

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2009

David R. Schanker
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. 2007AP2840

Cir. Ct. No. 2006FA338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE MATTER OF THE AWARD OF FRIVOLOUS COSTS IN
IN RE THE MARRIAGE OF:**

HEIDI MARIE GRAEF,

PETITIONER-RESPONDENT,

v.

CHADWICK TIMOTHY GRAEF,

RESPONDENT,

CHRISTOPHER S. CARSON,

APPELLANT.

APPEAL from an order of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

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

¶1 PER CURIAM. This is Attorney Christopher S. Carson’s second appeal of costs and attorney fees arising out of an underlying divorce action. He appeals the amount awarded on remand after his first appeal. We decline to find this appeal frivolous, but affirm the order and order Carson to desist from filing any further appeals in this matter until he has paid all outstanding amounts in full.

¶2 Carson represented respondent Chadwick Graef in a 2006 divorce action. Attorney Amy Zott represented the petitioner, Heidi Graef. In May 2006, the circuit court, the Honorable Allan B. Torhorst presiding, sanctioned Carson under WIS. STAT. § 802.05 (2005-06)¹ for a frivolous filing and ordered him to pay \$954.14. We summarily affirmed the award, determined the appeal itself was frivolous and remanded for a determination of costs and reasonable attorney fees for filing a frivolous appeal. *See* WIS. STAT. RULE 809.25(3).

¶3 On remand, the circuit court, Judge Torhorst again presiding, conducted an evidentiary hearing. Carson cross-examined Zott at length about her billing entries, and the court received five exhibits and retained Zott’s file for review. In a written decision, the court ordered Carson to pay \$8,472.07 in addition to the previously ordered \$954.14. Carson appeals the new amount, contending the court “applied an improper legal standard [and] approved many patently and outrageously unreasonable fee entries [which] stemmed from an improper motive by Ms. Zott.” He requests a new hearing “in the interests of justice.”

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

¶4 Carson’s opening salvo criticizes Judge Torhorst for holding that “as a matter of law, he had no discretion” to award the attorney fees Zott sought.² Carson takes the court’s comment out of context. The court actually stated:

[WISCONSIN STAT.] RULE 809.25(3) is mandatory with regards to the successful party being awarded costs, fees and reasonable attorney’s fees against a party upon whose appeal is found frivolous. The duty of the circuit court is to award such reasonable attorney’s fees, costs and fees; the circuit court has no discretion if the Court of Appeals finds the appeal to be frivolous. This is the case in this proceeding.

Section 809.25(3)(a) provides that if an appeal is found to be frivolous, the court “shall award to the successful party costs, fees, and reasonable attorney fees under this section.” Judge Torhorst accurately stated the law.

¶5 Carson then contends that, under *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 577, 597 N.W.2d 744 (1999), a court may take equitable principles into account when awarding fees and expenses. Carson’s reliance on *Jandrt*’s general language is misplaced. Equity may give the court power to achieve a fair result in the absence of or in conjunction with a statute, but it does not allow a court to ignore a statutory mandate. See *GMAC Mortgage Corp. v. Givold*, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). The circuit court was correct when it stated that the plain language of WIS. STAT. RULE 809.25 obliged it to award costs

² Carson continues to skate on thin ice. He certifies that his appendix contains the findings or opinion of the trial court, yet he does not provide the opinion for our review, despite sharply criticizing it. The appendix omits pages two and four of the court’s five-page decision and provides none of the hearing transcript—save for the part where Carson pleads his financial straits—that might have illustrated the court’s rationale. This violates WIS. STAT. RULE 809.19(2)(a) and (b) and warrants a monetary sanction against counsel. See *State v. Bons*, 2007 WI App 124, ¶¶24-25, 301 Wis. 2d 227, 731 N.W.2d 367. Only so as not to hinder payment of the costs and fees already owed, we choose not to exercise our authority to sanction him further.

and reasonable fees. Moreover, we are not persuaded that financial obligations incurred as a result of voluntarily pursuing a frivolous appeal come under the rubric of “equitable principles.”

¶6 Carson next asserts that the circuit court erred in finding Zott’s claimed fees reasonable. Our review of a circuit court’s determination of the value of attorney fees is limited to determining whether the court properly exercised its discretion. *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993). A circuit court properly exercises its discretion if it “employs a logical rationale based on the appropriate legal principles and facts of record.” *Id.* (citation omitted). Carson lobbies for a de novo review, however, because Judge Torhorst did not preside over the underlying divorce action. The divorce action is not at issue on this matter. Rather, it is the costs and fees Zott incurred in litigating the frivolous appeal. See *Puchner v. Hepperla*, 2001 WI App 50, ¶6, 241 Wis. 2d 545, 625 N.W.2d 609 (per curiam). Judge Torhorst was integrally involved in the case from early on, allowing him to observe the quality of the services rendered. See *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). The deferential standard is appropriate here.

