COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2593 **Cir. Ct. No. 2002CV1494**

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

GORDON D. NELSON,

PLAINTIFF,

A. STEVEN PORTER,

APPELLANT,

V.

HAUS, ROMAN & BANKS LLP P/K/A HAUS, RESNICK & ROMAN LLP, WILLIAM HAUS AND NATIONAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed and cause remanded.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Attorney A. Steven Porter appeals the circuit court's judgment awarding attorneys fees and costs against Porter personally as a sanction for filing a frivolous action. *See* WIS. STAT. §§ 802.05 and 814.025 (2003-04).[1] We affirm.

¶2 Attorney Porter's client, Gordon Nelson, was fired for falling asleep while working at Hormel Foods Corporation. Nelson's union filed a grievance on his behalf and the matter went to arbitration. William Haus, the union's attorney, did not appear at the arbitration hearing, apparently because he forgot about it. Nelson negotiated a $2000 settlement with Hormel.

¶3 Nelson then retained Attorney Porter, who filed a federal court action alleging that the union local had breached its duty of fair representation because Haus had failed to appear at the arbitration hearing on Nelson's behalf. In the federal pleading, Porter specifically alleged that Haus was the union's attorney. The federal action was filed after the statute of limitations had expired, so the case was dismissed with prejudice.

¶4 A year and a half later, Porter filed this action in state court on behalf of Nelson, alleging that Haus had committed malpractice when he failed to appear at the arbitration hearing. Shortly after the action was filed, Haus informed Porter by letter that the suit was baseless because he represented the union, not Nelson, and federal law established that attorneys for unions are immune from any lawsuits brought by union members alleging malpractice. Over a year later, the circuit court granted summary judgment in favor of Haus.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 Haus then moved for attorney's fees and costs on the grounds of frivolousness pursuant to WIS. STAT. §§ 802.05 and 814.025. The circuit court concluded that the action was frivolous and awarded Haus attorney's fees of $22,268.

¶6 Pursuant to WIS. STAT. § 802.05, an attorney who commences an action warrants: (1) that the action is not brought for any improper purpose; (2) that, after making a reasonable inquiry into the circumstances, the action is well grounded in fact; and (3) that, after making a reasonable inquiry into the law, the action is warranted by existing law or a good-faith argument for a change in it. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999) (citations omitted).[2] "If the circuit court finds that any one of the three requirements set forth under the statute has been disregarded, it may impose an appropriate sanction …." ***Id.*** When we review the circuit court's decision on appeal, "[d]etermining what and how much prefiling investigation was done are questions of fact that will be upheld unless clearly erroneous." ***Id.*** (citation omitted). "Determining how much investigation *should* have been done, however, is a matter within the [circuit] court's discretion because the amount of research necessary to constitute 'reasonable inquiry' may vary, depending on such things as the particular issue involved and the stakes of the case." ***Id.*** at 548-49 (citation omitted).

[2] Where, as here, the circuit court awards fees under both WIS. STAT. § 802.05 and WIS. STAT. § 814.025, we review the decision as one made pursuant to § 802.05. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548-49, 597 N.W.2d 744 (1999) (citations omitted). Also, effective July 1, 2005, the former §§ 802.05 and 814.025 were repealed and a revised § 802.05 was created. *See* Wisconsin Supreme Court Order No. 03-06, 2005 WI 38 (Mar. 31, 2005).

¶7 Porter argues this action was not frivolous because there was a reasonable basis in fact for this lawsuit. He contends that there was a genuine issue of fact as to whether an attorney-client relationship existed between Attorney Haus and Nelson. He points to the fact that Ike Edwards, the union's business representative, told Nelson prior to the arbitration that Haus would attend the arbitration hearing to represent Nelson.

¶8 Aside from Edwards' off-hand comments about Haus to Nelson, there was no evidence that Haus represented Nelson. Haus and Nelson never communicated before the arbitration hearing. There was no retainer letter or other written or oral indication—formal or informal—of an attorney-client relationship. There was no evidence that Haus received compensation from Nelson or that Nelson expected to pay him. In addition, Porter himself alleged in the federal lawsuit that Haus represented the union. Under these circumstances, the circuit court properly exercised its discretion in concluding there was no reasonable basis in fact for this action.

¶9 Porter next contends that there was a reasonable basis in law for this action. The existence of an attorney-client relationship is a condition precedent to a viable claim of attorney malpractice. *See* ***Rendler v. Markos***, 154 Wis. 2d 420, 426, 453 N.W.2d 202 (Ct. App. 1990). Not only did no such relationship exist here, federal law bars a member of a union from bringing a legal malpractice claim against an attorney retained by a union. ***Peterson v. Kennedy***, 771 F.2d 1244, 1257 (9th Cir. 1985); *accord* ***Security Bank v. Klicker,*** 142 Wis. 2d 289, 298-99, 418 N.W.2d 27 (Ct. App. 1987) ("[A]n attorney who is handling a labor grievance on behalf of a labor union as a part of the collective bargaining process is not considered the attorney for each individual member of the union as a matter

of law."). Given this precedent, the circuit court properly exercised its discretion in concluding that there was no reasonable basis in law for this action.

¶10 Haus has filed a motion for costs and attorney's fees on appeal. Porter did not respond to the motion. Because we affirm the circuit court's conclusion that this case is frivolous, Haus is entitled to attorney's fees under the per se rule of ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). We remand to the circuit court to determine and award Haus his appellate attorney's fees. *See* ***id.*** at 264.

By the Court.—Judgment affirmed and cause remanded.

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