

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 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. 2014AP397

Cir. Ct. No. 2010CV76

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WAUSHARA COUNTY,

PLAINTIFF-RESPONDENT,

V.

RONALD J. DECOSTER AND NICOLE K. DECOSTER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waushara County:
GUY D. DUTCHER, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This is a dispute over litigation expenses between Ronald and Nicole Decoster and Waushara County. The Decosters appeal a circuit court order awarding the Decosters litigation expenses in an amount that was substantially less than the Decosters' claimed. The Decosters make two

arguments on appeal: (1) the court erred in reducing the claimed litigation expenses and (2) the circuit court judge erred in denying the Decosters' motion that he recuse himself from further proceedings. For the reasons that follow, we conclude that the court properly exercised its discretion in limiting the litigation expenses awarded to the Decosters, and that the judge properly denied the Decosters' motion for recusal. We affirm.

BACKGROUND

¶2 The County filed a lawsuit against the Decosters seeking an order requiring the Decosters to remove a fence located on their property. In the complaint, the County claimed the fence was on a right-of-way of a county road targeted for a highway improvement project. The Decosters refused to remove the fence, and filed a counterclaim alleging inverse condemnation. In the counterclaim, the Decosters demanded that the County construct a ditch on the Decosters' property to receive storm water runoff from the road improvement project and direct that runoff so as to prevent flooding on their farm land.

¶3 In attempts to resolve this dispute, the County offered to pay the Decosters compensatory damages and expert witness fees, in an amount of \$7,282.54. In response, the Decosters told the County that they would not settle unless the offer included litigation expenses, which at that point totaled approximately \$31,000. The parties attempted to mediate a settlement in September 2011, however, those attempts failed. Following the mediation attempt, the County advised the Decosters that it could not admit to a taking, but that in an effort to resolve the dispute, the County would pay \$7,282.54 to the Decosters and agree to pay reasonable attorney's fees as if a taking had taken

place and in an amount to be determined by the court. The County indicated, however, that it would strongly dispute the reasonableness of the fees claimed.

¶4 In January 2013, the parties agreed to settle the issues in this case and entered into a stipulation memorializing that agreement. The court signed an order approving the stipulation. The stipulation contained a provision establishing the legal framework for how litigation expenses were to be determined by the circuit court. The dispute in this case centers on that provision.

¶5 The circuit court held an evidentiary hearing to determine the reasonableness of the Decosters' claimed expenses. During the lengthy hearing, the Decosters disputed the court's construction of paragraph two of the stipulation. The court heard arguments on the proper construction of paragraph two, and heard testimony and considered documentary evidence on the topic of litigation expenses.

¶6 Approximately three months after the hearing, the Decosters filed a motion for the circuit court judge to recuse himself on the ground that the judge was biased against the Decosters. In a telephone hearing on the motion to recuse, the court denied the motion. Following that hearing, the court asked the parties to submit briefs regarding the interpretation of the stipulation and the claimed expenses.

¶7 In a memorandum decision, the circuit court awarded the Decosters approximately \$31,000 in litigation expenses, which is a substantial reduction from the \$110,000 in expenses the Decosters' claimed. The court entered an order of judgment and judgment consistent with the terms of the stipulation regarding litigation expenses. The Decosters appeal the court's orders denying their motion for recusal and reducing their claim for litigation expenses.

DISCUSSION

¶8 The Decosters raise two arguments on appeal: first, that the circuit court erred in reducing their claimed litigation expenses without a reasonable basis, and second, the circuit court judge erroneously denied the Decosters' motion for recusal. We reject both arguments. We begin our discussion with the Decosters' judicial-bias argument and then turn to the issue of litigation expenses.

Judicial Bias

¶9 The Decosters contend that Judge Dutcher demonstrated judicial bias, as evidenced by various comments he made throughout the litigation expenses hearing. They argue that these comments strongly suggest that the judge had prejudged the case without having first heard testimony from the Decosters' witnesses. The Decosters also complain that the judge exhibited bias by repeatedly challenging the Decosters' litigation strategy, and ignoring the County's strategy.

