COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1997

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.

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No. 96-3383

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

KRISTINE D. GESKE,

PLAINTIFF-APPELLANT,

V.

BRIAN E. JACKSON AND FARNSWORTH BUILDERS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

VERGERONT, J.[1] Kristine Geske appeals from a judgment awarding attorney fees and costs of $2,816 against her and her counsel, Attorney

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

James Monroe, under § 814.025, STATS.,[2] which governs frivolous actions, and under § 802.05(1), STATS.,[3] which governs sanctions in certain circumstances for

[2] Section 814.025, STATS., provides in part:

> **Costs upon frivolous claims and counterclaims**. (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant 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, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
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> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint 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.
>
> (4) To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

[3] Section 802.05(1), STATS., provides in part:

> **Signing of pleadings, motions and other papers; sanctions**. (1) (a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name…. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other

(continued)

pleadings, motions and other papers. The circuit court's determination followed a trial to the court commissioner on Geske's small claims action against Brian Jackson and his employer, Farnsworth Builders, Inc., for damages arising out of a collision between the vehicle Geske was driving and the truck Jackson was driving for Farnsworth Builders. On appeal, Geske contends that the circuit court erred in not ordering entry of judgment against Jackson and Farnsworth Builders after Geske's acceptance of an offer of judgment; in determining that her action for negligence and punitive damages was frivolous without an evidentiary hearing; and in determining the reasonableness of attorney fees without an evidentiary hearing. Geske also asks for a reversal and remand in the interests of justice. For the reasons we explain below, we affirm in part, reverse in part and remand for further proceedings.

BACKGROUND

The summons in the small claims action, filed on September 14, 1995, alleged that Jackson was driving a truck owned by Farnsworth Builders, Inc. and "negligently caused plaintiff to drive off the road near the intersection of CTH N and Happy Valley Road in Dane County, Wisconsin. Defendants outrageously, recklessly and wantonly disregarded the rights of plaintiff." It is undisputed that

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> paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation…. If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

the vehicle Geske was driving was owned by her father, Dennis Geske. The answer, in addition to denying the allegations of the complaint and asserting affirmative defenses, moved to dismiss on the ground that Geske was not the owner of the vehicle and moved to dismiss, under § 814.025, STATS., the portion of the complaint alleging outrageous, reckless and wanton disregard of Geske's rights. The answer also contained an "offer of judgment," which denied a duty to make payments for plaintiff's alleged repairs but "[n]evertheless … in an effort to resolve this matter, expressed … willingness and readiness before this lawsuit was filed, to [make a payment under] § 807.01, STATS., in the amount of $473.80, to extinguish all claims deriving from this alleged accident."

On October 6, 1995, two days after the answer was filed, Geske filed a notice of acceptance of offer of judgment, signed by Attorney Monroe on her behalf. However, before the judgment was entered by the clerk, a dispute arose over the terms of the offer and acceptance. According to the defendants, they intended that Geske would use the $473.80 to pay for the repairs to the vehicle she was driving, which were made by ABRA Auto Body & Glass after Geske and her mother brought the vehicle to ABRA just after the accident. According to Geske, the rental costs for a replacement vehicle while the damaged vehicle was being repaired were $585.32. The defendants' insurer had paid only $111.52 of those costs. Geske contended, through counsel, that the insurer had already agreed to pay ABRA directly for the repairs, and she intended to apply the $473.80 to the remaining rental costs. To resolve the dispute, the defendants proposed that their insurer make the check in the amount of $473.80 payable to both Geske and ABRA, but that was not acceptable to Geske. It is undisputed that on October 20, 1995, Attorney Monroe wrote to ABRA stating that Geske did not own the truck, and that "other parties should be responsible to (ABRA) for the repairs."

