

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1992

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ALVIN HERLACHE AND DOROTHY HERLACHE,

PLAINTIFFS-RESPONDENTS,

V.

ROBIN ZAHRAN AND KAREN ZAHRAN,

DEFENDANTS-APPELLANTS,

**DENMARK STATE BANK, JAMES F. PRESSENTIN,
AL BARAKA BANCORP (CHICAGO), INC. AND
MARJAN KMIEC,**

DEFENDANTS.

APPEAL from an order of the circuit court for Manitowoc County:
DARRYL W. DEETS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Robin and Karen Zahran have appealed pro se from an order entered in the trial court on June 20, 2000, establishing the amount to be paid by them for the redemption of property which was the subject of a sheriff's sale held on June 6, 2000. The sheriff's sale resulted from a foreclosure judgment entered in the trial court on July 16, 1998. The foreclosure judgment was affirmed in part and reversed in part by this court in *Herlache v. Zahran (Herlache I)*, No. 98-2712, unpublished slip op. (Wis. Ct. App. Feb. 9, 2000).¹ The June 20, 2000 order approved the Zahrans' redemption of the property upon payment of \$169,035.58. We affirm the June 20, 2000 order.

¶2 The Zahrans' first argument is that the trial court erroneously exercised its discretion when it failed to impose sanctions on Alvin and Dorothy Herlache for filing a frivolous motion. They object to a motion filed by the Herlaches on February 17, 2000, requesting \$7900 for attorney's fees incurred in responding to the Zahrans' appeal in *Herlache I*, and \$2593 in attorney's fees incurred to secure dismissal of a lawsuit filed by the Zahrans in the federal district court in Illinois. The Herlaches also requested an order finding that the Zahrans were "vexatious litigants and ... prone to file frivolous actions." They requested that the Zahrans be barred from filing any action against the Herlaches, their counsel, and the other defendants in this action in any court in the United States without permission of the Manitowoc County Circuit Court. The trial court denied the Herlaches' requests, but also denied the Zahrans' request for sanctions.

¹ This court reversed and remanded on only one issue: whether the Zahrans were entitled to a credit for a \$607.62 milk assignment. On remand, the Herlaches conceded that the Zahrans were entitled to the credit, and the judgment was amended accordingly.

¶3 The Zahrans contend that the Herlaches' request for attorney's fees incurred in the first appeal was frivolous because attorney's fees were denied by this court in *Herlache I*, slip op. at ¶31, when this court stated, "No costs on appeal to either party." However, this court's ruling related to the costs on appeal² specified in WIS. STAT. RULE 809.25(1)(b) (1999-2000).³ This court did not address or resolve any request for appellate attorney's fees, as none was made.

¶4 Although the trial court denied the Herlaches' motion for appellate attorney's fees incurred in *Herlache I*, it declined to determine that the motion was frivolous. A motion may be deemed frivolous and sanctions may be imposed if the motion has no reasonable basis in law or fact, and cannot be supported by a good faith argument for the extension, modification, or reversal of existing law. *See* WIS. STAT. § 802.05(1)(a). In their February 17, 2000 motion, the Herlaches based their request for attorney's fees incurred in *Herlache I* on language in the mortgage providing that in the case of default and foreclosure, all costs and expenses, including reasonable attorney fees, should be included in the judgment. They also relied on case law from other jurisdictions providing that in the event of a foreclosure, appellate attorney fees may be awarded to the prevailing party. Based upon the language of the mortgage and the supporting case law from other jurisdictions, and absent a showing by the Zahrans that existing Wisconsin case law expressly prohibited the award of appellate attorney fees in a foreclosure appeal, the trial court was not compelled to determine that the Herlaches' request for attorney's fees was frivolous, despite denying the fees.

² Generally, when this court affirms a judgment in part and reverses in part, costs are denied to both parties. This is what occurred in *Herlache I*.

³ All references to the Wisconsin Statutes are to the 1999-2000 version.

¶5 The trial court also reasonably rejected the Zahrans' request that they be awarded sanctions based on the Herlaches' request for attorney's fees incurred in the federal district court action in Illinois, and for an order limiting the Zahrans' right to file new actions without approval of the circuit court. The Herlaches' request for attorney's fees was based on the language of the mortgage providing that in the event of foreclosure, attorney fees would be added to the judgment. The request for an order requiring preapproval of future lawsuits by the Zahrans was based upon the Zahrans' commencement of the federal district court lawsuit and their filing of a separate summons and complaint in the Illinois state court, within days of each other and within days of entry of the foreclosure judgment. Both the federal district court action and the Illinois state court summons and complaint derived from the note and mortgage involved in this action.⁴ The Herlaches relied on *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 468 N.W.2d 760 (Ct. App. 1991), to argue that an order requiring prior approval of future lawsuits by the Zahrans was necessary and permissible to protect them from additional vexatious and frivolous lawsuits.

¶6 The trial court denied the request for attorney's fees incurred in the federal district court on the ground that it had no authority to add fees incurred in another jurisdiction to the judgment in this case. It also denied the request for an order requiring prior approval of future filings by the Zahrans. However, it further concluded that the Herlaches' motion was supported by a sufficient legal basis and refused to find that the Herlaches' requests were frivolous.

⁴ The federal lawsuit was ultimately dismissed. The Illinois state court action never proceeded because service of the summons and complaint was never made.

¶7 We agree with the trial court that it lacked authority to award attorney's fees incurred in the federal district court action. However, nothing in the record compelled the trial court to find, as requested by the Zahrans, that the Herlaches' motion was brought for purposes of harassment. Based upon the record, the trial court also reasonably refused to determine that the February 17, 2000 motion so lacked a reasonable basis as to compel the award of sanctions. The Zahrans' motion for sanctions was therefore properly denied. *See* WIS. STAT. §§ 802.05(1), 814.025(3).

