COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2615 **Cir. Ct. No. 02CV009621**

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

SHRINERS HOSPITALS FOR CHILDREN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ST. MARY'S HOSPITAL MILWAUKEE FOUNDATION, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Shriners Hospitals for Children (Shriners) appeals from the trial court's grant of summary judgment in favor of St. Mary's Hospital Milwaukee Foundation, Inc. (St. Mary's). St. Mary's cross-appeals from the trial court's denial of its request for attorneys' fees. After St. Mary's moved for summary judgment in Shriners's action against it seeking the proceeds of two

annuity contracts, Shriners also moved for summary judgment. Shriners insists that because Mrs. Buchelt allegedly intended the bulk of her estate to go to Shriners and thus allegedly intended to change the beneficiary of the annuities, it was the rightful beneficiary, not St. Mary's. St. Mary's sought an award of attorneys' fees for frivolousness, pursuant to WIS. STAT. § 814.025 (2001-02).[1] The trial court granted summary judgment in favor of St. Mary's, but denied its request for attorneys' fees. On appeal, Shriners contends that the trial court erred in granting summary judgment in favor of St. Mary's "by failing to determine that it was Mrs. Buchelt's [the decedent] intent that Shriners Hospitals be the beneficiary of the annuity contracts that constituted substantially all of her estate." While St. Mary's believes that the trial court's summary judgment award was proper, it argues that it is entitled to an award of attorneys' fees because it insists that "the undisputed facts of this case would lead a reasonable attorney to conclude that Shriners' claim was frivolous when commenced[.]" Because the circumstances here do not establish an unequivocal indication of the deceased's intent to change the beneficiary of the annuities as required by WIS. STAT. § 632.48(1)(b), and because Shriners's claim was not frivolous, we affirm the trial court's grant of summary judgment and denial of St. Mary's request for attorneys' fees.

I. BACKGROUND.

¶2 Ursula M. Buchelt died on March 6, 2000, at the age of ninety-four. Her husband, William E. Buchelt, died approximately sixteen years earlier, in

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

1984. The two were married for five and a half years, and did not have any children together.[2] In 1987, while living in California, Mrs. Buchelt created a revocable trust appointing herself as trustee. The trust provided that Mrs. Buchelt would receive the net income from the trust during her lifetime, and specified various bequests to be paid from the trust upon her death. The trust also specified that the beneficiary of the residue of the trust, after the expenses and specific bequests were satisfied, was to be the Tripoli Temple in Milwaukee, which was affiliated with Shriners Hospitals.[3]

¶3 In 1988, while Mrs. Buchelt was still residing in California, a securities broker from West Bend began providing investment advice and brokerage services to her. The broker, Jeffrey Kuklinski, provided Mrs. Buchelt with a mix of investments, and the trust held an investment account with his firm.

¶4 Mrs. Buchelt subsequently returned to Wisconsin, and in January of 1989, she amended the trust to indicate her change in residence; changed the co-trustee and successor trustee to M&I First National Bank, West Bend, Wisconsin; added a number of specific bequests; and changed the description of the residuary gift to include the name of her husband's first wife as well.

¶5 In 1990, Kuklinski sold Mrs. Buchelt a charitable gift annuity policy. The policy was issued in Mrs. Buchelt's name, not that of the trust, and was held by the issuing insurance company. The annuity was not part of the trust's investment account. Mrs. Buchelt received the income from the annuity during

[2] While her husband did have children from a previous marriage, they predeceased Mrs. Buchelt as well.

[3] Mrs. Buchelt's husband, William, was a Shriner.

her lifetime, and she chose "St. Mary's Hospital Burn Center" to be the beneficiary.

¶6 In 1996, Mrs. Buchelt purchased a new annuity contract to replace the original contract, and at the same time purchased a second annuity contract. The replacement annuity was purchased with the proceeds from the original annuity, and the second annuity was purchased with some of the assets previously held in the trust. It appears that Mrs. Buchelt was aware that the annuities were held outside of the trust. She designated St. Mary's as the beneficiary of both annuities, and never mentioned Shriners Hospitals to Kuklinski during the transactions.