¶10 The right to an impartial judge invokes the fundamental principals of due process under the United States and Wisconsin Constitutions. *See State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Under due process principles, it is presumed that a judge has acted fairly, impartially, and without bias. *Id.* However, this is a rebuttable presumption. *Id.* To overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased. *State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). To determine whether a party has rebutted that presumption, we apply both a subjective and objective test. *Id.* at 415-16. A party's due process right to an impartial judge can be violated upon a finding that

a judge was biased in either way. *See State v. Gudgeon*, 2006 WI App 143, 295 Wis. 2d 189, ¶20, 720 N.W.2d 114.

¶11 The County contends that the Decosters forfeited their judicial bias challenge because they failed to file a timely motion. Relying on *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992), the County points out that any challenge to a judge's ability to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to a decision in a contested matter. The County argues that the Decosters knew all of the grounds that allegedly supported their judicial bias challenge, at least by the end of the evidentiary hearing in April, yet they waited until three months had passed to move for the judge's recusal.

¶12 In reply, the Decosters contend that under the standards set in *Marhal* for timeliness, their challenge to the judge's partiality was timely made. They point out that they filed their motion on July 17, 2013, which was well before the judge issued his decision on litigation expenses on December 30, 2013. The Decosters also contend that, contrary to the County's argument, they filed their recusal motion as soon as they learned that the judge demonstrated bias at the litigation expenses hearing, which was not until after they received the hearing transcript on May 31, 2013. The Decosters argue that because they met the standards for timeliness under *Marhal*, they did not forfeit their right to move for the judge's recusal.

¶13 We agree with the County that the Decosters' challenge to the judge's partiality was not timely made, and therefore they have forfeited their right to raise this challenge. Moreover, even if we were to accept the Decosters'

assertion that they first learned that the judge exhibited bias at the hearing only after they received the hearing transcript¹ on May 31, 2013, the Decosters do not explain or point to any case law or legal authority supporting the idea that filing a motion to recuse six weeks after learning of the judge’s “alleged infirmity” is timely under *Marhal*. We need not define the parameters of when a motion to recuse is timely. It is sufficient to say that under the circumstances here, filing the motion six weeks after learning all necessary facts is not timely. The Decosters do not explain the long delay between receiving the hearing transcript and filing their motion to recuse. Thus, we conclude that the Decosters have forfeited their right to challenge the judge’s ability to be impartial at the hearing on the litigation expenses.

Litigation Expenses

¶14 The Decosters contend that the circuit court erroneously reduced their claim for litigation expenses from approximately \$110,000 to just \$31,000. We disagree.

¶15 As background, the parties entered into a stipulation that, by all appearances, was intended to settle all of the issues in this case. Pertinent to this case, paragraph two of the stipulation purportedly was intended to set the framework by which litigation expenses the Decosters incurred were to be established and determined by the court. Paragraph two provides:

2. The parties have agreed that the Court shall treat the County’s acquisition of the parcels of land identified as

¹ We make this assumption without deciding. The Decosters do not explain why they needed the transcript to know the judge was biased when they and their counsel were present at the hearing and observed and heard the remarks firsthand.

‘Parcel A’ and ‘Parcel B’ as a ‘taking’ for the purposes of establishing litigation expenses as that term is used by § 32.28, Wis. Stats, and shall determine those litigation expenses as if the defendants had received a judgment as a condemnee under § 32.28(3)(c), Wis. Stats. The County maintains no taking has taken place, but agrees for purposes of this Stipulation it shall not argue that there was no taking. Further, the parties agree that this Stipulation shall be void if the Court were to make such a finding independently.

¶16 WISCONSIN STAT. § 32.28 is part of the condemnation statutory scheme and governs the circumstances under which litigation expenses and costs are awarded in a condemnation proceeding. Section 32.28(3)(c), which cross-references WIS. STAT. § 32.10 concerning inverse condemnation claims, provides that litigation expenses shall be awarded where a plaintiff prevails on a claim of inverse condemnation.