¶8 The Zahrans also challenge the trial court's award of \$1246.49 for the expenses of the sheriff's sale. They contend that the sheriff's sale was scheduled prematurely by the Herlaches while their petition for review of this court's decision in *Herlache I* was pending, resulting in two postponements and increased costs.

¶9 Costs of the sheriff's sale were properly included by the trial court in the amount to be paid for redemption pursuant to WIS. STAT. §§ 846.13 and 846.16. Although the Zahrans contend that the postponements resulted in excessive costs, they cite to no offer of proof in the record establishing which specific portions of the sheriff's sale costs resulted from the postponements and which did not, nor do they present any argument in this court which establishes which portion of the \$1246 award was permissible and which was excessive. In their brief on appeal, they simply contend that if any costs for the sheriff's sale are assessed against them, it should be "only one advertising notice and one sheriff fee." They make no showing of what that actual amount would be, nor is it this court's obligation to search the record in an attempt to make that determination. Because the Zahrans' argument is inadequately briefed, this court will not disturb the \$1246 award. *See Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d

278, 283-84, 528 N.W.2d 502 (Ct. App. 1995); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶10 The Zahrans also challenge the trial court's award of interest at 10% per annum for the period between entry of the judgment of foreclosure and redemption. They contend that the interest rate should be 5% pursuant to WIS. STAT. § 138.04, and that the 5% rate was contemplated by this court in *Herlache I*, slip op. at ¶28.

¶11 In the judgment of foreclosure, the trial court awarded interest at 5% per annum from the date of default to the date of the foreclosure judgment, and at 10% per annum from the date of the foreclosure judgment to the date of redemption. In *Herlache I*, this court reversed and remanded only for a determination of whether the Zahrans were entitled to a credit for a milk assignment and did not disturb the trial court's interest determinations. Consequently, we reject the Zahrans' argument that the 10% interest award violates our decision in *Herlache I*.

¶12 We also conclude that the trial court's interest award was correct. WISCONSIN STAT. § 846.12 provides that "the amount adjudged due [in a foreclosure judgment] shall draw interest at the rate provided to be paid on the mortgage debt, but shall not exceed the minimum rate prevailing immediately prior to the default on which the foreclosure is based, until the date of sale or payment." The promissory note executed by the Zahrans came due on March 30, 1993. Although the Herlaches did not sue for foreclosure based upon the Zahrans' default until February 1998, the Zahrans defaulted on March 30, 1993. The note provided for an interest rate of 10% per annum effective March 30, 1988, to the due date of the note on March 30, 1993. Because the interest rate prevailing under

the note at the time of the default was 10% per annum, the trial court properly awarded interest at that rate from the date of the foreclosure judgment to the date of redemption pursuant to § 846.12. While the trial court awarded interest pursuant to WIS. STAT. § 138.04 at only 5% per annum from the date of default to the date of the foreclosure judgment, this award did not limit its authority to award interest at 10% per annum for the period between entry of the default judgment and redemption, as provided in § 846.12.

¶13 For these reasons, we affirm the trial court's June 20, 2000 order and the prior nonfinal rulings challenged by the Zahrans. However, we deny the motion for attorney's fees filed by the Herlaches which is also pending before this court. The Herlaches request \$7900 for attorney's fees incurred in *Herlache I*, and \$3500 for attorney's fees incurred in the current appeal. They contend that they are entitled to the fees pursuant to the language in the mortgage providing that "[i]n case of default ... all costs and expenses including reasonable attorneys' fees ... shall be added to the principal, become due as incurred, and in the event of foreclosure, be included in the judgment." They also rely on cases from other jurisdictions, and language in the foreclosure judgment providing that in order to redeem the property, the redeemer must pay additional attorney's fees incurred by the Herlaches after the date of the foreclosure judgment.

¶14 The Herlaches' request for attorney's fees incurred in *Herlache I* is denied. The appeal in *Herlache I* was concluded and remanded long ago, with no award of attorney's fees having been made by this court. Although the Herlaches subsequently moved the trial court for \$7900 in attorney's fees incurred in *Herlache I*, they filed no cross-appeal from the trial court's order denying their motion. Because we therefore have no jurisdiction to review the trial court's order denying attorney's fees, and because our jurisdiction to act in *Herlache I*

terminated with remittitur, *see State ex rel. Fuentes v. Wisconsin Court of Appeals*, 225 Wis. 2d 446, 452-53, 593 N.W.2d 48 (1999), attorney's fees incurred in *Herlache I* cannot be awarded by this court.

¶15 We also deny the Herlaches' request for \$3500 in attorney's fees incurred in the current appeal. While the mortgage permits the award of attorney fees incurred in the trial court, it does not specifically provide that appellate attorney fees may be awarded, nor do the Herlaches cite to any Wisconsin statutes or case law which permit such an award by this court. Under these circumstances, the request for attorney's fees is denied.⁵

¶16 In addition to denying the Herlaches' motion for appellate attorney's fees, we deny the Zahrans' countermotion for sanctions. The Zahrans responded to the Herlaches' motion for attorney's fees with a response contending that the motion was frivolous and a countermotion for \$2000 in sanctions. The Zahrans' lengthy response and motion for sanctions raises numerous confusing arguments, only portions of which directly address the Herlaches' motion. The Zahrans' motion for sanctions is therefore denied.

By the Court.—Order affirmed.

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

⁵ The Herlaches have neither claimed nor established that this appeal is frivolous, justifying appellate court attorney's fees pursuant to WIS. STAT. RULE 809.25(3).

