COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP3175 **Cir. Ct. No. 2002CV4720**

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

ELIZABETH FREER,

PLAINTIFF-APPELLANT,

V.

M & I MARSHALL & ILSLEY CORPORATION,

DEFENDANT-RESPONDENT.

ON a decision entered by the circuit court for Milwaukee County pursuant to our earlier order remanding the matter and retaining jurisdiction: KITTY K. BRENNAN, Judge. *Affirmed and cause remanded with directions.*

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

¶1 FINE, J. On May 14, 2002, Elizabeth Freer sued her former employer M & I Marshall & Ilsley Corporation, claiming that an employee of

Marshall & Ilsley slandered her in a telephone conversation with Ruth A. Sherman. Freer's complaint asserted:

> 6. That subsequent to the termination of her employment with [Marshall & Ilsley,] [Freer] became an equity partner in Capital Investment Services of America, Inc., as an investment counsel.
>
> 7. That after [Freer] became employed as an investment counsel and in the course of her employment she solicited business customers in southern California. *One of those customers was Ruth A. Sherman who was interested in personally investing with [Freer].*
>
> 8. That on May 26, 2000 Ruth A. Sherman telephoned the Marshall & Ilsley Trust Company and spoke with an agent and employee of [Marshall & Ilsley], Joanne Matchette. At the time Matchette was employed as a vice president of [Marshall & Ilsley].
>
> 9. That Matchette identified herself as a vice president of [Marshall & Ilsley] in her phone conversation with Sherman.
>
> 10. That Sherman then identified herself as a resident of the Los Angeles, California area, *who was interested in investing with [Freer] and her employer, Capitol* [*sic*] *Investment Services of America, Inc.,* and was seeking some information and references regarding [Freer] from [Marshall & Ilsley].
>
> 11. Ruth A. Sherman asked Joanne Matchette what position had been held by [Freer] at [Marshall & Ilsley]. Matchette replied that [Freer] was employed as a sales person. When Sherman stated that she thought [Freer] was an investment manager, Matchette replied, "Oh no, Elizabeth had no such position. Elizabeth was never anything other than a sales person, although she did some marketing, too." Matchette further informed Ruth A. Sherman "that Freer had never been a money manager, had never been an investment manager, nor was Freer in any type of management position at [Marshall & Ilsley]." Matchette then repeated to Ruth A. Sherman "that Freer never had held a management position." Ruth A. Sherman further asked Matchette if [Freer] had ever held a position at [Marshall & Ilsley] where she managed anyone's investment portfolio and Matchette replied "Oh, absolutely not."

> 12. That the statements of Joanne Matchette, as quoted in Paragraph 11 of this Complaint, defamed and slandered [Freer] in that the statements were false and were not privileged and harmed [Freer]'s reputation as to lower her in the estimation of Ruth A. Sherman *who subsequently withdrew from associating and dealing with [Freer] and doing business with her.*

(Emphasis added.)

¶2 The trial court granted summary judgment to Marshall & Ilsley and dismissed Freer's complaint. We affirmed. ***Freer v. M & I Marshall & Ilsley Corp.***, 2004 WI App 201, 276 Wis. 2d 721, 688 N.W.2d 756.

¶3 ***Freer*** noted a discrepancy between what Freer's complaint and appellate briefs represented to us and the summary-judgment record:

> [W]e are disturbed that Freer's complaint asserts things that conflict with the summary-judgment evidentiary record: That Sherman was "[o]ne of those customers" within Freer's range of business solicitation; that Sherman "was interested in personally investing with [Freer]"; and that Sherman "withdrew from associating and dealing with [Freer] and doing business with her" as a consequence of what Matchette told her. According to the evidentiary record, however, Sherman was neither an investor nor potential investor with either Capital Investment Services or Freer. Rather, as Freer conceded in her deposition and in her brief before the trial court, Sherman was retained for $200 to test what response an inquiry to Marshall & Ilsley about Freer would turn up. Although Freer's briefs on appeal assert that Sherman *was* a bona fide potential investor with Freer, Freer points to nothing in the evidentiary record that supports her contention, and, of course, we are bound by the record as it comes to us. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Thus, for example, Sherman's affidavits merely aver that she *told* Matchette that she was seeking information about Freer in order to decide whether to do business with Freer, *not* that that was her *actual* intent in seeking Matchette's comments about Freer.

