COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP995 **Cir. Ct. No. 2017SC1075**

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

BRAD BOTTOMLEY,

PLAINTIFF-RESPONDENT,

V.

JOSH SEAVERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: MICHAEL R. FITZPATRICK, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Josh Seaverson appeals an order of the trial court granting eviction and a monetary judgment in favor of his landlord,

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

Brad Bottomley.[2] He argues that the March 31, 2017 five-day notice to vacate was legally insufficient because it violated WIS. STAT. § 704.17, the terms of the lease, and certain federal regulations that he argues are applicable. Specifically, he argues that the property owner failed—as he contends was required by law—to provide "written notice of the violations and an opportunity to correct them." Secondly, he argues that the eviction was retaliatory and thus violated WIS. STAT. § 704.45. Finally he argues that both the trial and appellate courts deprived him of his right to appellate review pursuant to WIS. STAT. § 808.03(1) by not granting a stay of the eviction order pending his appeal. We reject his arguments and affirm the order of eviction.[3]

BACKGROUND

Seaverson's lease.

¶2 Seaverson signed a lease in 2015 for a unit in a housing complex in Milton that accepted tenants who qualify for federal housing subsidies. The lease was also signed by the landlord who owned the building at the time; that landlord is not party to this eviction action. The lease defined "basic rent" as $450 per month. It defined "monthly rent" as the amount Seaverson was required to pay, and his "monthly rent" was $279. The lease provided that the landlord may receive subsidies from a federal agency to make up the difference between the

[2] The oral order of the trial court from which Seaverson appeals was given May 19, 2017, and included the order of eviction, a monetary judgment for the landlord for past rent due, and dismissal of the counterclaim. Seaverson argues the propriety of the eviction order only on appeal. He asks for relief from the monetary judgment but makes no separate argument about it.

[3] As we explain below, we conclude that the entire appeal is not frivolous within the meaning of WIS. STAT. § 809.25(3), and we do not award the attorney's fees Bottomley seeks.

tenant-paid "monthly rent" and the "basic rent." At the time the lease was signed, Rural Development, a U.S. Department of Agriculture agency, paid the $171 per month difference between Seaverson's $279 "monthly rent" and the $450 "basic rent."

¶3 The lease contained the following provisions:

- The termination date of the lease was November 30, 2016.

- The lease stated that it is "not automatically renewable" and that both parties "must agree in a written new lease or written amendment to the lease if [the] resident is to continue to occupy the unit" after the lease terminates.

- The lease states, as relevant here, that the landlord may "terminate or refuse to renew the lease only for material non-compliance with the lease provisions, [or] material non-compliance with the rules or other good causes[.]" It defines "material noncompliance" as including "repeated[] non-payment or repeated late payment of rent or other financial obligations due under the lease or rules[.]"

- It permits the landlord to increase or decrease the tenant's "monthly rent" and the "basic rent" even *prior* to the expiration of the lease "if the increase or decrease is approved by [Rural Development] and … [the] landlord is required to do so under any program requirements[.]"

- It requires the tenant to complete applicable forms certifying the tenant's eligibility for subsidized housing. It also requires the tenant to "complete … any and all other forms of certifications and supply such further information and documentation with respect to [the] resident … as may be reasonably requested by [the] landlord … from time to time."

The purchase of the property by Bottomley.

¶4 In July 2016, midway through Seaverson's lease, Bottomley purchased the Milton housing complex. At the time of the purchase, the land was subject to a restrictive covenant requiring that the building be used "for the purpose of housing … very low-, low-, or moderate-income tenants." The new ownership did not change the use. However, under the rules of the federal housing subsidy program, the new ownership did make it necessary for tenants receiving housing subsidies to complete two sets of forms that were to be provided to them as well as to sign a lease with the new owner. Accordingly, a representative of Rural Development, the federal agency that paid their subsidies, met with tenants thirty days in advance of the July 2016 sale to inform them of these requirements. Subsidies would be paid only after the paperwork was completed; when late paperwork was completed for a tenant, the federal agency would backdate the supplemental payments for that tenant. The necessary paperwork was sent to each tenant as of August 3.

The federal housing agency's decision to increase rent in the complex.

