COURT OF APPEALS
DECISION
DATED AND RELEASED

December 20, 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. 94-2718

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

JAMES P. BRENNAN,
d/b/a BRENNAN & COLLINS,

Plaintiff-Appellant,

v.

TIMOTHY T. KAY, THOMAS J. KAY,
TOD A. WANTA, KAY & KAY,
Attorneys at Law,
ABC INSURANCE COMPANY,
SUSAN BROWN, JANE JONES,
BROWN & JONES REPORTING, INC.
and XYZ INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from an order of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Affirmed but cause remanded with directions*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. James P. Brennan appeals from an order dismissing his complaint alleging abuse of process and fraud in the commencement of a garnishment proceeding against him. He argues that it

was error for the trial court to grant summary judgment upon the defendants' motion to dismiss, that the trial court did not provide him with an opportunity to undertake discovery or respond to the motion, and that it was error to conclude that the action was frivolous under § 814.025, STATS. We conclude that the trial court properly treated the motion to dismiss as one for summary judgment and that Brennan was provided an adequate opportunity to respond. We affirm the order dismissing the complaint and finding the action to be frivolous. We remand the action to the trial court for a determination of the reasonable attorney's fees and costs to be awarded against Brennan for bringing a frivolous appeal.

The background of this controversy is lengthy as a result of Attorney Brennan and Attorney Timothy T. Kay flaunting their legal prowess.[1] On March 17, 1994, a judgment was entered against Brennan in favor of Brown & Jones Reporting, Inc. in the amount of $3394.20 for unpaid court reporting fees and the taxable costs and disbursements of the collection action. That judgment has been affirmed except to the extent that it awards judgment against both Brennan and the law firm of Brennan & Collins as a partnership. ***Brown & Jones Reporting, Inc. v. James P. Brennan, et al.***, No. 94-1118, unpublished slip op. at 4 (Wis. Ct. App. Dec. 6, 1995). The judgment has been remanded for entry of the judgment against James P. Brennan personally. ***Id.***

Kay and the law firm of Kay & Kay represented Brown & Jones in the collection action against Brennan. A garnishment action for the full amount of the judgment was filed against Brennan on March 23, 1994. This caused $3437.20 to be withdrawn from Brennan's bank account on March 24, 1994, to be held by the bank until further order of the court. On March 31, 1994, an amended garnishment complaint was filed seeking to collect the balance of the judgment due after crediting Brennan for a $2900 payment; that balance was $552.20.

Brennan commenced this action on April 1, 1994, alleging that the garnishment action was an abuse of process because a $2900 check payable to

[1] This is substantiated by the fact that at least the first sixteen pages of the parties' briefs are devoted to the statement of the facts, including the recitation of extraneous information in an effort to aggrandize their legal positions in related actions.

Brown & Jones had been submitted to Kay on March 16, 1994. He alleged that the garnishment action had been brought for the purpose of harassing and embarrassing Brennan and his associates, to obstruct their business operation, and to punish Brennan for taking an appeal to challenge the unpaid amount of the judgment. He also sought punitive damages for the alleged fraud perpetrated by the representation in the garnishment complaint that the full amount of the judgment was unpaid when in fact $2900 had been paid.

In response to the complaint, Kay filed a motion on behalf of all the defendants to change venue from Milwaukee County and in the alternative to dismiss the action. On May 20, 1994, an order was entered changing venue to Waukesha County and staying discovery pending an order of the Waukesha County court.

When the matter came on for hearing on September 1, 1994, pending was Brennan's motion for default judgment for the defendants' failure to file an answer or, in the alternative, for an order setting aside the order which stayed all discovery proceedings; the defendants' motion to consolidate the action with the garnishment action; and the defendants' motion to dismiss the action which was filed on August 22, 1994. The trial court determined that Kay had acted in good faith with no abuse of process, that there was no fraud and that there was no damage to Brennan. The motions for default judgment, to lift the stay on discovery and to consolidate the action were denied as moot.

After entry of the order dismissing the action, the defendants filed a motion seeking costs and attorney's fees under § 814.025, STATS., for a frivolous action. Brennan responded with a motion for reconsideration, which was denied. The trial court found that the action was meritless, that Brennan knew or should have known it was meritless and that the action was commenced for the purpose of continuing this matter "ad nauseam" to harass and antagonize Kay's law firm. Brennan was ordered to pay $3378.78 in attorney's fees.

There is no doubt that the trial court treated the motion to dismiss brought under § 802.06(3), STATS., as one for summary judgment. It was

authorized to do so. ***Id.***[2] *See also* ***Envirologix Corp. v. City of Waukesha***, 192 Wis.2d 277, 286-87, 531 N.W.2d 357, 362 (Ct. App. 1995).

