COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 97-0024
97-0971
97-1800

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

PATRICK D. AFFELDT,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

V.

YEHUDA ELMAKIAS, RUTH ELMAKIAS, YEHUDA ELMAKIAS AND RUTH ELMAKIAS D/B/A ELMAKIAS CONSTRUCTION,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Patrick Affeldt appeals from the judgment and order, which did the following: (1) awarded him limited injunctive and declaratory relief and dismissed many of his claims as frivolous; (2) dismissed his claim for sanctions against the respondents; (3) awarded the respondents costs for defending the frivolous claims; and (4) denied his motion for summary judgment on one counterclaim. Yehuda and Ruth Elmakias cross-appeal from the order denying their motion for costs and attorney fees for defending against frivolous claims. We affirm.

FACTS

This case has a remarkably long and complicated procedural history for what is a fairly simple dispute between owners of adjoining property. Affeldt and the Elmakiases own adjoining lots in a subdivision in Madison. The subdivision is governed by a restrictive covenant. The Architectural Control Committee must approve all construction in the subdivision. The deed restriction required that there be ten feet between a building and the side lot line (ten-foot sideyards), for a total of twenty feet between the buildings.

When the Elmakiases went to the committee to have their construction approved, they learned that their duplex might not comply. A member of the committee and Mr. Elmakias looked at the plat plan that appeared to show that Affeldt had a twelve foot sideyard. The Elmakiases then requested that the committee grant them a variance from the deed restriction and allow them to build the duplex with an eight foot sideyard for a total of twenty feet. The committee granted the Elmakiases' request.

The Elmakiases built a duplex on their lot which was eventually found to be between 19.6 and 19.9 feet from Affeldt's duplex.[1] This distance violated the deed restriction. As a result, Affeldt sued the Elmakiases alleging more than twenty-three causes of action.[2] After much discovery and a four-day trial, the circuit court granted Affeldt declaratory judgment that the Elmakiases' duplex violated the deed restrictions. The court further determined that the violation was negligent and not intentional. The court denied all claims for damages and dismissed most of Affeldt's other claims as frivolous. The court, however, granted an injunction to Affeldt prohibiting the Elmakiases from making "hang-up" phone calls to his house. The circuit court dismissed all of the Elmakiases' counterclaims. The court also denied the Elmakiases' claims for attorney fees and costs for defending against the frivolous claims, finding that the Elmakiases' attorneys had not sufficiently identified the time they had spent on defending against the frivolous claims. The court awarded the Elmakiases statutory costs.

ISSUES ON APPEAL

On this appeal, Affeldt raises twenty issues. He argues that: (1) the trial court erroneously exercised its discretion by not granting him an injunction; (2) the finding that the Elmakiases violated the deed restriction negligently rather than willfully, wantonly, and recklessly, was not supported by the facts; (3) he was damaged by the violation; (4) he did not violate the common deed restrictions;

[1] In a supplemental decision, the circuit court also found that the Elmakiases' duplex was too close to the duplex on the lot adjoining the property on the other side; therefore, it violated the deed restriction. The owner of that duplex, however, is not a party to this litigation.

[2] The circuit court found that Affeldt alleged twenty-three causes of action for trespass alone.

(5) the circuit court made improper use of the judicial view of the property; (6) the circuit court failed to make the determinations required by § 805.17, STATS.; [3] (7) the circuit court's reasoning process was not reasonable and the circuit court was biased against him; (8) he is entitled to greater declaratory relief; (9) the deed restriction violation constitutes a nuisance; (10) he is entitled to damages on the deed restriction claims; (11) he is entitled to punitive damages; (12) he is entitled to fees under § 895.50(1)(c), STATS.;[4] (13) the Elmakiases are not entitled to costs

[3] Section 805.17, trial to the court, states in relevant part:

> (2) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

[4] Section 895.50, STATS., right of privacy, states in relevant part:

