COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-2201

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

WAYNE K. HAGEN AND DEBORAH J. HAGEN,

PLAINTIFFS-APPELLANTS,

ATTORNEY MICHAEL C. ABLAN,

APPELLANT,

V.

BMM MOLDING A/K/A BMM WESTON LIMITED,

DEFENDANT,

SLINGER MANUFACTURING COMPANY, INC.,
SPARTA MANUFACTURING CO., INC.,
HERITAGE MUTUAL INSURANCE CO.,

DEFENDANTS-RESPONDENTS,

GEORGE FISCHER DISA HOLDING CORP.,
GEORGE FISCHER DISA, INC.,
ST. PAUL REINSURANCE COMPANY LIMITED,
NORTHBROOK INDEMNITY COMPANY,
NORTHBROOK PROPERTY AND CASUALTY INS. CO.,
ZURICH INSURANCE CO. (USA),

DEFENDANTS.

APPEAL from an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Wayne and Deborah Hagen (the Hagens), together with their attorney, Michael C. Ablan, appeal from orders in which the circuit court: (1) found that continuation of the Hagens' suit was frivolous; (2) denied reconsideration; (3) imposed costs on Ablan; and (4) distributed settlement proceeds. We conclude that the circuit court did not err in finding that the continuation of the Hagens' action against Slinger Manufacturing and Sparta Manufacturing was frivolous. Also, we conclude that structuring the settlement distribution to include a sum to Heritage Mutual Insurance Company[1] was proper. Accordingly, we affirm.

Slinger and Sparta move this court for double attorney's fees and costs for being compelled to defend this appeal, which they contend is frivolous. We deny the motion because we conclude that the appeal raises arguments that do not rise to the level of frivolousness.

[1] Heritage is Sparta's workers' compensation insurer.

BACKGROUND

On May 5, 1993, Wayne Hagen accidentally cut off his finger on a molding machine. On May 3, 1996—two days before the statute of limitations expired—the Hagens, represented by Ablan, filed this action, along with a request for the production of certain documents.

During June 1996, Slinger and Sparta requested the Hagens to voluntarily dismiss, arguing that the Hagens' suit against Sparta was barred by workers' compensation, and that the Hagens had no suit against Slinger. They also alleged in their answer that the suit was frivolous. And while they filed a motion to dismiss the case, they provided the Hagens with most of the requested documents.

By September 4, 1996, Slinger and Sparta had documented Sparta's immunity under the workers' compensation statute, and provided the Hagens with documentation of Slinger's lack of connection with the case. Slinger and Sparta again requested the Hagens' voluntary dismissal, asking for action within ten days. In December 1996, Slinger and Sparta moved for summary judgment, as well as sanctions and costs, arguing that the Hagens' action had been frivolously commenced and maintained. This motion was heard in March 1997.

The Hagens did not contest summary judgment, but objected to a finding that the action was frivolous. In April 1997, the circuit court issued an order granting summary judgment. The court held that the lawsuit was not frivolous when it was commenced; however, it became frivolous on September 14, 1996, when the Hagens failed to timely respond to Slinger and Sparta's September 4, 1996 request for voluntary dismissal. The court ordered Ablan to pay $1020 costs to compensate Slinger and Sparta for those attorney's fees

incurred after September 14, 1996. The Hagens moved for reconsideration; Slinger and Sparta moved for further costs. The court ultimately held for the manufacturing respondents and required Attorney Ablan to pay an additional $100 in costs.

Meanwhile, in September 1996, the Hagens reached a $3500 settlement agreement with George Fischer DISA, Inc. (Fischer), a non-employer defendant. Fischer contacted Heritage and learned that Heritage would not approve the settlement because Heritage felt it would not be adequately compensated under the proposed distribution plan. In April 1997, Fischer moved the circuit court to approve the settlement as subject to a § 102.29(1), STATS., division.[2] The Hagens objected but did not introduce evidence regarding their costs. The court granted Fischer's motion to approve the settlement, allocating nothing for the Hagens' costs. Before this court, the Hagens argue that: (1) Fischer had no standing to move for approval of the settlement; (2) the circuit court erred in finding § 102.29(1), STATS., applicable; and (3) it erred in allowing distribution to Heritage without proof that Heritage had paid any amounts on Wayne Hagen's behalf.

