COURT OF APPEALS DECISION DATED AND FILED

September 14, 1999

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. 98-3244

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

DORENE A. GOSWITZ,

PLAINTIFF-APPELLANT,

V.

HARLAN R. HEINZ AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. Dorene Goswitz appeals a summary judgment dismissing her malpractice claims against Harlan Heinz and St. Paul Fire and Marine Insurance Company. Goswitz and Paul Johnson were involved in a custody and placement dispute regarding their son. Heinz, a licensed

psychologist, appeared as an expert witness at the custody trial and testified on Johnson's behalf. Goswitz argues that the trial court erroneously dismissed her malpractice claim against Heinz on the basis of witness immunity. She argues that she demonstrated that Heinz owed her a duty of care and was not relieved of that duty solely because he testified as a witness in a custody and placement dispute. Goswitz further argues that the trial court erroneously found that her malpractice claim was frivolous and approved excessive attorney fees under § 814.025, STATS.

Because Goswitz failed to establish a prima facie case and failed to rebut Heinz's prima affirmative defense of witness immunity, she failed to establish an issue of material fact. We conclude that Goswitz. Goswitz's claim is that Heinz's opinions about her were negligently obtained because he did not even talk to her. Heinz's opinions, however, related only to the custody litigation. We further conclude that the record supports the trial court's finding of frivolousness and reasonable attorney fees. We affirm the summary judgment.

We review a summary judgment de novo, applying the same standards as the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). Summary judgment is appropriate if the material facts are undisputed and the reasonable inferences lead to one conclusion. ***Id***. We will affirm the trial court if the court reached the correct result, even if we disagree with its reasons. ***Negus v. Madison Gas & Elec***., 112 Wis.2d 52, 61 n.3, 331 N.W.2d 658, 664 n.3 (Ct. App. 1983).

We first examine the complaint to determine whether it states a claim, and then the answer to determine whether it raises a material issue of fact. ***Brownelli***, 182 Wis.2d at 372, 514 N.W.2d at 49. Next, we examine the moving parties' affidavits and supporting documents to determine whether that party has

established a prima facie case for summary judgment. ***Id***. If so, we review the opposing parties' affidavits and supporting documents to determine whether there are any material facts in dispute. ***Id***. at 373, 514 N.W.2d at 49-50. A party may not rest on mere allegations in the pleadings to establish a genuine issue of material fact. Section 802.08(2), STATS.

Goswitz filed a malpractice complaint against Heinz alleging that he is a licensed clinical psychologist who interviewed, examined and treated Paul Johnson. The complaint alleges that Heinz was negligent in "generating and providing to Paul Johnson and/or his agents and the Chippewa County Circuit Court statement[s] and opinions regarding custody and placement of the minor child of the plaintiff … without adequate evaluation of said child [and] without adequate evaluation … observation or meeting with [Goswitz]." It further alleges that Heinz was negligent for providing statements to Johnson, his agents and the court regarding Goswitz's intentions, mental status and actions without any contact with her.

The complaint also alleged "severe emotional distress" and a "severe and disabling effect on her relationship with her son as a result of the statements and opinions provided by [Heinz] in the Chippewa County Circuit Court which was [sic] relied upon by the Chippewa County Circuit Court in its decision regarding the placement of the petitioner's minor child in Chippewa County Circuit Court Case No. 90-PA-21," therefore requiring counseling and treatment.[1]

[1] The complaint also alleged a defamation claim; its dismissal is not an issue raised on appeal.

Heinz denied the allegations and moved for summary judgment based upon a witness immunity defense. In support of his motion, he offered his affidavit and several pages of his testimony at the custody and placement hearing. The transcripts showed that Heinz testified about Johnson's concerns regarding custody and placement issues and that he successfully treated Johnson for mild depression. Heinz also testified regarding his observations of Johnson's relationship with his son and further testified that he never met Goswitz.

Goswitz filed no opposing affidavits or proof. The trial court granted Heinz summary judgment based upon witness immunity and dismissed the complaint. The court also determined that the action was frivolous and awarded costs and fees pursuant to § 814.025, STATS.

