COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1793 **Cir. Ct. No. 2012CV97**

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

EUNICE KITZMANN,

PLAINTIFF-APPELLANT,

V.

CHARLOTTE PAYTON,

DEFENDANT,

TINA HERFEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Eunice Kitzmann appeals an order of the circuit court dismissing Tina Herfel as a defendant in this action. Kitzmann's suit against

Herfel pertained to a dog Kitzmann possessed at one time which ultimately ended up in Herfel's possession. Kitzmann brought suit against Herfel, seeking to quiet title in the dog. Kitzmann also asserted a claim for relief which she described as a "Violation of Section 173, Wisconsin Statutes." The circuit court struck both claims for relief on the basis that neither has any basis in law and, because those were the sole claims asserted against Herfel, dismissed Herfel as a defendant. We affirm.

BACKGROUND

¶2 In February 2012, Kitzmann brought suit against Herfel. Kitzmann alleged that she temporarily gave possession of her dog "Heidi" to Charlotte Payton and that Payton subsequently surrendered Heidi to Herfel, who owns Tina's K9 Rescue, Inc., which is located in Sparta. Kitzmann alleged that Herfel subsequently refused to surrender Heidi to Kitzmann or to allow Kitzmann to adopt Heidi on the bases that Payton was Heidi's owner at the time Heidi was surrendered to Herfel and Kitzmann abused Heidi. Kitzmann asserted an action for conversion and/or bailment against Payton, as well as the following claims for relief against Herfel: an action to quiet title in Heidi based upon Herfel's refusal to return Heidi, and an action against Herfel based upon a claimed "Violation of Section 173" of the Wisconsin Statutes.

¶3 Payton moved the circuit court to strike Kitzmann's quiet title and "Section 173" claims on the basis that neither is a remedy recognized by law under the facts alleged in Kitzmann's complaint. Payton also moved the court for

attorney fees and costs under WIS. STAT. § 802.05 (2011-12).[1] Herfel joined in Payton's motion, and also moved the court for attorney's fees and costs under § 802.05. The circuit court granted Payton's and Herfel's motions. The court struck Kitzmann's claims for relief based on the determination that neither claim has a "basis in the law," and the court ruled that Kitzmann and her attorney were jointly liable to Herfel for attorney's fees in the amount of $1,357.50.[2] The court subsequently entered an order dismissing Herfel as a defendant on the basis that Kitzmann's sole remaining claim for relief, the conversion/bailment claim, involved only Payton. Kitzmann appeals.

DISCUSSION

¶4 Kitzmann challenges the circuit court's determination that her action to quiet title in a dog should be dismissed because Wisconsin law does not recognize such an action.

¶5 Wisconsin Statutes provide that a quiet title action may be brought by "[a]ny person having an interest in *real property*" seeking from the circuit court the declarations of the parties' relative "interest[s]" in the land. *See* WIS. STAT. §§ 840.03(1) and 841.01 (emphasis added). Consistent with this, BLACK'S LAW DICTIONARY defines an action to quiet title as "[a] proceeding to establish a plaintiff's title to *land* by compelling the adverse claimant to establish a claim or

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We observe that the transcript of the hearing on the motions to dismiss and for attorney's fees reflects that the circuit court signed two separate orders for attorney's fees—one for Payton and one for Herfel. However, neither of those orders is part of the record before us on appeal.

be forever estopped from asserting it." BLACK'S LAW DICTIONARY 32 (8th ed. 2004) (emphasis added). Kitzmann concedes that "generalized restatement[s] of [the] law[] … [have] led to the generalized belief that quiet title claims are the sole province of real property." She argues that this court should nevertheless recognize an action to quiet title in a pet because of the following statement in a case from 1899: "[a]ctions [to quiet title] are infrequently brought where the subject is personal property, but the jurisdiction of the court in such cases is as well defined and as well understood as where the subject is real estate." ***Magnuson v. Clithero***, 101 Wis. 551, 554, 77 N.W. 882 (1899).

