COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0565

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

SCOTT L. HARRIS,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

TODD PONICK,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott Harris appeals a judgment dismissing his multicount complaint against Todd Ponick. Ponick cross-appeals the denial of his

motion for costs and attorney fees based on Harris's continuing this frivolous action. We conclude that the trial court properly dismissed Harris's claims, but erred when it concluded that the claims were not frivolous. We further conclude that Harris's appeal is frivolous. Therefore, we affirm the dismissal of Harris's claims, reverse the denial of Ponick's frivolousness claim and remand the cause for imposition of costs and attorney fees incurred in the underlying action and on appeal.

¶2 Harris and Ponick were partners in a chiropractic business. The partnership agreement contained a covenant not to compete that precluded Ponick from opening a chiropractic business within twenty-five miles of Harris's business for five years following termination of the partnership. After the partnership dissolved, Ponick's attorney notified Harris that the noncompete clause was invalid and that Harris would open a chiropractic business two to three miles from Harris's office. The attorney's letter informed Harris that any attempt to enforce the invalid agreement would be considered malicious and frivolous.

¶3 Harris brought this action alleging breach of contract, or in the alternative, requesting reformation of the contract, as well as causes of action for negligent conspiracy, civil conspiracy, negligence, intentional misrepresentation, tortious interference with his business and libel. The trial court granted summary judgments dismissing all of the claims except tortious interference with business relationships and libel. Harris abandoned the libel claim at trial. In a trial to the court, after the close of Harris's case, the court directed verdict in Ponick's favor, finding that Harris failed to present any evidence that Ponick interfered with Harris's relationship with his patients.

¶4 The trial court properly dismissed Harris's breach of contract action on summary judgment because the noncompete agreement is unenforceable under § 103.465, STATS. To be enforceable, a covenant not to compete must meet a five-part test: (1) it must be reasonably necessary for the protection of the employer; (2) it must provide a reasonable time restriction; (3) it must provide a reasonable territorial limit; (4) it must be reasonable as to the employee; and (5) it must be reasonable as to the general public. *See* ***Chuck Wagon Catering v. Raduege***, 88 Wis.2d 740, 751, 277 N.W.2d 787, 792 (1979). Harris conceded in his complaint that the five-year restriction was not reasonable. His brief on appeal addresses the other four tests, but does not argue that the time restriction was reasonable. The trial court correctly concluded that a five-year restriction for a business that has contact with patients on a daily, weekly or monthly basis is unreasonable and unenforceable. Under the terms of § 103.465, if any portion of the covenant not to compete is unreasonable, the entire covenant fails.

¶5 Harris's position in the trial court and on appeal has no basis in law or equity and is not supported by a good faith argument for extension, modification or reversal of existing law. Therefore, it is frivolous. *See* §§ 814.025 and 809.25(3), STATS. Harris's attempt to enforce the noncompete agreement depends on his ignoring the unreasonableness of the time restriction.

¶6 The trial court also properly refused to reform the contract, and Harris's attempts to seek reformation in the trial court and in this court are frivolous. Section 103.465, STATS., prohibits the court from saving an invalid noncompete agreement by modifying its terms. *See* ***Streiff v. American Family Mut. Ins. Co.***, 118 Wis.2d 602, 614, 348 N.W.2d 505, 512 (1984). Minimal legal research would have disclosed that the Wisconsin Supreme Court has long held that reformation is not available in this type of action because the legislature, by

adopting § 103.465, opted not to give effect even to the parts of the covenant that would be a reasonable restraint when any part of it is unreasonable. *See* ***id***.

¶7 Harris's attempts to sue in tort to make up for the deficiencies in the contract are also frivolous. His tort claims impermissibly attempt to enforce indirectly a contract that cannot be enforced directly. *See* ***Adelmeyer v. Wisconsin Elec. Power Co.***, 135 Wis.2d 367, 370-71, 400 N.W.2d 473, 474 (Ct. App. 1986). Harris's allegations of conspiracy and negligence for creating the invalid contract are nothing more than an attempt to circumvent § 103.465, STATS., by labeling the creation of the invalid agreement a tort. Harris may not enforce the unlawful restrictive agreement merely by pleading actions sounding in tort regarding the creation of the agreement.