¶7 Mrs. Buchelt supported herself with assets other than the annuity contracts until those assets were depleted, at which time she began to withdraw proceeds from the annuity contracts. Kuklinski assisted her with these withdrawals until apparently sometime in April 1997, when M&I Trust Company took over responsibility for all aspects of her investments, replacing Mrs. Buchelt as trustee. At that point, Kuklinski was largely uninvolved with Mrs. Buchelt's investment and financial affairs.

¶8 When this occurred, Mrs. Buchelt was residing at a nursing home in West Bend, and wanted to meet with an attorney regarding the preparation of a health care power of attorney. Lori Spaeth, the M&I trust officer responsible for administering the trust, contacted James Pouros, an attorney in West Bend, and advised him that Mrs. Buchelt wanted to meet with an attorney. Pouros met with Mrs. Buchelt and prepared a health care power of attorney at her request, appointing a close friend, Patricia Metz, as her health care agent.

¶9 Several months later, Spaeth again contacted Pouros and indicated that Mrs. Buchelt wanted to meet with him regarding her will. Mrs. Buchelt told Pouros that she wanted to modify the trust to make a specific bequest to Metz, eliminate the existing bequests to her sisters, and add a specific statement indicating that she was purposefully leaving nothing for her sisters. She also discussed her family and work history with him. In one such conversation, she mentioned that she wanted her husband's money to go the Shriners Hospital in Chicago.

¶10 Pouros prepared a second amendment to the trust to accomplish the modifications she requested. Noticing that the actual name of the residuary beneficiary had not been affected or modified by the first amendment, Pouros did some research on Shriners Hospitals to ensure that the paragraph naming the Tripoli Temple was adequate. Accordingly, he made a technical change in the amendment to more accurately identify the entity that was to receive the residue.

¶11 After Pouros inquired about Mrs. Buchelt's assets, Spaeth confirmed that the total value of the assets in the trust was almost $420,000, which included the market value of the annuities, and that all of Mrs. Buchelt's assets were held in the trust; however, it does not appear that the beneficiary of the annuities was ever discussed.[4] Moreover, it does not appear that Mrs. Buchelt and Pouros ever discussed the annuities at all, as Pouros testified: "At no time in my discussions with Ursula Buchelt did she ever mention annuity contracts." Regardless, to

[4] In Spaeth's deposition testimony, it appears she was unaware of the identity of the annuity contract beneficiaries. Further, exactly when the annuity contracts were actually transferred to the trust, if ever, is unclear. Regardless, that transfer would not affect the beneficiary designations.

ensure that all of Mrs. Buchelt's assets were in fact held in trust, Pouros also prepared a general document transferring ownership of all of her assets to the trust.

¶12 Finally, Pouros prepared Mrs. Buchelt's will, and all three documents were executed in July 1997. While Mrs. Buchelt did indicate that she wanted the residue of her trust to go to Shriners, and Pouros had "no doubt" that she wanted, in the words of Shriners's counsel, "substantially all of her money to go to Shriners Hospitals upon her death[,]" Pouros also indicated that, in the words of St. Mary's counsel, "it was not [his] understanding that [he] was making a change from the status quo relative to what Mrs. Buchelt previously had indicated in her estate documents was going to Shriners." The trust was established in 1987, designating Shriners Hospitals as the beneficiary of the residue—the status quo; however, the annuity contracts were purchased in 1996, originally held outside of the trust, and designated St. Mary's as the beneficiary.

¶13 Mrs. Buchelt died in March 2000. A couple of months later, St. Mary's was notified that it was the beneficiary of the annuity contracts. After submitting the necessary paperwork, St. Mary's received the proceeds of the annuity contracts—$326,065.93. Shortly thereafter, M&I Trust contacted St. Mary's and informed St. Mary's that while they estimated the assets of the trust to be worth approximately $340,000, they were originally unaware that the annuity contracts did not name the trust as the beneficiary. As such, since the other assets in the trust were inadequate to cover Mrs. Buchelt's final expenses, M&I Trust asked St. Mary's to return part of the annuity proceeds to help cover the final expenses. St. Mary's obliged, and sent almost $2,700 from the proceeds.

