

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP282

Cir. Ct. No. 2012CV861

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JASON L. EDMONSON,

PLAINTIFF-APPELLANT,

V.

**MICHELLE DEWITT, DARREN DEWITT, DEWITT ENTERPRISES, INC.
AND DEWITT INVESTMENTS, LLC,**

DEFENDANTS-RESPONDENTS,

JANE DOE AND LORI FLEMING,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed and cause remanded; motion granted.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Jason Edmonson, pro se, appeals a summary judgment granted to Michelle DeWitt, Darren DeWitt, DeWitt Enterprises, Inc., and DeWitt Enterprises, LLC (collectively, the DeWitts).¹ Prior to filing their response brief, the DeWitts moved to declare Edmonson’s appeal frivolous. We agree the appeal is frivolous. We therefore affirm, grant the frivolousness motion, and remand for an award of reasonable attorney’s fees.

BACKGROUND

¶2 Edmonson and Lori Fleming executed a purchase agreement and a land contract to acquire a hair salon from the DeWitts. Edmonson provided rental property as collateral. He and Fleming married soon after the deal, but their relationship promptly soured. Fleming accused Edmonson of sexually assaulting her and obtained a restraining order against him. The DeWitts subsequently released Edmonson from his obligations under the contracts and issued him a full satisfaction of mortgage on his rental property. Fleming continued operating the hair salon, but her business ultimately failed.

¶3 Edmonson filed a pro se civil complaint against Fleming, the DeWitts, and Jane Doe (as an unknown owner of the hair salon). The complaint alleged, inter alia, that Fleming falsely accused him of sexual assault, and that Fleming and the DeWitts fraudulently used his personal information and forged checks on a business bank account, maliciously reported him to police and had

¹ The circuit court’s order also denied Edmonson’s motions for default judgment and summary judgment against Jane Doe and Lori Fleming. However, those defendants are not named in the appeal and have not filed any documents with this court, and the DeWitts’ brief indicates their attorney does not represent Doe or Fleming. Accordingly, we do not address Edmonson’s motions against Doe and Fleming.

him arrested, and compelled him to sign documents removing him from the salon business by threat of arrest. Edmonson asserted a litany of legal claims, including fraud, extortion, obstruction of commerce, conspiracy, Fourth Amendment violations, breach of contract, and various statutory claims. Edmonson requested compensatory and punitive damages, statutory costs, and numerous declaratory judgments.

¶4 The DeWitts moved for summary judgment. Their motion was supplemented by an affidavit refuting facts alleged in the complaint. Edmonson responded and, in his response brief, asserted that summary judgment should be granted to him instead.² Additionally, Edmonson moved for both default judgment and summary judgment against Fleming and Doe. Edmonson's motions and response to the DeWitts' motion were not supported by documentary evidence or affidavits containing factual averments. Instead, Edmonson relied on the allegations in the complaint. The circuit court denied Edmonson's motions and granted the DeWitts' motion. Edmonson appeals.

DISCUSSION

¶5 Edmonson argues the circuit court erroneously granted summary judgment to the DeWitts. Summary judgment is appropriate when "there is no

² The DeWitts assert they were not served with Edmonson's response to their summary judgment motion and did not learn of it until Edmonson filed his appeal. However, the circuit court's summary judgment decision explicitly references his response. Moreover, the DeWitts did not obtain permission to supplement the appellate record with their attorney's affidavit addressing the matter. Similarly, it appears many of the items included in Edmonson's appendix are not part of the record. We have disregarded all information or documents improperly submitted by the parties. *See* WIS. STAT. RULES 809.15(3), 809.83(2).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). Further:

When a motion for summary judgment is made and supported [by proper affidavits or supplementary evidence], an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response, by affidavits or [depositions or answers to interrogatories], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

WIS. STAT. § 802.08(3). We review grants of summary judgment de novo. *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997).

¶6 The DeWitts moved for an order finding Edmonson’s appeal frivolous and awarding them their fees, costs, and attorney’s fees under WIS. STAT. RULE 809.25(3)(a).

In order to find an appeal ... frivolous under par. (a), the court must find one or more of the following:

1. The 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 ... 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.

RULE 809.25(3)(c). Whether an appeal is frivolous is a question of law. *Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. “To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous.” *Id.* Since the RULE 809.25(3)(c)2. standard is objective, we consider what a reasonable party or attorney knew, or should have known, under the same

or similar circumstances. *Id.* “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*, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998).

¶7 In their frivolousness motion, the DeWitts assert:

While Edmonson argues that the circuit court ignored some causes of action and “failed to identify” the facts that support his causes of action, all of his arguments on appeal boil down to the exact same claims, with no factual support, he tried to make in front of the circuit court.

The DeWitts then address Edmonson’s individual arguments in their response brief, contending they all fail because Edmonson “failed to set forth specific factual evidence in support of his claims.” (Capitalization omitted.)

¶8 We agree Edmonson’s appeal is frivolous. The language of WIS. STAT. § 802.08(3) is clear. When the DeWitts moved for summary judgment and supported their arguments with affidavits rebutting the allegations set forth in the complaint, Edmonson was required to respond in kind. “[A]n adverse party may not rest upon the mere allegations or denials of the pleadings[.]” *Id.* However, instead of supporting his claims with affidavits averring facts or documentary evidence as required by § 802.08(3), Edmonson relied entirely on the allegations of the complaint. Accordingly, the circuit court properly granted the DeWitts’ motion and rejected Edmonson’s argument that he should instead be granted summary judgment. *See id.*

¶9 Having failed to provide any evidentiary support for his claims, Edmonson merely reiterates conclusory legal statements on appeal. At the very least, a party appealing a summary judgment decision must be expected to have

reviewed the summary judgment statute. Had Edmonson done so, it would have been apparent that he had no viable appellate arguments, due to his failure to adequately respond to the DeWitts' summary judgment motion. Further, Edmonson failed to file an appellate reply brief, which we deem a concession of the DeWitts' arguments that Edmonson's claims all fail due to a lack of evidentiary support. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶10 The DeWitts additionally assert Edmonson, who is incarcerated, should not be relieved from paying the full appellate filing fee, and they request that we freeze Edmonson's institution account until there is full repayment of all fees and costs associated with this appeal.

¶11 The DeWitts' argument, however, relies on a false premise. As Edmonson observes in his response to the DeWitts' frivolousness motion, Edmonson's appellate filing fee was paid. While he initially sought to file as an indigent prisoner, another party paid the appellate filing fee on his behalf before final action was taken on his indigency petition. The DeWitts' request relies on WIS. STAT. RULE 809.103(3), WIS. STAT. § 814.29(1m), and *Lindell v. Litchser*, 2003 WI App 36, 260 Wis.2d 454, 659 N.W.2d 413, all of which concern prisoners proceeding without prepayment of the filing fee. Accordingly, we reject the DeWitts' request because it is not supported by legal authority.

¶12 We remand for the trial court to determine the DeWitts' reasonable attorney's fees pursuant to WIS. STAT. RULE 809.25(3).³ See *Lucareli v. Vilas Cnty.*, 2000 WI App 157, ¶¶5-12, 238 Wis. 2d 84, 616 N.W.2d 153 (appropriate to remand frivolous appeal to circuit court to determine attorney's fees).

By the Court.—Judgment affirmed and cause remanded; motion granted.

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

³ The DeWitts' other appellate costs and fees are recoverable pursuant to WIS. STAT. RULE 809.25(1).