Freer, 2004 WI App 201, ¶5, 276 Wis. 2d at 726–727, 688 N.W.2d at 759 (emphasis in original, footnote omitted). Although, as noted, we affirmed the trial court's dismissal of Freer's complaint, we also remanded the matter to the trial court to determine whether Freer violated the rules of procedure that mandate candor and honesty in court submissions. Thus, we wrote:

> WISCONSIN STAT. RULE 802.05(1)(a) [2003–2004] provides, as material here:
>
> > Every pleading … of a party represented by an attorney shall contain the name … of the attorney … and shall be subscribed with the handwritten signature of at least one attorney of record…. The signature of an attorney … constitutes a certificate that the attorney … has read the pleading …; that to the best of the attorney's knowledge, information and belief, formed after reasonable inquiry, the pleading … is well-grounded in fact.
>
> RULE 802.05(1)(a) also provides, as material here:
>
> > If the court determines that an attorney … failed to read or make the determinations required under this subsection before signing any … paper, the court may, upon motion, or upon its own initiative, impose an appropriate sanction on the person who signed the pleading … 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 … including reasonable attorney fees.
>
> We are not a fact-finding court. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980). Accordingly, we remand this matter to the trial court with directions that it hold a hearing to determine: (1) Sherman's true role in this case; (2) what and when Freer and her lawyer knew of Sherman's true role in this case; and (3) whether the statements in Freer's appellate briefs about Sherman are true, even though they are not supported by the summary-judgment evidentiary record.

> By virtue of our superintending authority over the circuit court, WIS. STAT. § 752.02 ("[t]he court of appeals has supervisory authority over all actions and proceedings in all courts except the supreme court"), we direct the trial court to report its findings to us, and, in connection with items 1 and 2, and, depending on its findings, to impose under RULE 802.05(1)(a) any sanction that in the exercise of its reasoned discretion it believes is appropriate. We retain jurisdiction over this appeal, pending receipt of the trial court's report.

Freer, 2004 WI App 201, ¶6, 276 Wis. 2d at 727–728, 688 N.W.2d at 759–760.[1]

¶4 Following our remand order, the trial court held an evidentiary hearing, and has issued comprehensive written findings of fact and conclusions of law in a sixteen-page "Findings of Fact and Sanctions Decision." (Uppercasing omitted.) A copy of the trial court's decision is attached and incorporated herein.

¶5 Upon receipt of the trial court's decision, we gave the parties an opportunity to file briefs in response. With an extension requested by Freer's counsel, the briefing schedule required Freer's brief to be filed by August 1, 2005, Marshall & Ilsley's brief to be filed by August 15, 2005, and Freer's "reply brief (if she seeks to reply)" by August 26, 2005. We have received both Freer's and Marshall & Ilsley's briefs, but Freer has not filed a reply brief.

¶6 As noted, the trial court made extensive findings of fact. The trial court found that: (1) Sherman was a "checker" and not a potential investor; (2) Freer knew from the spring of 2000 that Sherman was a checker and not a potential investor; (3) Freer's lawyer, James P. Brennan, Esq., knew from October

[1] Effective July 1, 2005, WIS. STAT. RULE 802.05 was modified. S. CT. ORDER, 2005 WI 38, § 2. The parties do not contend that the modification affects our disposition.

of 2000 that Sherman was a checker and not a potential investor; and (4) the following statements in Freer's appellate briefs were not true:

- "That subsequent to the telephone conversation with Larry Crober and in the year 2000, a customer of Ruth A. Sherman was interested in personally investing with the Plaintiff-Appellant" (Appellant's Brief, p. 11, Certified by Attorney Brennan 3/26/04) (Emphasis added)2

- "One of those customers was Ruth A. Sherman who was interested in personally investing with plaintiff" (Appellant's Brief, p. 17, Certified by Attorney Brennan 3/26/04) (Emphasis added)

- "... Ruth Sherman broke off her *business relationship* with Elizabeth Freer and her employer, Capital Investment, and did not do business with her." (Appellant Brief p. 20 Certified by Attorney Brennan 3/26/04) (Emphasis added)

- "She was contacted by Larry Crober, a California resident, to seek out a reference concerning Elizabeth Freer from her former employer because Crober and *Ruth Sherman both intended to invest with Plaintiff Appellant.*" (Appellant Brief, p. 23, Certified by Attorney Brennan 3/26/04) (Emphasis added)

- "There is no question but that Ruth Sherman called respondent seeking a reference *so that Ruth Sherman and other[s] could invest their money with her*." (Reply Brief of Plaintiff-Appellant, p. 2, Certified by Atty. Brennan 5/20/04) (Emphasis added)

- "*...this was not a setup phone call...*" (Reply Brief of Plaintiff-Appellant, p. 6, Certified by Atty. Brennan 5/20/04) (Emphasis added)

[2] Larry Crober was an associate of Freer in California. Freer described him as someone "who allegedly sought to steer business to Freer by virtue of his position with a California bank." ***Freer v. M & I Marshall & Ilsley Corp.***, 2004 WI App 201, ¶10, 276 Wis. 2d 721, 730, 688 N.W.2d 756, 761.