When ABRA learned that Geske did not intend to pay for the repairs, it moved to intervene. The small claims commissioner held a hearing on November 29, 1995, on this motion, the motion to dismiss, and the dispute over the entry of judgment. Counsel for both Geske and the defendants contended that a judgment of $473.80 should be entered, but each wanted it entered on different terms. In their brief before the hearing, the defendants asked for recovery of costs for having to respond to Attorney Monroe's "inconsistent representations." This referred to affidavits and correspondence the defendants submitted, which, they asserted, showed that Attorney Monroe had initially represented that Geske owned the vehicle; that Geske requested the repairs; that Geske, through Attorney Monroe, claimed she was responsible for the repairs; and that Attorney Monroe's later statement after acceptance of the offer of judgment—that Geske was not responsible for the repairs—was inconsistent with earlier representations and actions.

At the November 29 hearing, ABRA's motion to intervene was granted. The case information sheet also recorded these rulings: "2. Motion to dismiss was denied & offer of judgment set aside. 3. All parties to be set for trial. 4. Requested attorney's fees and costs held open until trial."[4] The parties agree that the commissioner stated that he did not know if he had the authority to set aside the offer of judgment, and that he did so because the parties disputed the terms of the offer and acceptance. However, it is not clear from counsels' account

[4] The record of the proceedings before the small claims court commissioner is sparse. This court has had to rely on counsels' account to the circuit court of what took place before the commissioner, as well as their account in the lengthy oral argument before this court, in an effort to obtain a more complete picture of the proceedings before the commissioner. However, as is evident in this opinion, it is still not possible to resolve all disputes and ambiguities about exactly what happened.

and the record whether the commissioner set the matter for trial because he determined that there was no "meeting of the minds" on the offer and acceptance, and the judgment should therefore not be entered; because he did not know if he had authority to determine whether the judgment should be entered; or because he did not know if the judgment should be entered given the dispute over its terms.

At the trial before the commissioner, evidence was presented concerning the circumstances of the accident, Jackson's driving record, and tire and other equipment violations on the truck Jackson was driving. Geske testified that Dennis Geske owned the vehicle she was driving, that she had to borrow Attorney Monroe's vehicle (Attorney Monroe is her stepfather) while the damaged vehicle was being repaired, and Attorney Monroe had to rent a vehicle to drive.[5] She submitted the rental bill of $585.49, billed in Attorney Monroe's name. The commissioner determined that Geske was thirty percent negligent; Jackson was seventy percent negligent; and that there was nothing in Jackson's driving record "to show a safety problem or bearing on this accident." The commissioner concluded that punitive damages were not proved. The commissioner's notes show that Geske was requesting punitive damages in the amount of $3,052.23 and "out of pocket" in the amount of $473.80 plus $585.49, less $111.52 already paid by the defendants. From seventy percent of the "out of pocket," or $663.44, the commissioner deducted $50 in costs.[6] Then, because the defendants' insurer had

[5] Attorney Monroe explained to the circuit court that Geske could not rent a replacement vehicle in her name because of her age.

[6] The defendants state this deduction for costs was pursuant to § 814.07, STATS., which provides:

> **Costs on motion**. Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding $50, and may be absolute or directed to abide the event of the action.

in the interim paid ABRA for the repairs,[7] the commissioner deducted $473.80, resulting in an award to Geske of $139.64 plus statutory costs of $64.

According to the commissioner's notes, the defendants asked for $1,200 in attorney's fees. The commissioner did not rule on this request. He informed the parties that under ***Hessenius v. Schmidt***, 102 Wis.2d 697, 307 N.W.2d 232 (1981), the circuit court had to rule on the request for attorney fees. In ***Hessenius***, the court held that the reference to "court" in § 814.025, STATS., did not include a court commissioner and therefore the circuit court had to determine whether attorney fees should be awarded under § 814.025.

The defendants petitioned for a hearing in the circuit court on the "outstanding motions for costs and attorney's fees under §§ 814.025 and 802.05, STATS." The request stated: "[T]his is not an appeal of the merits of the case which were decided at the small claims trial and are not being appealed, except for the outstanding motion on costs and attorney's fees as indicated." The request noted that the commissioner had referred the parties to ***Hessenius***.

