**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2001

**Cornelia G. Clark
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*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 00-1844

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

DAWN M. SABEL AND JOHNNIE D. SABEL,

PLAINTIFFS-RESPONDENTS,

V.

MARTIN E. ROSENTHAL,

DEFENDANT-APPELLANT,

**RICHARD L. ZAFFIRO, CNA INSURANCE CO.,
THOMAS J. NIEMIEC, AND MINNESOTA
LAWYERS MUTUAL INSURANCE CO.,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Martin E. Rosenthal appeals from a judgment entered in his favor, granting his motion to reopen and vacate a default judgment that Dawn M. and Johnnie D. Sabel secured against Rosenthal on August 25, 1987. Rosenthal challenges only that part of the judgment which ordered the Sabels to pay sanctions to him in the amount of $5,523. Rosenthal claims the trial court erred in numerous respects when it failed to order the Sabels to pay the full amount of costs and fees that Rosenthal incurred in having to litigate the default judgment. Because the trial court erred when it determined the sanctions amount, we reverse and remand with instructions to the trial court to determine what amount would be reasonable to sanction the Sabels for their conduct.

I. BACKGROUND

¶2 In 1986, the Sabels filed a *pro se* summons and complaint against Rosenthal and others, alleging legal malpractice. Proper service was never effected against Rosenthal and, as a result, he never appeared in the action. In May 1987, Dawn Sabel, a recent law school graduate, filed a motion seeking a default judgment, which misrepresented to the trial court that the Sabels had accomplished proper service. Based on these representations, the trial court granted a default judgment in favor of the Sabels for $60,000.

¶3 In 1997, the Sabels sought to enforce the judgment in Illinois through a garnishment action. When Rosenthal was served with this action, he sought to vacate the judgment and dismiss the underlying action in Wisconsin. The Sabels stipulated to reopening and vacating the 1996 default judgment, but they would not agree to pay Rosenthal's costs and fees. On February 5, 1998, the trial court granted the motion to reopen, vacated the default judgment, and dismissed the case against Rosenthal with prejudice. Rosenthal requested that the

trial court sanction the Sabels for lying to the court. He suggested that the proper sanction would be the total amount of costs and fees he incurred in having to wade through the legal morass created as a result of the Sabels' misrepresentations.

¶4 Although Rosenthal presented evidence that his costs and fees exceeded $10,000, the trial court imposed the $5,523 sanction for several reasons, including: (1) that Dawn Sabel could not be responsible for costs incurred in Illinois because she did not appear in that action or sign the Illinois pleadings; (2) that the parties' attempt to mediate this matter was unsuccessful; and (3) that Rosenthal made no attempt to mitigate his damages. Judgment was entered. Rosenthal now appeals.

II. DISCUSSION

¶5 The trial court relied on its inherent authority when it sanctioned the Sabels.[1] A trial court has the inherent authority to sanction parties for wrongful conduct. ***Latham v. Casey & King Corp.***, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964). The inherent authority extends to the trial court's ability to assess attorney fees as a sanction. ***Schaefer v. Northern Assurance Co.***, 182 Wis. 2d 148, 163, 513 N.W.2d 615 (Ct. App. 1994). The decision whether to award sanctions is within the trial court's discretion and we will not reverse absent an erroneous exercise of discretion. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991).

[1] The parties to this case disagree as to whether sanctions are also permissible under WIS. STAT. §§ 802.05 and 814.025 (1997-98). Because we resolve the matter on the trial court's inherent authority to sanction, we need not resolve the parties' disagreement.

¶6 Here, the trial court erroneously exercised its discretion when it based an award of sanctions on three incorrect grounds. First, it concluded that Dawn Sabel could not be responsible for fees and costs incurred in the Illinois enforcement action of the Wisconsin default judgment because the trial court's authority did not extend to Illinois, and because she was not the attorney responsible for the Illinois case. Not so.

