

MEMORANDUM

To: Executive Committee of the Wisconsin State Bar Board of Governors
From: Colleen D. Ball, Chairperson of the Appellate Practice Section
Date: June 10, 2004
Subject: Request for permission to file an *amicus* brief in *Howell v. Denomie*, Appeal No. 03-0979

The Appellate Practice Section Board of Directors seeks the Executive Committee's authorization to file an *amicus* brief in *Howell v. Denomie*, Appeal No. 03-0979, now pending in the Wisconsin Supreme Court. The Court's decision is expected to establish the procedures that Wisconsin appellate courts must use to determine whether an appeal is frivolous under Wis. Stat. § 809.25(3).

Our Section consists of almost 400 attorneys who do appellate work, and our fifteen-member Board of Directors includes an appellate judge, appellate court staff, attorneys from the Department of Justice and the State Public Defender's Office, private practice lawyers from large and small firms, and a law school faculty member. Our section is the voice of the appellate bar in Wisconsin. We would like to participate in the process of developing clear and fair standards for determining whether an appeal is frivolous.

Pursuant to Article VII, § 2 of the Wisconsin State Bar Bylaws, the APS Board of Directors provides the following information:

A. Statement of the Case.

Gary Howell wanted to buy a house in Trempealeau, Wisconsin, but he did not have enough money. He tried to get a loan from a bank and was turned down. So Orrin and Helen Denomie agreed to help Howell acquire the house. Howell says that the Denomies gave him a mortgage loan so that he could purchase the house from a third-party. The Denomies, in contrast, say that they purchased the home and that they were renting it to Howell until he obtained the funds necessary to buy it from them in the future.

Howell sued the Denomies, asserting that he had paid them all of the principal and interest due under the mortgage loan but they refused to sign a satisfaction of mortgage. Howell's complaint demanded the satisfaction of a paid mortgage, penalty damages per § 706.05(1), consequential damages, attorneys fees, and court costs. Judge John A. Damon of the Trempealeau County Circuit Court tried the case on January 13, 2003. The trial judge found that at least some of the testimony supporting the Denomies' defense was "entirely credible." However, he found Howell's version of events more credible and ruled that there was no merit to the Denomies' claim that they owned the property. The trial judge ordered the Denomies to sign the satisfaction of mortgage and awarded Howell a \$2,000 penalty under Wis. Stat. § 706.05(10)(b), actual damages of \$2,267.36, attorney fees of \$4,744.60, and statutory and taxable costs of \$601.14. The total judgment was \$9,612.74.

The Denomies appealed the trial judge's decision to award judgment to Howell, as well as his finding that their defense was frivolous. The court of appeals determined that the case was appropriate for summary disposition, rejected the Denomies' arguments, declared the appeal frivolous, and remanded the case for a determination of Howell's attorney fees on appeal. The court noted that "the trial judge, when acting as the fact finder, is considered the 'ultimate arbiter of the credibility of a witness.'" (Decision at 2) (citing *Estate of Dejmal*, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980) and Wis. Stat. § 805.17(3)). The Denomies neglected this standard of review and offered no basis to overturn the trial judge's credibility determination. (Decision at 2). The court of appeals concluded that the Denomies' attorney "should have known that his appellate argument was without any reasonable basis in law or in equity and cannot be supported by a good faith argument for an extension, modification or reversal of existing law." (Decision at 2). The Denomies filed a petition for review, and the Supreme Court granted it on April 29, 2004.

B. Statement of the Principles of Law to Be Supported.

The issues that the Supreme Court will review are:

1. Is a losing party's position frivolous even if supported by testimony that the circuit court found to be "entirely credible"?
2. Is there a fundamental difference between appealing the sufficiency of the evidence and appealing the credibility of the evidence?
3. Is it frivolous to appeal a circuit court's determination that a party's position was frivolous and the corresponding award of attorneys fees when counsel was not given an opportunity to be heard regarding the finding of frivolousness?
4. What procedures must the court of appeals employ before finding an appeal frivolous under Wis. Stat. § 809.25(3)?¹

The proposed amicus brief will address primarily the fourth issue for review. The APS Board of Directors advocates a "bright line" rule, which would require a respondent who contends that an appeal is frivolous to present his argument in a separate motion. The appellant would be given an opportunity to respond, and the court of appeals would be required to make specific findings regarding frivolousness. This rule would also apply to the situation where the court of appeals is reviewing a trial court finding of frivolousness. In other words, the court of appeals could no longer declare an appeal per se frivolous simply by affirming the trial court's finding of frivolousness. Our position is supported by Wis. Stat. § 809.25(3); *Weiland v. Paulin*, 2003 WI 27, 260 Wis. 2d 277, 659 N.W.2d 875; Fed. R. App. P. 38; and a host of federal decisions.

C. Authorization of this Request.

The APS Board of Directors held a telephonic meeting on May 27, 2004, to discuss this matter. Eleven of our fifteen elected board members were on the call. Nancy Kopp, a Supreme Court commissioner, abstained from the discussion. The remaining ten board

¹ The petition for review raised the first three issues. The Supreme Court's order granting review defined the fourth issue for review and directed the parties to brief it.

members voted unanimously to prepare and submit this request for permission to file an amicus brief.

D. Personal or Professional Interests in the Matter.

Nancy Kopp (Wisconsin Supreme Court Commissioner) and Ted Wedemeyer (Wisconsin Court of Appeals Judge) are members of the APS Board of Directors. Neither of them has participated in our decision on this issue. No other APS Board members have personal or professional interests in the case.

E. Proposed Author of the Amicus Brief.

Attorney Mike Halfenger of Foley & Lardner will prepare the amicus brief with the assistance of our 2004-2005 chair person, Jeff Davis of Quarles & Brady.

F. Distribution of Request.

The APS Board of Directors has not distributed a copy of this request to the parties or the attorneys involved in *Howell v. Denomie*. However, George Burnett alerted counsel for both parties that the APS Board was considering whether to file an *amicus* brief in their case.

G. Purpose of Amicus Brief.

The purposes of the State Bar are, among other things, “to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence, and public service and high standards of conduct . . .” SCR 10.02(2). One purpose of the Appellate Practice Section is “to further develop the appellate process in state and federal courts.” Appellate Practice Section Bylaws, Art. I, § 2. The APS Board of Directors believes that the proposed *amicus* brief would be consistent with these State Bar and the Appellate Practice Section objectives.

H. Time Line.

The APS Board of Directors’ motion for permission to file an amicus brief is presently due July 20, 2004.