The circuit court held a hearing on the defendants' request for attorney's fees on June 24, 1996. The defendants in their letter brief to the court, filed prior to the hearing, argued that they were entitled to costs and attorney's fees under §§ 814.025 and 802.05, STATS., on these grounds: (1) the false and unfounded statements of Attorney Monroe relating to ownership of the vehicle and responsibility for the repair costs, which resulted in increased litigation; and

[7] The insurer paid ABRA, took an assignment of ABRA's claim against Geske, and ABRA was dismissed from the action.

(2) pursuing the claim of punitive damages without a basis in law and fact.[8] Accompanying this letter brief were copies of correspondence to and from Attorney Monroe, which had been attached to the affidavits submitted to the court commissioner.

At the June 24 hearing, Attorney Monroe presented argument in opposition to the request for sanctions. Most of the argument of both counsel, and the court's questions, related to the circumstances and dispute surrounding the offer of judgment. Although initially the court was of the view that there were factual issues that needed to be resolved concerning whether the defendants were justified in not making a payment in the amount of $473.80 to Geske after she accepted the offer of judgment, the parties eventually agreed that the court could make this determination based on the letters that defendants had submitted.

At the June 24 hearing, the parties also discussed the amount of attorney's fees requested. Attorney Monroe objected that the fees were not itemized and that certain work should not be included in any recovery of fees, including fees associated with defending on the negligence claim. The court concluded that if it found in defendants' favor on the request for fees, the record was not complete enough to determine the appropriate amount of fees, and defendants would need to submit an itemization of fees.

A second hearing was held on July 22, 1996, so that the parties could react to and supplement the chronology of events up to and including the small

[8] The letter brief asserted a third ground: threat of bad faith litigation made by Attorney Monroe to the defendants' insurer. However, this is not pertinent to the issues on appeal.

claims trial, which the court had pieced together from the meager record. At the close of this hearing, the court stated:

> Well, as I see this, based on the record I think we've formulated at this point, the sole issue for the Court to decide is once the offer of judgment was made and accepted by the defendants, there doesn't seem to be any question that the appropriate procedure followed, that the defendants' counsel asked for the entry of the judgment, is whether or not the inability of the clerk and/or the commissioner to actually have that judgment entered, whether or not there's any fault on either party that that didn't happen. That's how I see it.

Both counsel agreed with this assessment.

The court issued a written decision on July 30, 1996. It found that Attorney Monroe knew that Geske did not own the vehicle but falsely represented that fact; that he accepted the offer of judgment knowing the offer was based on the cost of repairs but advised the repair shop he was not going to pay them and they should sue the defendant; and that he took the position that the acceptance of the offer of judgment was not based on the repair costs but was based on plaintiff's "other damages" when no "other damages" existed. The court found that Attorney Monroe was attempting to receive money for a prescribed purpose--repair of the vehicle--and intended to leave the defendants exposed to additional litigation which he knew would be resolved if he used the proceeds of the settlement for the purpose they were intended.

The court concluded that the lawsuit was frivolous because Geske had no cause of action for property damage because she did not own the vehicle and there was no basis for punitive damages, "born out by the failure of plaintiff to submit any such damages at trial." The court concluded that the defendants were entitled to attorney's fees under both § 814.025 and 802.05(1), STATS., and

directed the defendants to submit an itemized statement of claimed fees and expenses. The trial court denied Attorney Monroe's motion to reconsider its decision.

The defendants submitted an itemization of attorney and paralegal time spent in the litigation, requesting $2,950.50 in fees and $114.14 in costs. Upon receipt of Attorney Monroe's objections to the reasonableness of the attorney's fees, the court held a hearing on the objections. The court determined that the fees requested were reasonable, subject to a minor reduction based on one of Attorney Monroe's objections, and it awarded the fees against both Geske and Attorney Monroe. At the close of the hearing, Attorney Monroe brought to the court's attention that the court commissioner had never entered a judgment based on his decision after the trial. Attorney Monroe requested that the court direct the commissioner to enter judgment in the amount the commissioner previously determined and further requested that the court then deduct that amount from the attorney's fees awarded. Defendants' counsel stated he had no objection to this and the court so ordered. Accordingly, after the commissioner entered judgment in favor of Geske in the amount of $139.64 plus $61 in costs,[9] the circuit court entered an "amended judgment" in favor of the defendants in the amount of $2,816.

