

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2010

A. John Voelker
Acting 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. 2009AP2769

Cir. Ct. No. 2008SC1256

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DANIEL S. GROCHOWSKI AND CRYSTAL AGUIRRE,

PLAINTIFFS-RESPONDENTS,

V.

LYLE HOFACKER AND THERESA HOFACKER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed in part; reversed in part, and
cause remanded with directions.*

¶1 PETERSON, J.¹ Lyle and Theresa Hofacker appeal a small claims judgment in favor of their former tenants, Daniel Grochowski and Crystal Aguirre.

¹ This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

On the whole, the Hofackers' claimed errors are without merit. However, the Hofackers are correct that the circuit court awarded attorney fees to Grochowski and Aguirre's counsel without considering the proper factors. We affirm in part, reverse in part, and remand with directions to recalculate attorney fees.

BACKGROUND

¶2 Grochowski and Aguirre rented an apartment from the Hofackers beginning on September 21, 2005. They signed a residential lease and initialed a number of nonstandard rental provisions. After they vacated the apartment on June 30, 2008, the Hofackers refused to return their \$1,300 security deposit. The Hofackers also alleged they owed an additional \$929.22 to repair damage to the apartment. In response, on July 25, 2008, Grochowski filed a small claims action to recover the security deposit. The Hofackers filed an answer and counterclaim. The matter was set for a trial before the court commissioner on December 11, 2008.

¶3 On December 2, the Hofackers filed a third-party cross-complaint against Aguirre, along with interrogatories and a request for production of documents. The clerk of court mistakenly provided the Hofackers with a trial date of February 26, 2009, for their third-party cross-complaint. On December 3, Grochowski and Aguirre's attorney wrote to the court and objected to any continuance. The court commissioner confirmed that the trial remained set for December 11, not February 26.

¶4 At the December 11 trial, Lyle Hofacker refused to be sworn in as a witness. He advised the court that he would stand mute for the remainder of the proceedings and would wait to present his case on February 26. Grochowski and Aguirre were sworn in as witnesses and provided evidence. The court

commissioner issued a written decision on January 8, 2009 in favor of Grochowski and Aguirre.

¶5 Pursuant to WIS. STAT. § 757.69(8), the Hofackers filed a timely demand for trial. At the pretrial on February 26, 2009, the Hofackers filed a motion to compel responses to their interrogatories and requests for production. The court did not grant the Hofackers' motion, because it determined that the request for a new trial had started a new case with new discovery deadlines. Grochowski and Aguirre provided their discovery responses the same day the Hofackers filed the motion to compel.

¶6 At trial on June 5, 2009, Lyle Hofacker and Aguirre were the principal witnesses. Based on their testimony, the circuit court determined the Hofackers had improperly retained Grochowski and Aguirre's security deposit. The court disallowed the majority of the Hofackers' claimed items of damages, but allowed a few items that Aguirre admitted causing. The court concluded the Hofackers had improperly claimed \$1,898.32 in damages. Because Grochowski and Aguirre were the prevailing parties under WIS. ADMIN. CODE § ATCP 134, the court doubled that amount and awarded them \$3,796.64. The court also awarded Grochowski and Aguirre \$11,417.72 in attorney fees. The Hofackers appealed the circuit court's judgment. Grochowski and Aguirre moved for sanctions and appellate attorney fees.

DISCUSSION

¶7 The Hofackers argue the circuit court erred by: (1) failing to award costs for their motion to compel; (2) finding Aguirre's testimony at trial more credible than Lyle Hofacker's; (3) disallowing the nonstandard rental provisions of the lease; (4) using the wrong method to calculate damages; and (5) improperly

calculating Grochowski and Aguirre's attorney fees. Grochowski and Aguirre argue the Hofackers' appeal is frivolous and contend they are entitled to appellate attorney fees under WIS. STAT. § 100.20(5).

I. The Hofackers' request for costs

¶8 The Hofackers do not appeal the circuit court's denial of their motion to compel. Instead, they contend the court erred by denying their request for costs. However, because the court never issued an order to compel, there is no way for the Hofackers to receive the costs they seek. *See* WIS. STAT. § 804.12(1)(c)1. We therefore affirm the circuit court's denial of the Hofackers' request for costs associated with their motion to compel.

II. The trial court's credibility determinations

¶9 The Hofackers next assert the circuit court erred when it determined Aguirre was a more credible witness than Lyle Hofacker. We will uphold the circuit court's findings of fact, including its credibility determinations, unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *State v. Jenkins*, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses. *Plesko v. Figgie Int'l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). The standard of review for credibility determinations affords substantial deference to the trial court judge, who is uniquely positioned to observe the witnesses and their demeanor on the witness stand. *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998).

¶10 The Hofackers argue the circuit court's credibility determinations were clearly erroneous. The Hofackers' argument is heavily dependent upon facts

in the record. However, the Hofackers' brief does not contain any citations to the record. This is a violation of WIS. STAT. RULE 809.19(1)(d) and (e).² We decline to embark on our own search of the record, unguided by references and citations to specific testimony, to look for evidence to support the Hofackers' argument. RULE 809.19(1)(e) requires parties' briefs to contain "citations to the ... parts of the record relied on." Where a party fails to comply with this rule, we may refuse to consider that party's argument. *See Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. "[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]." *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (citation omitted). We therefore decline to address this portion of the Hofackers' appeal and dismiss it. *See* WIS. STAT. RULE 809.83(2).³

² WISCONSIN STAT. RULE 809.19(1) reads as follows:

(1) BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal. The brief must contain:

....