Goswitz argues that Heinz owes a common law duty of ordinary care to refrain from doing any act that will cause foreseeable harm to her. *See* ***A.E. Invest. Corp. v. Link Builders***, 62 Wis.2d 479, 483, 214 N.W.2d 764, 766 (1974). She argues that ***Sawyer v. Midelfort***, 217 Wis.2d 795, 802, 579 N.W.2d 268, 270 (Ct. App. 1998), supports her claim. ***Sawyer*** recognized parents' negligence claims against their daughter's therapist and psychiatrist to recover damages stemming from injuries caused by their daughter's false memories of abuse. While ***Sawyer*** addresses the potential liability to third persons for a psychiatrist's negligent treatment of his patient, it does not address the witness immunity issue.

We conclude that Heinz has demonstrated an affirmative defense to Goswitz's malpractice claim. "Statements made in the course of judicial proceedings are absolutely privileged and insulate the speaker from liability so long as the statements 'bear a proper relationship to the issues.'" ***Snow v. Koeppel***, 159 Wis.2d 77, 80, 464 N.W.2d 215, 216 (1990) (quoted source

omitted). "The rule extends to attorneys, witnesses and physicians appointed to examine a person in connection with judicial proceedings." ***Id***. at 80-81, 464 N.W.2d at 216. The determination whether the statements are pertinent and relevant to the issues is a question of law for the court and not a fact issue for the jury. *See* ***id***. at 81, 464 N.W.2d at 216. When making this inquiry, all doubts should be resolved in favor of relevancy. *See* ***id***.

Goswitz attempts to distinguish ***Snow*** on the basis that ***Snow*** involved a court appointed psychiatrist and that here, Heinz was privately retained. This is not a valid distinction. It makes no difference whether the witness was court appointed. *See* RESTATEMENT OF TORTS § 588 (1934), cited with approval in ***State v. Cardenas-Hernandez***, 214 Wis.2d 71, 81-82, 571 N.W.2d 406, 409 (Ct. App. 1997), which states: "[A] witness is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding and as part of a judicial proceeding in which he is testifying, if it has some relation thereto."

Next, Goswitz attempts to draw a distinction in the types of professional services Heinz allegedly performed. She essentially argues that while Heinz may be immune from liability arising out of his testimony in court, he is not immune for negligent out-of-court treatment he provided to Johnson and the foreseeable harm it caused others. This may be a valid distinction. Wisconsin courts apply a functional analysis to determine whether such absolute immunity attaches to a particular defendant: "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." ***Paige K.B. v. Molepske***, 219 Wis.2d 418, 425, 580 N.W.2d 289, 292 (1998) (quoted source and emphasis omitted).

Giving Goswitz's complaint a liberal interpretation, it does not draw the distinction she now advances.[2] Assuming that it could be construed to allege a claim against Heinz arising out of services provided outside the context of the judicial proceedings, Goswitz's claim still fails. The record before us discloses that all of Heinz's activities of which Goswitz complains were related to his anticipated testimony.

Heinz's summary judgment proofs lead to no inference other than that his services were performed in connection with his testimony in the custody litigation.[3] As a result, he is immune from liability arising out of those services. *See* ***Snow***, 159 Wis.2d at 80, 464 N.W.2d at 216. Although Goswitz now argues that Heinz performed services outside of his role as an expert witness, she submitted no affidavit or other proof supporting her assertion.[4] Because Goswitz has not offered any proofs to rebut Heinz's affirmative defense of witness immunity, she fails to establish a genuine issue of material fact.[5]

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[2] Goswitz's appellate brief is inconsistent with respect to her characterization of her claim. For example, she states: "Because Johnson wanted to continue the litigation about the custody and placement of the child, he asked Heinz to provide professional analysis of the family, including Goswitz." This contention supports the inference that Heinz's services were provided in connection with the custody suit.

[3] Goswitz does not make any claims arising out of Heinz's treatment of Johnson's mild depression.

[4] Nor did Goswitz file summary judgment proofs showing a standard of care, that the services provided were negligent and caused her injury. "To establish liability, a plaintiff must prove not only that the defendant's conduct was negligent, but also that the negligent conduct was the 'cause or a substantial factor in causing the eventual injury.'" ***Ollman v. Wisconsin Health Care Liab. Ins. Plan,*** 178 Wis.2d 648, 666, 505 N.W.2d 399, 405 (Ct. App. 1993) (quoted source omitted).

