

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 5, 1996

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.

No. 95-3188

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES SARLUND,

Plaintiff-Appellant,

v.

KIMBERLY MORK,

Defendant-Respondent.

APPEAL from orders of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. James Sarlund and Richard A. Lyshek, Jr., his attorney, appeal from an order dismissing Sarlund's complaint and finding it frivolous, and from an order setting the amount of fees and costs they must pay. We affirm in part, reverse in part, and remand for further proceedings.

Sarlund, represented by Lyshek, filed a complaint in March 1995 alleging abuse of process by defendant Kimberly Mork. The complaint alleged that in December 1993 Mork obtained a restraining order against Sarlund. He alleged she then abused legal process to have him prosecuted for violating that order, and that she did so to retaliate against Sarlund because of the "informant role" he played in convicting two persons Sarlund alleged to be friends of Mork's.

Mork moved to dismiss the complaint. Sarlund sought to depose Mork, but she successfully moved to have the notice quashed. The circuit court then dismissed the complaint for failure to state a claim. It also concluded Sarlund and Lyshek knew or should have known that the complaint was lacking a reasonable basis in law. *See* § 814.025(3)(b), STATS. The court later awarded several thousand dollars in costs and fees to Mork.

Sarlund first argues the court erred in quashing his notice to depose Mork. He argues that Mork's motion to dismiss was converted to summary judgment under § 802.06(3), STATS., by submission of additional materials, and that the court's quashing of his notice prevented him from providing materials necessary to argue on that basis. He also argues that the quashing of the notice prevented the appellants from obtaining information necessary to defend against the argument that the suit was frivolous.

We conclude that any error would be harmless. The first step in summary judgment analysis is to determine whether the complaint states a claim. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). The circuit court concluded, solely from the face of the complaint, that Sarlund did not state a claim. Therefore, a deposition of Mork never would have become part of the court's analysis. Its absence cannot have harmed Sarlund. Similarly, Mork's deposition would have been irrelevant to deciding what the appellants knew or should have known at the time they filed the action.

The next issues require a review of the elements of a claim for abuse of process. They are: (1) a purpose other than that which the process was designed to accomplish, and (2) a subsequent misuse of the process. *Strid v. Converse*, 111 Wis.2d 418, 427, 331 N.W.2d 350, 355 (1983). In *Thompson v. Beecham*, 72 Wis.2d 356, 363, 241 N.W.2d 163, 166 (1976), the court stated:

In order to maintain an action for abuse of process, the process must be used for something more than a proper use with a bad motive. The plaintiff must allege and prove that something was done under the process which was not warranted by its terms. The existence of an improper purpose ... must also culminate in an actual misuse of the process to obtain some ulterior advantage.

We assume for purposes of appeal that Sarlund would have been able to prove the factual allegations of his complaint. However, even so, the appellants should have known that those facts fail to state a claim for abuse of process because no inference can be drawn that Mork did something under the process which was not warranted by its terms. It is not abuse of process solely because she may have acted out of bad motive or improper purpose. *Id.* at 362-63, 241 N.W.2d at 165-66.

The appellants argue that their abuse of process theory is not frivolous because it could be supported by a good faith argument for an extension, modification or reversal of existing law. *See* § 814.025(3)(b), STATS. Specifically, they argue Mork's acts were in retaliation for Sarlund's informant role, and therefore violated 18 U.S.C. §§ 1512 and 1513 which prohibit respectively tampering with or retaliation against a victim, witness or informant.

The first of these statutes prohibits conduct which attempts to prevent or discourage one of those persons from taking some action in the future, such as testifying. Here there is no allegation that Sarlund's informant role was ongoing or that he was expected to take action in the future regarding Mork's alleged friends. Therefore, there is no basis to argue that Mork violated this statute. The second statute, retaliating against a witness, victim or informant, prohibits conduct causing bodily injury or damage to tangible property of such a person. Mork's alleged conduct in this case did neither. Therefore, we reject the argument that these statutes provide a good faith basis for Sarlund's abuse of process claim.

The appellants also argue that the circuit court made inadequate findings in determining that Sarlund's claim was frivolous. We reject this argument. The findings were adequate.

Finally, the appellants argue that the trial court improperly ordered Sarlund and Lyshek to be jointly liable for the entire amount of fees assessed. Mork concedes that the circuit court must apportion the fees between Sarlund and Lyshek. Therefore, we reverse and remand with directions to do so.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

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