

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 16, 2011

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. 2010AP1221

Cir. Ct. No. 2001CV885

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE MATTER OF GUARDIAN AD LITEM FEES IN C.J. POLSTER (CAHALA) V.
ANNE M. RIENDL, M.D.:**

ROBERT B. MOODIE,

APPELLANT,

V.

WAUKESHA COUNTY,

RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Robert B. Moodie appeals an order denying his motion to direct Waukesha county to pay his court-appointed guardian ad litem (GAL) fees. The circuit court found that Moodie also served as the attorney of record, thus precluding compensation for his services as GAL. *See* WIS. STAT. § 757.48(1)(b) (2009-10).¹ These findings are not clearly erroneous. We affirm.

¶2 A minor and his mother were plaintiffs in a birth trauma medical malpractice action. Attorney Kenneth A. Stern, of Stern & Associates, a Michigan law firm, filed the summons and complaint.² At the same time, a petition was filed to appoint a GAL for the minor. Stern & Associates proposed Moodie to serve as GAL because of their association in similar cases. The court granted the petition and Moodie accepted the appointment.

¶3 Four months later, Moodie moved for an order that Attorneys Terrance J. Cirocco and Euel W. Kinsey of Stern & Associates be admitted *pro hac vice* to represent the plaintiffs in the Waukesha county circuit court. Moodie stated in the motion that he, on the minor's behalf, and the mother retained the services of the law firm of Hippenmeyer, Reilly, Moodie & Blum, S.C., ("HRM&B") to serve as counsel representing their interests and that HRM&B

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

² The county claims the summons and complaint were "signed by attorneys not licensed to practice in the State of Wisconsin or otherwise specially admitted to practice." Moodie asserts that Stern has been licensed to practice law in Wisconsin since 2000. According to the State Bar of Wisconsin website, Stern was admitted in 2000 but his status is "inactive." It does not indicate when his Wisconsin licensure went to inactive status. *See* State Bar of Wisconsin, <http://www.wisbar.org> (last visited Feb. 3, 2011).

In any event, the summons and complaint are not part of the record on appeal. We are bound by the record as it comes to us and assume that anything missing supports the trial court's ruling. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

requested the law firm of Stern & Associates and Attorneys Terrance J. Cirocco and Euel W. Kinsey be admitted to practice for this particular matter. HRM&B is Moodie's law firm.

¶4 The orders admitting Cirocco and Kinsey *pro hac vice* provided that the attorneys would be permitted to appear in the Waukesha county action “as long as they associate with [HRM&B] or some other lawyer/Law Firm admitted to practice law in the State of Wisconsin by the Wisconsin Supreme Court.” They associated only with HRM&B.

¶5 The jury returned a defense verdict and neither plaintiff was awarded damages. With no trial recovery from which the ward could pay, Moodie moved for an order directing Waukesha county to pay his approximately \$73,000 in GAL fees. The circuit court, the Honorable Paul F. Reilly presiding, summarily denied the motion.³ Moodie appealed. This court remanded for additional fact finding, in particular as to whether Moodie and out-of-state counsel had a fee-sharing agreement. *See Moodie v. Waukesha County*, No. 2008AP1042, unpublished slip op., ¶¶1, 7 (Wis. Ct. App. July 7, 2009).

¶6 At the hearing on remand, the circuit court, the Honorable Ralph M. Ramirez presiding, found that Moodie was attorney of record when the action commenced, when he brought Cirocco and Kinsey in *pro hac vice* and throughout his service as GAL. The court denied his motion.

¶7 Moodie argues on appeal that the circuit court's determination that he was both GAL and attorney of record goes against the great weight of the

³ The motion also sought discharge as GAL. The court granted that part of the motion.

evidence; that its denial of fees was an erroneous exercise of discretion; and that he is entitled to reasonable GAL fees either under WIS. STAT. § 757.48(1)(b) or as a necessary operating cost of the court. We disagree.

¶8 If a minor’s interests are represented by an attorney of record, the court shall, except for reasons not relevant here and except upon good cause stated in the record, appoint that attorney as the guardian ad litem. WIS. STAT. § 803.01(3)(a). “The guardian ad litem shall be allowed reasonable compensation for his or her services such as is customarily charged by attorneys in this state for comparable services.” WIS. STAT. § 757.48(1)(b). If the attorney of record also is the GAL, however, he or she “shall be entitled only to attorney fees and shall receive no compensation for services as guardian ad litem.” *Id.*

¶9 Whether Moodie was attorney of record is a finding of fact. *See Guthrie v. WERC*, 111 Wis. 2d 447, 449, 331 N.W.2d 331 (1983). We are bound by a circuit court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). 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., Inc.*, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (citations omitted).

¶10 Kinsey testified at the fact-finding hearing that it was “nice and advantageous” for the plaintiffs “to have local counsel in Waukesha who was familiar with the environment as well as geographically ... close to the client so that it would be easier for certain things for him to attend than for us.” He testified that Moodie attended depositions where “it was important to have someone there,” reviewed depositions and provided “a detailed report of ... his impressions of those events.” Moodie personally attended some depositions Kinsey took by

telephone and later provided Kinsey “with his observations of the witness and what he believed was important in the deposition.”

¶11 Moodie insisted that he was solely the GAL and was not permitted to make an opening statement or closing argument at trial. Billing statement entries reflect discussions Moodie had with Michigan counsel about special verdicts, jury instructions, closing arguments and what to expect from local juries. He testified that he kept these statements to track time spent and work performed for which he would be reimbursed from a favorable recovery, but that he had no fee arrangement with plaintiffs’ counsel.

¶12 Of the exhibits admitted into evidence, the court deemed “important” the *pro hac vice* motion, the order granting the motion, and the accompanying cover letter to the court, all submitted four months after the lawsuit was filed. It also found noteworthy the lack of a fee agreement, written or otherwise, between Moodie and the county.

¶13 The court stated that, in contrast to a case in which the party needing the GAL is brought to court by another:

this is a case where a plaintiff came to court and made certain decisions. Obviously, I’m not faulting the plaintiffs, the child or the parents, but ... the attorneys made a decision, we’re going to bring this case, we’re going to bring it in Waukesha County, and it’s necessary to have a local attorney. Mr. Moodie was designated to be that person, and Mr. Moodie was, therefore, when he brought these others in *pro hac vice*, the attorney of record, and he never ceased to be that attorney of record in this case, in addition to fulfilling his role as guardian ad litem.

Applying WIS. STAT. §§ 757.48(1)(b) and 803.01(3)(a) to the facts, the court found that the case was commenced with Moodie as local counsel, rendering him

attorney of record as well as GAL, and concluded that he “never ceased to be that attorney of record.”

¶14 The evidence may have allowed competing factual inferences. The circuit court’s findings that Moodie was both attorney of record and GAL do not go against the great weight and clear preponderance of the evidence, however. We therefore must sustain them. *See Phelps*, 319 Wis. 2d 1, ¶39. Accordingly, Moodie is entitled only to attorney fees and shall receive no compensation for his services as GAL. *See* WIS. STAT. § 757.48(1)(b).

¶15 Having upheld the circuit court’s findings regarding Moodie’s dual role, we need not address whether compensation might have been warranted under other scenarios.

By the Court.—Order affirmed.

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

