COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2335 **Cir. Ct. No. 2000CV8851**

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

IN THE INTEREST OF TIM HANSEN AND BONNIE STANFORD:

ALAN EISENBERG,

APPELLANT,

V.

TOM HANSEN AND BONNIE STANFORD,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Attorney Alan Eisenberg appeals from an order denying his motion to vacate and dismiss a September 2001 judgment entered against him and his client Tim Hansen, jointly and severally, requiring them to pay $3785.70 for bringing a frivolous action. Eisenberg argues that: (1) the trial court erred in refusing to address the merits of the earlier entered judgment; (2) because

the judgment failed to reflect whether the frivolous costs were being assessed pursuant to WIS. STAT. §§ 802.05 or 814.025 (1999-2000), and § 814.025 does not permit costs to be assessed jointly and severally, the judgment is void; and (3) the trial court erred and violated due process by failing to afford Eisenberg a hearing on the question of frivolous costs.[1]

[1] In 2005, the supreme court repealed WIS. STAT. § 814.025 and amended WIS. STAT. § 802.05. S. CT. ORDER 03-06, 2005 WI 38 (eff. July 1, 2005). WISCONSIN STAT. § 802.05(1)(a) (1999-2000) provides:

> **Signing of pleadings, motions and other papers; sanctions**. **(1)** (a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. A party who is not represented by an attorney shall subscribe the pleading, motion or other paper with the party's handwritten signature and state his or her address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. 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; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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 to 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.

(continued)

¶2 We conclude that the post-judgment trial court properly exercised its discretion by refusing to address the merits of whether the frivolous costs assessment was warranted, but was willing to examine whether the judgment was void, and found it was not. In addition, we agree with the post-judgment trial court's determination that the original trial court relied upon WIS. STAT. § 802.05

(Underlining added.)

WISCONSIN STAT. § 814.025 (1999-2000) provides:

> **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.
>
> **(2)** The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
>
> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint 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.
>
> **(4)** To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

All references to the Wisconsin Statutes are to the 1999-2000 version.

when it found that Eisenberg brought the suit without conducting a "reasonable inquiry," and thus, the joint and several liability language was appropriate. Lastly, because Eisenberg was given notice but failed to attend the hearing, no due process violation occurred. Accordingly, we affirm.

I. BACKGROUND.

¶3 On October 23, 2000, Hansen, represented by Eisenberg, commenced a lawsuit against Hansen's former mother-in-law, Bonnie Stanford. In it, Hansen claimed he was the owner of a nine and one-half-year-old Labrador dog named "Smiley." Hansen alleged that after learning that the dog was missing, his investigation into its disappearance revealed that Stanford "had brought Smiley in [to a small animal hospital] falsely declaring that she was Smiley's owner, and ordered the dog's destruction." He averred that Stanford's destruction of the dog "was done intentionally and maliciously to harm [him]," and Hansen asked that he be awarded $500 for the replacement value of the dog and an unspecified amount for punitive damages. The complaint was signed by Eisenberg.

¶4 Stanford responded by sending a handwritten letter approximately one month later to the trial court stating that she "did not take the dog in to the vet." In it, she claimed that she went to the veterinarian's office and was told that "they knew [Stanford] didn't bring the dog in" and that no one at the veterinarian's office told Hansen that she did. She went on to add in her response that Stanford's son had given the dog to his sister, Hansen's ex-wife, Sheree Hansen, years ago and that Hansen had been charged with cruelty to animals several years earlier by the Hales Corners Police Department. Included in this correspondence were copies of the police reports concerning the cruelty to animals charge and a "Consent for Euthanasia" form purportedly written on the Whitnall Small Animal

Hospital's stationary, signed by Sheree Hansen.