¶7 Carson undertakes a nearly line-by-line challenge, heavy with sarcasm, to the fees and costs Zott submitted. He also assails the “overnight doubling” of Zott’s requested fees, spurred, he asserts by the “fiendishly improper motive” of desiring to punish him. Zott testified that the first amount she submitted was a summary billing statement because she did not want to expend more time on the file. When Carson challenged that amount, however, and suggested she was being untruthful, she went through the file, itemized her billings and prepared a statement of her actual costs and fees. Zott provided the file to the court.

¶8 The circuit court reviewed the exhibits that illustrated Zott’s itemized claim and considered her testimony and the cross-examination by Carson. Zott conceded a 5.7-hour reduction in time on one matter and the court found the remainder of her requests to be reasonable in light of prevailing rates in the area. It also allowed Zott’s full rate for travel time because such time can be used to contemplate arguments and strategy. Carson chastises the circuit court for its “scant commentary” on the reasonableness of Zott’s fees. We deem the court’s clear and concise explanation of its reasons for the fee award to be sufficient. *See Southeast Wis. Prof’l Baseball Park Dist. v. Mitsubishi Heavy Indus. America, Inc.*, 2007 WI App 185, ¶54, 304 Wis. 2d 637, 738 N.W.2d 87 (citations omitted). We see no erroneous exercise of discretion.

¶9 Finally, Carson contends a new hearing on costs and fees is warranted in the interests of justice. *See* WIS. STAT. § 752.35. He claims justice miscarried because the circuit court misconstrued the arguments he intended to make and failed to consider his “financially straightened [sic] circumstances.”³ Carson called no witnesses and was not sworn in himself. Zott presented exhibits and gave sworn testimony. Carson’s position seems to be that the circuit court should have believed him and accepted his arguments over Zott and her evidence. First, this is not a proper basis for granting a new trial. Second, we defer to the

³ Zott cites to *Brinckman v. Wehrenberg*, 2005 WI App 38, 279 Wis. 2d 516, 693 N.W.2d 146, in her response to this portion of Carson’s argument. As *Brinckman* is unpublished, it may not be cited, and we admonish counsel for doing so. *See* WIS. STAT. RULE 809.23.

Zott also shades some of the facts. For example, she claims Carson made the unsupported assertion that “\$190 per hour is not a reasonable hourly rate.” Carson actually stated: “I submit that it is unreasonable to bill at \$190 an hour for Attorney Zott’s travel time to and from the courthouse.” We caution Zott, too, to temper her approach.

circuit court's credibility determinations unless they are clearly erroneous. WIS. STAT. § 805.17(2). They are not.

¶10 Respondent Heidi Graef asks that we find this appeal frivolous. We may not do so, however, unless the entire appeal is frivolous. See *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. We conclude that Carson's challenge to the reasonableness of certain of Zott's fees falls short of being frivolous.

¶11 As a final matter, we are compelled to note that Carson's fervor too frequently strays into vitriol. His vituperative language shows disrespect to opposing counsel, the circuit court and to this court. We do not know if he is too close to this particular case or if this is his usual approach. Whichever, we strongly advise that he moderate his tone and adopt a demeanor more befitting an officer of the court. Continuing in this manner will not be tolerated.

¶12 We therefore order that Carson refrain from filing any further appeals in this matter until all outstanding amounts are paid in full. "[W]hile persons have a constitutional right to access to the courts, that right is neither absolute nor unconditional." *Village of Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997) (citation omitted). Barring Carson from involving Zott or Heidi in litigation until the sanction is paid promotes the efficient functioning of the courts and is narrowly tailored to deter Carson from pursuing frivolous litigation. See *id.* at 785-86; see *Puchner*, 241 Wis. 2d 545, ¶9. The clerk of this court is instructed to return unfiled any document Carson submits relating to any matter arising from, relating to or involving case number 2006FA338. The clerk of this court will resume accepting Carson's documents for filing if the documents are accompanied by an order of the circuit court

indicating that Carson has paid the costs, fees and reasonable attorney fees awarded by the circuit court.

By the Court.—Order affirmed.

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

