

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2014

Diane M. Fremgen
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. 2013AP1367

Cir. Ct. No. 2012CV4772

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CATHERINE CONRAD,

PLAINTIFF-APPELLANT,

RIGRAD MUSIC & PUBLISHING LLC AND RODNEY RIGSBY,

PLAINTIFFS,

v.

DAVID BATZ, SHARON BATZ AND SHANAUBA PRODUCTIONS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed and cause remanded with directions.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Catherine Conrad appeals a civil judgment dismissing multiple claims of action that she, Rodney Rigsby, and RigRad Music & Publishing, LLC brought against David and Sharon Batz and Shanauba Productions (collectively, Batz). The judgment also ordered Conrad, Rigsby, and RigRad to pay Batz over \$7,000 in costs and attorney fees for having filed and maintained a frivolous lawsuit. Batz asks this court to declare Conrad's appeal frivolous as well, and seeks an additional award of costs and attorney fees. For the reasons discussed below, we affirm the circuit court's decision, declare the appeal frivolous, and remand for a determination of the amount of attorney fees incurred upon appeal.

BACKGROUND

¶2 Conrad and Rigsby are co-owners of RigRad Music and Publishing. Batz and his wife are co-owners of Shanauba Productions, which hosted a website for RigRad. In 2012, Batz shut down RigRad's website for six weeks without notice because the \$25 annual hosting fee had not been paid. Batz eventually paid \$3,000 to Conrad and another \$1,000 to RigRad for claimed lost profits.

¶3 After Batz refused to pay Rigsby and RigRad an additional \$6,000 that they were demanding, Conrad filed suit against Batz on her own behalf and that of RigRad for breach of contract, tortious interference with business relationships, unfair competition, negligence, and emotional distress. Conrad later amended the complaint to add Rigsby as a plaintiff.

¶4 The circuit court dismissed RigRad from the suit on the grounds that the corporation was not represented by counsel. The court then dismissed the remaining claims of Conrad and Rigsby with prejudice on the alternate grounds that: (1) there was no personal jurisdiction over any of the defendants due to lack

of proper service; (2) any claim by Conrad for personal losses suffered as a result of breach of contract had already been satisfied; (3) any tort claim by Conrad was barred by the economic loss doctrine; and (4) Rigsby had not stated any claim upon which relief could be granted because he was not a party to the website hosting contract from which all of the alleged damages arose. The circuit court further determined that the plaintiffs should have known that the lawsuit had no reasonable basis in law or fact based upon their history of “essentially making the same claims repeatedly in Dane County Circuit Court,” and that their pattern of attempting to leverage or extort money from people by making “the same arguments and the same claims over and over again until the other party is simply worn down and just wants it over with” constituted an abuse of the legal process that warranted sanctions.¹

¶5 Conrad now appeals the circuit court’s judgment, arguing that: (1) RigRad should have been given time to find counsel and allowed to refile; (2) there was no satisfaction and accord of Rigsby’s verbal contract claims because Batz did not pay the additional damages claimed by Rigsby for loss of licensing revenues from copyrights and trademarks; (3) in addition to her breach of contract claim, Conrad stated claims for tortious interference, emotional distress, breach of duty, and unfair competition stemming from Batz’s withholding the content of RigRad’s website and shutting down a stream of income; and (4) the dismissal of Conrad’s claims should not have been with prejudice and sanctions

¹ It appears that the repetitive arguments to which the circuit court referred may have been Conrad and Rigsby’s theory that, by paying them some money, Batz had somehow “admitted liability” for the full amount of their claimed damages. That theory rests upon several erroneous legal premises. First, the payment of money to settle potential litigation does *not* constitute an admission of liability. Secondly, even an admission of liability for some action does not constitute agreement as to the amount of resulting damages.

should not have been imposed against her because the lack of service means that the lawsuit was never commenced.

¶6 As a threshold matter, we note that neither Rigsby nor RigRad filed a notice of appeal. Therefore, even aside from Conrad's lack of authority to assert appellate claims on the behalf of others, this court has no jurisdiction to review the circuit court's dismissal of Rigsby or RigRad's claims. Accordingly, we will not address whether RigRad should have been given time to obtain counsel or allowed to refile; whether Rigsby was party to a verbal contract; or whether there was accord and satisfaction of Rigsby's claims. The only issues properly before us are those relating to whether the circuit court properly dismissed Conrad's own claims and imposed sanctions against her.