¶5 Several days later, a notice of retainer and a formal answer including affirmative defenses were sent to the court and Eisenberg by Stanford's attorney. The answer questioned Hansen's ownership of the dog and reiterated that Stanford had no part in the dog's death. As relevant here, the document contained the following affirmative defenses:

> 5. Affirmatively allege that the Complaint fails to state a claim upon which relief can be granted.
>
> 6. Affirmatively allege that issues raised in the Plaintiff's Complaint are without basis or foundation as to this answering Defendant, and therefore are frivolous; that the facts concerning the ownership of the animal in question and the circumstances of the death of the animal in question are and have been available to any person making an inquiry into them.
>
> 7. That this answering Defendant seeks actual and compensatory damages from any and all persons responsible for the commencement of this suit if it is determined to be frivolous.

Later, a scheduling conference was held by the trial court with both Eisenberg and Stanford's attorney in attendance. Stanford's attorney submitted a scheduling conference data sheet in which the following was written on the space provided for claimed special damages: "Possible damages for frivolously commencing and maintaining an action against one who is not a proper party." Notwithstanding Stanford's several denials that she was involved in the dog's death and her contention that Hansen did not own the dog, Eisenberg filed a witness list and itemization of damages form with the trial court in March 2001 restating Hansen's allegations and naming a "Ms. Rojohn," the receptionist at the small animal hospital, as the person who told Hansen that Stanford brought the dog in to be destroyed.

¶6 In April 2001, Stanford's attorney attempted to depose Hansen. In an apparent attempt to explore who owned Smiley, the attorney asked Hansen about his divorce. Hansen answered the question by stating that the question posed was "irrelevant." Eisenberg then interjected:

> I have my own feelings about the rude way that you're being treated. The earlier sarcasm asking you if you have a law license. The tone has been arrogant and abusive, and I would just as soon the Judge know what's going on.
>
> I think you have been attempting to be polite. You may not be doing the best job in answering the question, but you obviously don't understand it. I'm not going to step in. I understand that you're having a problem with this because you don't understand what he's doing. I think it would be appropriate to get a ruling from a Judge.

Stanford's attorney responded that he did not mean to be arrogant or sarcastic, to which Eisenberg answered by addressing his client, and the following conversation took place:

> MR. EISENBERG: Did you pick up on the fact that he was being sarcastic and did you feel he had an insulting tone to you when he asked you if you were a lawyer and if you were licensed to practice law? Did you pick up on that?
>
> [HANSEN]: Not as good as you did, sir; but I did relate to that, that it was pretty irrelevant, you know.
>
> MR. EISENBERG: He was telling you by tone and manner that you're stupid, right?
>
> [STANFORD'S ATTORNEY]: Object to that, Mr. Eisenberg. You're trying to testify and you're trying to characterize –
>
> MR. EISENBERG: Sir, you were trying to tell my client that he was stupid, you were acting in an insulting, arrogant tone.
>
> [STANFORD'S ATTORNEY]: Actually, you're the one that's being insulting.

MR. EISENBERG: I thought it was mean-spirited. I wish there was tape so that – audio and videotape so the judge could see what you're trying to do to this man. He asked a naïve question and you were rude to him, very rude.

[STANFORD'S ATTORNEY]: Okay, and I think, actually, if there's any rudeness, it's on your part.

MR. EISENBERG: How have I been rude?

[STANFORD'S ATTORNEY]: Let me finish. I didn't talk while you did.

MR. EISENBERG: Yes, yes, you did.

[STANFORD'S ATTORNEY]: What you're trying to do is manipulate the witness, coach him.

MR. EISENBERG: I didn't tell him what to answer. He asked you what has this got to do with it and he was very polite and very humble.

[STANFORD'S ATTORNEY]: We're here to try to take a deposition of this gentleman and find out some facts that may or may not relate to this controversy.

MR. EISENBERG: I'd like to see you do it without these bullying, mean-spirited tactics.

[STANFORD'S ATTORNEY]: Do you want to go off the record?

MR. EISENBERG: No, we're staying right on the record. You're not shutting off any record. The Judge is going to find out exactly what you're doing here.

He asked a naïve, very polite question of you that any citizen would ask. You threw his divorce papers in front of him, and he asked what that had to do with it. I, too, had no idea where you were going.