Brennan argues that error occurred when the court converted the motion at the start of the hearing and decided it without providing him a reasonable opportunity to present relevant material as required by § 802.06(3), STATS. Brennan's suggestion of surprise at the treatment of the motion as one for summary judgment is incredible. In a letter to the trial court two days before the motion was heard, Brennan acknowledged that the motion to dismiss was "tantamount to a motion for summary judgment." It was not error for the trial court to treat the motion as one for summary judgment.[3] *See* ***Envirologix***, 192 Wis.2d at 287, 531 N.W.2d at 362 (trial court properly treats motion to dismiss as one for summary judgment where party contributes to court's decision to use that methodology).

Further, Brennan had the opportunity to file materials in opposition to the motion. In fact, he did so. On April 19, 1994, Brennan filed an affidavit in opposition to the motion to dismiss which had been filed early in the action. Brennan had an additional opportunity to submit materials in

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[2] Section 802.06(3), STATS., provides:

> After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings. Prior to a hearing on the motion, any party who was prohibited under s. 802.02(1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

Even if the motion to dismiss was brought under § 802.06(2)(b), STATS., as Kay argues, the motion can be converted to summary judgment and all parties shall be given a reasonable opportunity to present relevant materials.

[3] Our conclusion rejects Brennan's claim that the trial court should not have considered the two affidavits filed in support of the motions to dismiss.

opposition to the motion to dismiss during the ten-day period between the filing of the motion and the hearing.[4]

We next address Brennan's argument that summary judgment was improper because a dispute of fact exists as to whether the $2900 check he submitted was a certified check. He relies on the recitation in his affidavit that the check was certified as disputing the recitation in Kay's affidavit that the check was not certified. However, whether the check satisfied the definition of a certified check was a question of law.[5] The trial court needed only to examine the check to determine that it did not contain the appropriate endorsement as a certified check. That the check was not certified was not a disputed issue of fact.

What is curiously missing is any explanation for the parties' apparent belief that if the check had been a certified check, the garnishment action may have been an abuse of process. The $2900 check tendered by Brennan on March 16, 1994, was a cashier's check; it was a check drawn on the financial institution's own account. *See* BLACK'S LAW DICTIONARY, 217 (6th ed. 1990). Kay acknowledged the check in a letter dated March 18, 1994, and made no objection to the fact that the check was not certified. We recognize that as a practical matter a cashier's check, like a certified check, can be considered to be

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[4] Brennan argues that when one considers the motion to dismiss as one for summary judgment, he was not given the twenty-day notice required by § 802.08, STATS. Brennan did not object in the trial court to the timeliness of the motion and has waived the objection. *See* ***Allen v. Allen***, 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977) (the burden is upon the party alleging error to establish by reference to the record that the error was specifically called to the attention of the trial court). He raises the issue for the first time on appeal and we will not address it. ***Segall v. Hurwitz***, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).

At the conclusion of his brief, Brennan claims that in denying him the opportunity to present pertinent materials, the trial court deprived him of his constitutional rights of due process of law and equal protection of the laws. The argument is a single paragraph and contains no citation to legal authorities. We need not consider arguments broadly stated but not specifically argued. ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

[5] A certified check is defined as "the check of a depositor drawn on a bank on the face of which the bank has written or stamped the words `accepted' or `certified' with the date and signature of a bank official." BLACK'S LAW DICTIONARY, 227 (6th ed. 1990). A certified check becomes the primary obligation of the certifying bank. *See* §§ 403.411 and 403.413, STATS. It is a warranty that sufficient funds are on deposit and have been set aside.

backed by sufficient funds to guarantee payment. However, here the check was only a partial payment of the judgment and could not constitute a complete defense to the garnishment proceeding.

Brennan contends that the trial court's determination that Kay had acted in good faith and that no abuse of process or fraud existed was a disputed issue of fact. Abuse of process is found where one uses a legal process against another primarily to accomplish a purpose for which it is not designed. ***Brownsell v. Klawitter***, 102 Wis.2d 108, 114, 306 N.W.2d 41, 44 (1981). Abuse of process has two essential elements: "'a wilful act in the use of process not proper in the regular conduct of the proceedings' and an 'ulterior motive.'" ***Id.*** at 115, 306 N.W.2d at 45 (quoted source omitted). The first element requires allegation of "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process ...; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." ***Tower Special Facilities v. Investment Club***, 104 Wis.2d 221, 229, 311 N.W.2d 225, 229 (Ct. App. 1981) (quoting ***Thompson v. Beecham***, 72 Wis.2d 356, 362, 241 N.W.2d 163, 166 (1976)).