[5] We recognize that the trial court's reasoning was not identical to our reasons. Because our review is de novo and our discussion is dispositive, we do not extensively address the trial court's analysis. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

Next, Goswitz argues that the trial court erroneously determined that her action was frivolous. The trial court found the action frivolous because Goswitz commenced her suit in bad faith and because her attorney should have known that it was without a reasonable basis in the law. The court stated:

> The doors to the courthouse have to be open to imaginative, thoughtful expansions of the law and, thus, the imposition of sanctions as a matter in a frivolous action is one that the court never enters into lightly ….
>
> ….
>
> [Goswitz] indicated that the reason for this action was 'because I would like [Heinz] to stop giving opinions about me and my son … without knowing me. I feel that it continues yet today, as witnessed by Mr. Johnson being in the courtroom "

The court found that there was no discussion of damages between Goswitz and her attorney. It determined that this indicated the object of the action was not to collect damages, but to send a "chilling effect to Dr. Heinz to withdraw from participation in this case" and "thus be unavailable to provide opinions in court …." The court found that was an improper motive under § 814.025, STATS.

In order to impose sanctions against a party for a frivolous claim under § 814.025(3), STATS., the court must find one of the following:

> (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.

Whether the party or attorney knew or should have known that the claim was without reasonable basis in law presents a mixed question of law and fact. ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 187 (Ct. App. 1984). A determination of what a reasonable attorney would or should have known with regard to the facts requires the trial court to determine what those facts were. ***Id***. at 513, 362 N.W.2d at 187-88. However, the legal significance of those findings presents a question of law. ***Id***. at 513, 362 N.W.2d at 188. We decide questions of law without deference to the trial court. ***Id***. at 514, 362 N.W.2d at 188. If the record is sufficient, we can decide as a matter of law whether a reasonable attorney should have known whether the action was without a proper basis in law. *See* ***Richland County v. DHSS***, 146 Wis.2d 271, 275, 430 N.W.2d 374, 376 (Ct. App. 1988).

Goswitz argues that Heinz claimed in his summary judgment motion that there were no factual disputes and that only an issue of law existed: whether Heinz demonstrated a witness immunity defense. She contends that numerous cases support her claim that Heinz is not immune from liability for out-of-court treatment provided in his office. As a result, she asserts that her malpractice claim had a basis in the law and was not frivolous.

Goswitz's argument fails to recognize that as the responding party to a motion for summary judgment, it was incumbent upon her to demonstrate an issue of material fact. *See* § 802.08(2), STATS. Heinz's proofs demonstrated that the services Goswitz complains of were provided in connection with litigation. To rebut his motion, Goswitz was required to submit some factual basis for her assertion that Heinz provided services not connected to the litigation and failed to meet the standard of professional care in doing so.

The test is not whether a party can prevail, but whether the party's position is so indefensible that it is frivolous and the party or its attorney should have known it. *See* ***Stoll***, 122 Wis.2d at 517, 362 N.W.2d at 188. Section 814.025, STATS., requires an adequate investigation of the facts as well as the law. Here, the total lack of proofs necessary to support her claim would lead a reasonable party to conclude that the assertion of the claim would be frivolous. Because Goswitz provided no facts to rebut Heinz's summary judgment motion based upon witness immunity, the trial court was entitled to find that the claim was so indefensible that her attorney should have known it. We therefore affirm the trial court's assessment of costs and attorney fees.[6]

Next, Goswitz argues that the attorney fees awarded were excessive[7] because she agreed to dismiss her defamation claim on December 10, 1997. She contends that Heinz did not agree to the offer of dismissal and that the bills submitted by counsel demonstrate substantial time spent researching and briefing that claim after December 10.

The record does not support Goswitz's argument. In support of her position, Goswitz refers to a copy of her counsel's letter and proposed stipulation to dismiss the defamation claim *without costs*. We are unpersuaded that an offer to dismiss without costs is equivalent to an offer of dismissal and, consequently, Goswitz's argument fails.

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[6] Because the trial court's decision reflects its analysis proceeded under § 814.025, STATS., we do not address Heinz's response that § 802.05, STATS., provides alternative support for the award.

[7] The court approved fees and expenses of $3,046.91 for one of the attorneys representing Heinz and $5,651.50 for his other attorney.

Finally, Goswitz argues that Heinz inappropriately had two law firms representing him, and as a result the fees were duplicative and unnecessary. The record, however, indicates that one firm represented Heinz and his insurance carrier and the other firm represented Heinz for potential liability not covered by insurance. Goswitz does not develop her argument or provide legal authority to support it. This court declines to abandon its neutrality in an attempt to develop Goswitz's argument for her. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct.App.1987).

By the Court.—Judgment affirmed.

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