I actually thought you'd give him a polite answer. You chose instead to be insulting, mean-spirited, arrogant. You didn't raise your voice too much, a little bit, but I thought it was abusive. I wouldn't talk to somebody like that. I wouldn't do that.

[STANFORD'S ATTORNEY]: Well, I deny all of the allegations. I think you've acted improperly, counsel.

> MR. EISENBERG: In what way? I didn't tell him what to answer.
>
> [STANFORD'S ATTORNEY]: I am properly characterizing what I'm doing and what I have said to this witness –
>
> MR. EISENBERG: You have been mean-spirited and abusive and I'll stand on it.
>
> [STANFORD'S ATTORNEY]: You're raising your voice.
>
> MR. EISENBERG: I'm not raising my voice.
>
> [STANFORD'S ATTORNEY]: Of course, you are.
>
> One more chance I will ask of this gentleman to proceed with this deposition.
>
> MR. EISENBERG: If you are not able to proceed as a gentleman and extend simple human courtesy, we're out of here. If you do it one more time, we're out of here.
>
> [STANFORD'S ATTORNEY]: It's ended.
>
> MR. EISENBERG: Then you have ended it. Let's go.

Stanford's attorney then filed a motion seeking to compel Hansen's deposition. Eisenberg opposed the motion. The trial court, apparently unimpressed with Eisenberg's concerns, granted Stanford's motion and assessed costs and attorney fees to be borne by Eisenberg, which included the thirty-five minutes that it took after the assigned time scheduled for the motion for an attorney from the Eisenberg firm to appear on the motion. The judgment roll reflects that Eisenberg's office subsequently attempted to obtain an emergency motion hearing from the duty judge (a judge other than the trial judge) in order to stop a deposition scheduled for July 6, 2001. The request was denied. Hansen was successfully deposed on July 6, 2001.

¶7 Shortly before Hansen's deposition, Stanford filed a motion for summary judgment. Shortly after Hansen's deposition was taken, but prior to the hearing on the summary judgment motion, Stanford's attorney sent a letter to the court explaining that Eisenberg had requested that they enter into a stipulation dismissing the matter without costs being assessed. As a result, Stanford requested that the court consider the question of costs, noting that:

> Shortly after the deposition Mr. Eisenberg and his client submitted a stipulation and order for dismissal on the merits without costs. We believe that the question of costs in this case has become material. It is our position that this is a case where a factual determination of non-liability could have been had by the Plaintiff virtually at the outset.

¶8 On the day of the scheduled summary judgment motion hearing, Hansen, represented by another lawyer in Eisenberg's firm, filed a motion with the court seeking dismissal. Also filed was an affidavit of Eisenberg and a brief responding to Stanford's request for costs. Eisenberg was not present at the motion hearing. During the hearing, Stanford's attorney advised the court that Eisenberg had done no discovery whatsoever once the case was filed. The trial court listened to arguments from both attorneys and granted the defense's motion seeking frivolous costs. The written order contains no statutory references, nor did the trial court specify which frivolous costs statute was being utilized.

¶9 A motion for reconsideration was filed by Hansen on October 30, 2001, and denied by the trial court without a hearing. On December 28, 2001, Hansen filed a notice of appeal. On June 5, 2002, this court dismissed the appeal because the court lacked jurisdiction, principally because the appeal was not timely filed. This court had given Eisenberg an opportunity to respond but nothing was filed.

¶10 The next record entry, some five years after the judgment was signed, is the motion dated May 1, 2006, brought by Eisenberg's attorney, requesting that the trial court find that the underlying judgment was illegal and unenforceable.[2] The motion was denied. This appeal follows.

II. ANALYSIS.

¶11 Eisenberg's first argument is difficult to understand. In his brief, he writes:

> The first issue set forth in the brief addresses subject matter jurisdiction, and does so in the manner it does due to the Circuit Court judge availing itself to jurisdiction to address the issues posed by the Appellant. Judge Christopher R. Foley the successor judge to that branch, which Judge Flanagan ruled on in this case in 2001, believes that the subject matter jurisdiction is distinguished by whether there was an exercise of discretion when none existed versus just and erroneous exercise of discretion.

