COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2147 **Cir. Ct. No. 2007SC1608**

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

PARKLAND PLAZA VETERINARY CLINIC SC,

PLAINTIFF-RESPONDENT,

V.

ANNE GERARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed and cause remanded with directions.*

¶1 SNYDER, J.[1] Anne Gerard appeals from an order affirming the court commissioner's dismissal with prejudice and on the merits rendered in her favor. That order dismissed a small claims action by which Parkland Plaza Veterinary Clinic SC attempted to collect payment allegedly owed to it by Gerard. Parkland ultimately moved to dismiss with prejudice and the court so ordered. As best we can tell, Gerard contends that the matter should not have been dismissed because arguments she raised before the court commissioner were never satisfactorily addressed. Gerard never conceded that the small claims court had jurisdiction. While maintaining that argument, Gerard also demanded that Parkland comply with her discovery requests. Gerard seeks sanctions against Parkland and the trial court, compensatory damages and costs, and punitive damages from Parkland, Parkland's attorney, and the trial court. We ascertain nothing in the record or from the arguments of the parties that would support such relief. Furthermore, we observe that Gerard obtained a favorable ruling in the circuit court; moreover, nothing in the order is left unresolved or could be interpreted as against Gerard's interest. We affirm the order.

¶2 The facts of this case are brief, but the procedural history is somewhat convoluted.[2] On March 23, 2007, Parkland initiated a small claims action against Gerard, alleging that she owed the clinic just over $258 for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] We observe that in the fact statement portion of her brief, Gerard repeatedly editorializes and incorporates incidents completely irrelevant to this case. She attempts to place the whole of the Waukesha circuit court system on trial. We caution Gerard that editorial comment and argument interspersed in what WIS. STAT. RULE 809.19(1)(d) and (e) requires, namely an objective and completely accurate recitation of the facts, is inappropriate. *See* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194.

veterinary services rendered. An affidavit of personal service indicates Gerard was served with the summons and complaint on April 1.

¶3 On April 16, Gerard filed an answer denying the claim and offering nine affirmative defenses. Among other things, Gerard alleged that she had not been served with the summons and complaint but that a neighbor found muddy, rain-soaked papers appearing to be a summons and complaint in Gerard's orchard.[3] Gerard also alleged that Parkland failed to mitigate its damages and that Parkland engaged in deceptive billing practices. Gerard did not file a counterclaim, but demanded "fees, costs and disbursements of this action incurred in answering this complaint," sanctions against Parkland for failure to mitigate, and other relief the court deemed just and equitable. She then proceeded to demand discovery.

¶4 On April 26, Gerard requested that Parkland furnish "all documents involved with the service of the Summons and Complaint." She followed with written interrogatories and a request for production of documents dated May 2. Gerard filed a motion to compel on May 29, seeking a court order requiring Parkland to produce the documents she had requested on April 26. She filed a second motion to compel on June 6, this time seeking a court order to compel Parkland to produce the documents requested on May 2. On June 7, Gerard sent a letter to Court Commissioner Laura Lau stating that she was not aware of any return dates scheduled in the case and was "not aware of any Amended Complaint."

[3] Parkland responded to Gerard's allegation that she had not been properly served by re-authenticating and re-issuing the summons and complaint on May 16, 2007, and providing proof of service dated May 18.

¶5 On June 12, Parkland sent a letter to the court in response to Gerard's motions to compel. Parkland stated in part:

> If you [the court] review your file in this matter you will note that Anne Gerard challenged service of process….
>
> If, in fact, Anne Gerard is claiming that the Court lacked jurisdiction, then the discovery demands that she forwarded to my office would be improper. However, if Anne Gerard is willing to [waive her] jurisdictional defense, then my client would be happy to respond to her discovery demands.

The court set a July 9 hearing date for Gerard's motions to compel.

¶6 On June 19, Gerard filed a "Motion to Furnish Affidavit of Service Based on Law and Statute." She demanded that the court forward to her copies of the affidavit of service relating to the initial summons and complaint along with the affidavit of service relating to the re-issued summons and complaint. Two days later, Court Commissioner Thomas Pieper ordered that copies of both affidavits be sent to Gerard. On June 28, Gerard filed a motion to adjourn the scheduled July 9 hearing and to compel Parkland to comply with past discovery demands.

¶7 In the meantime, on June 27, Parkland notified the court and Gerard that it was moving to voluntarily dismiss the action. Commissioner Pieper issued an order stating in relevant part that "[Parkland's] complaint against [Gerard] … shall be dismissed with prejudice and upon its merits and without further cost to any of the parties." The order was filed, faxed, and mailed on July 6, 2007.

¶8 Nonetheless, on July 18, Gerard filed a "Motion to Comply with Law and Duties of Court Commissioner." She alleged that Commissioner Lau had failed to respond to Gerard's "numerous documents" and she sought "all actions

and orders made" along with "non-responses and actions not taken" by the court. The next day, Gerard filed a motion for clarification of the order for dismissal, seeking to add several provisions to the order issued by Commissioner Pieper. On July 20, she followed up her motion seeking documentation from Commissioner Lau with a letter detailing the documentation she desired. Four days later, Gerard filed a letter with the court in which she demanded a jury trial.