DISCUSSION

Geske first contends that the commissioner had no authority to "set aside" the offer of judgment and that the circuit court erred in failing to order entry

[9] There appears to be a $3 discrepancy between the costs awarded Geske according to the commissioner's note and the costs awarded in the judgment.

of judgment based on the defendants' offer and Geske's acceptance. This argument merits little comment.

Geske did not request a hearing before the circuit court on the commissioner's decision of November 29, 1995, to set aside the offer of judgment.[10] Given the lack of clarity in the record and in counsels' accounts of the nature and basis for the commissioner's decision on November 29 to set aside the offer of judgment, we cannot conclude that the failure to request a hearing before the circuit court at that time is a waiver by either party of the right to raise before the circuit court issues concerning the offer and acceptance of judgment.

However, after the trial before the commissioner, Geske did not request a hearing before the circuit court on the issue of the commissioner's authority to set aside the offer of judgment. And at the hearings held before the circuit court based on the defendants' request for attorney's fees, Geske did not argue that the circuit court should enter judgment based on the defendants' offer of judgment. Of course, it made no sense for Geske to do so at that time, because the commissioner's decision was more favorable to her than the offer of judgment. We mention Geske's failure to pursue this issue before the circuit court only to point out the internal inconsistency in her position. In fact, Attorney Monroe emphasized to the circuit court that, she "won more" in the trial to the commissioner than she "had agreed to settle for." Attorney Monroe did argue before the circuit court that the commissioner should have entered the judgment based on the offer of judgment as he conceived it, but only in the context of defending against the request for attorney's fees and by way of explaining why his

[10] The record shows that at the November 29 hearing, the commissioner gave the parties "de novo" information sheets, which explain how to request a hearing before the circuit court.

conduct relating to the acceptance of the offer did not warrant sanctions. We generally do not address issues not presented to the circuit court. *See* ***Wengerd v. Rinehart,*** 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983). We decline to do so here, particularly because Geske's position on this issue before us is not consistent with her position before the circuit court.

Geske next contends that the trial court erred in not "abiding by" the terms of the parties' stipulation and in not holding an evidentiary hearing before it entered its decision of July 30. We first consider the court's ruling relating to Attorney Monroe's conduct and representations with respect to the acceptance of the offer of judgment and the liability for repairs. We will consider the court's ruling on punitive damages later in the opinion.

Attorney Monroe acknowledged at oral argument what is plain from the transcript of the July 22 hearing: at the close of that hearing he agreed that the issue the court was to decide was whether the inability of the clerk or the commissioner to have the judgment entered was due to the fault of either party. At the June 24 hearing, defendants' counsel had submitted the correspondence he wished the trial court to consider in making its decision, all of which was already part of the record. That is the material, along with other documents already on the record, that the court reviewed with both counsel in the July 22 hearing to make sure the court understood the sequence of events. After doing so, and determining that there was agreement on the issue to be decided, the court ended the July 22 hearing by saying: "All right counsel. Thank you. I'll render a written decision." We conclude that, with respect to the issue of why the judgment was not entered and whose fault that was, Geske agreed to have that issue decided based on the record before the circuit court and without an evidentiary hearing.

However, we agree with Geske that the issue of whether the entire lawsuit was frivolous because Geske did not own the vehicle was not discussed in either of the hearings before the circuit court. It was not mentioned as a basis for defendants' request for attorney's fees before the commissioner or in their brief to the circuit court or in their argument to the circuit court either on June 24 or July 22. As the defendants' counsel explained at oral argument, the defendants considered that, even though Geske did not own the vehicle, she could have a claim for repairs if she was liable for the repairs, and she could have a claim for rental costs if she necessarily incurred those as a result of the damage to the vehicle and was liable for those payments.[11] It was not until Attorney Monroe took the position that Geske was not liable for the repair costs, after accepting the offer of judgment, that defendants felt they had a basis for attorney's fees because that position was inconsistent with prior representations on which the offer of judgment had been based. Defendants' counsel's argument to the circuit court was that sanctions were appropriate because Geske had no legal basis to deny liability for the repair costs. They did not argue that she had no legal or factual basis to bring the entire lawsuit.