Brennan's complaint alleged that despite the fact that he had already paid $2900 to Brown & Jones on the judgment, the garnishment action was commenced for the full amount of the judgment. He also alleged that Kay entered judgment in excess of the debt still due. Kay's affidavit stated that the garnishment action was commenced for the entire amount of the judgment because it was not known on March 23, 1994, the date the action was commenced, whether the check had cleared deposit into the Brown & Jones bank account.[6] He stated that he acted to protect his client's interest because Brennan had stated that he would not honor the full amount of the judgment. Kay's letter acknowledging receipt of the check gave Brennan the opportunity to pay the remaining portion of the judgment, and if he did so, Kay indicated that he would not docket the judgment. When Brennan failed to tender the remaining portion, Kay proceeded with the garnishment proceeding. On March 28, 1994, Kay inquired of Brown & Jones whether the check had cleared. Upon learning that the check had cleared, Kay wrote to Brennan suggesting a

[6] Therefore, Brennan's claim that a fraud was perpetrated by representing that the full amount of the judgment was due fails.

resolution. An amended garnishment complaint was filed on March 31, 1994, giving credit for the payment on the judgment.

Undoubtedly commencement of the garnishment action was a display of legal "hardball." That posture has plagued the entire interaction of Attorneys Brennan and Kay over the debt in dispute.[7] However, Kay did not use the garnishment process for any purpose for which it was not intended, that is, to extract payment of a judgment. Double payment on the judgment was never attained. That Kay may have felt obliged to abandon professional courtesy and trust and proceed without providing an adequate time for the check to clear does not constitute abuse of process. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 252, 517 N.W.2d 658, 670 (1994) (we need not consider an alleged ulterior motive until or unless some perversion or unjust manipulation of the process is shown).

Further, Brennan did not suffer damages as a result of the garnishment. It is undisputed that the bank's holding of the entire amount of the judgment did not cause Brennan's account to become overdrawn and that the money was withheld for only fourteen days. Brennan complains that he was not allowed to present evidence on his allegation that the garnishment proceeding affected his relationship with his bank. Although he does not suggest what evidence he has, we have already determined that he had an opportunity to submit pertinent materials, such as an affidavit from a bank officer.

Having determined that it was not error to grant summary judgment dismissing Brennan's action, we reject Brennan's claim that he was not permitted discovery before being required to respond to the motion to dismiss. Brennan does not explain what additional material he could have obtained through discovery. The trial court's decision was based on the pleadings and affidavits. Under the circumstances, discovery was not necessary.

[7] Displaying an equally litigious stance, Brennan ignored Kay's letter proposing a resolution and commenced this action for abuse of process on April 1, 1994, and noticed Kay's deposition for Saturday, April 16, 1994.

We turn to Brennan's contention that the trial court's determination that the action was frivolous under § 814.025, STATS., was "grievously unfair" and improper because the complaint stated a cause of action. The trial court determined that the action was frivolous upon both grounds stated in § 814.025(3): (a) that the action was commenced in bad faith, solely for purposes of harassing another, and (b) that the party knew or should have known that the action was without a reasonable basis in law. We need only consider the ruling under § 814.025(3)(b).

If the record is sufficient, we can decide as a matter of law whether a reasonable attorney should have known the action was without a proper basis in law. ***Elfelt v. Cooper***, 163 Wis.2d 484, 501, 471 N.W.2d 303, 310 (Ct. App. 1991), *rev'd on other grounds*, 168 Wis.2d 1008 (1992), *cert. denied*, 113 S. Ct. 1251 (1993). The standard is an objective one: whether the attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666.

Brennan knew that a valid judgment had been entered against him, that a judgment creditor has the right to commence a garnishment proceeding to collect the judgment, that he had not tendered the full amount of the judgment, and that because a court determination would be made as to the amount that would be paid over to the judgment creditor, no double recovery was possible. In possession of that knowledge, a reasonable attorney would know that an action for abuse of process would not lie. "[A] claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed." ***Id.*** at 244, 517 N.W.2d at 667. Therefore, as a matter of law, the action was frivolous.

The final issue is the assessment of costs on appeal. We must make a determination of whether an appeal is frivolous under RULE 809.25(3)(c), STATS. We may make this determination as a matter of law. ***Stern***, 185 Wis.2d at 252, 517 N.W.2d at 670. It follows that upon affirming the trial court's determination that the action was frivolous, the appeal is frivolous as a matter of law. *See* ***id.*** at 253, 517 N.W.2d at 671. *See also* ***Riley v. Isaacson***, 156 Wis.2d 249, 262, 456 N.W.2d 619, 624 (Ct. App. 1990) (if the claim is correctly adjudged

to be frivolous in the trial court under § 802.05, STATS., it is frivolous per se on appeal). Brennan should have known that his claim that dismissal was improper was without any reasonable basis in law or equity. He should have also known that, as a sole defense to a finding of frivolousness, his argument that the action was not frivolous because the complaint stated a cause of action lacks any reasonable basis in law.

We therefore remand to the trial court to determine and assess the costs and reasonable attorney's fees incurred in this appeal against Brennan.

By the Court.—Order affirmed but cause remanded with directions.

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