COURT OF APPEALS
DECISION
DATED AND RELEASED

January 29, 1997

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.

NOTICE

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

Nos. 95-1759
95-3208

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

DONALD GELLER
and LEE GELLER,

Plaintiffs-Appellants,

v.

GERALD NIEDERT,

Defendant-Respondent.

APPEAL from judgments of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Donald and Lee Geller have appealed from a judgment dismissing their complaint against Gerald Niedert based on their failure to comply with a trial court order requiring them to appear for a deposition (court of appeals case No. 95-1759). They have also appealed from a judgment finding their underlying action to be frivolous under § 814.025(3),

STATS., and awarding costs and attorney's fees to Niedert (court of appeals case No. 95-3208).[1] We affirm the judgments.

The Gellers commenced this action against Niedert on September 26, 1994, contending that the home he was building adjacent to their property in the Loramoor subdivision (Loramoor) on the shores of Lake Geneva violated a restrictive covenant governing Loramoor. They sought an injunction preventing Niedert from constructing a residence taller than one story in height, a declaration that Niedert's attempts to amend or modify the covenant were legally ineffective, and an order requiring Niedert to remove construction materials and clean up his property.

On November 18, 1994, Niedert's attorney served a notice of deposition, scheduling the Gellers' depositions for December 15, 1994, in Wisconsin. The Gellers, who have a summer home in Lake Geneva and a permanent residence in Chicago, were wintering in Florida at the time. Through counsel, they requested that the depositions be held in Florida or in the spring of 1995 upon their return to Wisconsin.

On January 10, 1995, after those options were rejected by Niedert's counsel and no other alternative was agreed upon, Niedert moved to compel the attendance of the Gellers at a deposition in Wisconsin. On February 14, 1995, the motion was heard and granted by the trial court, which rejected the Gellers' request that the depositions be conducted by telephone pursuant to § 804.05(8), STATS. A written order was entered on February 18, 1995, incorporating the trial court's ruling and ordering the Gellers to submit to the depositions in Wisconsin "forthwith."

Niedert's counsel subsequently attempted to schedule the depositions in February 1995, or on one of four dates between March 15 and 22, 1995. When the Gellers did not accept any of the dates, Niedert filed a motion to dismiss their complaint with prejudice. On April 28, 1995, the trial court heard and granted the motion.

[1] These appeals were consolidated by order dated December 11, 1995.

The Gellers contend that the dismissal order must be reversed because the trial court failed to make a specific finding that their claim had no merit, or that they exercised bad faith in violating the order compelling their attendance at the depositions. They rely on language in ***Dubman v. North Shore Bank,*** 75 Wis.2d 597, 601, 249 N.W.2d 797, 799 (1977), which provided that the striking of a pleading as a sanction for the violation of a court order denies due process when imposed without evidence warranting a finding of no merit or bad faith. They also contend that their conduct in failing to appear for the depositions was not sufficiently egregious to warrant the sanction of dismissing their complaint.

A trial court's order dismissing an action involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. *See* ***Johnson v. Allis Chalmers Corp.,*** 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991).[2] However, dismissal of an action for failure to comply with discovery and scheduling orders is permissible only when bad faith or egregious conduct can be shown on the part of a noncomplying party. *See* ***id.*** at 275, 470 N.W.2d at 864. We will sustain the sanction of dismissal if there is a reasonable basis for the trial court's determination that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance. *See* ***id.*** at 276-77, 470 N.W.2d at 865.

The trial court expressly found that the Gellers' conduct in failing to personally appear at the depositions and in failing to comply with its order compelling their attendance "forthwith" constituted egregious conduct warranting dismissal of their complaint with prejudice pursuant to § 804.12(2)(a)3 and (4), STATS. Contrary to the Gellers' contention, the trial court was not required to also make a finding of bad faith. The Wisconsin Supreme Court has treated findings of egregious conduct or bad faith as equivalent findings and has held that even an implicit finding of egregiousness or bad faith is sufficient to warrant dismissal of an action if the facts provide a reasonable basis for the trial court's conclusion. *See* ***Schneller v. St. Mary's Hosp.,*** 162 Wis.2d 296, 311, 470 N.W.2d 873, 878-79 (1991); *see also* ***Englewood Community***

[2] The "erroneous exercise of discretion" standard has the same meaning as the former "abuse of discretion" standard. *See* ***Allstate Ins. Co. v. Konicki,*** 186 Wis.2d 140, 149 n.3, 519 N.W.2d 723, 726 (Ct. App. 1994).

Apartments v. Alexander Grant & Co., 119 Wis.2d 34, 39 n.3, 349 N.W.2d 716, 719 (Ct. App. 1984).

Under the facts of this case, the trial court could reasonably conclude that the Gellers' conduct was egregious and without a clear and justifiable excuse. The record indicates that the Gellers left Wisconsin for a winter home in Florida shortly after filing their complaint. While the trial court denied their motion for a temporary injunction halting the construction of Niedert's home before they left, they were obviously aware that their complaint subjected Niedert to a great deal of stress and uncertainty because if he proceeded with construction during the pendency of the litigation, he might ultimately have to undo it, thus incurring large additional expenses.

