COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1966 **Cir. Ct. No. 2007CV3600**

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

IN THE MATTER OF ATTORNEY FEES IN: KAREN POSTON AND BARRY POSTON, PLAINTIFFS, V. ANDREA L. BURNS AND JAMES D. BARR, DEFENDANTS:

KAREN POSTON AND BARRY POSTON,

RESPONDENTS,

V.

ANDREA L. BURNS AND JAMES D. BARR,

APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Andrea L. Burns and James D. Barr ("Burns-Barr") appeal from an order denying their motion for attorney fees pursuant to WIS. STAT. § 995.50(6) (2009-10).[1] Burns-Barr contends that Karen and Barry Poston ("the Postons") initiated a lawsuit pursuant to WIS. STAT. § 995.50(2), the invasion of privacy statute, either in bad faith or for the purpose of harassing Burns-Barr, entitling Burns-Barr to attorney fees under § 995.50(6). We affirm the circuit court.

BACKGROUND

¶2 This case is before us for a second time. In ***Poston v. Burns***, 2010 WI App 73, 325 Wis. 2d 404, 784 N.W.2d 717 ("***Poston I***"), we reversed an invasion of privacy judgment obtained by the Postons against Burns-Barr because we concluded that no evidence in the record supported the judgment. *See* ***id.***, ¶1. The Postons had filed a complaint against their neighbors, Burns-Barr, alleging that Burns-Barr violated the Postons' privacy by electronically eavesdropping on them, contrary to WIS. STAT. § 995.50(2). ***Id.***, ¶¶1, 3. The evidence on which the Postons relied was many hours of audio recordings that Burns-Barr had submitted to West Allis police in support of Burns-Barr's noise complaint against the Postons. ***Id.***, ¶2. The Postons argued that the audio recordings revealed such a degree of clarity of words and noises from the Postons' home, that such recordings could only have been made by high-tech, sophisticated, and thereby, offensive, recording equipment. ***Id.***, ¶7. Because the Postons presented only their "belief" that Burns-Barr used sophisticated equipment, we concluded that Burns-Barr did not violate WIS. STAT. § 995.50(2).[2] ***Poston I***, 325 Wis. 2d 404, ¶¶ 24-28. We

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] WISCONSIN STAT. § 995.50(2) provides:

remanded to the circuit court with directions to dismiss the complaint against Burns-Barr. ***Id.***, ¶28.

¶3 Following remand, Burns-Barr moved for attorney fees pursuant to WIS. STAT. § 995.50(6), arguing that the Postons' action was frivolous because it was commenced in bad faith, for the purposes of harassment, and was without legal basis.[3] On April 12, 2011, following briefing from the parties, the circuit

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> In this section, "invasion of privacy" means any of the following:
>
> (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
>
> (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
>
> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.
>
> (d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

[3] WISCONSIN STAT. § 995.50(6) provides:

> (a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.
>
> (b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:

court conducted a hearing on the motion. At the hearing, and in their brief, Burns-Barr described what they considered to be a pattern of harassing conduct by the Postons, eventually culminating in the litigation of ***Poston I***. The Postons, both at the hearing and in their brief, argued that they were victimized by Burns-Barr and disputed the implications of their conduct, as described by Burns-Barr.

¶4 The circuit court, relying substantially on the facts asserted in the briefs,[4] denied Burns-Barr's motion, stating:

> It is not frivolous almost as a matter of law that a judge ruled after listening to the arguments, a jury ruled after listening to the arguments and, therefore, it's not frivolous.… So that knocks out the request for attorney's fees based upon that.
>
> Now, for the purposes of harassment, and this is really a gratuitous statement by (sic) my behalf. People have a right to come to court and argue whatever they want, and if they're stubborn or they want to go ahead, and both – there's an equal amount of stubbornness here.… I don't think anybody is standing here with … clean hands. Both of you should have stepped away a long time ago and … gone in a different direction than you did.
>
> ….
>
> It's over. The motion is denied. It is not frivolous because it was tried and reversed. And my suggestion to both of you is you walk away and forget that the other side exists.

> 1. The action was commenced in bad faith or for harassment purposes.
>
> 2. The action was devoid of arguable basis in law or equity.

[4] As we noted in ***Poston v. Burns***, 2010 WI App 73, n.1, 325 Wis. 2d 404, 784 N.W.2d 717 ("***Poston I***"), the judge who conducted the pretrial proceedings and trial of this case was not the judge who presided over post-trial proceedings, which led to the appeal in ***Poston I***. Thus, the judge hearing the attorney fees motion did not have the advantage of personal observation of the demeanor and testimony of the parties; perforce, the judge had to substantially rely on the facts asserted in the parties' briefs.

This appeal follows.

