

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 15, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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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. 2016AP528**

**Cir. Ct. No. 2013CV11417**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**ROSEMARY MERKEL,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SANDRA JEAN NEAULT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed and cause remanded with directions.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRASH, J. Sandra Jean Neault appeals from a judgment in the amount of \$98,782.40, entered by the trial court upon finding Neault liable for conversion, misrepresentation, unjust enrichment, and theft after Neault withdrew

funds in the amount of \$48,931.65 from a checking account that was held jointly by Neault and her mother, Rosemary Merkel, the respondent. Merkel asserts that she opened the account with Neault for purposes of convenience after she had moved in with Neault. However, Neault contends that Merkel told her the funds were a gift to her and her children, and she had a right to withdraw the funds since they were held in an account jointly owned by Neault and Merkel.

¶2 On appeal, Neault argues (1) that Merkel was incompetent at trial, and that the trial court erroneously exercised its discretion in relying on her testimony; (2) that the trial court erroneously exercised its discretion in admitting Neault's deposition; (3) that the trial court erroneously exercised its discretion in precluding testimony regarding previous cash gifts to family members by Merkel; and (4) that the evidence in the record does not support the trial court's findings. In contrast, Merkel contends that the evidence supports the trial court's findings and that the court properly exercised its discretion in all of its rulings in this matter. We agree and affirm.

¶3 Merkel further asserts that this appeal is frivolous, and has filed a motion for fees and costs pursuant to WIS. STAT. RULE 809.25(3) (2015-16).<sup>1</sup> We agree and remand this matter to the trial court to determine the costs, fees, and reasonable attorney's fees to be awarded to Merkel.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

## BACKGROUND

¶4 In the summer of 2002, Merkel, who was at that time in her early seventies, sold a duplex in which she had been living and moved in with Neault and her family. With the proceeds from that sale, approximately \$45,000, Merkel opened a joint account with Neault at Educator's Credit Union on October 1, 2002. Merkel had previously maintained an account at Landmark Credit Union; however, Neault suggested that it would be more convenient to open the account at Educator's Credit Union, which was where Neault did her banking and was close to Neault's home.

¶5 Merkel moved in with Neault and her family in October 2002. She gifted Neault \$15,000 to put towards the construction of her living space in the basement of Neault's home. Additionally, Merkel paid rent to Neault monthly during the time that she lived there in amounts that varied from \$500 to \$700. Neither Neault nor Merkel made any further deposits into the Educator's Credit Union account; however, Neault stated that at some point in 2007 she withdrew \$500 from the account, and told Merkel that she was doing so.

¶6 Merkel lived with Neault until September 2010, when Merkel underwent surgery on her knee. During her recovery, she went to stay at the home of another daughter; she subsequently decided to remain there rather than moving back in with Neault, as her relationship with Neault had been deteriorating.

¶7 Soon after Merkel advised Neault that she would not be returning to her home, Neault, on October 7, 2010, withdrew the entire balance from the joint account at Educator's Credit Union, in the amount of \$48,931.65. She did this without Merkel's knowledge or consent. Merkel, through two different attorneys,

sent demand letters to Neault in November 2010 and December 2010 for the return of the funds; Neault did not respond to either letter.

¶8 Subsequently, in October 2013, Merkel retained new counsel who sent another demand letter to Neault. Furthermore, this letter outlined potential claims against Neault, declaring that Merkel would file suit against Neault if the funds were not returned. Neault responded in a letter to counsel discussing turmoil within the family among Merkel, Neault, and Neault's siblings. She also claimed that Merkel had told her that the money in the Educator's Credit Union account was a gift to Neault and her family.

¶9 Merkel then filed suit against Neault in December 2013, alleging theft, conversion, unjust enrichment, and breach of fiduciary duty, later adding a claim of misrepresentation. She sought compensatory and exemplary damages, as well as punitive damages, against Neault. Merkel contended that it was never her intent to gift the money in the account to Neault; rather it was opened jointly with Neault, at Neault's suggestion, for purposes of convenience, so that Neault could assist Merkel with paying her bills.

¶10 This case proceeded to a court trial, held on November 19, 2015. The trial court found that Merkel's testimony was very consistent, and that she was very clear as to her intent for the funds in the Educator's Credit Union account. Furthermore, the court noted that it would have been irrational for Merkel to promise all of these funds, which represented two-thirds of her entire estate, to only one of her children, when at the time the account was opened she had four other living children and sixteen grandchildren. In fact, the court remarked that the remaining funds she had in her Landmark Credit Union account (separate from the funds in the Educator's Credit Union account that were

withdrawn by Neault) would be “barely enough for her to live on .... She’s generous, but she’s not irrational.”

