COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2112

Cir. Ct. Nos. 2014SC626
2014SC627
2014SC628

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

LAKE ARROWHEAD ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

THOMAS A. WILKES, RICHARD WILKES,
GILBERT EWER AND LINDA EWER,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Adams County: DANIEL G. WOOD, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] This is the latest in a series of appeals involving the Lake Arrowhead Association, Inc., a homeowners' association.[2] In this case, the Association filed small claims suits against four owners of residential lots in Lake Arrowhead—Thomas Wilkes, Richard Wilkes, Gilbert Ewer, and Linda Ewer ("the Association members")—for the collection of membership assessments for various years. After the suits were consolidated in the circuit court, the court held a one-day court trial and issued a written decision in favor of the Association.[3] The Association members appeal. The Association cross appeals. I affirm the judgments against each of the Association members, based on the appeal, because the Association members have failed to order at least one potentially significant trial transcript and fail to explain why the absence of this transcript could not matter under the proper standard of review. I do not reach the cross appeal, which appears to urge affirmance of the judgment on an alternative ground.[4]

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] *See* ***Wilkes v. Lake Arrowhead Ass'n, Inc.***, No. 2004AP3090, unpublished slip op. (WI App Nov. 17, 2005); ***Ewer v. Lake Arrowhead Ass'n, Inc.***, 2012 WI App 64, 342 Wis. 2d 194, 817 N.W.2d 465.

[3] The Hon. Charles A. Pollex presided over the initial proceedings in this case, before the Hon. Daniel G. Wood presided over proceedings that included issuing the judgment at issue.

[4] In the cross appeal, the Association argues that the Association members could pursue their mutual defense against portions of their annual assessments only as a derivative claim that belongs to the Association, which they have not done, based on the doctrine of issue preclusion in light of ***Wilkes***. The Association's briefing in the cross appeal does not explicitly state whether the Association seeks only the same relief that it seeks as respondent in the appeal, or instead seeks additional relief, regardless of the mandate in the appeal. However, I conclude that the following passage, which the Association uses to sum up its argument in the cross appeal, appears to establish that the cross appeal contemplates only alternative relief: "A ruling *in [the Association members'] favor* would not be an isolated event. It would open the door to disgruntled individual members refusing to pay their full assessments based on their particular (continued)

BACKGROUND

Stipulated Background Facts

¶2 In advance of trial, the parties entered into a set of factual stipulations, with exhibits attached, which reflects facts that include the following. The Association operates and manages the Lake Arrowhead community, pursuant to a set of declarations, which obligate Association members to pay annual assessments. In addition, the parties stipulated to an operative set of "restated" Association by-laws. Under the declarations, common areas and common facilities of the Association include a golf course, called the "Pines Course."

¶3 East Briar, Inc. is a wholly-owned subsidiary of the Association. The owners of East Briar residential lots are members of the Association. However, the Association "is not legally or contractually responsible for the debts or operating expenses of East Briar, Inc.," and East Briar and its assets "are not a utility, common area, common facilities, private area, or private facility," as those terms are defined in the declaration.

¶4 Sometime after January 1997, East Briar constructed a golf course, which it maintains, called the "Lakes Course."

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view[s] of how the community should be run." (Emphasis added.) The only apparent logic that I can see in this concluding comment would be to signal that the cross appeal presents a live issue in the event that I were considering ruling *in the Association members' favor* in the appeal, which I am not. And, the Association does not explain what difference that the Association believes it would make for me to affirm on the additional ground of issue preclusion, given my decision in the appeal entirely in the Association's favor.

¶5 For each budget year, 2008-09 through 2014-15, the Association members tendered to the Association as annual assessment payments only those amounts that the Association members asserted that they owed "based on their review of the Association's budget." The Association rejected these tenders as insufficient and as a consequence placed restrictions on the ability of the Association members to participate in various community activities.

Nature Of The Dispute And Circuit Court Ruling

¶6 With that as the basic background, the Association members argue the following as their common defense to the partial non-payment of membership assessments: (1) the Association "has continually" used Association assessment funds to keep the Lakes Course golf operation "afloat"; and (2) this use of assessment funds is improper, because the Association members have "absolutely no contractual duty" to pay "debts and/or operating expenses" of East Briar or the Lakes Course.

¶7 The Association concedes the second part of this argument, acknowledging that revenue derived from the Association assessment funds may not be used to subsidize East Briar or the Lakes Course. However, based on the evidence presented by the parties, the Association argued that the first part of the argument is incorrect. The circuit court agreed. The court found that "no membership assessments were used to fund [East Briar] or the Lakes Course," and therefore the Association members' "defense for non-payment of the assessments in full is not justified."

DISCUSSION

¶8 I resolve this appeal on narrow grounds that avoid the need to address most of the arguments raised on appeal by both sides, and any of the arguments in the cross appeal. The problem is that the Association members have failed to ensure that the appellate record includes a potentially significant transcript from the bench trial, and I am required to assume that the testimony reflected in that transcript would defeat the Association members' arguments. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) ("We are bound by the record as it comes to us … [and] when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling."). Moreover, after the Association calls this potentially fatal problem to the attention of the Association members, they make no attempt to explain why the absence of this transcript could not matter under the proper standard of review. Finally, I observe that, setting aside the missing transcript problem, the Association members appear to be unable to establish that the circuit court clearly erred in finding that the Association did not use annual assessments to subsidize East Briar or the Lakes Course.

¶9 Appellate courts review a circuit court's factual findings at a bench trial under the clearly erroneous standard, with due regard for the court's ability to assess the credibility of witnesses. WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Consistent with this standard:

> Findings of fact by the [circuit] court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the [circuit] court need not in

> itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) (citations omitted).