(d) A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.

(e) An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

³ WISCONSIN STAT. RULE 809.83(2) states:

(continued)

III. Disallowance of the nonstandard rental provisions

¶11 The Hofackers contend the circuit court erred by disallowing the nonstandard rental provisions of the lease. However, the Hofackers' argument is without merit because the circuit court did not disallow the provisions. The court merely concluded that Grochowski and Aguirre did not receive the provisions after requesting a copy from Lyle Hofacker. Rather than disallowing the provisions, the court applied and interpreted them throughout its decision. For instance, the court discussed specific provisions related to the landlord's right to show the apartment and the tenant's duty to notify the landlord of defects. The court also awarded the Hofackers \$45 per hour for labor, pursuant to one of the provisions. The Hofackers' argument that the circuit court disallowed the nonstandard rental provisions has no basis in the record.

IV. Calculation of Grochowski and Aguirre's damages

¶12 The Hofackers argue the trial court improperly determined the amount of Grochowski and Aguirre's damages. However, the Hofackers' brief once more fails to cite the record to support this argument. Again, this is a violation of WIS. STAT. RULE 809.19(1)(d) and (e). This court will not scour the record to look for evidence supporting the Hofackers' argument. We therefore

NONCOMPLIANCE WITH RULES. Failure of a person to comply with a court order or with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

decline to address this portion of the Hofackers' appeal and dismiss it. *See* WIS. STAT. RULE 809.83(2).

V. Calculation of Grochowski and Aguirre's attorney fees

¶13 The Hofackers finally argue that the circuit court erroneously exercised its discretion by awarding attorney fees to Grochowski and Aguirre without using a reasonable decision-making process. When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court. *First Wis. Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 537, 335 N.W.2d 390 (1983). We uphold the circuit court's determination unless the circuit court erroneously exercised its discretion. *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). We give deference to the circuit court's decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel. *Id.* Thus, we do not substitute our judgment for that of the circuit court, but we instead probe the court's explanation to determine if it employed a logical rationale based on the appropriate legal principles and facts of record. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58.

¶14 In *Kolupar*, the Wisconsin Supreme Court adopted the lodestar method of calculating reasonable attorney fees. *Id.*, ¶30. Under this method, the court first determines the number of hours reasonably expended on the representation and then multiplies by a reasonable hourly rate. *Id.*, ¶28. The court may adjust this lodestar figure up or down based on the factors contained in SCR 20:1.5 (2010). *Id.*, ¶29. These factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the

acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. SCR 20:1.5 (2010).

¶15 In this case, the circuit court did not use the lodestar method to determine reasonable attorney fees. The court did not determine the number of hours reasonably expended on the representation and did not determine a reasonable hourly rate. The court's decision contained no discussion of the SCR 20:1.5 factors. Instead, the court approved Grochowski and Aguirre's request for \$11,417.72 in attorney fees without explaining its reasoning process. By awarding attorney fees without using the lodestar method, the court erroneously exercised its discretion. We therefore reverse and remand to the circuit court to recalculate Grochowski and Aguirre's attorney fees.

VI. Grochowski and Aguirre's motion for sanctions and motion for appellate attorney fees

¶16 Grochowski and Aguirre ask us to find the Hofackers' appeal frivolous under WIS. STAT. RULE 809.25(3) and to sanction the Hofackers and their attorney. We decide as a matter of law whether an appeal is frivolous. *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 841, 520 N.W.2d 93 (Ct. App. 1994). Under RULE 809.25(3)(c), an appeal is frivolous if it (1) was filed in bad faith for the sole purpose of harassing or maliciously injuring another or (2) is without any reasonable basis in law or equity. If we find an appeal frivolous, we award costs,

fees, and reasonable attorney fees to the successful party. WIS. STAT. RULE 809.25(3)(a).

¶17 In order to find an appeal frivolous, we must determine that each argument is frivolous. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶27, 277 Wis. 2d 21, 690 N.W.2d 1. The Hofackers' argument that the circuit court improperly calculated Grochowski and Aguirre's attorney fees is not frivolous. Therefore, we cannot find the Hofackers' appeal frivolous, and Grochowski and Aguirre are not entitled to attorney fees and costs under WIS. STAT. RULE 809.25(3)(a).

¶18 Grochowski and Aguirre also contend they are entitled to appellate attorney fees under WIS. STAT. § 100.20(5). Section 100.20(5) entitles a tenant who has suffered pecuniary loss because of a violation of WIS. ADMIN. CODE § ATCP 134 to reasonable attorney fees for appellate review undertaken to defend a trial court's decision. See *Shands v. Castrovinci*, 115 Wis. 2d 352, 359, 340 N.W.2d 506 (1983). Because we affirm the circuit court on four issues but reverse on a fifth issue, Aguirre and Grochowski are only entitled to recover attorney fees incurred in defending the issues we affirm. See *Wright v. Mercy Hosp. of Janesville, Wis., Inc.*, 206 Wis. 2d 449, 472, 557 N.W.2d 846 (Ct. App. 1996). Consequently, we remand to the circuit court with directions to determine a reasonable attorney fee award for the appeal of the four issues we affirm.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions.

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