¶17 One of the issues in this case concerned the Decosters claim that the County was obligated to install a ditch across parcels A and B of the Decosters’ property as part of the road improvement project. The Decosters wanted a ditch to prevent potential water runoff onto parts of the their farm land caused by the highway improvement project. This issue was part of the Decosters’ inverse condemnation counterclaim. Paragraph six of the stipulation addressed this concern:

6. The parties agree that this stipulation is contingent upon Waushara County completing the installation of a ditch within the area depicted as ‘Parcel A’ and ‘Parcel B’ on the attached Exhibit A, in accordance with its application to the Wisconsin Department of Natural Resources. If Waushara County should fail to complete installation of this ditch project, the [Decosters] shall be permitted to press claims for additional takings in the area of Parcel C as depicted on the attached Exhibit B.

¶18 The circuit court’s decision to reduce the Decosters’ claimed litigation expenses hinged primarily on the court’s interpretation of paragraphs two and six of the stipulation. In its written decision, the court read paragraph two as limiting litigation expenses to the “taking” of parcels A and B. Based on this reading of paragraph two, in conjunction with the court’s reading of paragraph six, the court deemed the Decosters’ claim for litigation expenses incurred litigating issues apart from the County’s “taking” of parcels A and B to be unreasonable. As to paragraph six, the court explained that this paragraph worked against the Decosters’ interpretation of paragraph two. On this topic the court wrote:

Paragraph 6 dictates that the De[c]osters would be allowed to assert “taking” of an additional parcel (Parcel C) if and only if the County failed to install the ditch across Parcels A and B. The reference to this additional ‘taking’, conditioned upon one party’s failure to perform an agreed task, begs the rhetorical question: If the Stipulation really was intended to directly encompass ‘takings’ beyond Parcels A and B, then why is the potential for the De[c]osters arguing the taking of additional lands specifically articulated?... The conditional language applicable to Paragraph 6 further eliminates any conceivable argument that the ‘takings’ agreed upon within the Stipulation applied to any property beyond Parcels A and B.

¶19 With this background in mind, we now address the merits of this issue. As indicated, the circuit court rested most, if not all, of its decision to limit the Decosters’ claim for litigation expenses to just over \$31,000 on the court’s interpretation of the parties’ stipulation. On appeal, the Decosters’ inexplicably avoid addressing the court’s interpretation of the stipulation in their brief-in-chief. The Decosters wait until their reply brief to refer to the stipulation, and even then the Decosters only tangentially touch on it. The Decosters focus their entire brief-in-chief on explaining the lodestar method for determining the reasonableness of attorney’s fees, the policies underlying fee-shifting in condemnation proceedings,

and arguing that the court erroneously exercised its discretion by making a downward adjustment in the Decosters' claimed litigation expenses. Nowhere in their brief-in-chief do the Decosters even mention the court's interpretation of the stipulation, let alone argue that the court's interpretation was unreasonable. Because the Decosters do not develop an argument regarding the interpretation and application of the stipulation, they, obviously, fail to persuade us that the circuit court erred.

¶20 Having concluded that the Decosters failed to demonstrate that the circuit court erred in its interpretation and application of the stipulation to the facts of this case, the Decosters only remaining argument is that they are entitled to additional expenses incurred relating to the County's acquisition of parcels A and B. However, the Decosters fail to provide a basis for this court to discern the expenses they incurred relating to the County's acquisition of parcels A and B, and distinguish those from expenses incurred to litigate the other issues. The Decosters' arguments on this topic are made in broad sweeping terms and they fail to provide specifics to support reversal of the circuit court.

¶21 Thus, for the above reasons, we conclude that the circuit court did not erroneously exercise its discretion in awarding litigation expenses to the Decosters in an amount less than they claimed.

By the Court.—Judgment affirmed.

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