¶10 The circuit court explicitly relied, in part, on the trial testimony of Bob Benkowski, a former Association manager, to find that no assessments were used during the pertinent time period to subsidize East Briar or the Lakes Course. Despite this, however, the Association members have failed to order a transcript of the Benkowski testimony for consideration as part of the record on appeal.[5]

¶11 In its written decision, the court found that Benkowski had "intimate familiarity with the operation of" the Association. The court explained that it relied in part on Benkowski's testimony "that the Lakes Course had its own budget, its own employees, and was responsible for its own maintenance and expenses"; that "the only unallocated expenditure by [the Association] for the

[5] The only transcript from trial-related proceedings ordered by the Association members and included in the record is the testimony of Association accountant Robert Miller. I focus on the absence of a transcript of Bob Benkowski's trial testimony because the circuit court made clear in its written decision that Benkowski's testimony was significant to the court's fact finding on the subsidy issue. I need not and do not consider whether the absence of transcripts reflecting the testimony of *other* trial witnesses would also support affirmance, nor do I address any potential problems that could arise from failure of the Association members to ensure that the appellate record contains the transcript reflecting pertinent oral arguments of the parties on the subsidy issue to the circuit court at trial.

Lakes Course was the de minimis time associated with routine general manager and staff accountant duties, such as signing payroll checks for Lakes Course employees"; and "that the administration and maintenance expenses on the assessment budget do not include golf expenses" (emphasis in original), which was testimony "that defendants were not able to dispute other than stating their own assumptions." The court stated that it was satisfied that the testimony of Benkowski, and a second witness, Association accountant Robert Miller, "is more credible and compelling[,] given their intimate knowledge of the operations of [the Association] and of both courses[,]" than the "observations and calculations" of the Association members, which "are based largely on assumptions."

¶12 It appears from their briefing that the Association members make the unstated assumption that, because the circuit court explicitly relied on the testimony of Miller, in addition to that of Benkowski, it is sufficient for the Association members to have ordered the transcript of Miller's testimony. If this is the assumption, it is illogical. Both Benkowski and Miller testified at the trial, and the court repeatedly cited Benkowski's testimony as providing support for its findings.

¶13 A hypothetical illustrates the point. Assume that, on appeal, the Association members were able to demonstrate defects in Miller's testimony on the subsidy issue so significant that the circuit court clearly erred in crediting any of Miller's testimony. Even then, the Association members would still have before them all the work of showing that *Benkowski*'s pertinent testimony was unreliable. Moreover, the Association members do not argue, and have given me no basis to conclude, that whatever defects there could be in Miller's testimony bearing on the subsidy issue, identical defects invalidate all of Benkowski's pertinent testimony. Without an opportunity to review a transcript, it is impossible

to determine whether Benkowski's testimony is in all respects cumulative to Miller's testimony, and the Association members give me no basis to conclude that it was.

¶14 Compounding the missing transcript problem, the Association members make no effort to justify providing only the partial trial transcript that consists of Miller's testimony alone, even after the Association directly calls attention to the problem. In its briefing in the appeal, the Association states:

> The only transcript the appellants asked to include in the record on appeal is the testimony of the Association's accountant, Robert Miller. Therefore, the testimony of the appellants and other witnesses must be assumed to support the trial court's findings of fact. *See* ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353 n.2, 526 N.W.2d 822 (Ct. App. 1994) ("In the absence of a transcript, we will assume that every fact essential to sustain the trial court's exercise of discretion is supported by the record.").
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> ….
>
> The [Association members] have chosen not to include the transcripts of their testimony [at trial] as part of the record on appeal. Therefore this court must assume that the factual basis for the record supports these conclusions. ***Streff***, 190 Wis. 2d at 353 n.2.[6]

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[6] I note that the court in ***Streff*** explained as follows in footnote 2, cited by the Association:

> When an appeal is brought on a partial transcript (or no transcript), the scope of review is necessarily confined to the record before the appellate court. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233, 239 (1979). In the absence of a transcript, we will assume that every fact essential to sustain the trial judge's exercise of discretion is supported by the record. *See* ***id.***

Streff v. Town of Delafield, 190 Wis. 2d 348, 353 n.2, 526 N.W.2d 822 (Ct. App. 1994); *see also* ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (accord); ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) (accord).

¶15 Despite these references by the Association, the Association members in their reply brief make no mention of the missing transcripts, much less do they attempt to explain why the absence of any transcript, including the Benkowski transcript, could not matter under the proper standard of review. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

¶16 In sum, there is a fatal missing transcript problem that the Association members do not even attempt to explain or justify, even after its potentially fatal consequence is directly called to their attention, accompanied by a citation to on-point precedent.

¶17 Before concluding, I make a brief observation on the merits. It appears from my review of the circuit court's written decision, the briefs on appeal, and the exhibits highlighted by the parties, that the Association members do not come close to identifying a quantum of evidence constituting the great weight and clear preponderance of the evidence establishing that the circuit court clearly erred in finding that the Association did not use annual assessments to subsidize East Briar or the Lakes Course.

¶18 One obvious and significant problem with the arguments of the Association members involves Miller's testimony. As referenced above, this is the *only* testimony in the record on appeal. On its face, Miller's testimony favors the Association. The court found Miller to be credible in applying his accounting expertise and his knowledge of the pertinent facts to the subsidy issue. The Association members fail to present competing testimony that could serve to undermine Miller's testimony in any respect, and fail to sufficiently explain why I

should not give deference to the circuit court's credibility determinations. The Association members in their appellate briefing refer to various documents in ways that could, at best, raise questions about the reliability or meaning of various assertions Miller made. However, it appears to me that these question-raising points about Miller's testimony do not come close to providing an evidentiary basis establishing clear error by the circuit court on the factual question at issue.

By the Court.—Judgment affirmed.

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