COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0520

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

SHERRY MULLIGAN AND MICHAEL A. WOZNY,

Plaintiffs-Respondents,

v.

BARBARA J. KOEHLER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: WILLIS J. ZICK, Reserve Judge. *Reversed*.

CURLEY, J. Barbara J. Koehler, the defendant in a landlord tenant dispute, seeks reversal of the trial court's order assessing $1,100 in appellate attorney fees against her, when no request was made of the appellate court for attorney fees and the remittitur is silent on the issue of fees. Because a review of the relevant statutes reflects it was the legislature's intent to permit only the Court of Appeals to authorize appellate attorney fees contributions, the trial

court exceeded its authority by awarding appellate attorney fees. Accordingly, the trial court order is reversed.[1]

The underlying controversy in this matter was an action brought by Sherry Mulligan and Michael A. Wozny (hereinafter, Mulligan) to recover damages and costs for Koehler's alleged violation of the WIS. ADM. CODE § Ag 134 dealing with the retention of security deposits. Mulligan prevailed in the trial court and Koehler appealed the September 28, 1994, judgment to this court in case number 94-2532. Ultimately that appeal was dismissed by the Court of Appeals on July 7, 1995, because Koehler failed to file a brief. A remittitur was prepared by the Court of Appeals on August 8, 1995, and the record was returned to the Milwaukee County Circuit Court on August 8, 1995. The court made no directives or mandates to the trial court awarding appellate attorney fees.

On August 16, 1995, Mulligan filed a motion in the trial court requesting attorney fees from Koehler incurred solely in the defense of the first appeal. Koehler challenged the trial court's jurisdiction and argued that the procedure found in RULE 809.25(1)(c), STATS., was not followed. Despite the objection, on November 24, 1995, the trial court entered an order awarding Mulligan $1,100 in appellate attorney fees from Koehler. This appeal follows.

Under the American system of jurisprudence, ordinarily a prevailing party is not entitled to be reimbursed for attorney fees. "We note at the outset that generally, except for court costs and fees, a plaintiff may not recover attorney fees and expenses of litigation in his or her claim against the defendant unless such liability arises from specific statutory provisions or the contract of the parties." ***Shands v. Castrovinci***, 115 Wis.2d 352, 357, 340 N.W.2d 506, 508 (1983). Here, Koehler concedes that the clear mandate of § 100.20(5), STATS., allows for an award of costs and a doubling of the damages, including appellate attorney fees, to one who prevails in a landlord tenant dispute. While admitting to the legality of the fees, nevertheless Koehler challenges the trial court's authority for ordering appellate attorney fees.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

To ascertain whether the trial court had the power to assess appellate attorney fees requires a review of the relevant statutes. Construction of a statute in relation to a particular set of facts is a question of law. ***State v. Clausen***, 105 Wis.2d 231, 243, 313 N.W.2d 819, 825 (1982). We review questions of law *de novo*.

The determination to be made in this case is whether § 100.20(5) attorney fees emanating out of an aborted appeal can be awarded by the trial court or whether this responsibility falls within the exclusive province of the Court of Appeals.

RULE 809.25, STATS., sets out the statutory scheme for the awarding of fees in an appellate setting. Included in the list of occasions when fees can be awarded by the Court of Appeals is: "Against the appellant before the court of appeals when the appeal is dismissed or the judgment or order is affirmed." RULE 809.25(1)(a)1, STATS. The statute also enumerates the type of costs that are allowed. There is a catch-all provision which permits "other costs as directed by the court," RULE 809.25(1)(b)5, STATS. The term "court" is defined in RULE 809.01(4), STATS.: "`Court' means the court of appeals or, if the appeal or other proceeding is in the supreme court, the supreme court." What can be culled from a reading of the three statutes is that the Wisconsin Rules of Appellate Procedure permit the Court of Appeals to both award fees when, as here, a party fails to file an brief leading to dismissal, and, under the catch-all provision, to assess the type of fees being sought in this case; that is, § 100.20(5), appellate attorney fees. RULE 809.25(1)(c), STATS., does, however, contain a time limitation on the request for fees. "A party seeking to recover costs in the court shall file a statement of the costs within 14 days of the filing of the decision of the court. An opposing party may file within 7 days of the service of the statement a motion objecting to the statement of costs." RULE 809.25(1)(c), STATS.