(Emphasis and parentheticals by the trial court, footnote added.) The trial court, in connection with (1) and (2) of our remand order, has directed Brennan "to pay the defendant's the reasonable attorneys' fees and costs of defending this action."

¶7 We may not overturn a trial court's findings of fact unless they are "clearly erroneous." WIS. STAT. RULE 805.17(2). In her brief submitted to us in response to the trial court's sanctions decision, Freer argues that whatever the trial court may have found, Sherman *was* a "potential investor" with Freer because, essentially, in all things in this world all things are possible. Thus, the brief quotes a dictionary definition of "potential" "as: '1: existing in possibility: capable of development into actuality; 2: expressing possibility;'" and argues that, "as an equity partner with Capital Investment Services of America, as an investment counsel, [Freer] probably would regard any business contact as a potential investor." Freer's brief explains:

> The dictionary definition is exactly the definition [Freer] has adopted from the very beginning in this case. [Freer]'s position was always that since Ruth Sherman names herself as a potential investor and attended the gathering for potential investors given on Elizabeth Freer's behalf[,] Ruth Sherman was then a potential investor and all of the statements by the trial court decision notwithstanding, [Freer]'s counsel still believes that Ruth Sherman was a potential investor.

Marshall & Ilsley characterizes Freer's argument before us as "disingenuous." We agree.

¶8 On page 175 of his 1891 book, *Gypsy Sorcery and Fortune Telling*, Charles Godfrey Leland reflected on the unlimited horizons of potentiality:

> How long will it be before sights, scents, and tastes will be thus transferred, and the man sitting in London will see all things passing in Asia, or wherever it pleases him or an agent to turn a mirror on a view? It will be. Or how long

> before the discovery of cheap and perfect aerial navigation will change all society and annihilate national distinctions?

Available at http://www.sacred-texts.com/pag/gsft/gsft13.htm. That Sherman *might*, one day, want to invest with Freer does not make the representations in Freer's appellate briefs any more truthful than would be 1891 advertisements for jet-travel or wide-screen, plasma-matrix television screens. Freer has not demonstrated that the trial court's findings of fact are clearly erroneous, and, accordingly, Marshall & Ilsley is entitled to its reasonable attorney's fees and costs in connection with Freer's lawsuit and these sanction proceedings, both before the trial court and this court. *See* ***Jackson v. Benson***, 2002 WI 14, ¶23 n.7, 249 Wis. 2d 681, 695–696 n.7, 639 N.W.2d 545, 552 n.7 (per curiam) (By virtue of WIS. STAT. RULE 809.84, WIS. STAT. RULE 802.05(1)(a) (2003–2004) applies to appellate proceedings.); *see also* ***Jackson v. Benson***, 2002 WI 90, ¶6, 255 Wis. 2d 24, 28–29, 647 N.W.2d 815, 817 (per curiam).[3]

¶9 We remand to the trial court for a determination of Marshall & Ilsley's reasonable attorney's fees and costs. Marshall & Ilsley should serve upon Brennan a breakdown of what it contends are its reasonable attorney's fees and costs, and, if appropriate, supplement the affidavit dated August 15, 2005, executed by John A. Casey, Esq., and submitted to us as part of its brief on sanctions. If Brennan seeks a hearing on either the necessity or reasonableness of the requested fees or costs, he shall request the hearing within twenty days of service upon him of Marshall & Ilsley's breakdown. If Brennan timely requests a hearing, the trial court shall hold one, and award those fees and costs it determines

[3] Freer does not contend that deliberate misstatements in an appellate brief are not sanctionable under WIS. STAT. RULE 802.05(1)(a) (2003–2004).

were reasonable and necessary, including fees or costs expended by Marshall & Ilsley in connection with that hearing.

By the Court.—Decision affirmed and cause remanded with directions.

Publication in the official reports is not recommended.