¶14 In May 2001, Shriners contacted St. Mary's, via counsel, and requested St. Mary's to pay the proceeds of the annuities to Shriners Hospitals,

citing Mrs. Buchelt's alleged intent to change the beneficiary of the annuities from St. Mary's to Shriners. St. Mary's contacted M&I Trust and was advised that they had determined that St. Mary's was entitled to the proceeds. After contacting both Kuklinski and Pouros in regard to some of the representations made in the letter, St. Mary's subsequently rejected the request.

¶15 Shriners commenced an action against St. Mary's in May 2002. After several witnesses were deposed and Shriners refused to dismiss the action, St. Mary's moved for summary judgment and requested an award of attorneys' fees under WIS. STAT. § 814.025.[5] After missing the deadline to file its own summary judgment motion, Shriners responded to St. Mary's motion and requested summary judgment pursuant to WIS. STAT. § 802.08(6).[6] After hearing oral arguments in July 2003, the trial court granted St. Mary's motion for summary judgment, but denied its request for attorneys' fees. Shriners now appeals from the grant of summary judgment. St. Mary's cross-appeals the denial of its request for attorneys' fees, and contends that it is also entitled to costs and attorneys' fees pursuant to WIS. STAT. § 809.25(3) (frivolous appeal).

---

[5] WISCONSIN STAT. § 814.025 provides, in relevant part:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

[6] WISCONSIN STAT. § 802.08(6) provides: "JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefore."

II. ANALYSIS.

¶16 In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987); ***Wright v. Hasley***, 86 Wis. 2d 572, 579, 273 N.W.2d 319 (1979). That methodology is well known, and need not be repeated here. *See* WIS. STAT. § 802.08; ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶17 This case concerns the interpretation and application of WIS. STAT. § 632.48(1)(b) (concerning a beneficiary change in a life insurance or annuity contract), which is subject to this court's *de novo* review. *See* ***Minuteman, Inc. v. L.D. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989). Furthermore, as both parties essentially moved for summary judgment, the supreme court has noted that "the practical effect of … bilateral summary judgment motions [i]s the equivalent of a stipulation as to the facts." ***Powalka v. State Mut. Life Assur. Co. of Amer.***, 53 Wis. 2d 513, 518, 192 N.W.2d 852 (1972) (citation omitted). As such, this case requires us to discern the proper result when § 632.48(1)(b) is applied to the undisputed facts of this case.

¶18 WISCONSIN STAT. § 632.48(1)(b) provides, in relevant part:

> [N]o … annuity contract may restrict the right of a policyholder or certificate holder:

> (b) *Change of beneficiary*. If the designation of beneficiary is not explicitly revocable, to change the beneficiary without the consent of the previously designated beneficiary. Subject to s. 853.17,[7] as between the beneficiaries, any act that unequivocally indicates an intention to make the change is sufficient to effect it.

(Footnote added.) In ***Empire General Life Insurance Co. v. Silverman***, 135 Wis. 2d 143, 399 N.W.2d 910 (1987), our supreme court had an opportunity to analyze the effect and meaning of this statute. ***Empire*** concluded that the statute "indicates … that the focus of our inquiry should be on whether the insured has performed some act which unequivocally indicates an intent to change policy beneficiaries, sufficient to effect that change." ***Id.*** at 157. The supreme court reasoned:

> Where … a policyholder performs an act, such as instructing his or her attorney to take steps to finalize a desired beneficiary change, and that act unequivocally indicates an intent to make that change, the terms of the statute are satisfied. … As long as there is no room for doubt as to the insured's intent … we need not place undue emphasis on the nature of the act performed by the policyholder. The statute itself states that "any" act will be sufficient provided the intent is evident.
>
> … We wish to make clear that where there is more than one possible inference as to the insured's intent, we will not engage in the speculative exercise of determining what the real intent was. Under those circumstances … we would

[7] WISCONSIN STAT. § 853.17(1) provides:

> Any provision in a will which purports to name a different beneficiary of a life insurance or annuity contract than the beneficiary properly designated in accordance with the contract of the issuing company, or its bylaws, is ineffective to change the contract beneficiary unless the contract or the company's bylaws authorizes such a change by will.