Of course, a circuit court may on its own initiative consider whether a pleading or other filing meets the requirements of § 802.05(1), STATS., *see* § 802.05(1), and whether sanctions are warranted under § 814.025, STATS. However, the party against whom sanctions are sought must have notice and the opportunity to respond. *See* ***In the Matter of the Estate of Bilsie***, 100 Wis.2d 342,

[11] Defendants' counsel explained that the motion to dismiss based on Geske's lack of ownership was intended as an alternative, in case Geske denied liability for the repair costs.

356, 302 N.W.2d 508, 517 (Ct. App. 1981).[12] We conclude that Geske did not have notice that the court's decision was going to address whether the entire lawsuit was frivolous. For that reason, we must reverse the circuit court's decision insofar as the court made an award of fees based on its conclusion that the entire action was frivolous.[13]

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[12] An evidentiary hearing is required on a motion under §§ 814.025 and 802.05(1), STATS., unless the facts are undisputed or an evidentiary hearing is waived. ***Kelly v. Clark***, 192 Wis.2d 633, 654-55, 531 N.W.2d 455, 462 (Ct. App.1995).

[13] The defendants contend that the record supports the circuit court's conclusion that the entire action was frivolous and we may affirm on that basis, searching the record for evidence that supports findings the trial court did not make but that are implicit in its conclusion. Apparently, the defendants' position is that even if Geske had notice the court was going to address this issue, she could have supplied no argument or evidence that could have made a difference to the circuit court's conclusion. We are not persuaded. As counsel for the defendants acknowledged at oral argument, there are ambiguities in the trial court's decisions that are not easy to resolve. For example, what about the rental payments, not mentioned in the opinion? Did the trial court implicitly find, as the defendants suggest, that Attorney Monroe, not Geske, incurred these costs and therefore she was not liable? Since the defendants never made that argument to the circuit court and since the focus of both the June 24 and July 22 hearings was on the repair costs, not the rental costs, we are reluctant to imply that finding. Moreover, such an implied finding is inconsistent with the court's direction to the commissioner, at the close of the hearing on attorney fees, to enter judgment based on the commissioner's decision to award to Geske a portion of the rental costs (reduced by the amount already paid by defendants' insurer and by the thirty percent attributable to her negligence).

Finally, although the court's conclusion that the action was frivolous is expressly premised on the fact that Geske did not own the vehicle, defendants' counsel acknowledged at oral argument that that fact, in itself, does not preclude recovery for either rental costs or repairs to the damaged vehicle. We also note that the circuit court found that Geske in her complaint requested $4,000 in damages plus punitive damages. Defendants acknowledge that the complaint requested a total of $4,000 damages, including punitive damages, but, at oral argument, contended this was harmless error. However, we are unable to say with confidence that this error did not affect the trial court's conclusion that the entire action was frivolous.

We agree with the defendants that the record supports the circuit court's finding that Attorney Monroe adopted inconsistent positions with respect to Geske's liability for repairs. But the trial court's conclusion that, as a result, the entire action is frivolous was reached without notice to Geske and has sufficient gaps in the reasoning and factual underpinnings such that we cannot affirm it.

Because the reason for reversal is lack of notice, ordinarily we would direct the circuit court to hold a hearing on remand, after notice, at which Geske could defend against the assertion that the entire action was frivolous. However, Geske also argues that, even with notice and the opportunity to be heard, the circuit court does not have the authority, or jurisdiction, to decide that the entire action was frivolous. This is so, she contends, because the commissioner awarded damages to Geske and defendants did not request a hearing before the circuit court on their liability to Geske, only on the issue of attorney's fees. We disagree and conclude the circuit court does have the jurisdiction to consider whether the entire action is frivolous.