It is a duty of a trial court to discourage the protraction of litigation and to refuse the court's aid to those who negligently or abusively fail to prosecute the actions they commence. *See* ***Schneller,*** 162 Wis.2d at 314, 470 N.W.2d at 880. In this case, the trial court was aware of the burden the litigation placed on Niedert when it granted his motion to compel the Gellers' appearance at the depositions. It also reasonably concluded that the nature of the depositions, which were to involve questioning based on numerous written documents, could not be handled adequately by telephone. In addition, it reasonably concluded that the Gellers, who maintained homes in Lake Geneva, Chicago and Florida, would not be unduly burdened by being required to appear at the depositions in Wisconsin.

In its order compelling their appearance, the trial court also warned the Gellers that their failure to comply with the order might result in sanctions, including the dismissal of their action. Despite this clear warning, the record indicates that the Gellers failed to accept any of several dates proffered by Niedert for holding the depositions in February or March 1995, and failed to propose any alternative dates which would comply with the trial court's provision that the depositions be held forthwith.

In concluding that the Gellers' noncompliance was egregious, the trial court found that they represented that they would be available for telephonic depositions at a time when they were out of the country and

unavailable even for telephonic depositions. It also considered that Niedert, who faced the threat of having to tear down part of his home if the Gellers were successful, was entitled to prompt disposition of the claims against him and that he was denied this right by the Gellers' conduct.

These facts support the trial court's determination that the Gellers' conduct was egregious. Moreover, because their noncompliance was based only on inconvenience, and not on financial inability to appear at the depositions, the trial court properly determined that they failed to demonstrate a clear and justifiable excuse for their noncompliance. It therefore acted within the scope of its discretion in dismissing their complaint. The fact that it could have imposed a lesser sanction provides no basis for disturbing the dismissal sanction chosen by it. *See* ***Englewood,*** 119 Wis.2d at 40, 349 N.W.2d at 719. Similarly, the dismissal order cannot be disturbed on the ground that sanctions could have been imposed solely on trial counsel, even if, as contended by the Gellers, the delay was attributable to counsel rather than to them personally. *See* ***Johnson,*** 162 Wis.2d at 284-85, 470 N.W.2d at 868.

We also affirm the trial court's judgment finding the Gellers' action to be frivolous. The trial court found the action to be frivolous under § 814.025(3)(a) and (b), STATS. Because we affirm on the ground that the action was frivolous under § 814.025(3)(b), we need not address whether it was also frivolous under § 814.025(3)(a).

A claim is frivolous under § 814.025(3)(b), STATS., if a party or his or her attorney knew or should have known that the claim was without any reasonable basis in law or equity and could not be supported by a good faith argument for the extension, modification or reversal of existing law. A finding under this section is based upon an objective standard, requiring a determination of whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable party or attorney would have known or should have known under the same or similar circumstances. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 240-41, 517 N.W.2d 658, 665-66 (1994).

This inquiry involves a mixed question of law and fact. *See* ***id.*** at 241, 517 N.W.2d at 666. The trial court's determination as to what was known or should have been known involves questions of fact. *See* ***id.*** Its findings on these matters will not be disturbed unless they are clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). The ultimate conclusion as to whether what was known or should have been known supports a finding of frivolousness is a question of law which we review independently of the conclusions of the trial court. *See* ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666.

A claim cannot be made reasonably and in good faith 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. *See* ***id.*** at 244, 517 N.W.2d at 667. The court must determine whether the evidentiary facts available to the party against whom a finding of frivolousness is sought provide any reasonable basis for meeting the party's burden of proof. *See* ***id.*** at 245, 517 N.W.2d at 667.

In their complaint, the Gellers alleged that the residence being built by Niedert violated a restrictive covenant applicable to Loramoor, including a restriction limiting buildings to one story. They alleged that Niedert had attempted to amend the restrictive covenant to remove the one-story restriction, but that the proposed amendment was not created pursuant to the rules and regulations governing Loramoor, which required consent of 90% of all owners in the subdivision. The Gellers alleged that the purported amendment was accomplished without notice to or the consent of any of the Loramoor property owners and was therefore invalid.

The Gellers also alleged that approval of the Loramoor architectural committee was required before construction could occur and that Niedert never submitted plans to the architectural committee for its approval or obtained committee approval. In addition, they alleged that the construction of Niedert's home began before August 30, 1993, and was not yet complete, thereby violating a condition of the restrictive covenant requiring that all construction to be completed within one year. They further alleged that the construction violated their right to privacy and quiet enjoyment.