Later in his brief, he states:

> THE CIRCUIT COURT RETAINS SUBJECT MATTER JURISDICTION ON A MATTER THAT THE JUDGE UTILIZED AN ERRONEOUS EXERCISE OF DISCRETION IN ITS DECISION FROM AN ORDER IT RENDERED IN SEPTEMBER 2001, SO AS TO ALLOW THAT SAME CIRCUIT COURT BRANCH TO REVIEW, CLARIFY AND CORRECT THE ORDER NOW IN 2007, NOT BECAUSE OF THE EXERCISE OF DISCRETION BUT BECAUSE THE ORDER WAS VOID PURSUANT TO 806.07[(1)](d) Wis. Stats.

We interpret these sentences to mean that Eisenberg claims the trial court did not think it had subject-matter jurisdiction over the frivolous action costs because it

[2] Initially Stanford filed a motion seeking both a dismissal of Eisenberg's motion and costs, alleging that Eisenberg's motion was frivolous. Later this motion was withdrawn.

would not reevaluate whether the finding of frivolousness was correct, but did agree to determine whether the order was void pursuant to WIS. STAT. § 806.07(1)(d).[3]

¶12 The post-judgment trial court stated:

> That last point I do want to emphasize that because at this point I hope I'm stating the obvious when I indicated that I'm limiting my review to any issue related to subject matter jurisdiction and/or interrelated constitutional issues, any right to review of the merits of Judge Flanagan's determination has long, long since past.

[3] WISCONSIN STAT. § 806.07 provides:

> **Relief from judgment or order**. **(1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> ….
>
> (d) The judgment is void[.]
>
> ….
>
> **(2)** The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from the judgment, order, or proceeding, or to set aside a judgment for fraud on the court.
>
> **(3)** A motion under this section may not be made by an adoptive parent to relieve the adoptive parent from a judgment or order under s. 48.91 (3) granting adoption of a child. A petition for termination of parental rights under s. 48.42 and an appeal to the court of appeals shall be the exclusive remedies for an adoptive parent who wishes to end his or her parental relationship with his or her adoptive child.

> Those determinations are five years old. An appeal was undertaken and dismissed as I understand for failure to comply with jurisdictional requirements before the Court of Appeals.

In other words, the trial court acknowledged it had the ability to grant relief from the judgment, had Eisenberg persuaded the court that the judgment was void. However, the trial court refused to evaluate whether Judge Flanagan's discretionary determination was proper.

¶13 Subject-matter jurisdiction refers to the court's power under the Wisconsin Constitution to hear a particular case. ***Village of Trempeleau v. Mikrut***, 2004 WI 79, ¶8, 273 Wis. 2d 76, 681 N.W.2d 190. Because our constitution gives courts "original jurisdiction in all matters civil and criminal within this state," as a general rule circuit courts have subject-matter jurisdiction "to entertain actions of any nature whatsoever." ***Id.*** (quoting WIS. CONST. ART. VII, § 8). An untimely motion is addressed to the sound discretion of the trial court, and its decision will be affirmed unless an erroneous exercise of discretion is shown. *See* ***State v. Schill***, 93 Wis. 2d 361, 378, 286 N.W.2d 836 (1980).

¶14 Here, the trial court refused to address the merits of whether the frivolous costs were warranted. It did not do so because it thought it had no subject-matter jurisdiction; rather, the trial court did not think it appropriate to review the issue as it was raised untimely. This was an appropriate exercise of discretion. The trial court concluded that, given the passage of time and the history of the case, particularly the fact that an appeal of the judgment awarding frivolous costs was dismissed due to Eisenberg's failure to respond to this court's inquiry regarding jurisdiction, it would be inappropriate to revisit whether frivolous costs were warranted. The original trial court held a hearing before entering its order for frivolous costs and reexamined its decision in denying the

motion for reconsideration. The post-judgment trial court properly decided that the motion was untimely and refused to reconsider the frivolous costs issue. The trial court's decision to do so was not an erroneous exercise of discretion.