¶6 We agree with Herfel that Kitzmann's reliance on ***Magnuson*** is misplaced. ***Magnuson*** concerned the plaintiff's ability to foreclose on a mortgage that was awarded to the plaintiff in a default divorce decree, which was incorrectly described in the original judgment of divorce but was correctly described in an amended judgment. ***Id.*** In ***Magnuson***, the plaintiff was in possession of the note and mortgage, but the plaintiff's ability to enforce the mortgage was questioned by the mortgagor. The court stated that in that situation, "a court of equity had jurisdiction to quiet plaintiff's title to the property." ***Id.*** Kitzmann has not presented a persuasive argument as to why the court's statement in ***Magnuson*** should be extended to the present situation, which concerns a dog in the possession of the defendant. Kitzmann has not provided any statutory authority authorizing a quiet title action for pets. To the contrary, as cited above, a quiet title action may be brought by "[a]ny person having an interest in *real property*" seeking from the circuit court the declaration of the parties' relative "interest[s]" in the land. *See* WIS. STAT. §§ 840.03(1) and 841.01. Accordingly, we conclude that the circuit court properly dismissed Kitzmann's quiet title action.

¶7 As to her second claim for relief against Herfel, which she describes as a "Section 173" claim,[3] Kitzmann does not argue that the court erred in dismissing that claim, and in fact concedes that WIS. STAT. ch. 173 does not apply in this case. Instead, Kitzmann posits multiple questions pertaining to what remedies are available to her if Herfel has acted contrary to ch. 173, which governs the appointment and duties of animal humane officers and establishes procedures for political subdivisions to care for animals taken into custody by humane officers. This court does not provide advisory opinions, nor do we give legal advice. ***Commerce Bluff One Condominium Ass'n, Inc. v. Dixon***, 2011 WI App 46, ¶22 n.6, 332 Wis. 2d 357, 798 N.W.2d 264.

¶8 Finally, Kitzmann also challenges the circuit court's award of attorney's fees under WIS. STAT. § 802.05, which governs sanctions for frivolously continued actions.

¶9 In reviewing a circuit court's award of attorney's fees under WIS. STAT. § 802.05, we will uphold the court's findings of fact unless they are clearly erroneous; however, ultimately the question of whether a claim is frivolous is a question of law that we review de novo. *See* ***Brunson v. Ward***, 2001 WI 89, ¶27, 245 Wis. 2d 163, 629 N.W.2d 140. The supreme court has stated that allegations that a claim is frivolous is an "especially delicate area of the law," and has directed that any doubts be resolved against the conclusion of frivolousness. ***Id.***, ¶28.

[3] Kitzmann states "Section 173" in her complaint, in other materials presented to the circuit court and in her brief on appeal. However, it seems obvious that Kitzmann means this as a general reference to various statutes in *chapter* 173.

¶10 Kitzmann does not argue that her "Section 173" claim was not frivolous for purposes of awarding attorney fees under WIS. STAT. § 802.05. She does, however, argue that her quiet title claim was not frivolous because "there is not a well-established doctrine precluding a quiet title claim." We disagree. Kitzmann has relied almost entirely on a case from 1899 in which the court referenced "quiet title" actions and "personal property" in the same sentence to support her assertion that in Wisconsin a litigant may quiet title in a pet. The authority upon which Kitzmann relies does not support her position, and no other legal authority in Wisconsin since that time has indicated that title may be quieted in pets. In fact, the statute under which quiet title actions are brought applies only to real estate, and it appears from our independent research that all cases concerning quiet title actions since 1899 have related to real property. Accordingly, we conclude that Kitzmann's quiet title action was frivolous and affirm the circuit court's award of attorney's fees.[4]

CONCLUSION

¶11 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] Kitzmann also challenges Payton's entitlement to attorney fees, arguing that the quiet title action did not pertain to her and argues that she "may be entitled to attorney's fees, on remand, due to [Payton's] over-litigation" of the issue of quiet title. Kitzmann appeals the order dismissing Herfel as a defendant. Although that order was final as to Herfel, it was not a final order as to Payton. *See* ***Culbert v. Young***, 140 Wis. 2d 821, 827, 412 N.W.2d 551 (Ct. App. 1987) (an order is not final as to a particular defendant merely because the order is final as to other defendants). We therefore do not address this issue.