DISCUSSION

¶5 Under WIS. STAT. § 995.50(6)(b)1.-2., a proceeding is frivolous and entitles the moving party to costs and attorney fees if the circuit court finds that the action or proceeding was commenced or continued "in bad faith or for harassment purposes," or if the action was "devoid of arguable basis in law or equity." *See* ***id.*** The question of whether a litigant commenced or continued an action or proceeding in bad faith or for purposes of harassing another party, is a question of fact that will not be overturned on appeal unless clearly erroneous. *See* ***Sommer v. Carr***, 99 Wis. 2d 789, 793, 299 N.W.2d 856 (1981) ("Attitudes such as bad faith, harassment, maliciousness solely for injuring another do not appear ... unless the trial judge finds them present."). The circuit court must use a subjective standard to determine whether the action or proceeding was commenced or continued in bad faith in order to find a position frivolous under this section. *See* ***Robertson-Ryan & Assocs. v. Pohlhammer***, 112 Wis. 2d 583, 589, 334 N.W.2d 246 (1983). The ultimate determination of whether an action is frivolous under § 995.50(6), however, is a question of law, which we review *de novo*. *See* ***Lamb v. Manning***, 145 Wis. 2d 619, 628, 427 N.W.2d 437 (Ct. App. 1988). With this standard in mind, we turn to Burns-Barr's motion for attorney fees.

¶6 With regard to whether the Postons initiated an action that was devoid of a legal basis, we note that the transcript of the motion hearing before the circuit court consists solely of oral argument by the attorneys and the court's decision. Arguments of counsel are not evidence. *See* WIS JI—CIVIL 110. Therefore, we interpret the circuit court's statement that the action was "not

frivolous because it was tried and reversed" as a finding that the action was *not* devoid of arguable basis in law. Thus, one basis for finding a frivolous claim was not established to the circuit court's satisfaction.

¶7 In determining whether the Postons' action was commenced in bad faith or for harassment purposes, we will not upset the circuit court's findings regarding "'what was said, what was done, [and] what was thought … unless they are against the great weight and clear preponderance of the evidence.'" *See* ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶11, 238 Wis. 2d 535, 543, 618 N.W.2d 218 (citation omitted; brackets in ***Lenhardt***; discussing frivolous actions under WIS. STAT. § 814.025).[5] "However, whether the facts are enough to support the legal conclusion that the action was frivolous is a question of law we review de novo." ***Id.***

¶8 The circuit court did not make specific findings regarding whether the action was commenced in bad faith or for harassment purposes. The circuit court's comments regarding harassment, which he described as "gratuitous," reflect the court's perception of the stubbornness of both parties as evidenced by the continued litigation and the need for both sides to "walk away and forget that the other side exists." We appreciate the circuit court's candor in his assessment of the human interactions he observed. Nonetheless, we cannot equate that observation with either a finding, or a rejection, of bad faith or harassment. When a circuit court fails to make the necessary findings, we may search the record for evidence sustaining the circuit court's decision. *See* ***Dodge v. Carauna***, 127 Wis. 2d 62, 67, 377 N.W.2d 208 (Ct. App. 1985).

[5] WISCONSIN STAT. § 814.025 was repealed by S. CT. ORDER 03-06, 2005 WI 38, 278 Wis. 2d xiii (eff. July 1, 2005).

¶9 Here, there were no witnesses who testified at the motion hearing. Therefore, the circuit court had only the parties' briefs, which made multiple references to the record in ***Poston I***, to consider. Consequently, we review the same briefs, the record in ***Poston I***, and the transcript of the motion hearing, to determine whether there is support for the decision to deny attorney fees, which required the implicit conclusion that there was no bad faith in the commencement of the action nor was the action commenced for a purpose of harassment. The Postons made the following assertions of fact, which support the implicit conclusion that the Postons did not act in bad faith or for a purpose of harassment:

- The Postons did not originally know Burns was unhappy about the noise they made.
- Quarrels did not begin until Barr moved in with Burns.
- Acrimony began when the Postons complained about the condition of the Burns-Barr yard.
- A walnut tree was shedding walnuts on the Postons' driveway and cars.
- Burns-Barr put up a fence for which workers trespassed on the Postons' land.
- Burns-Barr complained that the Postons' dog defecated on Burns-Barr's front lawn.
- Barry Poston had to rev the engine of the van he used for work as a carpenter to get it started; sometimes he left for work between 2:30 a.m. and 4:00 a.m.

- The Postons also owned a car, a truck and a motorcycle all of which were kept in the driveway and which they would idle, rev up, or drive for a short time in the driveway.

- The Postons were recorded having conversations in their home through double-paned windows in both houses, and across the driveway that separated the houses.

- Burns-Barr called police claiming the Postons were having an underage drinking party, although only adults were present.

- When the Postons found out Burns-Barr was recording them, the Postons' lives changed; the situation was stressful.

- The Postons played music in their van to drown out the microphone of the recording device.

- The Postons attempted to get a restraining order to stop the recordings.

¶10 Although we acknowledge that Burns-Barr made very different assertions regarding their relationship with the Postons, (i.e., as a pattern of continuous abuse and harassment by the Postons of Burns-Barr) it is the Postons' assertions, which, if believed by the circuit court, that would support the circuit court's conclusion. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979) (Where the circuit court is the finder of fact and there are conflicting assertions, the circuit court is the ultimate arbiter of the credibility of witnesses and weight to be given the facts.). Had the circuit court believed the assertions made by Burns-Barr, the result would have been to award the fees requested. Burns-Barr failed to persuade the circuit court of the facts Burns-Barr

had the burden to establish in order to obtain attorney fees under WIS. STAT. § 995.50(6).

¶11 Because the record supports the circuit court's refusal to award attorney fees under WIS. STAT. § 995.50(6), we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.