COURT OF APPEALS
DECISION
DATED AND RELEASED

November 9, 1995

No. 93-1397

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

IN THE MATTER OF BOWMAN ENTERPRISES, INC., ET AL V. DANE COUNTY DAIRY, INC., ET AL:

DONALD HUE,

Appellant,

v.

MARY ANN TERPSTRA (FORMERLY BOWMAN),

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Reversed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. Attorney Donald Hue appeals from an order entered February 22, 1993, finding that he commenced and maintained a frivolous

action contrary to § 814.025(1) and (3)(b), STATS.[1] The trial court raised the question of the frivolousness of the underlying action *sua sponte* and permitted the defendant, Mary Ann Terpstra (formerly Bowman), to bring a motion for costs and fees under § 814.025. The trial court was incensed that Hue would bring an action on behalf of Bowman Enterprises, Inc. and Bowman Farms, Inc. (collectively "Bowman") against Ms. Terpstra for contribution to a back wage judgment entered against the parties pursuant to the complaint of the National Labor Relations Board (NLRB) where Hue failed to timely answer NLRB's complaint and represented Ms. Terpstra before NLRB and the Seventh Circuit Court of Appeals. We conclude that Hue's possible malpractice and conflict of interest do not make the underlying action frivolous. Ms. Terpstra's remedy to protect herself from Hue's conflict of interest was to move to disqualify him from appearing in Bowman's action. *See* ***Berg v. Marine Trust Co.***, 141 Wis.2d 878, 416 N.W.2d 643 (Ct. App. 1987). If she has been damaged by Hue's malpractice, she may have a cause of action against him. However, whether this action for contribution is frivolous must be determined by examining whether the action has a reasonable basis in law or equity and is well-grounded in fact.[2] Hue's argument that the trial court erred when it found that he

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[1] Section 814.025(1) and (3)(b), STATS., provide in part:

> (1) If an action or special proceeding commenced or continued by a plaintiff ... is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
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> ....
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> (3) In order to find an action, special proceeding, ... to be frivolous under sub. (1), the court must find one or more of the following:
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> ....
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> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

[2] The "well-grounded in fact" standard is found in § 802.05(1)(a), STATS. Section 814.025(4), STATS., makes § 802.05 applicable to proceedings under § 814.025.

represented Terpstra is moot because our decision is based on an examination of the underlying action and not on Hue's relation to any of the parties.

The ultimate conclusion whether a party or an attorney has commenced or maintained a frivolous action is a question of law which we decide independently of the conclusion of the circuit court. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 236, 517 N.W.2d 658, 664 (1994).

The liability of the parties herein for the judgment in favor of the employees is joint and several. Where liability is joint and several, if one party is forced to pay more than his or her share of the liability, he or she has a claim against another responsible party for contribution. *See* ***Brown v. LaChance***, 165 Wis.2d 52, 64, 477 N.W.2d 296, 302 (Ct. App. 1991). It is undisputed that Bowman paid the entire judgment. Unless there is something in the facts that makes it inequitable for Ms. Terpstra to pay her share of NLRB's judgment, Bowman has a claim against her to recover her share of the judgment. It is true that NLRB obtained a judgment against her by default caused by Hue's negligence; however, any estoppel which could be invoked against him does not extend to Bowman. Though Hue was both legal counsel and a director of Bowman, the record does not show that he had an ownership interest in Bowman's companies.

On April 11, 1984, Local 695, representing the employees of Dane County Dairy (Dairy), filed charges with NLRB alleging that Dairy had laid off Dairy employees and transferred bargaining unit work to other parties. The trial court found that Dairy laid off these employees because they had cooperated in past NLRB proceedings against Dairy and presented affidavit evidence against Dairy.

On June 13, 1984, NLRB issued a complaint against Dairy and the other parties to this action, alleging that they constituted a single enterprise. NLRB sought back pay and injunctive relief. Hue represented all of the named parties except Duane Bowman, who represented himself and Dairy. Hue failed to file a timely answer to NLRB's complaint and the board moved for summary judgment. Finally, on December 11, 1984, Hue filed a brief requesting that the board accept the parties' answer. The board rejected his brief and held that the parties had not shown good cause for failing to file a timely answer.

NLRB found that each of the parties was an *alter ego* of Dairy. It entered summary judgment ordering Dairy to cease and desist from its unfair labor practices. It also ordered Dairy to make the laid-off employees whole for any loss of earnings. NLRB's judgment was affirmed by the Seventh Circuit Court of Appeals. ***NLRB v. Dane County Dairy***, 795 F.2d 1313 (7th Cir. 1986). Thereafter, the board moved for sanctions against Hue for failing to answer its complaint; for contempt of NLRB orders; and for failure to make a reasonable inquiry into the facts and the law and "to deal with clearly established and binding precedent contrary to his client's position." NLRB found that Hue's actions "have plainly been both disingenuous and dilatory." NLRB imposed monetary sanctions against him.

The court affirmed NLRB's finding that Dairy and the other parties to this action "are affiliated business enterprises and are a single integrated business [and] are alter egos of one another." ***Id***. at 1322. The court noted that the parties failed to offer affidavits, depositions or documentary evidence to establish their defense to the *alter ego* claim. The court also concluded that the allegations of *alter ego* status in the complaint were deemed to be admitted by the parties' failure to file a timely answer. ***Id***. at 1323.

NLRB's judgment was satisfied by Bowman's rent receipts which NLRB had made subject to a protective order, and Olympia M. Bowman's personal check in the amount of $144,257.22, payable to Bowman Farms, Inc. and NLRB. On May 23, 1989, NLRB notified Hue that the cases against Dairy and the other defendants were "closed."

We see nothing in these facts which makes Bowman's contribution action frivolous. The elements of a contribution claim are: "(1) joint causally negligent wrongdoers, (2) common liability because of such negligence to the same person and (3) one bears more than his or her fair share of the burden." ***Brown***, 165 Wis.2d at 64, 477 N.W.2d at 302. These elements are present here. Perhaps Ms. Terpstra could have avoided a judgment against her if Hue had not been dilatory. She may have a cause of action against Hue for legal malpractice. However, once NLRB obtained a judgment against her which Bowman paid, Bowman had a possible claim against her for contribution. Whether Bowman can succeed in that action is not the test of frivolousness; the test is whether Bowman's claim "admitted of lawyer-like argument such as

courts should listen to." ***Kelly v. Clark***, 192 Wis.2d 633, 662, 531 N.W.2d 455, 465 (Ct. App. 1995). Bowman's claim meets that test.

By the Court.—Order reversed.

Not recommended for publication in the official reports.