After dismissal of the Gellers' complaint, the trial court held an evidentiary hearing to determine whether the allegations of the complaint were frivolous. At the hearing, a written consent form was introduced into evidence. It was signed by Donald Geller on December 9, 1993, and stated that he and his wife, Lee, consented to Niedert's construction of a two-story house. Evidence was also introduced regarding the consent of other Loramoor property owners which, in conjunction with the Gellers' consent, constituted approval of the construction by 90% of the Loramoor property owners. In addition, evidence was introduced indicating that Niedert submitted his proposed construction plans to the Loramoor architectural committee and obtained written approval of the construction.

Based on this evidence, the trial court found that the Gellers' representation that Niedert never obtained the consent of 90% of the property owners was false, as was their representation that Niedert never obtained approval from the architectural committee. It further found that the Gellers either knew the representations were false or, with a reasonable investigation of the facts, should have known. It held that the Gellers waived any right to object to the construction of a two-story house when they gave their consent.

The Gellers challenge the trial court's order on the ground that their consent to the construction was conditioned upon Niedert's consent to the use of golf carts on an easement between their properties. They contend that their consent lapsed when Niedert reneged on his part of the bargain. However, the written consent signed by Donald contained no such condition, nor did the Gellers make any allegation of conditional consent in their complaint or appear at the deposition and so testify. Instead, they alleged that the construction violated the restrictive covenant because Niedert never obtained the consent of 90% of the Loramoor property owners, an allegation which was untrue. Prior to the hearing on frivolousness, they made no allegation that their consent was conditional, that Niedert had failed to fulfill the conditions, and that they therefore were not bound by their consent.

Because the Gellers consented to the two-story residence, they waived their objections to the construction and had no reasonable basis in law or equity for challenging it.[3] In making this determination, we reject the Gellers' contention that their action was permissible because Lee, who owned the property as a joint tenant with Donald, did not sign the written consent. On its face, the written consent provided that "we" consent to the construction and bore the typed names of "Mr. and Mrs. Donald Geller." While it was signed only by Donald, Lee testified that she knew Donald intended to sign it and that she never told Niedert that she would not give her consent.

Even if the consent was not a waiver of the Gellers' objections, the trial court also properly found that because 90% of the Loramoor lot owners had consented to the construction, no possible factual support existed for the Gellers' allegation to the contrary.[4] Similarly, because the evidence indicated that Niedert obtained approval of his plans from the three-member architectural committee, the trial court properly determined that the Gellers falsely alleged that architectural committee approval was not sought or obtained by Niedert.[5] The Gellers admitted that they never investigated these facts prior to filing the complaint and that they never told their attorney of their own consent. Since a reasonable investigation of the facts would have disclosed that no basis existed

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[3] The Gellers contend that no weight should be given to the fact that the written consent signed by Donald did not contain any conditions because the document was prepared by Niedert and sent to the Gellers for signature. However, nothing in the record indicates that the Gellers objected to the form, requested that conditions be included, or were prevented from adding conditions before signing. The trial court therefore properly considered its unconditional nature.

[4] In their brief, the Gellers argue that without a formal amendment of the restrictive covenant, Niedert did not have the necessary permission to build his home. However, the restrictive covenant provided that it could be amended by the consent of 90% of all of the owners of lots. Because it did not specify more formal requirements and because the Gellers based their allegation of a covenant violation on lack of consent, not on failure to file a written amendment, the trial court properly concluded that the allegation was false and frivolous.

[5] The Gellers contend that the committee approval obtained by Niedert was ineffective because he obtained the committee members' signatures after October 16, 1993. The Gellers contend that the committee composition changed on October 16, 1993, when Donald was elected to it. Even if this is true, the Gellers' consent to the construction on December 9, 1993, waived their objection to any lack of committee approval and deprived their complaint of a reasonable factual basis.

for the action, the trial court properly found it to be frivolous under § 814.025(3)(b), STATS.

In making this determination, we reject the Gellers' claim that even if they consented to the construction, they were entitled to bring their action because they did not consent to a construction period exceeding the one-year limitation contained in the restrictive covenant. The record indicates that Niedert began construction in July or August 1993, but that construction was halted in September 1993 when a temporary injunction was issued in a lawsuit commenced by another Loramoor property owner. In settling that case, Niedert commenced seeking written consents from the remaining Loramoor owners, including the Gellers. He testified that he additionally was required to revise his building plans and obtain new permits, and that inclement weather and difficulty in obtaining a construction crew delayed the recommencement of construction until February 1994. Because the record indicates that the Gellers consented to the construction in December 1993, knowing that a delay had already occurred, no reasonable factual basis existed for them to seek relief based on delay when they filed their complaint ten months later in September 1994.

In challenging the trial court's finding of frivolousness, the Gellers also contend that facts could have been developed to support their claims if the action had not been dismissed at the discovery stage. This argument is disingenuous because it ignores the fact that if the Gellers had appeared at their depositions as ordered by the trial court, they could have created an evidentiary record prior to dismissal. Most importantly, the trial court afforded them an evidentiary hearing after dismissal at which they were able to present evidence and argument to support their claim that a reasonable basis existed for their complaint. The trial court properly determined at the conclusion of that hearing that the complaint had no reasonable basis in law or equity.

By the Court.—Judgments affirmed.

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