COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 01-2011 Cir. Ct. Nos. 99CV5303 & 00CV1705

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

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions*.

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

¶1 PER CURIAM. This case comes before us on remand from the supreme court. On October 21, 2002, the supreme court issued an order granting the petition for review in the case of ***Morters v. Barr***, 2002 WI App 134, 255 Wis. 2d 833, 646 N.W.2d 855, solely with respect to the issue of frivolousness. The supreme court also vacated our decision with respect to that issue and directed us to reconsider whether the issue was frivolous, and to make specific findings as required by WIS. STAT. RULE 809.25(3)(c) (1999-2000).[2]

¶2 Upon reconsideration, we conclude that the appeal is not frivolous pursuant to WIS. STAT. RULE 809.25(3)(c), because we cannot conclude that the entire appeal is frivolous as required by ***Nichols v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994). However, as our initial alarm was with the complete lack of substance in the appellants' brief, we further conclude that the appellants' brief failed to comply with the requirements of WIS. STAT. RULE 809.19, and accordingly, award the respondents all costs and fees on appeal, including attorney fees, pursuant to WIS. STAT. RULE 809.83(2).

[1] Judge John A. Franke presided over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

I. BACKGROUND.

¶3 Ronald Morters was involved in a multi-car accident when a driver crossed the centerline during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries. The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident.

¶4 Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict. The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶5 Ronald Morters then challenged the motion filed by his first two attorneys requesting that their legal fees be paid out of the settlement. The trial court ruled that the Morters did not have just cause to discharge Barr or the second

law firm, and that these attorneys were entitled to their fees out of the arbitration award.

¶6 Morters and his granddaughter then started legal malpractice suits against Barr,[3] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; and that he had failed to demand the policy limits or file a statutory offer to settle. During the pendency of this action, the trial court consolidated the two lawsuits over the objections of the Morters, granted partial summary judgment to the respondents, and granted a motion in limine brought by the respondents. Later, the trial court directed a verdict for the respondents at the close of the Morters' case-in-chief.

¶7 Ronald and Shannon Morters then appealed both the order granting partial summary judgment and a later judgment entered in the respondents' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents had also filed a motion requesting frivolous costs on appeal. We affirmed the trial court in all respects. We also ruled that the appeal was frivolous, and remanded the matter to the trial court for a determination of frivolous costs on appeal.

¶8 On May 28, 2002, the Morters filed a petition for review with the supreme court. On October 21, 2002, the supreme court: (1) granted the petition for review solely with respect to the issue of whether the appeal was frivolous;

[3] Ronald's wife, Ann, died before either suit was filed.

(2) vacated this court's decision solely as to the issue of frivolousness; and (3) remanded the matter to this court for reconsideration of whether the appeal was frivolous.

II. ANALYSIS.

¶9 An appeal can be found frivolous if the party or the attorney for the party knew or should have known that the appeal 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. *See* WIS. STAT. RULE 809.25(3)(c)2; *see also* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 240-41, 517 N.W.2d 658 (1994). However, to award attorney fees for a frivolous appeal, this court must conclude that the entire appeal is frivolous. ***Nicholas v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994).

¶10 "The question of whether a reasonable attorney and litigant would or should have concluded that a particular claim is without a reasonable basis in law or equity presents a mixed question of law and fact and not a question of fact alone." ***State v. State Farm Fire & Cas. Co.***, 100 Wis. 2d 582, 601, 302 N.W.2d 827 (1981). "When mixed questions of law and fact are presented to this court, there are really two component questions which must be answered. The first question is what, in fact, actually happened; the second question is whether those facts, as a matter of law, have meaning as a particular legal concept." ***Department of Revenue v. Exxon Corp.***, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979).

¶11 The respondents have asked us to award attorney fees for this appeal under WIS. STAT. RULE 809.25(3). While at least two of the appellants'

arguments in this appeal may be frivolous, and have been delineated as such by the trial court, we cannot conclude that the entire appeal is frivolous.[4] Because, we have no authority to find individual arguments in a brief frivolous, *see* ***Nichols***, 190 Wis. 2d at 365 n.2, we conclude that the appeal is not frivolous.

¶12 However, this leads us back to our original problem with the Morters' appeal. The appellants' brief contains no specificity of argument other than general assertions of error and long recitations of the law. Therefore, we conclude that the appellants' brief fails to satisfy WIS. STAT. RULE 809.19(1)(e), which requires:

> An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

¶13 Simply stated, the appellants' brief fails to set forth an "argument." An argument is defined as "a coherent series of reasons, statements, or facts intended to support or establish a point of view." WEBSTER'S THIRD NEW INT'L DICTIONARY 117 (unabr. 1993). In terms of a legal argument, this definition necessarily includes some analysis of the law and the facts of the case as well as an explanation of how the law as applied to those facts yields a certain desired

[4] In a decision and order dated October 18, 2001, the trial court concluded that a number of the Morters' claims were frivolous. We conclude that the "arguments" to this court concerning the trial court's grant of summary judgment and a directed verdict are no more than the re-hashing of a number of claims that the trial court has already concluded are frivolous. However, because we cannot conclude that Morters' remaining two claims are without *any* reasonable basis, we have no authority to find the entire appeal frivolous. *See* ***Nichols v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994).

result. In contrast to these requirements, each of the appellants' arguments consists primarily of two pages of block quotation of the law, preceded by one or two vague and directionless sentences concerning the appellants' case. In all, the appellants' argument lasts thirteen pages, but approximately eight of those pages are comprised entirely of cases block-quoted *en masse*.

¶14 We recognize that it is unreasonable to expect every attorney in Wisconsin to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs in order to give some life to the requirements of WIS. STAT. RULE 809.19. The appellants' brief falls short of the mark – the brief was apparently thrown together by making a number of general claims of error and then quoting two pages of law that may or may not be relevant to the case at hand.[5] Thus, we conclude that the brief failed to provide "[a]n argument" including "the contention of the appellant [and] the reasons therefor," as required by WIS. STAT. RULE 809.19(1)(e).

¶15 We also pause to note that in filing the brief, the attorney for the appellants certified that he had complied completely with WIS. STAT. § 802.05(1)(a), which provides:[6]

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[5] The appellants' brief is even more troubling in light of the trial court's conclusion that the Morters' negligence claims were frivolous. Despite this ruling and the presumption that "if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal," *see* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990), in the argument sections concerning summary judgment and directed verdict, the appellants simply reiterate their belief that the trial court was incorrect; they fail to offer a reasoned analysis to overcome this presumption.

[6] WISCONSIN STAT. RULE 809.84 provides: "An appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result."

> 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….
>
> 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 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 case law is clear with respect to every argument at issue. Under current law, the relief sought by the appellants is not well-grounded or warranted. Without adequate argument seeking an extension, modification or reversal of existing law, appellate counsel has also failed to satisfy the requirements of § 802.05(1)(a).

¶16 Because the appellants' brief fails to satisfy the requirements of WIS. STAT. RULE 809.19, we award the respondents costs and fees, including attorney fees, pursuant to WIS. STAT. RULE 809.83.[7] Accordingly, we remand this matter to the trial court for a determination of costs and fees on appeal.

[7] WISCONSIN STAT. RULE 809.83(2) holds the sanction for a violation of WIS. STAT. RULE 809.19 and states, in relevant part: "Failure of a person to comply with a court order or with a requirement of these rules … is grounds for dismissal of the appeal, summary reversal, striking of a paper, *imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate*." (Emphasis added.)

By the Court.—Judgment and orders affirmed and cause remanded with directions.

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