COURT OF APPEALS
DECISION
DATED AND RELEASED

December 6, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1118

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

BROWN & JONES REPORTING, INC.,

Plaintiff-Respondent,

v.

JAMES P. BRENNAN and
BRENNAN & COLLINS,
Attorneys at Law,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. James P. Brennan (Brennan) has appealed from a judgment awarding the respondent, Brown & Jones Reporting, Inc. (Brown), damages in the amount of $3,086.75 for unpaid court reporting services. Judgment was awarded against "Brennan & Collins, Attorneys at Law and James P. Brennan." One of the issues on appeal is whether the judgment was erroneously entered against both Brennan and the law firm of Brennan &

Collins as a partnership, when, in fact, it should have been entered only against James P. Brennan personally. We conclude that the trial court erred by entering judgment against the firm of Brennan & Collins as a partnership and reverse the judgment to that extent alone, remanding for correction of the judgment. We conclude that the other issues raised by Brennan are without merit and affirm the remainder of the judgment.

This complaint was commenced by Brown against the law firm of Brennan & Collins, which Brown alleged upon information and belief was a partnership. Brown's complaint also named Brennan as a defendant, as well as four other attorneys in the Brennan & Collins firm; namely, Russell D. Bohach, Joseph E. Schubert, Meghan M. Brennan and Jennell L. Challa. Brown alleged upon information and belief that all of these attorneys were partners in the Brennan & Collins firm.

In their answers, all of the defendants denied that Brennan & Collins was a partnership. Each attorney also individually denied that he or she was a partner in the law firm of Brennan & Collins.

At the commencement of the trial, the trial court dismissed the action against Challa on the ground that she did not order any of the court reporting services underlying this action. Brennan subsequently testified at trial that he was a self-employed lawyer and owned the law firm of Brennan & Collins. This constituted the only evidence in the record on the issue of the form of ownership of the firm of Brennan & Collins. At the conclusion of the trial, the trial court granted a motion for summary judgment previously filed by Bohach, Schubert and Meghan Brennan, finding that no evidence had been presented indicating that Brennan & Collins was a partnership or service corporation in which they were shareholders, and that no basis therefore existed to find them personally liable for the debts incurred by the firm.

The first issue on appeal is whether judgment was erroneously entered against both Brennan and the law firm of Brennan & Collins when, in fact, it should have been entered only against James P. Brennan personally, since Brennan did business as Brennan & Collins, a sole proprietorship.[1] Based

[1] Brown contends that we have already resolved this issue by denying Brennan's prior motions

on the undisputed testimony that Brennan owned the law firm of Brennan & Collins, and the trial court's finding that nothing in the evidence indicated that Brennan & Collins was a partnership or corporation, we conclude that the portions of the judgment which state that Brennan & Collins is a partnership and that Brennan is a partner in that firm constitute error. The judgment must be reversed to the extent it awards judgment against both Brennan and the law firm of Brennan & Collins. The matter is remanded for entry of judgment against James P. Brennan, personally.

In reversing this portion of the judgment, we have considered Brown's contention that any objections to the form of the judgment were waived because Brennan never moved to amend the caption in the trial court or for dismissal of "Brennan and Collins" as a separate party. Brown relies on ***Schroedel Corp. v. State Highway Comm'n***, 34 Wis.2d 32, 148 N.W.2d 691 (1967) for this argument.

Schroedel merely holds that a defect in a caption is a formal defect which is not fatal to a pleading and may be waived. ***Id.*** at 40, 148 N.W.2d at 695. Here, the objection is not to a defect as to the form of the caption in the complaint. Rather, the objection is to a substantive portion of a judgment which awards damages against a law firm as a separate entity and partnership when

(..continued)

to amend the caption on appeal to reflect that Brennan & Collins is a sole proprietorship. We disagree. In our order dated September 1, 1994, we expressly noted that the judgment set forth the trial court's finding that Brennan & Collins was a partnership. We stated that to the extent Brennan disputed this determination, he could brief that issue in his appellant's brief. We further stated that until the trial court's determination was either vacated or reversed by us, we would not alter the caption on appeal, which was derived from the caption on the order for judgment and judgment. Contrary to Brown's contention, our orders therefore clearly do not constitute a final resolution of this issue adverse to Brennan.

Brown also contends that this issue was waived because it was not timely raised in the trial court. However, the record contains a letter written to the trial court by Brennan and filed in the circuit court on February 7, 1994. In that letter, Brennan made various objections to the proposed order for judgment and judgment which had been filed by Brown on February 4, 1994. One of his objections was that the judgment should be corrected to reflect that it was entered against James P. Brennan, d/b/a Brennan & Collins, and not against Brennan and the law firm of Brennan & Collins as separate entities. He based his objection on the testimony that Brennan & Collins was a sole proprietorship. This objection subsequently was reiterated on numerous occasions. The issue thus was preserved for appeal.

no evidence supports that determination. Brennan was not required to move to amend the caption to preserve this substantive objection to the judgment. Moreover, all of the defendants' answers disputed Brown's claim that Brennan & Collins was a partnership, and put the matter in issue. Nothing in Wisconsin law indicates that Brennan was required to file a motion to dismiss or a motion for summary judgment to resolve this issue, rather than resolving it through testimony at trial.

