

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2010

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. 2009AP1817

Cir. Ct. No. 2009SC27

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL FRANCIS FURTAK,

PLAINTIFF-RESPONDENT,

v.

POLAR GAS COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
ROBERT E. EATON, Judge. *Affirmed; attorneys sanctioned.*

¶1 HOOVER, P.J.¹ This is an appeal disputing \$100. Polar Gas Company appeals a portion of a small claims judgment, arguing it was entitled to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

recover a \$100 penalty when it terminated propane gas delivery service to Michael Furtak. We affirm.

BACKGROUND

¶2 Polar provided propane and propane accessories to Furtak pursuant to two separate contracts. The first, a Rental and Service Agreement, provided that Furtak agreed to purchase, and Polar to sell and deliver, Furtak's residential propane requirements. The agreement, dated November 9, 2000, also indicated Polar would install and maintain a propane tank and accessories "[f]or Consumer's convenience." The agreement stated the equipment was leased, but paragraph six regarding the rental period, price, and payment date indicated N/A, zero dollars, and N/A respectively. The agreement further provided, at paragraph eight:

This agreement, unless sooner terminated as herein provided, shall be and remain in effect for a period of N/A months from the date hereof, and for successive periods of N/A months thereafter upon prompt prepayment of the specified rentals as they become due; provided, however, that it may be terminated either (a) by Consumer without cause at any time by giving Dealer not less than thirty days prior written notice, or (b) by Dealer (i) without cause at any rent-paying date hereof by giving the Consumer not less than thirty days prior written notice, or (ii) at any time after the date hereof for the continuous nonoccupancy of said premises by Consumer for more than ninety days ..., or (c) by either party at any time after any default or violation by the other party of any of the provisions of this agreement by giving such other party not less than ten days prior written notice.

¶3 The second contract between the parties, the 2008-2009 Polar Gas Protection Solution, set forth their pricing agreement for provision of the propane gas. Furtak selected the prepay option, agreeing to purchase 1000 gallons upfront at a slightly reduced rate compared to the pay-as-you-go option. The pricing agreement terms and conditions provided:

Agreement is reached between customer as listed and the Polar Gas Company if both parties fulfill all provisions. The Agreement will remain in effect starting September 1, 2008 and will expire April 30, 2009, or until the agreed upon gallonage is purchased, whichever occurs first. ... In the event that Customer does not accept all contracted gallons by the expiration of this Agreement, Polar Gas Company will issue a credit for future gas purchased for all unused contract gallons at the current market rate.

No refunds/credit checks will be processed without penalty. Maximum penalty is set at \$100.00.

If customer purchases propane from another company, Agreement will default. Early termination will result in a penalty to be determined by the Polar Gas Company.

¶4 At trial, Furtak testified he purchased his own propane tank in February 2009, after discussing the matter with a Polar employee over the phone. Polar's phone records confirmed Furtak called on January 19, 2009 and stated he was buying his own tank so he had more options. The employee told Furtak to contact Polar for pick up of the old tank, and Furtak stated he would still be receiving propane from Polar. A February 2, 2009 phone record indicated Furtak called for pick up of the tank and requested Polar keep him "on keep fill" until the contract was done.

¶5 Furtak explained that Polar then sent a letter from the general manager dated February 13, which indicated:

[Y]ou now own a propane tank and had an outside party install the equipment. By doing [so] you are in violation of paragraph 8 of your Rental and Service Agreement and WI Statute 101.16(b)1.²

The Polar Gas Company is unable to provide you with any additional services because you are not in compliance.

² It appears the letter intended to reference WIS. STAT. § 101.16(4)(b)1.

Leaving the current 2008-2009 Polar Gas Protection Solution invalid and under review for penalty.

Furtak testified that after the manager would not accept his calls to discuss the situation, he wrote a letter demanding a full refund for his prepaid, nondelivered propane, and then filed a small claims action. Around the same time, Polar delivered a refund check, minus \$100.

¶6 Furtak requested \$666.57, plus an additional \$21.50 in miscellaneous delivery and hazardous material charges he had disputed. The court granted judgment for the full amount,³ concluding the pricing agreement was unenforceable because its first sentence rendered the contract unenforceable. The court also observed the rental and service agreement was both of questionable relevance to the case and invalid as too vague because it failed to define the applicable time period. The court further concluded the provision allowing Polar to decide whether to impose a \$100 penalty was unenforceable. Finally, the court determined Polar had no right to impose the miscellaneous surcharges without providing advance notice. Polar now appeals, but only that portion of the judgment consisting of the \$100 penalty. Furtak has not responded.

DISCUSSION

¶7 Polar seeks to uphold the contracts, arguing their terms were definite and enforceable. Polar then asserts it was entitled to a \$100 penalty under the rental and service agreement because Furtak requested a refund. In its brief's conclusion, however, Polar instead states it is entitled to the \$100 penalty based on the pricing agreement.

³ Furtak had not cashed Polar's refund check at the time of trial.

¶8 Polar represents that “[b]ased upon Polar Gas’s policy that it not deliver propane to a tank which it does not own due to safety concerns, it terminated the relationship between itself and Furtak.” Polar further states, “Until Furtak purchased his own propane tank and Polar Gas could no longer deliver propane due to safety concerns, there was no dispute that the parties intended to be bound by both [contracts].” Polar’s representations are not supported by the record—citations thereto notwithstanding. Polar directs us to nothing in the record suggesting Polar had any policy against servicing non-owned tanks, much less that it ceased its contractual duty to provide propane because of any safety concerns.

¶9 Even assuming the contracts were enforceable as Polar argues, we cannot discern how Furtak violated any provisions of either. Rather, it would appear Polar was the breaching party because it failed to satisfy Furtak’s residential propane requirements as required by the rental and service agreement, and failed to provide the prepaid propane contracted for in the pricing agreement. Indeed, absent a breach by Furtak, paragraph eight of the rental and service agreement precluded Polar from *ever* unilaterally ceasing propane delivery. As set forth *supra*, paragraph eight only allows Polar to terminate the agreement without cause by giving notice thirty days prior to any “rent-paying date.” Polar, however, failed to provide for any such dates because it instead inserted N/A in the contract’s blank provided at paragraph six.

¶10 In any event, Polar develops no argument that Furtak breached either of the contracts. Polar avoids the subject entirely, aside from providing its unsupported assertions of fact. We therefore reject Polar’s appeal, despite Furtak’s failure to file a brief. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We will not grant relief when issues are not, or inadequately, briefed.). Further, we sanction Polar’s counsel fifty dollars for each

of its misrepresentations of, and false citations to, the record concerning its reasons for terminating propane deliveries. Polar's counsel shall pay \$100 to the clerk of this court within thirty days of the date of this decision. *See* WIS. STAT. RULES 809.19(1)(d)-(1)(e), 809.83(2). Finally, we observe this appeal, over a \$100 dispute, becomes frivolous once it is no longer supported by Polar's false assertions. We admonish Polar and its counsel to refrain from such conduct in the future.

By the Court.—Judgment affirmed; attorneys sanctioned.

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