Section 799.207(2), STATS., provides that the decision of the commissioner becomes a judgment unless either party files a demand for a trial before the circuit court within a specified time of the decision. If a party makes such a demand, there is a "new trial before the court on all issues." Section 799.207(5). We interpret this to mean that the circuit court has jurisdiction to hear and decide all issues once a party has properly requested a hearing before the circuit court. The fact that, after the trial to the commissioner, the commissioner did not enter a judgment based on his decision to award damages to Geske confirms this interpretation: no judgment was entered because the entire matter was before the circuit court once the defendants timely requested a hearing before the court on the issue of attorney fees. We acknowledge that their request for a hearing before the circuit court limited the issue to attorney fees. But we do not see how their request can limit the circuit court's jurisdiction, although it is relevant, as we have indicted above, to the question of notice to Geske. Having jurisdiction of all issues that were before the commissioner, and with the authority to raise on its own initiative the issue of compliance with § 802.05(1),

STATS., and frivolousness under § 814.025, STATS., the circuit court had the jurisdiction to decide whether the complaint complied with § 802.05(1) and whether the entire lawsuit was frivolous under § 814.025. Accordingly, on remand it may do so, consistent with the applicable notice and hearing requirements.

Although we have decided that Geske did not have notice that the court was going to decide whether the entire action was frivolous, we also decide that the findings the trial court did make on the issue Geske knew the court was going to decide are sufficient, as a matter of law, to support the conclusion that Attorney Monroe filed an acceptance of the offer of judgment in violation of § 802.05(1), STATS.

As we have stated above, the trial court found that Attorney Monroe accepted the offer of judgment knowing the offer was based on the cost of repairs but advised the repair shop he was not going to pay them and they should sue the defendant; took the position that the acceptance of the offer of judgment was not based on the repair costs but was based on plaintiff's "other damages" when no "other damages" existed; and was attempting to receive money for a prescribed purpose--repair of the vehicle--and intended to leave the defendants exposed to additional litigation that he knew would be resolved if he used the proceeds of the settlement for the purpose they were intended. We do not reverse the findings of fact made by a trial court sitting as a fact-finder unless they are clearly erroneous. Section 805.17(2), STATS.

At oral argument the only one of these findings that Attorney Monroe contended was clearly erroneous is the finding that "no other damages existed." Attorney Monroe points to the evidence of the rental costs. We are

uncertain whether the trial court overlooked the existence of the rental costs, since they are nowhere mentioned in its decision, or had some basis, not explained in the opinion, for concluding those were not proper damages. *See supra* note 13. However, we need not resolve this ambiguity because we conclude that even if this is a factual finding that is clearly erroneous, the other findings are sufficient to support the conclusion that Attorney Monroe "used [the acceptance of judgment] for an improper purpose." *See* § 802.05(1), STATS. We have no hesitancy in ruling that attempting to receive money that he knew was intended for one purpose while not intending to use it for that purpose is an improper use of an acceptance of offer of judgment.[14]

Although we conclude the findings of the trial court support an award of attorney's fees under § 802.05(1), STATS., a remand is necessary for the trial court to determine the appropriate sanction. The sanction "may include the

[14] The § 814.025, STATS., counterpart to the "improper purpose" component of § 802.05(1), STATS., is § 814.025(3)(a), relating to bad faith. The improper purpose component of § 802.05(1) is similar to, although not necessarily the same as, the bad faith alternative under § 814.025(3)(a). We review awards of attorney fees under § 814.025(3)(a) as mixed questions of fact and law, reviewing de novo whether the facts as found by the trial court meet the legal standard of the statute. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 236, 517 N.W.2d 658, 664 (1994). We consider this to be the proper standard of review for the improper purpose component of § 802.05(1). We recognize that in ***Riley v. Isaacson***, 156 Wis.2d 249, 256, 456 N.W.2d 619, 622 (Ct. App. 1990), we held that, for the prefiling investigation component of § 802.05(1), we defer to the trial court's discretion in reviewing what is a reasonable inquiry. We do not consider that ***Riley*** defines the standard of review for the improper purpose component. However, even if it did, our conclusion would be the same.

reasonable expenses incurred [by the defendants] because of the filing of the [acceptance of offer of judgment]." *See* § 802.05(1).[15]

We now consider Geske's contention that the trial court erred in concluding Geske's punitive damage claim was frivolous. In her brief, Geske argued that the trial court erred in deciding this issue without an evidentiary hearing. However, at oral argument Attorney Monroe agreed that this court may decide as a matter of law whether the four particular pieces of evidence Geske points to provide a reasonable basis for the punitive damage claim. This is an implicit concession that an evidentiary hearing was not necessary.[16] We proceed, then, to decide whether Geske had a reasonable basis for the punitive damage claim, and we conclude she did not.