¶7 According to the United States Supreme Court, a tribunal may impose sanctions for conduct before other courts, as long as the attorney or party facing the sanctions has received an appropriate hearing. ***Chambers v. NASCO, Inc.***, 501 U.S. 32, 57 (1991). Here, Dawn Sabel received a full hearing. The trial court, therefore, may impose sanctions related to the Illinois matter, which was set in motion by the Sabels' improper Wisconsin action. Likewise, the trial court's reasoning that the Sabels could not be sanctioned for the actions of their Illinois attorney was incorrect. A litigant cannot avoid the consequences of his/her attorney's conduct. ***Johnson***, 162 Wis. 2d at 284.

¶8 Second, the trial court noted that the parties were unable to resolve the fees dispute through mediation. Although the trial court stated that it was not making a finding of fact regarding the failed mediation, WIS. STAT. §§ 802.12(4) and 904.08 (1997-98) prohibit trial courts from even considering the parties' mediation statements or positions.

¶9 Third, the trial court erred when it imposed upon Rosenthal a duty to mitigate his damages, or make a "constructive appearance" with the court in an attempt to clear up the matter. The trial court's written decision devotes a substantial amount of time to Rosenthal's failure to act. The trial court found: that "Rosenthal failed to investigate the status of the claim"; that Rosenthal "could

have come to the Circuit Court for Milwaukee County from his home in Chicago … and he could have examined the court records … or he could have placed a phone call to the … Court to find out the status of the case"; that "Rosenthal … could have … waited until the statute of limitations expired and thereafter could have contacted Ms. Sabel and explained her failure to get proper service"; and that if Rosenthal would have taken any of these steps, he could have "mitigated his damages." The trial court's findings in this regard were based in part on the fact that at the time the Sabels filed the legal malpractice action, Rosenthal was an experienced attorney, and Dawn Sabel was a "novice" attorney who had just graduated from law school.

¶10 The trial court's discussion on this matter is erroneous. A defendant, whether an experienced attorney or not, has no duty to investigate or track down improperly started cases against him or her. There is no obligation until proper service is accomplished. WIS. STAT. §§ 801.05, 801.11. The trial court's suggestions would have required Rosenthal to submit himself to a "constructive appearance" in an action where he had not even been served. Such conduct may have resulted in a waiver of Rosenthal's claim that the Sabels failed to properly effect service. *See* ***Honeycrest Farms, Inc. v. Brave Harvestore Systems, Inc.***, 200 Wis. 2d 256, 265, 546 N.W.2d 192 (Ct. App. 1996).

¶11 Similarly, the trial court's finding that Rosenthal's failure to act reasonably increased the amount of his damages is not controlling. Contributory negligence is not a defense to fraud. ***United States v. Berman***, 21 F.3d 753, 757 (7th Cir. 1994). Likewise, the Sabels have failed to produce, and we are unable to locate, any controlling case law which suggests that a mitigation-of-damages analysis applies in an action involving sanctions for abuse of the legal process by an attorney.

¶12 "'An injured party has a duty to use reasonable means under the circumstances to avoid or minimize his or her damages.'" ***Langreck v. Wisconsin Lawyers Mut. Ins. Co.***, 226 Wis. 2d 520, 524, 594 N.W.2d 818 (Ct. App. 1999) (citation omitted). "If the effort, risk, sacrifice or expense which the injured person must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline to incur it, the injured party's failure to act will not bar recovery of full damages." ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978). Here, however, Rosenthal was injured when the Sabels filed the Illinois enforcement action based on the improper Wisconsin judgment, and started to garnish his wages. At that point, Rosenthal took reasonable steps to remedy the injury. Until that point, it would not be reasonable to expect an individual to investigate and clear up the mess created when the Sabels violated the procedural statutes, and made false representations to the trial court in order to secure the default judgment.

¶13 In sum, we are compelled to conclude that the trial court's decision is erroneous for the aforementioned reasons. Accordingly, we must reverse the judgment and remand the matter for the trial court to conduct further proceedings necessary to determine what amount of sanctions would reasonably compensate Rosenthal for the Sabels' improper conduct.

By the Court.—Judgment reversed and cause remanded with directions.

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