¶11 In contrast, the trial court found that Neault’s conduct throughout these events and her subsequent explanations were “not rational or consistent.” The court specifically referenced the evidence that Neault had accumulated very high credit card debt, so if she had considered the funds in the Educator’s Credit Union account as a gift from Merkel that belonged to her, it did not make sense for Neault to not have used the funds over all the years the account was open to try to offset her debt. Furthermore, there would have been no need to list Merkel’s name on the account had it been a gift to Neault. Instead, the trial court stated that it was “very likely” that it had occurred to Neault that she was going to “lose her control and access over this account” after Merkel moved out, so Neault withdrew all of the funds from the account shortly after finding out that Merkel was not returning to her home.

¶12 Consequently, the trial court found that even though it was a joint account, there was clear and convincing evidence that Merkel’s intent was not to gift the money to Neault, but rather to allow for Neault to assist Merkel with her banking. As a result, the court found in favor of Merkel, holding that Neault had converted the funds, misrepresented to Merkel the manner in which she took the funds, committed theft, and unjustly enriched herself. The court entered a judgment ordering Neault to pay \$98,782.40, which included compensatory damages, exemplary damages, and costs. This appeal follows.

## **DISCUSSION**

¶13 We begin by noting that while Neault included the entire transcript of the court trial in an appendix submitted with her appellate brief, only a portion

of that transcript—the decision of the trial court—is included in the record. “It is boilerplate law that, when an appeal is brought on a partial transcript, the scope of the review is necessarily confined to the record before the court.” *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). Accordingly, we will not consider any materials submitted in an appendix that are not included in the record. See *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶10 n. 1, 305 Wis. 2d 658, 741 N.W.2d 256. Furthermore, in the absence of a complete transcript, this court will assume that “every fact essential to sustain the trial judge’s exercise of discretion is supported by the record.” See *Austin*, 86 Wis. 2d at 641.

#### *Competency of Merkel*

¶14 Neault first argues that Merkel was not competent at the time of the trial. However, Neault never raised this issue at trial; in fact, she concedes that she did not challenge Merkel’s competency during the proceedings. It is well-established law that “[a]rguments raised for the first time on appeal are generally deemed forfeited.” *Northbrook Wis., LLC v. City of Niagara*, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851. Neault argues that there are extenuating circumstances in this case that should be considered in spite of her forfeiture of this issue. We disagree.

¶15 In the first place, Neault’s argument relies on portions of Merkel’s testimony given during the trial; however, as discussed above, most of the transcript from the trial, including those portions cited by Neault in support of this argument, are not included in the record. A party who wishes to attack the discretionary decisions of the trial court has the obligation to provide the portions of the transcript that support its argument. See *Austin*, 86 Wis. 2d at 640. We therefore are unable to review and consider those transcript excerpts, and must

assume that the trial court properly exercised its discretion with regard to its consideration of Merkel's testimony. *See id.* at 641.

¶16 Furthermore, the examples from Merkel's testimony to which Neault cites in support of her argument are not complete exchanges. Merkel contends that when taken in complete context, the testimony cited by Neault is indicative only of a bit of confusion on the part of Merkel in response to complex questions asked during cross-examination. Moreover, the trial court noted that this was the testimony of an elderly woman regarding a very emotional and difficult situation. In fact, in its decision the trial court specifically characterized Merkel's conduct during these events, as explained in her testimony, as "not irrational."

¶17 Therefore, we reject Neault's argument that we should take exception to the waiver rule regarding this issue. Accordingly, we find the issue of Merkel's competency forfeited since it was not raised and preserved at the trial court level.

#### *Admission of Neault's Deposition*

¶18 Neault next argues that the trial court erroneously exercised its discretion when it allowed her deposition testimony to be read into the record at the court trial when she was available to testify. She initially cited WIS. STAT. § 804.07(1)(c) in support of her argument, which sets forth the guidelines for admitting the deposition of a witness. However, because Neault is a party to this action, the applicable subsection is § 804.07(1)(b), which permits the deposition of a party to be used by an adverse party "for any purpose." *Id.* Neault concedes in her reply brief that she erroneously read the statute, but nevertheless argues that the trial court erred in allowing the deposition testimony because it contained "irrelevant answers" that "prejudiced ... Neault."

¶19 The trial court “has broad discretion in determining the relevance and admissibility of proffered evidence.” *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). In reviewing a trial court’s evidentiary ruling, this court determines whether the trial court properly exercised its discretion, and will affirm the ruling “if there is a reasonable basis for the trial court’s determination.” *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶20 The deposition testimony to which Neault primarily objects relates to her use of the funds that she withdrew from the Educator’s Credit Union account—to pay off her voluminous credit card debt—and whether she claimed the funds as a gift on her income taxes. Both of these topics are directly relevant to the credibility of Neault’s defense that the funds were a gift, and therefore provide a reasonable basis for allowing the admission of her deposition testimony. *See id.* Accordingly, we reject Neault’s argument and affirm the trial court’s ruling.