Obviously, this is not relevant to the case at hand.

> refuse to recognize the attempt to remove the named individual as beneficiary.

Id. at 158-59. Thus, a change in beneficiary will be effected in this manner only when there is an unequivocal indication of intent, on behalf of the deceased, to change the beneficiary—there must be "no room for doubt[.]" ***Id.*** at 158.

¶19 The unfortunate undisputed facts of the instant case reveal that no one discovered the inherent conflict and confusion that resulted from the difference in the named beneficiaries of the trust and annuity contracts until it was too late. Deposition testimony was presented concerning what people *believe* Mrs. Buchelt intended, but the testimony was woefully inadequate to establish an *unequivocal* intent on Mrs. Buchelt's behalf. For instance, Pouros testified that there was no doubt in his mind that, upon her death, Mrs. Buchelt wanted substantially all of her trust money to go to Shriners Hospital, but he also testified that he never discussed the annuities, or their beneficiary, with her. Furthermore, he testified that it was not his intention to change the "status quo" when he drafted the documents for Mrs. Buchelt. The documents Pouros drafted were executed in 1997. Mrs. Buchelt purchased the annuities, and designated St. Mary's as the beneficiary, in 1996. Shriners was designated as the beneficiary of the residue of the trust when it was created in 1987. None of that was altered by the documents drafted by Pouros in 1997.

¶20 To be sure, Mrs. Buchelt apparently felt strongly about the Shriners being a beneficiary of her estate, as was demonstrated by the deposition testimony of both Metz and Pouros. However, this evidence does not rise to the level of an unequivocal indication of her intent to change the beneficiary of the annuities. Quite unlike the circumstances in ***Empire***, when the deceased specifically "informed his attorney … that he wanted the policy proceeds to go for the benefit

of his family, rather than to" the previously designated beneficiary, ***id.*** at 148-49, Mrs. Buchelt never even mentioned either the annuities or their beneficiary to her attorney, nor is this a case in which the deceased simply failed to follow the contract's rules for changing the beneficiary. The circumstances of this case leave open the potential for many inferences. The question remaining: what exactly was Mrs. Buchelt thinking? Was she confused about the form in which the bulk of her assets was held? Did she think that the "close to half a million dollars," as she put it, in the trust was held in a variety of forms, as opposed to solely in the annuities? Did she think that St. Mary's would receive a certain amount of the proceeds and the rest would be left to Shriners as the residue of the trust? Was she unaware of the significance of the difference in the beneficiary designations of the annuities and the trust? Was she operating under the mistaken assumption that, since the annuities were purportedly held in trust, the proceeds would be returned to the trust? Why did she fail to mention the annuities or their beneficiary to her attorney when he was amending her will only one year after she purchased the annuities? If she wanted the bulk of her estate to go to the Shriners, why did she designate St. Mary's as the beneficiary of her annuities, instead of the trust, when Shriners was already the beneficiary of the residue of the trust? We simply do not know the answers to these questions. Too many questions remain unanswered. As such, we cannot determine, based upon this record, that she unequivocally intended to change the beneficiary of the annuities; we can only speculate. Under ***Empire***, that is not sufficient. *See* ***id.*** at 158-59. As such, the trial court properly concluded that St. Mary's is entitled to summary judgment as a matter of law.

¶21 St. Mary's also sought an award of attorneys' fees pursuant to WIS. STAT. § 814.025. St. Mary's contends that the trial court failed to make any findings in regard to frivolousness when it denied its requests for attorneys' fees,

and insists that "the undisputed facts of this case would lead a reasonable attorney to conclude that Shriners's claim was frivolous when commenced within the meaning of" § 814.025. St. Mary's also urges this court to award attorneys' fees for this allegedly frivolous appeal, pursuant to WIS. STAT. § 809.25(3).

