COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2712 **Cir. Ct. No. 2011SC2667**

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

HARRY WAIT,

PLAINTIFF-APPELLANT,

V.

STEVEN JONES, NICHOLAS SHEEN, DAVIDSON TOWING AND PLS LOAN STORE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: DENNIS D. COSTELLO, Judge. *Affirmed and cause remanded.*

¶1 GUNDRUM, J.[1] In this small claims case, Harry Wait, pro se, appeals from a judgment of the circuit court granting judgment on the pleadings to PLS Loan Store, finding his claims against PLS Loan Store frivolous and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

awarding PLS sanctions, and dismissing, after a bench trial, his claims against Steven Jones and Davidson Towing.

¶2 The material facts are undisputed. PLS contracted with Davidson Towing to repossess a vehicle owned by Wait's niece, Nicole Szczerba. When Jones, co-owner of Davidson Towing, arrived at the Szczerba business property and began the repossession, Wait and others objected and attempted to stop Jones from towing the vehicle. A conflict ensued, during which Jones's repossession paperwork was torn up and Wait took the keys for the tow truck. Jones testified at trial that he was locked in the tow truck and, concerned for his safety, he called 911. Wait ultimately was cited for disorderly conduct. Jones never removed Szczerba's vehicle from the property.

¶3 Wait filed suit in small claims court against Jones, Davidson Towing and PLS, alleging that "[d]efendants engaged in an illegal act of repossession, causing financial cost and time to plaintiff." The circuit court granted PLS's motions for judgment on the pleadings and sanctions. Jones and Davidson Towing had not moved for judgment on the pleadings, so the court set a date for trial on Wait's remaining claims against them and also to determine the amount of sanctions for PLS. Wait moved for reconsideration, and the court denied the motion.

¶4 Wait represented himself at trial; Jones represented himself and Davidson Towing. The court found that Jones would have left the property if he had had the truck keys, that, under Wisconsin's self-help repossession statute, Jones was authorized to repossess the vehicle from the property, that Jones properly stopped his effort to repossess the vehicle once Wait and others objected, and that there were no damages because "the repossession never occurred. The

vehicle is still there ...." The court dismissed the case against Jones and Davidson Towing. At the hearing on the amount of sanctions held immediately before the trial, the court ordered Wait to pay $6432.02 in costs and attorney fees to PLS.

¶5 On January 17, 2012, three months after the bench trial and nearly two months after Wait had filed his notice of appeal, Wait filed in the circuit court a four-page document entitled "Causes of Action." We find no independent confirmation in the record of Wait's claim that he timely filed this document in the circuit court along with his complaint. The record does suggest that Wait did serve the Causes of Action document on at least PLS prior to circuit court action.

DISCUSSION

Jones and Davidson

¶6 Wait argues that the circuit court erred when it did not allow him to play at trial a recording of Jones's 911 call. In his Causes of Action document, Wait alleged that Jones made false statements to law enforcement. Wait now argues that by excluding the recording, the circuit court failed to "fairly evaluate [his] slander case." Even under the most generous reading of Wait's original complaint, which alleged only that "[d]efendants engaged in an illegal act of repossession, causing financial cost and time to plaintiff," we cannot conclude that it contained a claim of "false statements."

¶7 Wait does allege in his Causes of Action document that Jones gave false statements to law enforcement. However, the trial transcript is replete with statements between the circuit court and Wait establishing that the circuit court believed that Wait's sole claim was unlawful repossession. In ruling on the recording, the circuit court repeatedly tells Wait that his complaint does not allege

slander. In response to Wait's assertion that he is asking for damages due to Jones's false statement, the circuit court indicates: "That's maybe another case, maybe a slander case that you can bring, but it isn't before me. I don't have that case …. All I have is an objection to an attempted repossession of a vehicle." These exchanges make it clear that the circuit court was not aware of any slander claim. Despite this, Wait never alerted the circuit court to or asked if the circuit court had the four-page document entitled Causes of Action. This was Wait's case to prosecute. By his own inaction, Wait forfeited his right to now complain of circuit court error with regard to such a claim or the circuit court's failure to permit Wait to play a 911 recording related to same. *See* ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 790, 501 N.W.2d 788 (1993).