> (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:
>
> (a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(continued)

because (a) the costs had no statutory basis, (b) the Elmakiases forfeited the right to costs, (c) the circuit court did not have the authority to award costs, and (d) the award of costs was an erroneous exercise of discretion; (14) he is entitled to relief for a fence trespass; (15) he is entitled to an injunction prohibiting any further fence trespass; (16) he is entitled to an abatement of a spite fence; (17) his claim for sanctions was properly before the court; (18) the Elmakiases' sanctions motion was frivolous as a matter of law; (19) the circuit court's findings of frivolity constitutes reversible error; and (20) the cross-appeal is frivolous and he is entitled to fees for defending the frivolous cross-appeal.[5]

In their cross-appeal, the Elmakiases argue that they are entitled to all their costs and fees or in the alternative they are entitled to a percentage of their costs and fees for defending the frivolous claims.

STANDARD OF REVIEW

We sustain a trial court's findings of fact unless they are clearly erroneous. ***Klinefelter v. Dutch***, 161 Wis.2d 28, 33, 467 N.W.2d 192, 194 (Ct. App. 1991). The legal significance of those facts, however, is a question of law that we review de novo. ***Id.*** Further, we will sustain a discretionary act of the circuit court if that court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a

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(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney fees.

[5] Affeldt also moved for costs and fees for the frivolous cross-appeal. That motion is still pending before this court and we deny it for the reasons discussed in the order.

reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

ANALYSIS

The first issue on appeal is whether the circuit court erroneously exercised its discretion when it declined to grant Affeldt an injunction concerning the deed restriction violation. Affeldt argues that the full scope of the violation was not considered. "[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors the issuing of the injunction." ***Pure Milk Products Coop. v. Nat'l Farmers Org***., 90 Wis.2d 781, 800, 280 N.W.2d 691, 700 (1979) (citations omitted).

The circuit court determined that the Elmakiases had violated the deed restriction when they built their duplex between .1 and .4 of a foot too close to Affeldt's duplex. The court then balanced the equities of the harm caused by the violation and the hardship involved in remedying the violation. The court determined that remedying the violation would require moving or substantially modifying the duplex. The court concluded that the hardship was too great given the nature of the violation. We conclude that the circuit court's determination was not clearly erroneous and we affirm.

Affeldt argues that our decision in ***Forest County v. Goode***, 215 Wis.2d 217, 572 N.W.2d 131 (Ct. App. 1997), requires that we reverse and order an injunction. However, the supreme court rejected that conclusion in ***Forest County v. Goode***, 219 Wis.2d 655, 579 N.W. 2d 715 (1998).

Forest County involved the power of the circuit court to grant an injunction when enforcing a zoning violation. We held that in certain situations, once a statutory violation was found, the circuit court must issue an injunction. ***Id***. at 660, 579 N.W. 2d at 719. The supreme court disagreed. It said:

> [W]e conclude that to construe the enforcement statute as eliminating the circuit court's traditional equitable power could lead to unjust results. For instance, a resident of the district affected by the zoning regulation could request, and necessarily obtain, an injunction compelling conformance with the ordinance. This is so even if the violation is extremely minor and the issuance of an injunction would be inequitable.

Id. at 680, 579 N.W.2d at 727.

The evidence at trial established that the Elmakiases' deed restriction violation was minor. The circuit court did not erroneously exercise its discretion by determining that compelling conformance with the deed restriction would create too great a hardship given the nature of the violation.

The second issue is whether the circuit court erroneously concluded that the violation was negligent rather than willful, wanton or reckless. The court found that there was no evidence to establish that the Elmakiases had actual knowledge that the duplexes would be less than twenty-feet apart. The court further found that there was evidence, including the evidence that Mr. Elmakias reviewed the plat plan with a member of the Architectural Control Committee, that the Elmakiases intended to conform to the deed restrictions.

The court found that since the evidence also established that the duplexes were less than twenty-feet apart, a reasonable inference could be drawn that this could have been avoided. The court, therefore, found that the Elmakiases

were negligent. Again, we conclude that the circuit court's determination was not clearly erroneous and we affirm.[6]

Affeldt argues that he was damaged as a result of the deed restriction violation. At trial, Affeldt presented the testimony of a real estate expert who stated that the value of Affeldt's duplex had been diminished by ten percent because of its proximity to the Elmakiases' duplex. On cross-examination, however, the expert admitted that the larger, more expensive duplex built by the Elmakiases could actually have increased the value of Affeldt's duplex. The court concluded that the difference in distance of a maximum of 4.8 inches between the two duplexes "could not affect the view or value of the plaintiff's duplex." We conclude that the circuit court's determination that Affeldt did not suffer any damages as a result of this slight deed restriction violation was not clearly erroneous, and we affirm.