¶22 WISCONSIN STAT. § 814.025 provides, in relevant part:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff … is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ….
>
> **(3)** In order to find an action … to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action … was commenced, used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action … 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.

In ***Juneau County v. Courthouse Employees, Local 1312, American Federation of State, County and Municipal Employees***, 216 Wis. 2d 284, 576 N.W.2d 565 (Ct. App. 1998), we explained:

> Whether a claim is frivolous within the meaning of § 814.025, STATS., involves a mixed question of law and fact. However, when the facts are undisputed, our determination about whether those facts would lead a reasonable attorney to conclude that the claim was frivolous when commenced or when continued, presents a question of law which we review *de novo*.

Id. at 292 (citations omitted). Furthermore, the question to be resolved "is not whether one can prevail on his claim, but whether the claim is *so indefensible* that the party or his attorney should have known it to be frivolous." ***Id.*** at 295-96 (emphasis added). The supreme court has cautioned, "frivolous claims are an especially delicate area of the law. A claim [or] action … is frivolous if it was brought without any reasonable basis in law or equity." ***Brunson v. Ward***, 2001 WI 89, ¶28, 245 Wis. 2d 163, 629 N.W.2d 140 (citation omitted). "A claim cannot be made reasonably and in good faith if there is no set of facts which could satisfy the elements of the claim, or if the attorney knew or should have known that the needed facts do not exist or cannot be developed." ***Riley v. Lawson***, 210 Wis. 2d 478, 491-92, 565 N.W.2d 266 (Ct. App. 1997). Moreover, the supreme court has indicated that we are to "resolve any doubts against a finding of frivolousness." *See* ***Brunson***, 245 Wis. 2d 163, ¶28.

¶23 In order to determine whether an action was frivolous, we must consider the available facts and the burden of proof required by the applicable law. ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 354, 302 N.W.2d 508 (Ct. App. 1981). We must then determine whether the available facts provided "any reasonable basis" to meet that burden. ***Id.*** Here, the facts are undisputed, and the burden is high. Upon review, we are satisfied this is not a case in which there was no evidence to support Shriners's claim. An arguably reasonable basis existed upon which Shriners could bring this action. Indisputably, Mrs. Buchelt indicated an intent to leave a portion of her estate to Shriners. Indeed, Shriners was the residual beneficiary of her trust. However, Shriners failed to establish an unequivocal intent on behalf of the deceased to change the beneficiaries of the annuities. While ultimately unsuccessful, Shriners had a defensible argument. In determining frivolousness, the question is not whether one can or will prevail on

the claim, but instead, whether it is so indefensible that the attorney should have known it to be frivolous. *See* ***Juneau County***, 216 Wis. 2d at 295-96. This is not such a case. Given the cross currents created by the differences in beneficiaries, Shriners's action was not frivolous. Accordingly, we affirm the trial court's denial of St. Mary's request for attorneys' fees.

¶24 Moreover, we similarly conclude that as a matter of law, the appeal was not frivolous under WIS. STAT. § 809.25(3), and we decline St. Mary's request for an award of appellate costs and fees. An appeal is frivolous if it "was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another[,]" or if "[t]he party or the party's attorney 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." § 809.25(3)(c). The former is not applicable, and the latter is not satisfied. Here, Shriners argues, in good faith, that ***Empire*** provides the necessary authority to support its contention that Shriners Hospitals is the proper beneficiary of the annuity proceeds in light of the alleged intent of the deceased. Although admittedly factually distinct, ***Empire*** does open the door for determinations of beneficiary changes based upon the unequivocal intent of the deceased that may not necessarily follow its exact fact pattern. Although we have rejected Shriners's argument on appeal, we conclude that it was not frivolous. Consequently, we affirm.

By the Court.—Judgment affirmed.

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