting that argument, we concluded that "warnings are not motions." ***Id.***, ¶33. We stated:

> "To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe-harbor' period begins to run only upon service of the motion." FED. R. CIV. P. 11 advisory committee's note (1993 Amendment). It would "wrench both the language and the purpose of the [safe-harbor] amendment to the Rule to permit an informal warning to substitute for service of a motion."

Trinity Petroleum, 296 Wis. 2d 666, ¶33 (citation omitted).

¶12 American Family insists without citation to the transcript that, "As Judge Dillon recognized, the defendant moved for the frivolous claim award when the answer and amended answer were filed."[3] Because American Family fails to provide citation to the statement attributed to the circuit court, we need not consider the argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any case, our review of the record does not support American Family's characterization of the court's statement. Furthermore, we note that WIS. STAT. § 802.05(3)(a)1 provides, "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." American Family neither served upon Cooper a separate motion for sanctions prior to judgment, nor did it specifically describe the offending conduct. Therefore, any suggestion that American Family's affirmative defenses or prayers for relief in its answers constituted a motion for sanctions under § 802.05 is meritless.

[3] American Family requested in the prayer for relief in its answer and affirmative defenses that it be "granted judgment for actual defense costs, including attorney's fees incurred in defending against all claims determined to be frivolous pursuant to the provisions of § 814.025, Wis. Stats."

¶13 American Family's postjudgment motion did not comply with the safe harbor provisions, and therefore the award of sanctions to American Family was in error. We need not reach the cross-appeal, as only dispositive issues need be addressed. *See* ***Gross v. Hoffman***, 227 Wis. 2d 296, 300, 277 N.W.2d 663 (1938).

By the Court.— Judgment reversed; cross-appeal dismissed.

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