We conclude that Brennan's remaining arguments lack merit and affirm the remainder of the judgment. Brennan contends that the trial court erred when it failed to award Challa costs and fees for a frivolous appeal pursuant to § 814.025, STATS. He contends that a frivolous claim is one that is asserted by an attorney who knows or should have known that the position was without a reasonable basis in law or equity and was unsupported by any reasonable argument for extension or modification of the existing law. *See* ***Associates Fin. Servs. Co. v. Hornik***, 114 Wis.2d 163, 174-75, 336 N.W.2d 395, 401 (Ct. App. 1983). He argues that there was no reasonable basis for naming Challa as a defendant because Brown never claimed that she conducted any of the depositions or had been billed for any of the depositions for which court reporting services were unpaid.

Whether a reasonable attorney knew or should have known that an action was without a reasonable basis in law or equity is a mixed question of law and fact. ***James A.O. v. George C.B.***, 182 Wis.2d 166, 184, 513 N.W.2d 410, 416 (Ct. App. 1994). What a reasonable attorney knew or should have known is a question of fact; whether knowledge of the relevant facts would lead a reasonable attorney to conclude that a petition is frivolous is a question of law. ***Id.*** at 184, 513 N.W.2d at 416-17. Doubts are resolved in favor of the litigant and attorney. *See* ***id.*** at 184, 513 N.W.2d at 417.

Here, it is undisputed that the letterhead for the law firm of Brennan & Collins states, "BRENNAN & COLLINS, ATTORNEYS AT LAW," and then lists the five individual attorneys who were named as defendants in this case. Based on that letterhead, counsel for Brown reasonably inferred that Brennan & Collins was a partnership and so alleged in its complaint. Based on this permissible inference, Brown also reasonably inferred that the individuals named on the letterhead were partners who would be liable for a partnership debt. Challa thus was appropriately named as a defendant, regardless of

whether she personally took any of the depositions for which charges were unpaid. Since the action thus was properly commenced against Challa, and since Brown did not resist efforts to dismiss her when it became apparent that she was not personally liable, no basis existed to conclude that the action was frivolously commenced or continued as to her. The trial court's denial of costs pursuant to § 814.025, STATS., is therefore upheld.

We also conclude that the trial court properly denied statutory costs to Bohach, Schubert and Meghan Brennan. Brennan contends that, because the trial court granted summary judgment to them, an award of costs was mandatory pursuant to § 814.03(1), STATS.

We disagree. Section 814.03(1), STATS., provides: "If the plaintiff is not entitled to costs ... the defendant shall be allowed costs to be computed on the basis of the demands of the complaint." However, § 814.03(2) further provides: "Where there are several defendants *who are not united in interest and who make separate defenses by separate answers*, if the plaintiff recovers against some but not all of such defendants, the court *may* award costs to any defendant who has judgment in the defendant's favor." (Emphasis added.)

The use of the word "may" in § 814.03(2), STATS., implies that, in cases involving multiple defendants, an award of costs to a prevailing defendant is discretionary when the plaintiff prevails against some defendants and not others. We find nothing erroneous in the trial court's exercise of discretion here. One answer was filed on behalf of Brennan, Brennan & Collins, and Attorneys Bohach, Schubert and Meghan Brennan. In addition, Brennan represented himself as well as the other defendants throughout the proceedings, and conducted most of the proceedings on behalf of both himself and the others. While he filed a motion for summary judgment on behalf of Bohach, Schubert and Meghan Brennan which was not filed on his own behalf, he filed it after the time limit established in § 802.08(1), STATS., and it was not decided until after trial. Since it thus appears from the record that the costs and attorneys fees incurred to defend Bohach, Schubert and Meghan Brennan were the same costs and fees that Brennan incurred for his own defense and the defense of his law firm, the trial court properly exercised its discretion in refusing to award additional costs. *Cf.* ***Leuch v. Campbell***, 250 Wis. 272, 276, 26 N.W.2d 538, 540 (1947) (applying § 271.03, STATS., 1947, later renumbered as § 814.03 (S. Ct. Order, 67 Wis.2d 585, 761, eff. Jan. 1, 1976)).

We also reject Brennan's argument that the judgment must be reversed because the trial court refused to allow him to call Brown's counsel as a witness in an attempt to prove that a settlement was reached between the parties prior to trial. While the trial court did not permit Brennan to call Brown's counsel as a witness, he accepted an offer of proof from both parties on the issue. The offers of proof indicated that while the parties agreed on a sum of money for settlement of the case, they never agreed on the terms of a release to be executed as part of the settlement. Based on the offers of proof, the trial court correctly ruled that it had no power to enforce a settlement because there was no showing of a meeting of minds on the terms of the settlement. No relief based on this issue is therefore warranted.

Because we reverse the judgment in part and affirm in part, costs on appeal, including costs and fees for a frivolous appeal, are denied to both parties.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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