¶9 Interpreting Gerard's jury trial demand as a petition for de novo review, Commissioner Pieper routed Gerard's letter to the clerk of circuit court for scheduling. By letter dated August 8, 2007, Circuit Court Judge Paul F. Reilly advised Gerard that the order for dismissal would be upheld. The letter stated in relevant part, "This case was dismissed by Order of Court Commissioner Thomas J. Pieper on July 6, 2007, following Plaintiff's voluntary dismissal notice. No counterclaim was filed in this matter." The order was affirmed without costs to either party.

¶10 On August 16, Gerard moved for reconsideration. She alleged that the circuit court clerk had failed to produce documents that Gerard had lawfully requested and that were required to "file a correct and proper [c]ounterclaim/crosscomplaint and for pending judicial review." The court denied the motion on August 20. Gerard pursued additional relief in circuit court, but ultimately filed an appeal with this court on September 17, 2007.

¶11 Gerard's appellate brief presents twenty-one issues for our review. For example, she asserts that procedural irregularities and ex parte communication tainted the proceedings before Commissioners Lau and Pieper. She also argues that the circuit court's denial of her jury trial demand violated her constitutional rights and that the circuit court improperly upheld the dismissal order by failing to

give Gerard the opportunity to object and by failing to verify the factual content of the order. Much of Gerard's dissatisfaction with the events below seems to arise from the relative lack of formality in the small claims venue and her desire to discredit Parkland.[4]

¶12 For several reasons, we affirm the order of dismissal. First, we observe that when a party has received a favorable judgment, that party generally has no right to appeal from it. *See* ***Wyandotte Chems. Corp. v. Royal Elec. Mfg. Co.***, 66 Wis. 2d 577, 592, 225 N.W.2d 648 (1975) ("As a general rule, it has been held that if a benefit received is dependent upon … the order or judgment attacked, the party ought not be permitted to carry on his warfare."); *see also* ***Estreen v. Bluhm***, 79 Wis. 2d 142, 150-51, 255 N.W.2d 473 (1977) (a party who benefits from a judgment waives the right to appeal from that part of the judgment under which the benefit was received).

¶13 We understand that Gerard probably does not see herself as one who benefited from the judgment, largely because she feels she has a legitimate dispute about the clinic bill. However, Gerard's opportunity to contest that bill, the clinic's billing methodology, or any other material fact relating to the underlying collection action was in the small claims court. She began that process with the answer that she filed; however, because she affirmatively challenged the court's personal jurisdiction over her and because of her voracious motion practice,

[4] For example, one of her issues is as follows: "Whether trial court judges and court commissioners can legally issue scribbled and illegible writings on correspondence and documents as legal orders." Another asks, "Whether the trial court can legally issue orders and decisions based upon untruths and falsehoods submitted by the Plaintiff."

Parkland chose to forego its own day in court and abandon its claim. In other words, Gerard won.

¶14 In addition to the general rule of waiver described in ***Wyandotte*** and ***Estreen***, the nature of the issues presented prevents our review. We do not make credibility determinations or factual findings, and we do not craft newly claimed damage awards. *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621; ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶41, 265 Wis. 2d 703, 666 N.W.2d 38. Gerard asks us to admonish and sanction various parties for alleged deceit and covert dealing, to establish and award compensation for all costs, and to assess punitive damages against Parkland, its attorney and the circuit court. The relief Gerard seeks is unavailable.

¶15 Finally, as Parkland pointed out in its brief, even if Gerard could establish that an error occurred at some point in the prior proceedings, that error would be harmless in light of Parkland's voluntary dismissal with prejudice and on the merits.

¶16 We appreciate that we have not addressed all of the nuances and subtleties associated with Gerard's characterization of the issues, particularly those intended to demonstrate neglect and unprofessionalism by circuit court staff. However, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). To the extent we have not addressed arguments raised in this appeal, the arguments are deemed rejected.

¶17 As a final matter, we take up Parkland's motion for costs, fees and attorney fees pursuant to WIS. STAT. § 809.25(3). Section 809.25(3) states in pertinent part:

> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-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.

Parkland asserts that grounds for a finding of frivolousness exist in both § 809.25(c)1 and 2. Although Gerard filed numerous motions in this action, we do not believe she was motivated by bad faith or filed them solely for the purpose of harassment. We do, however, conclude that Gerard should have known that a judgment in her favor with prejudice and on the merits, where no counterclaims were brought, would provide no basis in law or equity for an appeal and that she could not in good faith argue that the law should be changed to allow such an appeal.

¶18 Our analysis holds Gerard to the standard of "what a reasonable party or attorney knew or should have known under the same or similar circumstances." *See* ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. "As with lawyers, a pro se litigant is required to make a reasonable investigation of the facts and the law before filing an appeal." ***Holz v. Busy Bees Contracting Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998). Here, Gerard's appellate arguments are without merit and the appeal in its entirety is frivolous. As a consequence, we must award costs and fees under WIS. STAT. § 809.25(3)(a) (if an appeal is found to be frivolous, the court *shall* award to the successful party costs, fees, and reasonable attorney fees). *See also* ***Howell***, 282 Wis. 2d 130, ¶9. We remand the matter to the circuit court to determine the

reasonable attorney fees incurred by Parkland in responding to Gerard's appeal and to establish the appropriate award. *See* ***Lucareli v. Vilas County***, 2000 WI App 157, ¶¶8-9, 238 Wis. 2d 84, 616 N.W.2d 153.

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

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.