PLS

¶8 Wait argues the circuit court erred in finding that Wait had no standing as to his illegal repossession or trespass claims and rendering judgment on the pleadings in favor of PLS. Wait contends that PLS violated WIS. STAT. §§ 425.206 and 425.2065 because Jones "breach[ed] the peace" and failed to contact law enforcement prior to attempting repossession. Wait contends that, at trial, PLS would be "found vicariously liable for the illegal actions of PLS Loan Store, Davidson Towing, [and] Steven Jones," including Jones's "false claims."

¶9 A judgment on the pleadings essentially is a summary judgment minus affidavits and other supporting documents. *See* ***DeBraska v. Quad Graphics, Inc.***, 2009 WI App 23, ¶12, 316 Wis. 2d 386, 763 N.W.2d 219. We first look to the complaint to determine if it states a claim. ***Id.*** The complaint should be liberally construed and be dismissed only if the alleged facts do not support any circumstances under which the plaintiff could recover. *See* ***Schuster***

v. Altenberg, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). Our review is de novo. *See* ***DeBraska***, 316 Wis. 2d 386, ¶12. Whether a party has standing is a question of law we also review de novo. ***Chenequa Land Conservancy, Inc. v. Village of Hartland***, 2004 WI App 144, ¶12, 275 Wis. 2d 533, 685 N.W.2d 573.

¶10 The circuit court properly granted judgment on the pleadings in favor of PLS. Liberally construed, Wait's complaint does not allege facts that support any condition under which he could recover. First, the Wisconsin Consumer Act, including WIS. STAT. ch. 425, provides remedies to "customers." WIS. STAT. §§ 421.101, 421.102. Wait does not allege in his original complaint, or in his Causes of Action document, that he was PLS's "customer." Indeed, Wait identifies the target vehicle as "Nicole's car." Wait has no standing to bring his repossession claims.[2]

¶11 The complaint's one-line description of Wait's claim also fails to state any claim for trespass. The Causes of Action document alleges that Jones "knowingly trespassed upon the private property of *Szczerba Investments Inc*." (Emphasis added.) Neither document asserts that Wait had any possessory interest in the property that would provide him with standing for a trespass claim. To maintain an action for trespass, a party must have either actual possession of the land upon which the trespass is committed, which may be demonstrated by acts of ownership or dominion, or good title to the property. ***State v. Gaulke***, 177 Wis. 2d

[2] Wait relies heavily on ***Hollibush v. Ford Motor Credit Co.***, 179 Wis. 2d 799, 508 N.W.2d 449 (Ct. App. 1993), for his contention that a noncustomer third party, like himself, who objects to the repossession of a customer's vehicle has standing to bring a claim for violation of Wisconsin's repossession laws. ***Hollibush*** does not support Wait's position because ***Hollibush*** does not suggest a third-party objector has a right to bring a claim against a repossessor, and the plaintiff in ***Hollibush*** was the customer. ***Id.*** at 802.

789, 794, 503 N.W.2d 330 (Ct. App. 1993). Wait never pled that he had ownership of, dominion over, or good title to the area where he claims Jones trespassed.

¶12 The complaint also fails to allege facts to support Wait's appellate claim that PLS is vicariously liable for the slander or "false claims" he asserts Jones made to law enforcement. Even considering the Causes of Action document, Wait alleges no such a claim against PLS.

¶13 Wait also contends the circuit court erroneously exercised its discretion by failing to rule on his motion to compel discovery as to PLS. Wait claims he received no "usable information in the possession of PLS Loan Store which was necessary to establish the business relationship between PLS Loan Store and Davidson Towing." However, the court correctly determined Wait had no standing to continue his claims, so it did not err in failing to compel discovery related to these untenable claims. Citing WIS. STAT. § 804.09, Wait also claims that PLS's counsel failed to provide him with discovery within thirty days of service. PLS responds that its discovery responses were timely because they were made within the additional three days afforded by WIS. STAT. § 801.15(5)(a) when, as in this case, service of the discovery request is by mail. Wait did not refute this point in his reply brief, thereby conceding it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Sanctions

¶14 Wait challenges the circuit court's finding that his suit against PLS was frivolous. PLS moved for sanctions under WIS. STAT. § 802.05 and provided

Wait with twenty-one days in which to withdraw his complaint, as required under § 802.05(3)(a). Ruling on PLS's motion to dismiss, the circuit court stated:

> Mr. Wait is not the borrower. He is not the owner of the property from which the repossession was attempted. He is simply a legal stranger to the proceedings. He does not have standing to sue, in my opinion, PLS Loan Store.
>
> ….
>
> Mr. Wait, you've picked a fight in which you have no basis to be involved in. I will grant the motion of PLS Loan Store because I believe Mr. Wait has no standing to sue them. None whatsoever ….