Affeldt further argues that he was entitled to have the Elmakiases' bay window counterclaim dismissed on summary judgment.[7] He has not sufficiently explained nor properly briefed this issue. He cites to only one legal authority, the relevance of which is not obvious, and spends only a few paragraphs

[6] Affeldt claims that he is entitled to punitive damages. Since we have affirmed the determination that the Elmakiases did not act willfully, wantonly or recklessly, we also affirm the determination that there is no basis for punitive damages.

[7] Although Affeldt did not win on summary judgment, the court eventually dismissed the Elmakiases' counterclaim. It is not obvious why Affeldt is appealing an issue that he eventually won. His brief does not shed any light on the question. Affeldt also states that he had "a number of equitable and legal defenses to the counterclaim that were never considered due to the dismissal." One must be aggrieved to appeal an issue. ***Mutual Serv. Cas. Ins. Co. v. Koenigs***, 110 Wis.2d 522, 526, 329 N.W.2d 157, 159 (1983). We will not pursue this assertion further.

on the argument. We will not consider the argument.[8] *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W. 2d 633, 642 (Ct. App. 1992).

Next, Affeldt argues that the circuit court improperly used a judicial view of the property to obtain new evidence. While Affeldt identifies the circuit court's findings based on the judicial view, he does not explain in any detail why these findings exceeded the proper scope of a judicial view. He merely cites to two cases and leaves us to draw our own conclusions. We conclude that this issue also was inadequately briefed and we decline to review it. ***Pettit***, 171 Wis.2d at 647, 492 N.W.2d at 642.

Affeldt also argues that the trial court did not make the findings required by § 805.17, STATS., concerning trials to the court. He asserts that the court was required to detail the reasons it denied his request for attorney fees and his motion for a new trial. The statute does not contain a requirement that the denial of a motion for a new trial contain any findings. Further, there is no requirement in § 805.17 that the circuit court detail its reasons for denying fees or costs under §§ 802.08(5) or 895.50(1)(c), STATS.

Affeldt next argues that the circuit court's reasoning process "was not reasonable" and that "there is also a very serious concern whether the trial court was capable of exercising its discretion in a fair and impartial manner...." Affeldt does not explain in sufficient detail why the court's reasoning process was not reasonable; therefore, we will not consider the argument. *See* ***Pettit***, 171

[8] Although Affeldt also appealed the circuit court's decision on his summary judgment motion, this is the only time in the brief he discusses the summary judgment motion. Therefore, he has waived any other arguments he may have with respect to the appeal of the summary judgment motion.

Wis.2d at 647, 492 N.W. 2d at 642. Further, we find no support in the record for Affeldt's allegations that the circuit court was not capable of being fair. To the contrary, the circuit court was remarkably tolerant of contentious litigants.

Affeldt argues that he is entitled to "greater" declaratory relief by having the declaratory judgment apply to Mrs. Elmakias as well. We will not consider this argument because it does not appear from the record that Affeldt raised it before the circuit court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W. 2d 140, 145 (1980) (no issue or claimed error of the trial court may be reviewed on appeal unless it was raised first before the trial court). Further, even had Affeldt raised it in the circuit court, we would not consider it on appeal because he has neither fully explained the argument nor cited to any legal authority in support of the argument. *See* ***Pettit***, 171 Wis.2d at 647, 492 N.W. 2d at 642.

Affeldt next argues that the deed restriction violation constitutes a nuisance. Affeldt admits that no Wisconsin case holds that a violation of a private deed restriction constitutes a nuisance. He argues, however, that there is no reason to rule out the theory. Given the circuit court's determination that the violation was extremely minor and that Affeldt was not harmed by it, we conclude that this is not an appropriate case for considering whether such a violation constitutes a nuisance.