ANALYSIS

Frivolous Continuation of Suit

Whether a suit is frivolous is a mixed question of law and fact. ***State v. State Farm Fire & Cas. Co.***, 100 Wis.2d 582, 601-02, 302 N.W.2d 827, 837 (1981). Where there is a mixed question of law and fact, we determine whether the

[2] *See* footnotes 5 and 6, *infra* for the relevant statutory text.

factual finding was clearly erroneous, and whether the legal holding was correct. *Compare* ***Department of Revenue v. Exxon***, 90 Wis.2d 700, 713, 281 N.W.2d 94, 101 (1979), *aff'd* 447 U.S. 207 (1980) (reviewing court examines factual and legal holdings separately) *with* § 805.17(2), STATS. (findings of fact shall not be set aside unless clearly erroneous), *and* ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984) (appellate court determines questions of law without deference to the trial court).

The circuit court found that by September 4, 1996, Slinger and Sparta had presented the Hagens with evidence that Sparta was immune from suit as Wayne Hagen's employer. On that date, they also presented evidence that Sparta, not Slinger, bought the machine in question. It also presented evidence that Slinger was not a dual persona for Sparta, so that there was no connection between the Hagens and Slinger; therefore, the Hagens had no grounds to maintain a suit against Slinger. The Hagens did not timely respond within the ten days requested by respondents, and did not meaningfully respond until the matter was heard in April 1997.

At the April hearing, The Hagens did not contest Slinger and Sparta's motion for summary judgment, but argued against a finding of frivolousness. Relying on the information provided to the Hagens and their lack of action in response, the court found that continuing the action after receiving the information was frivolous, even though the action had not been frivolous at the outset. This is a question of law that we review independently.

The Hagens now argue that despite their request for document production, they never received until January of 1997 an "Exhibit B," which they believed would clarify the relationship between Slinger and Sparta. Exhibit B is

referenced in Sparta's purchase order dated March 1, 1988. The pertinent part of the purchase order reads: "The proposal made by BMM Weston in its letter dated February 26, 1988, and mistakenly addressed to Slinger Foundry Co., Inc. is considered as addressed to Sparta Manufacturing Co., Inc., the actual purchaser. The proposal is accepted by Sparta."

We reject this argument. Though the Hagens are correct that they could not know the contents of Exhibit B until they received it, there is nothing in the March 1, 1988 purchase order which suggests that Exhibit B would contain information which would help the Hagens defeat Slinger and Sparta's motion for summary judgment. The paragraph of the purchase order which the Hagens believe assists them reads: "A copy of the subject letter stating the terms proposed by Seller and hereby accepted by buyer, marked "Exhibit B" is attached hereto and incorporated herein by reference."

The most that a reasonable reading of Exhibit B provides is that the terms of the sale, proposed by the seller of the machine, were acceptable to Sparta. The Hagens assert that when they received Exhibit B, an inference could be drawn that Slinger made the decision to purchase the machine. We have read Exhibit B, and are unable to see how the Hagens reach this conclusion. Exhibit B addresses a problem in exchange rates which arose because the machine was manufactured in England and imported into the United States. And we see no need to examine Exhibit B in the first place, because we are reviewing the trial court's decision that the Hagen's lawsuit became frivolous in September, 1996, four months before they received Exhibit B. We accept the Hagen's general proposition that a plaintiff's lawsuit cannot be frivolous if the lawsuit hinges on a relevant document requested but not produced. However, while the Hagens knew of a missing document, they had no reasonable expectation that the document might be helpful

to them. We reject the assertion that a plaintiff may stave off summary judgment by continuous demands for irrelevant documents.