A claim does not have a reasonable factual basis, and is therefore frivolous, if the attorney knows or reasonably should know that the facts necessary to meet the required elements of an allegation are not present and cannot be

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[15] We do not decide whether the findings the trial court did make support an award under § 814.025, STATS. Section 814.025(4) provides that, "[t]o the extent § 802.05, STATS., is applicable and differs from this section, s. 802.05 applies." Since we have applied the "improper purpose" component of § 802.05(1), we do not decide whether the court's findings support sanctions under § 814.025(3)(a), STATS. We acknowledge that Attorney Monroe's position that Geske was not liable for the repairs may be frivolous, thus providing an additional ground for sanction under § 814.025(3)(b). *See* ***Gardner v. Gardner***, 190 Wis.2d 216, 250, 527 N.W.2d 701, 713 (Ct. App. 1994) (§ 814.025(3)(b) applies to positions adopted in course of litigation). However, because of the circuit court's approach--focusing on whether the complaint was frivolous rather than on whether Attorney Monroe's contention that Geske was not liable for the repairs was frivolous—the court did not make the findings necessary for us to decide, as a matter of law, that this position was frivolous.

[16] Attorney Monroe did not concede that he *agreed* that the trial court could decide the issue of the punitive damage claim without an evidentiary hearing and stated, as does the brief, that he did not know the court was going to decide this issue after the July 22 hearing. However, this becomes irrelevant, since we are considering all the evidence he contends the trial court should have considered and since it is a question of law whether this evidence is a reasonable basis for the punitive damage claim.

produced. ***Thompson & Coates, Ltd.***, 185 Wis.2d at 241, 517 N.W.2d at 666. Whether a reasonable factual basis exists must be assessed against the burden of proof required by law to prevail on the claim alleged to be frivolous. ***Estate of Bilsie***, 100 Wis.2d at 355 n.6, 302 N.W.2d. at 516. A greater quantum of proof is necessary to provide a reasonable factual basis when a claim must be proved by clear, satisfactory and convincing evidence, rather than by a preponderance of the evidence. The recovery of punitive damages requires proof by clear and convincing evidence that a defendant's conduct was willful or wanton, in a reckless disregard of rights or interests. ***Brown v. Maxey***, 124 Wis.2d 426, 433, 369 N.W.2d 677, 681 (1985).

Geske contends that she had a reasonable factual basis for alleging a claim for punitive damages against Jackson in the complaint and for pursuing this claim at the trial before the commissioner because of these pieces of evidence: (1) Jackson left the scene of the accident immediately; (2) Jackson left to go to a tire repair shop; and (3) Wisconsin Department of Transportation cited the truck with eleven equipment violations, including bald tires.[17] None of these pieces of evidence, considered separately or together, provide a reasonable basis for alleging or pursuing punitive damages against Jackson. We do not see how evidence that Jackson left the accident scene immediately, and went to a tire shop where he was

[17] This evidence was brought to the circuit court's attention in Geske's brief in support of her motion for reconsideration, which the trial court denied. The parties agreed at oral argument that Geske presented the documentation of the equipment violations to the court commissioner at trial, and they were part of the record before the circuit court. They also agreed that it is undisputed that Jackson was on his way to the tire repair shop when the accident occurred. Attorney Monroe represented at oral argument that, at the trial before the court commissioner, he made "an offer of proof" that he could present his client's testimony to show that Jackson left the scene of the accident immediately, but the defendants' attorney stated that did not occur. We assume for purposes of discussion that Attorney Monroe made such an offer of proof.

already headed, tends to prove that his driving prior to the accident was in reckless disregard of Geske's rights. And the only evidence that Attorney Monroe was able to point to at oral argument that the bald tire violations contributed to the accident was the evidence that Jackson left the scene immediately. We do not see the connection. We conclude that the allegations in the complaint relating to punitive damages were without a reasonable factual basis. This constitutes a frivolous claim under § 814.025(3)(b), STATS., and, as to Monroe's signature on the complaint, a violation of § 802.05(1), STATS.