*Preclusion of Testimony Relating to Previous Cash Gifts by Merkel*

¶21 Neault’s next evidentiary argument relates to a line of questioning regarding sums of cash that Merkel had previously gifted to Neault’s siblings. During the cross-examination of Merkel by Neault’s counsel, as well as during the direct examination of Neault by her counsel, Neault asserts that the trial court erroneously precluded testimony on this issue. Merkel, however, contends that the questioning by Neault’s counsel during Merkel’s cross-examination was repetitious, which is the reason that it was halted by the trial court. Additionally, Merkel argues that the testimony being elicited from Neault during her direct examination was based on hearsay, and the trial court therefore properly sustained Merkel’s objection.



¶22 Again, Neault’s argument relies on portions of testimony given during the trial for which the transcript is not included in the record. We are therefore unable to review the testimony and objections, and must assume that the trial court properly exercised its discretion in its rulings. *See Austin*, 86 Wis. 2d at 641. Accordingly, we affirm the trial court’s rulings on these evidentiary issues as well.

### *Sufficiency of the Evidence*

¶23 Neault’s final argument is that the trial court made “improper factual findings” that led to its decision in favor of Merkel. Neault suggests that Merkel’s intended use of the funds in the Educator’s Credit Union account shifted; specifically, she believes that when Merkel first opened the account with Neault her intention was to gift the funds to Neault, but that the plan changed after she moved out of Neault’s home and into the home of another daughter. In short, Neault argues that the trial court erroneously found Merkel’s testimony more credible.

¶24 “When the [trial] court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. This directive is based on the trial court’s position as the “trier of fact” that “had the opportunity to observe the witnesses and their demeanor.” *Id.* Findings of fact by the trial court will not be set aside on appeal unless they are clearly erroneous. *Herdeman v. City of Muskego*, 116 Wis. 2d 687, 691, 343 N.W.2d 814 (Ct. App. 1983). “[A] finding of fact is clearly erroneous when ‘it is against the great weight and clear preponderance of the

evidence.” *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (citation omitted).

¶25 Neault fails to demonstrate how any of the trial court’s findings of fact are clearly erroneous. Furthermore, we once again point out that we are unable to review the testimony of Merkel and Neault since Neault failed to include in the record the entire trial transcript, particularly those portions that purportedly support her argument. *See Austin*, 86 Wis. 2d at 641.

¶26 We were, however, able to review the transcript of the trial court’s decision, which was included in the record. In its decision, the trial court stated numerous times that it found Merkel’s testimony to be credible, stating that Merkel had “consistently told the same story” and had “consistently tried to get that money back” from Neault. In contrast, the court declared, in no uncertain terms, that Neault’s explanation of events “doesn’t make sense” and was “not rational or consistent.” Moreover, the court characterized Neault’s conduct as “very much self possessed” with “no regard for [her] mother whatsoever.”

¶27 In sum, after reviewing the record before us, we are confident that the trial court did not erroneously exercise its discretion in making its findings of fact. We therefore affirm.

*Merkel’s Motion for Sanctions for Frivolous Appeal*

¶28 We now address Merkel’s motion, filed with this court, asserting that Neault’s appeal was frivolous and that Merkel is entitled to costs, fees, and attorney’s fees, pursuant to WIS. STAT. RULE 809.25(3)(a). We agree.

¶29 An appeal is frivolous if (1) “[t]he appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously

injuring another”; or (2) “[t]he party or the party’s attorney knew, or should have known, that the appeal or cross-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.” WIS. STAT. RULE 809.25(3)(c)1-2. ““To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous.”” *Schapiro v. Pokos*, 2011 WI App 97, ¶20, 334 Wis. 2d 694, 802 N.W.2d 204 (citations and one set of quotation marks omitted). ““Whether an appeal is frivolous is a question of law.”” *Id.* (citation omitted).

¶30 The first issue Neault raises on appeal, that of Merkel’s competency, is without a basis in law: the issue was never raised at the trial court level and was therefore not preserved for appeal, and further, Neault provides no evidence of incompetency except for incomplete, misleading excerpts from the trial transcript that she did not provide in its entirety for the record. With regard to the second issue raised, the challenge to the trial court’s admission of Neault’s deposition, Neault concedes in her reply brief that she misread the applicable statute, which eviscerated her argument. In her third and fourth issues raised on appeal, Neault challenges discretionary decisions made by the trial court but fails to provide a legal basis for finding the rulings clearly erroneous, and again relies on excerpts from portions of the trial transcript that were not provided.

¶31 Therefore, we find that Merkel has met the requirements of WIS. STAT. RULE 809.25(3)(c)2, having established that Neault or Neault’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. Accordingly, we grant Merkel’s motion, and remand this matter to the trial court to determine the costs, fees, and reasonable attorney’s fees to be awarded to Merkel.

*By the Court.*—Judgment affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