As of September 4, 1997, plaintiffs knew that Slinger and Sparta were separate entities, that Sparta was immune from suit under workers' compensation law, and that Slinger never owned the machine in question. This was all the information a reasonable attorney would have needed to dismiss the suit as to both Slinger and Sparta. ***State Farm***, 100 Wis. 2d at 600, 302 N.W.2d at 826.[3]

Settlement Distribution

The Hagens argue that the circuit court erred when it: (1) permitted Fischer to bring a motion to allocate settlement proceeds; and (2) approved a settlement allocation awarding money to Heritage without evidence that Heritage had paid any amounts to Wayne Hagen, or how much was paid. We reject both arguments.

Underlying the Hagens' first argument is their theory that this was never a Chapter 102, STATS., case.[4] We disagree. The reason it was frivolous to continue this suit is that Wayne Hagen's only viable claim for injury arose under

[3] Slinger and Sparta argue that this appeal is frivolous, and that they are entitled to fees and costs for being compelled to defend this appeal. We will not award fees and costs. Despite the Hagens' position—a position that we and the circuit court have found had hardened into frivolousness as this suit developed—the entire dispute here could have been avoided had Slinger and Sparta provided Exhibit B. Because the record shows that the Hagens repeatedly requested the exhibit, and because Slinger and Sparta acknowledge that they failed to make Exhibit B available until one month after they moved for summary judgment, we deny the motion for costs and fees in this appeal.

[4] The Hagens have argued this position consistently. While we reject the argument, we cannot conclude that it is so meritless as to entitle Slinger and Sparta to costs and fees for a frivolous appeal.

the workers' compensation statute. Further, according to the Hagens' own complaint, Heritage was made a party to the suit because of its status as the workers' compensation insurer "due to its subrogated interests for payment of workers' compensation benefits pursuant to sec. 102.29, STATS."

Section 102.29(1), STATS., provides that a party situated as Fischer was, is a non-employer third party.[5] Section 102.29(1) also provides that distribution of any settlement is void unless approved by the court, and that any workers' compensation insurer who has paid a claim has standing to bring a tort claim against a non-employer third party for compensation.[6]

Thus, Fischer was necessarily an interested party. Until the settlement was approved by the court, Fischer remained a party to the proceedings, and was statutorily liable for claims brought by Heritage, as well as by the Hagens. In order to remove itself from the proceedings, Fischer had to have the settlement approved. This is so because after making its offer, Fischer waited several months for the Hagens to act on distribution, and finally moved after the Hagens failed to act. We reject the Hagens' argument that Fischer had no standing to move for settlement distribution.

Regarding payment to Heritage, the Hagens argue that the circuit court erred in approving a settlement to Heritage. Section 102.29(1), STATS.,

[5] Section 102.29(1), STATS., provides in relevant portion: "The making of a claim … against an employer … for the injury … shall not affect the right of the employe … to make claim or maintain an action in tort against any other party for such injury … hereinafter referred to as a 3rd party;…"

[6] Section 102.29(1), STATS., also provides in relevant portion: "If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim …. A settlement of any 3rd party claim shall be void unless said settlement … is approved by the court …."

provides that the proceeds of any claims shall be divided as follows: (1) the reasonable cost of collection shall be allowed; (2) then one-third "shall in any event" be paid to the injured employee; and (3) the workers' compensation insurer shall be compensated out of the balance for any payments it made.

The Hagens argue, however, that Heritage never offered proof that it had paid any amounts on Wayne Hagen's behalf. Heritage replies that this issue was never raised before the circuit court, and was therefore waived. We have examined the hearing transcript, and conclude that this is correct. We will therefore not consider the issue here. ***Zeller v. Northrup King Co.***, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985).

Further, an attachment to an exhibit that Ablan's paralegal filed in the circuit court indicates that in a letter dated February 14, 1997, Ablan affirmatively advised his clients that Heritage would be entitled to the balance of the settlement after the Hagens' claims were paid. In light of Ablan's letter, he will not be heard to argue that Heritage was not entitled to compensation. *See* ***Soo Line R.R. Co. v. Office of the Comm'r of Transp.***, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992) (where party adopts one position, it will not be heard to adopt another).

By the Court.—Order affirmed.

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