Geske contends that a fourth piece of evidence—Jackson's driving record—is evidence that Farnsworth Builders' hiring of Jackson was willful or wanton, in reckless disregard of the rights of others, including Geske.[18] Jackson's driving record shows a speeding ticket in 1993 and a failure to pay that fine; having an intoxicating beverage in a vehicle in 1995; and a seat belt violation in 1995. This falls far short of providing a reasonable factual basis for the recovery of punitive damages from Farnsworth.

Finally, Geske's claim that the court erred in not holding an evidentiary hearing on the reasonableness of the attorney's fees is entirely without merit and is frivolous. The defendants presented an itemization of fees, Geske responded with written objections, and the circuit court held a hearing, after notice, on the objections. It was not an evidentiary hearing, but Geske did not request one; and she does not point to any factual disputes which would have required one.

[18] Apparently at the trial before the commissioner, Attorney Monroe claimed negligent hiring by Farnsworth Builders. We understand the commissioner's notes to say that the commissioner found no negligence by Farnsworth Builders as well as no basis for punitive damages.

In summary, we affirm the circuit court's determination that the claim of punitive damages was frivolous under § 814.025, STATS., and a violation of § 802.05(1), STATS. We conclude that Attorney Monroe also violated § 802.05(1) by using the acceptance of the offer of judgment for an improper purpose. We reverse the trial court's award of attorney fees insofar as it was based on the conclusion that the entire action was frivolous, because Geske did not have notice that that issue was before the court. On remand, the court may either determine a reasonable award of attorney fees based on the frivolous punitive damage claim and the improper acceptance of the offer of judgment, or, upon the requisite notice and hearing, decide whether the entire action was frivolous under § 814.025 or the entire complaint was a violation of § 802.05(1). We conclude there is no basis for reversing in the interests of justice or because the real controversy has not been tried.

In ordering a remand, we are acutely aware that an inordinate amount of judicial resources at three different levels have already been expended on this case. We remand only because it is not possible for us to finally resolve all the issues on appeal. We urge both parties and their counsel, particularly Attorney Monroe, to give thought to the prudent and responsible use of judicial resources in any proceedings on remand.

Jackson and Farnsworth Builders ask for attorney's fees for this appeal. A party who prevails in the defense of an award of fees under §§ 802.05 or 814.025(1), STATS., is entitled to a further award on appeal without a finding that the appeal is frivolous under § 809.25(3), STATS. ***Riley v. Isaacson***, 156 Wis.2d at 249, 262-63, 456 N.W.2d 619 (Ct. App. 1990). We conclude that under ***Riley***, the defendants are entitled to attorney's fees for responding to the appeal of the award of fees for the punitive damage claim, including responding to the

argument that the court erred in not holding an evidentiary hearing. However, because we reverse the trial court insofar as it concluded the entire action was frivolous, even though we conclude that a portion of those fees is warranted on other grounds, we are not persuaded that the defendants are entitled under ***Riley*** to attorney's fees for defending aspects of the appeal other than those we have just mentioned.[19] The trial court is directed to determine the reasonable amount of such fees.

We may also award attorney fees under § 809.25(3)(a), STATS., if we determine that an appeal is frivolous. However, we have interpreted this provision to authorize an award only where an entire appeal is frivolous. ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994), *aff'd* 199 Wis.2d 268, 544 N.W.2d 428 (1996). Because we have determined that we must reverse in part, we cannot conclude that the entire appeal is frivolous.

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

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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[19] We conclude the first issue—that the trial court erred in not ordering entry of judgment—is frivolous. However, this issue does not come under ***Riley v. Isaacson***, 156 Wis.2d 249, 262-63, 456 N.W.2d 619 (Ct. App. 1990). And, as we explain in the last paragraph of the opinion, we cannot award attorney fees under § 809.25(3)(a), STATS., for some issues but not others.