Affeldt makes a second claim that he is entitled to damages on his deed restriction claims. But the circuit court determined that Affeldt did not suffer any damage as a result of the deed restriction violation. As we have already discussed, the circuit court concluded that a difference of 4.8 inches between the

two duplexes did not affect the view or value of Affeldt's duplex. This determination was not clearly erroneous.[9]

Affeldt next argues that he is entitled to fees under § 895.50(1)(c), STATS., a statute concerned with invasion of privacy. Affeldt succeeded on this claim by obtaining an injunction against the Elmakiases prohibiting them from telephoning his home. Under § 895.50, one who establishes an invasion of privacy is entitled to injunctive relief, which Affeldt obtained, compensatory damages based on the plaintiff's loss or the defendant's unjust enrichment, and a reasonable amount for attorney fees. The circuit court found that Affeldt had not suffered any damages as a result of the telephone calls. It does not appear, however, that Affeldt asked the circuit court for fees under this statute. Affeldt does not say if or when he asked the circuit court for fees, and we have not found anything in the record which indicates that he made the request. We will not consider the issue. *See* ***Wirth***, 93 Wis.2d at 443-44, 287 N.W.2d at 145.

Affeldt's next argument is that the award of costs to the Elmakiases must be reversed. The Elmakiases counterclaimed that many of Affeldt's causes of action were frivolous under § 814.025, STATS. The circuit court agreed. The court did not award the fees that the Elmakiases requested for defending against these claims because their attorneys' records did not indicate specifically the portion of their time spent on the frivolous claims. However, the circuit court awarded statutory costs pursuant to § 814.04, STATS., as authorized by § 814.025(1). Affeldt asserts that the award of costs to the Elmakiases should be

[9] Since we do not decide the issue of whether the violation of a private deed restriction can constitute a nuisance, we will also not consider whether Affeldt is entitled to damages for the nuisance claim.

reversed for a number of reasons, including that they were not timely filed. A review of the record indicates, however, that the bill of costs was timely filed.[10] The Elmakiases succeeding in establishing that most of Affeldt's claims were frivolous under § 814.025. Therefore, the trial court could award them costs pursuant to § 814.025(1), which incorporates § 814.04.

Affeldt next argues that he is entitled to relief for fence trespass and for an injunction prohibiting future trespasses. He admits that the fence which he claims trespassed on his property was taken down on "the eve of trial." He is, therefore, asking for "relief" concerning a fence which no longer exists. The circuit court, stating that the fence "is gone," concluded that the claim was moot and dismissed it. We affirm this determination.

The circuit court also declined to grant an injunction prohibiting future trespasses. The circuit court found that the evidence was inconclusive as to whether the former fence, which was actually only one board, was ever on Affeldt's property. The court found that there was a reasonable inference that the board was on city property. Since Affeldt did not successfully establish that there ever had been an unlawful fence, let alone that there ever would be, the circuit court did not erroneously exercise its discretion by concluding that Affeldt was not entitled to an injunction.

Affeldt also argues that he is entitled to abatement of another fence he calls a "spite fence" under § 844.10, STATS. This section prohibits a fence

[10] The circuit court decided the case on September 19, 1996. On September 26, 1996, the Elmakiases moved for costs and fees under § 814.025, STATS. Judgment was entered on November 14, 1996. The same day, the Elmakiases filed their supporting documents for their motion for costs and fees.

exceeding six feet in height which is maliciously erected and maintained to annoy the neighbors. The circuit court found that the fence at issue exceeded six feet by only one or two inches in certain parts.[11] The court further found that there was no evidence that the fence was maliciously constructed and therefore determined that it was not a spite fence. These findings were not clearly erroneous and we affirm the circuit court's determination that the Elmakiases did not construct a spite fence.

Affeldt next argues that the circuit court should have considered his claim for sanctions under § 814.025, STATS., against the Elmakiases for frivolous counterclaims and affirmative defenses. Affeldt asserts that his claim for sanctions against the Elmakiases was properly before the circuit court. The circuit court found that the claim was not properly before the court and did not consider it.