STANDARD OF REVIEW

¶7 Whether a complaint states a claim upon which relief can be granted is a question of law that we review de novo. *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. However, we accord deference to a circuit court's discretionary decision to impose sanctions, and will therefore affirm an award of attorney fees so long as the circuit court applied a proper standard of law to the relevant facts to reach a reasonable conclusion. *Schultz v. Sykes*, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604.

DISCUSSION

¶8 The amended complaint alleged that Conrad, Rigsby, and RigRad each suffered economic losses during the period when RigRad's website was taken down without warning. However, the complaint also acknowledged that Batz had already paid \$3,000 to Conrad for her claimed loss of income, and

asserted that the remaining amount of \$6,000 being requested for breach of contract was for the income Rigsby claimed to have lost. Conrad confirmed those allegations at the motion hearing when she told the circuit court:

They are saying that everything is satisfied. Mr. Batz is paid up. He has never paid Mr. Rigsby personally for his loss of income. He paid me. He refused to pay Mr. Rigsby, and that's why we ended up here. So there's not been any accord and satisfaction in any shape or form for Mr. Rigsby personally.

....

.... I got paid permanently. [Batz] paid the business a thousand, okay, but they were negotiating Mr. Rigsby's loss of income, so he had already acknowledged mine and paid for mine.

Allegations that Rigsby was not compensated for his alleged loss of income do not state a claim upon which Conrad could be granted relief. The circuit court properly determined based upon the allegations in the complaint and Conrad's statements at the hearing that Conrad's own breach of contract claim had already been satisfied by the \$3,000 Batz paid her.

¶9 Conrad complains that the circuit court did not address her other four claims. However, the circuit court determined that those claims were barred by the economic loss doctrine. The economic loss doctrine is a judicially created rule designed to preserve the distinction between contract and tort law by requiring contracting parties to pursue only contractual remedies for economic losses caused by an alleged breach of contract. *Linden v. Cascade Stone Co.*, 2004 WI App 184, ¶¶7-8, 276 Wis. 2d 267, 687 N.W.2d 823 (citations omitted). We agree with the circuit court that Conrad's claims for tortious interference, emotional distress, breach of duty, and unfair competition are all tort-based and all stem from the alleged breach of a contract between the parties for website hosting. Because

Conrad's tort claims are barred by the economic loss doctrine, they do not state claims upon which relief could be granted. Furthermore, because the circuit court determined that all five of Conrad's claims lack merit, it was proper to dismiss the claims with prejudice, regardless whether there was also a problem with personal jurisdiction. Therefore, it is not necessary for this court to determine whether or not the service on Batz was fatally flawed.

¶10 We turn next to Conrad's contention that the circuit court lacked authority to award damages, including attorney fees, against her under WIS. STAT. § 895.044 (2011-12),² because her lawsuit was never officially "commenced" according to the definition set forth in WIS. STAT. § 801.02.³ Conrad is reading § 895.044 too narrowly. That section of the statutes provides that a party may be liable for costs and fees "for commencing, using, or continuing an action" for the purpose of harassment or knowing that the action was without any reasonable basis in law. Section 895.044(1).

¶11 Here, regardless whether the lawsuit was ever validly "commenced," the circuit court's findings make clear that Conrad was "using" the lawsuit to leverage money from Batz to which she was not entitled under any viable theory of law. Because Conrad did not withdraw or correct her complaint within twenty-

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ WISCONSIN STAT. § 801.02(1) provides in part:

[A] civil action in which a personal judgment is sought is commenced as to any defendant when a summons and complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.

one days after Batz moved for damages, the circuit court was obligated to award Batz the actual costs of the action, including attorney fees. WIS. STAT. § 895.044(2)(b). Furthermore, because we are affirming the damages award on this appeal, this court is obligated to “remand the action to the [circuit] court to award damages to compensate the successful party for the actual reasonable attorney fees the party incurred in the appeal.” Section 895.044(4). Accordingly, we affirm the circuit court’s judgment against Conrad, grant Batz’s motion for attorney fees on appeal, and remand to the circuit court to determine the amount of attorney fees incurred in the appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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

