

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 2003

Cornelia G. Clark
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. 02-3065

Cir. Ct. No. 00-CV-780

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DAVID B. WESTRATE, INDIVIDUALLY AND AS ASSIGNEE
OF THE RESIDUAL INTERESTS OF NATIONAL BUSINESS
INSTITUTE, INC., A DISSOLVED FOR-PROFIT
WISCONSIN CORPORATION,**

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

v.

**NBI INC., A NON-PROFIT WISCONSIN CORPORATION,
JAMES E. RITSCH, INDIVIDUALLY, ROGER AMUNDSON,
INDIVIDUALLY, MARGARET WALDHART-LARSEN,
INDIVIDUALLY, AND JJR CONTRACTING SERVICES,
INC., A FOR-PROFIT WISCONSIN CORPORATION,**

**DEFENDANTS-RESPONDENTS-CROSS-
APPELLANTS.**

CROSS-APPEAL from an order of the circuit court for Eau Claire
County: ERIC J. WAHL, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. NBI, Inc., James E. Ritsch, Roger Amundson, Margaret Waldhart-Larsen and JJR Contracting Services, Inc., (collectively NBI) cross-appeal part of an order concluding that \$7,123.38 sought by NBI for videotaping David B. Westrate’s deposition was not a taxable cost pursuant to WIS. STAT. § 814.04(2).¹ NBI argues the circuit court erred by disallowing this cost because Westrate failed to file an objection to the cost bill with the clerk of court. We agree and reverse the order.²

BACKGROUND

¶2 After the circuit court granted NBI’s summary judgment motion dismissing Westrate’s claims, NBI filed a Notice of Taxation and Bill of Costs with the clerk of court, supported by counsel’s affidavit stating that the costs were both reasonable and necessary. The clerk disallowed \$7,123.38 sought for the cost of videotaping Westrate’s deposition, concluding that such a cost “does not appear to fall within the discretion of the Clerk.” NBI moved the circuit court to review the clerk’s determination, arguing that pursuant to WIS. STAT. § 885.45(2), “the reasonable expense of recording testimony on videotape shall be costs in the action.” Westrate then objected to NBI’s motion, contending that the expense of videotaping Westrate’s deposition was not a “necessary” cost. The court ultimately denied the videotaping cost, stating it was not persuaded that § 885.45(2) was applicable to the case and concluding that NBI had not

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² We note that because the appellant’s appeal was voluntarily dismissed by order dated January 17, 2003, this opinion necessarily addresses only the cross-appeal.

established the necessity of videotaping Westrate's deposition. This cross-appeal follows.

ANALYSIS

¶3 NBI argues the circuit court erred by disallowing the videotaping cost because Westrate failed to file an objection to the cost bill with the clerk of court. Pursuant to WIS. STAT. § 814.04(2), a prevailing party is entitled to an award of “[a]ll the necessary disbursements and fees allowed by law.” In turn, WIS. STAT. § 814.10 governs the procedure for taxation of costs and provides, in relevant part:

(1) CLERK'S DUTY, NOTICE, REVIEW. The clerk of circuit court shall tax ... on the application of the prevailing party, upon 3 days' notice to the other, the sum of the costs and disbursements as provided in this chapter, verified by affidavit.

....

(3) OBJECTIONS, PROOFS, ADJOURNMENT. The party opposing such taxation, or the taxation of any particular item shall file with the clerk a particular statement of the party's objections, and the party may produce proof in support thereof and the clerk may adjourn such taxation, upon cause shown, a reasonable time to enable either party to produce such proof.

(4) COURT REVIEW. The clerk shall note on the bill all items disallowed, and all items allowed, to which objections have been made. This action may be reviewed by the court on motion of the party aggrieved made and served within 10 days after taxation. *The review shall be founded on the bill of costs and the objections and proof on file in respect to the bill of costs. No objection shall be entertained on review which was not made before the clerk, except to prevent great hardship or manifest injustice.* (Emphasis added.)

¶4 Here, it is undisputed that Westrate neither filed an objection to the Bill of Costs with the clerk, nor opposed NBI's affidavit regarding the necessity or

reasonableness of the costs. Westrate's brief does not address NBI's argument that Westrate waived any objections to costs by not raising them with the clerk. Likewise, Westrate does not dispute that the expense of videotaping his deposition is a cost under WIS. STAT. § 885.45(2). Rather, Westrate argues that the clerk properly disallowed the cost because it was not a "reasonable expense" pursuant to § 885.45(2). We are not persuaded.

¶5 While the clerk of court may review a bill of costs to determine whether the items are the type allowable by law, Westrate has not established that the clerk has the adjudicative authority to unilaterally determine that an otherwise allowable cost is "unreasonable" because of its amount. Reasonableness is therefore not an issue until made so by objection. When NBI filed its Notice of Taxation and Bill of Costs, Westrate's responsibility to file an objection to disputed costs was triggered. Because Westrate did not file an objection with the clerk, the trial court was precluded from considering his "necessity" objection for the first time on review. *See* WIS. STAT. § 814.10(4). We therefore conclude NBI is entitled to recover the cost of videotaping Westrate's deposition.

By the Court.—Order reversed and cause remanded.

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