It appears from the record that the Elmakiases filed a motion for sanctions with the circuit court. It does not appear from the record that Affeldt ever filed such a motion. Affeldt asserts that he "sought relief under § 814.025, STATS.," as an alternative to sanctions. He then states: "Although all formal motions requirements were met, including notice, the trial court denied these requests for sanctions *sua sponte*." We note that Affeldt does not assert that he made a motion for sanctions. He simply calls it a request. He does not cite to the record where his request can be found. The citation to the record he gives is to an order entered by the circuit court which reads: "The Plaintiff has caused to be filed a Motion for New Trial, Reconsideration, and Costs in the above-captioned action." The court denied all three motions.

[11] Affeldt offered conflicting testimony about this at the trial, at one point stating that the fence was seven or eight feet tall.

It is impossible to determine the substance of Affeldt's motions from this reference. A reviewing court need not sift the record for facts that support counsel's contention of error. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). Therefore, we will not consider this issue.

We also agree with the circuit court's determination that the Elmakiases' claim for sanctions under § 814.025, STATS., was not frivolous. The circuit court determined that most of Affeldt's' claims against the Elmakiases were frivolous. We have affirmed that determination. The court did not award the Elmakiases sanctions because the documentation submitted by their attorneys was not adequate. Since the Elmakiases successfully established that many of Affeldt's claims were frivolous, we cannot conclude that the Elmakiases' motion for sanctions under § 814.025, was frivolous.

Affeldt also appears to argue that the circuit court improperly concluded that many of his claims were frivolous. His argument, however, consists of barely three paragraphs without any discussion of why the court's determination that specific claims were frivolous was erroneous. He makes general conclusions about constitutional and procedural errors without explanation or citation. We will not make Affeldt's arguments for him. Since the matter was not adequately briefed, we decline to review it. *See* ***Pettit***, 171 Wis.2d at 647, 492 N.W.2d at 642.

THE CROSS-APPEAL

The Elmakiases cross-appeal the circuit court's decision to deny them costs and attorney fees under § 814.025(1), STATS.[12] The circuit court found that it could not determine the amount of reasonable attorney fees expended in defending the frivolous claims from the records submitted by the Elmakiases' attorneys. Our review of the reasonableness of the award of attorney fees is limited to whether the circuit court erroneously exercised its discretion. *See* ***Brackob v. Brackob***, 265 Wis. 513, 524, 61 N.W.2d 849, 854 (1953).

The question is whether the circuit court erroneously exercised its discretion when it determined that the documentation submitted by the Elmakiases' attorneys was insufficient to justify an award of fees under § 814.025, STATS. Both parties in their briefs, however, spend more time discussing whether the circuit court properly determined that many of Affeldt's claims were frivolous. This issue is not germane to the cross-appeal.

The Elmakiases assert that they are entitled to one hundred percent of their fees for defending against the action. The Elmakiases further assert that the fees spent on defending the frivolous claims are not the only fees which would have been avoided if the frivolous claims had not been brought. They assert that Affeldt's meritorious claims would not have been the subject of such extensive litigation if Affeldt and his counsel had acted reasonably. They conclude that it is equitable under these circumstances to award them all of their costs and fees.

[12] The Elmakiases requested costs in the amount of $3,246.26. The circuit court awarded them $1,657.86.

This is insufficient to establish that the circuit court erroneously exercised its discretion. An appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy***, 107 Wis.2d at 414-15, 320 N.W.2d at 184. In deciding whether to grant the Elmakiases sanctions, the court considered the facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. Therefore, we affirm.

Affeldt argues that the Elmakiases' cross-appeal is frivolous and he is entitled to fees and costs for defending the cross-appeal. The circuit court found that most of Affeldt's claims were frivolous under § 814.025, STATS., but denied fees to the Elmakiases because their attorney's documentation was inadequate. While we affirmed the circuit court's ruling on the cross-appeal, we do not conclude that the Elmakiases or their attorneys should have known that the appeal was without any reasonable basis in law or equity. *See* § 809.25(3)(c), STATS.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.