¶15 Eisenberg next complains that because the order and judgment do not reflect whether the grant of frivolous costs was done pursuant to WIS. STAT. §§ 802.05 or 814.025, and § 814.025 does not permit joint and several liability, the judgment is void. We agree that the former § 814.025 did not permit the imposition of joint and several liability. ***State v. State Farm Fire & Cas. Co.***, 100 Wis. 2d 582, 604, 302 N.W.2d 827 (1981) (Section 814.025 "does not authorize the imposition of joint and several liability."). However, we also agree with the post-judgment court that the initial trial court's ruling was implicitly based on § 802.05. The initial trial court stated:

> It does appear that when confronted with that information Mr. Eisenberg did not delay and acted in a timely manner, but I think the bigger issue is not whether he maintained an action after receiving the information that it was not a valid claim but whether the action should have been brought at all given the standing and ownership issues ….
>
> ….
>
> Now, the issue of whether Mr. Hansen had standing to file this action I think is a substantial one for the Court to review because certainly that changes the whole tenor of how the dismissal is effected and whether Bonnie Stanford should be held to be liable for the expenses that she has incurred being brought into court on this action, it appears to the Court improperly.
>
> It wouldn't have taken a whole lot of effort to look at the records, and now counsel has indicated to me in fact they did look at the records but they chose to distinguish somehow the comments of their client from the – from the divorce decree which is clear and unequivocal he no longer had any – any interest in that property.

> [Hansen] was aware of that decree, or certainly should have been aware of that decree, and counsel for the plaintiff says that she was also aware of the decree and chose to basically ignore it or did not believe that it had any effect on this action which it has every effect on this action.

¶16 Clearly, by making those statements, the original trial court penalized Eisenberg for failing to conduct a "reasonable inquiry," as required by WIS. STAT. § 802.05, before starting this suit. Moreover, both the former WIS. STAT. § 814.025 and case law direct that motions brought under both statutes seeking frivolous costs for commencing an action are to be treated as though made under § 802.05.

> Where, as here, the circuit court awards sanctions for commencing a frivolous action pursuant to both §§ 802.05 and 814.025, we review the decision as one made pursuant to § 802.05. *See* Wis. Stat. § 814.025(4) ("To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.").

Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 547, 597 N.W.2d 744 (1999). There is no prohibition against awarding costs with joint and several liability in § 802.05. Therefore, the original trial court properly entered the order for frivolous costs to be borne jointly and severally by Eisenberg and his client.

¶17 Eisenberg's final argument is that the original trial court erred in not holding a hearing and giving him an opportunity to be heard. "[D]ue process requires that deprivation of property must be preceded by notice and an opportunity for hearing appropriate to the nature of the case." ***Marder v. Bd. of Regents***, 2005 WI 159, ¶40, 286 Wis. 2d 252, 706 N.W.2d 110 (citing ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 313 (1950)).

¶18 Eisenberg contends that the trial court violated due process by entering an order requiring him to pay costs without his being present. We

disagree. Eisenberg was on notice that Stanford was seeking frivolous costs. The answer advised him that frivolous costs would be sought. In addition, Stanford's lawyer wrote to the court and alerted it that the issue of frivolous costs was going to be addressed at the summary judgment hearing. Indeed, Eisenberg himself wrote a letter to the court and referenced the fact that the issue of frivolousness was going to be addressed at the summary judgment hearing. Along with this letter, Eisenberg submitted an affidavit explaining his actions in starting the suit. However, on the day of the hearing, Eisenberg chose to send an associate to the hearing rather than attending. Eisenberg had notice and he was given an opportunity to testify or argue and he chose not to. No due process violation has occurred.

¶19 For the reasons stated, the trial court's order refusing to find the underlying judgment void is affirmed.

By the Court.—Order affirmed.

Recommended for publication in the official reports.