The circuit court then decided that PLS was entitled to sanctions, and, after a hearing, awarded $6432.02 in attorney fees.

¶15 We review with deference the circuit court's decision that a lawsuit was commenced frivolously. *See* ***Storms v. Action Wis., Inc.***, 2008 WI 56, ¶34, 309 Wis. 2d 704, 750 N.W.2d 739. We uphold the circuit court's discretionary decision unless there is no reasonable basis for it. *See* ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994). This court will look for reasons to sustain the circuit court's discretionary decision. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. If the circuit court fails to provide reasoning for its decision, we may independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698.

¶16 The record supports the circuit court's discretionary determination that Wait frivolously commenced his lawsuit. Wait filed a lawsuit about an unfinished repossession of someone else's car that was parked on someone else's land. Even as a pro se layperson, Wait should have known, with the most cursory

investigation, that no reasonable basis existed for his claims. *See*, *e.g.*, ***Verex Assurance, Inc. v. AABREC, Inc.***, 148 Wis. 2d 730, 736, 436 N.W.2d 876, 879 (Ct. App. 1989) (holding pro se litigant responsible for adequate investigation of facts and law). As the circuit court put it, Wait was "a legal stranger to the proceedings" who "picked a fight in which [he had] no basis to be involved in."

¶17 Whether a lawsuit was continued frivolously presents a mixed question of fact and law. *See* ***Storms***, 309 Wis. 2d 704, ¶35. What the litigant knew or should have known is a question of fact. ***Id.*** Whether the circuit court's determinations of fact support the conclusion that the lawsuit was continued frivolously is a question of law we review de novo. ***Id.***[3]

¶18 Our review confirms that Wait's suit was continued frivolously. Wait's initial lawsuit was baseless. After the circuit court granted judgment on the pleadings to PLS and explained to Wait that he did not have standing, Wait moved for reconsideration, restating his original arguments. In the face of a motion for sanctions for frivolousness, Wait never made clear how his claims were well grounded in fact and law. Even on appeal, Wait does not contend that there was a viable argument that existing law should be modified or extended, he simply repeats the same arguments he made in response to PLS's motion for judgment on the pleadings and on his own motion for reconsideration.

[3] Our supreme court has suggested that the repeal of WIS. STAT. §§ 802.05 and 814.025 (2003-04) and recreation of § 802.05 (2005-06) "may call into question the existence of different standards of review for commencing and continuing frivolous claims" as the new rule is patterned after Federal Rule of Civil Procedure 11, under which courts review the imposition of sanctions for erroneous exercise of discretion. *See* ***Storms v. Action Wis., Inc.***, 2008 WI 56, ¶35 n.7, 309 Wis. 2d 704, 750 N.W.2d 739. Until this new standard is confirmed, we review under the split standard.

¶19 Finally, PLS has moved for costs and attorney fees on appeal. Whether an appeal is frivolous under WIS. STAT. RULE 809.25(3) is a question of law. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. Sanctions are awarded only if we conclude that the "party or party's attorney knew, or should have known, that the appeal ... [had no] 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." RULE 809.25(3)(c)2. Furthermore, to award attorney fees, we must conclude that the entire appeal is frivolous. ***Howell***, 282 Wis. 2d 130, ¶9. Because the standard is objective, we look to what a reasonable person would or should have known under the same or similar circumstances. ***Id.***

¶20 Wait's appeal was frivolous. Pro se litigants, like attorneys, are required to make a reasonable investigation of the facts and law before filing their appeal. *See* ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998). Here, Wait merely repeats the flawed arguments he made below. We therefore remand to the circuit court for a determination of appellate costs and attorney fees. ***Id.*** at 610.

By the Court.—Judgment affirmed and cause remanded.

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