¶8 In addition, all of the torts Harris alleges are unsupported by facts and/or lack a valid legal theory, and are therefore frivolous. "Negligent conspiracy" is not a recognized claim and is, in fact, a contradiction in terms. Harris attempts to justify pleading deliberate negligence by comparing it to "gross negligence," a claim that has not existed in this state since 1962. *See* ***Bielski v. Schulze***, 16 Wis.2d 1, 14, 114 N.W.2d 105, 111-12 (1962).

¶9 Harris's allegations that Ponick conspired with his attorney to create the unenforceable agreement is based entirely on Harris's speculation and conjecture. Harris offered no evidence that Ponick or his attorney knew that the five-year agreement was unenforceable, and no evidence of concerted action and agreement between them. Harris admitted in a deposition that he lacked evidence to support this claim. Conspiracy cannot be established by suspicion and conjecture, *see* ***Maleki v. Fine-Lando Clinic***, 162 Wis.2d 73, 84, 469 N.W.2d 629, 633 (1991), and Harris's attorney should have abandoned that claim for lack

of evidence. A party has an ongoing responsibility to ensure that his or her action is well-grounded in fact and law. Once Harris knew or should have known that his claims were not supported by any evidence, he should have dismissed the action to avoid sanctions. *See* ***Jandrt v. Jerome Foods***, 227 Wis.2d 531, 563, 597 N.W.2d 744, 760 (1999).

¶10 Harris's intentional misrepresentation claim also fails for lack of evidence. He alleged that Ponick misrepresented his intent to enter into a partnership and work together and that he would eventually buy Harris out when Harris retired. He also alleges that Ponick suggested a capital account, and misrepresented some matter relating to the account. It was Harris, however, who decided to terminate the partnership. He is in no position to accuse Ponick of misrepresenting Ponick's intentions regarding continuation of the partnership. The record also shows that Ponick indicated that a capital account would give them some tax advantages but that they should consult an attorney. Harris's brief does not address the intentional misrepresentation elements or identify any arguably misrepresented existing fact upon which Harris could claim justifiable reliance. *See* ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis.2d 306, 319-22, 475 N.W.2d 587, 591-93 (Ct. App. 1991). Both of the statements alleged to have been misrepresentations involved Ponick's subjective beliefs or opinions.

¶11 After Harris presented his case for tortious interference with business relationships, the trial court directed a verdict in favor of Ponick. In a trial to the court, the evidence is not viewed most favorably to the plaintiff on a motion to dismiss at the close of the plaintiff's case. *See* ***Household Util., Inc. v. Andrews Co.***, 71 Wis.2d 17, 28, 236 N.W.2d 663, 669 (1976). The trial court's findings of fact will not be set aside unless they are clearly erroneous. *See* § 805.17(2), STATS.

¶12 The record supports the trial court's finding that Harris failed to prove any unlawful interference with his business or any damages that resulted from Ponick's actions. Harris conceded that he had no proof that Ponick did anything to induce Harris's patients to switch to Ponick other than Ponick's request, during the existence of the partnership, that Harris switch some patients to him. Harris consented to the switch and instructed the staff to assign those patients to Ponick. Harris has not established any wrongdoing in Ponick's request. Harris conceded that he had no evidence of any kind that Ponick intentionally persuaded any of Harris's patients to discontinue treatment with Harris. He called no patients to testify that Ponick improperly induced, pressured or threatened any patients to leave Harris's care. Harris had no evidence that Ponick initiated any contact with any of Harris's patients after the dissolution of the partnership, and testified that it was just as likely that his patients left for other reasons.

¶13 The damages identified by Harris's witnesses related solely to competition by Ponick and involved no wrongful acts that damaged Harris. Harris's economic expert could only conclude that the value of Harris's chiropractic practice diminished because of Ponick's competition. Competition is not actionable in the absence of a valid noncompete agreement or other tortious interference. We conclude that Harris's continuing this action without any proof of liability or causally related damages was frivolous as a matter of law. *See* ***Juneau County v. Courthouse Employees***, 221 Wis.2d 630, 639, 585 N.W.2d 590, 591 (1998).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. The circuit court shall: (1) assess the costs and reasonable attorney fees incurred from commencement of the lawsuit through this

appeal; (2) determine against whom the assessment shall be made; and (3) award such costs and fees.

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