There is another chapter giving trial courts and clerks the ability to charge fees and costs. Chapter 814, STATS., titled "Court Costs and Fees," contains the legal authority to assess costs in civil actions and special proceedings and to set court fees at the conclusion of a case. There are no provisions in this chapter, however, giving the trial court authority to order costs for appellate matters. In fact, § 814.64, titled "Fees on appeal to court of appeals or supreme court," reads: "The fees on appeal to the court of appeals

and the supreme court are prescribed in s. 809.25(2)." (Referencing the chapter regulating appellate procedure.).

It is a long-recognized rule that, "[I]n construing a statute, the entire section and related sections are to be considered in its construction or interpretation." ***Clausen***, 105 Wis.2d at 244, 313 N.W.2d at 825. Here, there is no statutory authority for trial courts to order appellate attorney fees, although there are statutes setting forth the procedure for the Court of Appeals to make these awards. A harmonious reading of the statutes leads to the inescapable conclusion that the legislative intent was to allow only the Court of Appeals the right to award appellate attorney fees.

Despite the dearth of statutory authority enabling the trial court to award appellate attorney fees, Mulligan argues that a reading of §§ 808.08 and 808.09, STATS., allows the trial court to order appellate attorney fees once the case is returned on remittitur. Mulligan proposes § 808.09, which reads, "[I]n all cases an appellate court shall remit its judgment or decision to the court below and thereupon the *court below shall proceed in accordance with the judgment or decision*," permits the trial court to award appellate attorney fees once the judgment has been remitted. Section 808.09, STATS. (emphasis added).

Mulligan misreads these statutes. Although the Court of Appeals may order the trial court "to take specific action," *see* § 808.08(1), STATS., which could encompass the taking of testimony on what constitutes reasonable attorney fees, these statutes are silent on the issue of whether the trial court can award appellate fees without a Court of Appeals directive. In any event, it is a well-settled rule of statutory construction that "specific provisions relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law which might otherwise be broad enough to include it." ***Brennan v. Employment Relations Comm'n***, 112 Wis.2d 38, 43, 331 N.W.2d 667, 670 (Ct. App. 1983). Thus, the specific statutes governing the appellate procedure for the awarding of fees found in Chapter 809, STATS., govern over the general statute found in Chapter 808, STATS.

Finally, Mulligan cites to ***Shands***, for trial court authority to award appellate attorney fees under § 100.20(5). The court in ***Shands*** stated: "Section 100.20(5), STATS., on its face contains no instruction regarding at what stage of

the litigation process reasonable attorney fees shall be awarded. Certainly it contains no restrictions." ***Shands***, 115 Wis.2d at 357, 340 N.W.2d at 509. At first blush, this statement appears to bolster Mulligan's argument. In ***Shands***, however, the supreme court was addressing the defendant's argument that § 100.20, STATS., did not permit *any* appellate attorney fees. Hence, ***Shands*** stands for the proposition that attorney fees for appellate work fall within the ambit of § 100.20(5), STATS.; it does not authorize the trial court's awarding appellate attorney fees. Also telling is the fact that the attorney requesting appellate attorney fees in ***Shands*** addressed his request to the Court of Appeals, not the trial court. ***Shands*** does not support Mulligan's position.

In conclusion, there is neither statutory nor case law authority for the trial court to award appellate attorney fee contributions without a Court of Appeals directive. It is now well-settled law that appellate fees are available under § 100.20(5), STATS.; however, the forum for such requests is the appellate court, not the trial court. A reading of the pertinent statutes shows that only the Court of Appeals may award appellate attorney fees. Mulligan may well have been entitled to fees under § 100.20(5), STATS., but the motion should have been filed in the appellate court within the appropriate time limit.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.