¶5 Shortly after the initial tenant meeting, an unrelated change in the entity administering the housing subsidy program caused a review of the rent rates in the complex. After Bottomley purchased the complex, he received instructions from Rural Development to modify the rent for one-bedroom units to $615 per month and two-bedroom units to $677 per month. Tenants were notified of Rural Development's decision to increase rent in the complex at a meeting with Bottomley on September 10.

Seaverson's actions after the sale of the property.

¶6 Other tenants in the complex successfully completed the successive packets of paperwork, signed new leases, and continued receiving their subsidies under the new ownership. Seaverson did not do so. Rural Development paid no subsidies in connection with Seaverson's rent from August through November. Bottomley informed Seaverson's sister and his agent that failure to comply with Rural Development's requirement would make Seaverson responsible for the balance of the rent which was no longer being paid by Rural Development's subsidy. Although Seaverson later completed part of the process, he did not fully comply with the required documentation, and his suspension from the subsidy program remained in effect at the time of the eviction hearing.

¶7 For each of the last four months of his lease, August through November 2016, Seaverson paid only the "monthly rent" of $279, and no subsidies were received to make up the difference.

¶8 Seaverson gave verbal notice on September 10, 2016, of his intent to vacate the apartment when his lease was up November 30, 2016. On October 4, 2016, he gave Bottomley written notice of his intent to vacate at the end of his lease on November 30, 2016.

¶9 Seaverson did not vacate the apartment November 30. After November, Seaverson made no more $279 payments though he remained in the apartment. Seaverson's mother made a one-time payment of $677 in December 2016. Thereafter, Seaverson offered to make partial payments but refused to authorize his payee to make the full payment of $677 in rent; consequently, no payments were made from January forward even though Seaverson remained in the apartment.

The eviction action.

¶10 On March 31, 2017, Bottomley served Seaverson with a five-day notice that was dated at the top and stated as follows: "Josh Seaverson, This is a five day notice to vacate[] due to nonpayment of rent(s) and noncompliance." It was signed by Brad Bottomley.

¶11 On May 19, 2017, a hearing was held in the trial court. The trial court heard testimony from Bottomley, Seaverson, and Seaverson's sister. Following the testimony, the trial court made factual findings and credibility determinations on the record.

¶12 The trial court found that Bottomley was a credible witness. The trial court found that the defense witnesses were "just not believable[,]" that Seaverson had been "just lying" to obtain a result, and that his sister had been "outright lying" at certain points in her testimony.

¶13 The trial court found that Seaverson had violations of lease provisions or rules that were "substantial and repeated." These violations included nonpayment or repeated late payment of rent. The trial court found that there was "a failure to pay rent" beginning in January 2017, that there was "substantial and repeated" noncompliance by Seaverson in the use of alcohol in the apartment hallway and in failure to control his dog.

¶14 The trial court found that the housing complex was not "an Agency-financed housing project" in significant part because Seaverson failed to make any showing that Bottomley was a "borrower" within the language of the federal rule and based on that finding concluded that Bottomley's notice did not have to comply with a particular federal regulation setting forth a more demanding

standard for such properties before they may terminate a tenant's occupancy.[4] *See* 7 C.F.R. § 3560.159(b).

¶15 The trial court found that Seaverson's suspension from the subsidy program was "his fault and his fault alone." The trial court also found that Seaverson's refusal to pay the increased rent of $677 per month from August through November 2016 was not the basis for the non-renewal of the lease. This was a non-renewal of the lease situation, rather than a termination of the lease. The court reasoned that as a non-renewal, rent was still due under the lease until November 30, 2016. And because of the lease provision extending the term of a lease during any period where the tenant failed to remove his or her personal property, the trial court found that Seaverson was "holding over" and obligated to pay the increased rent of $677 per month after November 30, 2016, until the time of the eviction trial.

¶16 The trial court also rejected Seaverson's argument that the non-renewal of the lease was retaliation within the meaning of WIS. STAT. § 704.45. It did so because in the statute's definition of "retaliation[,]" there is a specific

[4] An Agency-financed housing project is required under federal regulations to include the following information in an occupancy termination notice:

> (1) A specific date by which lease termination will occur;
>
> (2) A statement of the basis for lease termination with specific reference to the provisions of the lease or occupancy rules that, in the borrower's judgment, have been violated by the tenant in a manner constituting material non-compliance or good cause; and
>
> (3) A statement explaining the conditions under which the borrower may initiate judicial action to enforce the lease termination notice.

7 C.F.R. § 3560.159(b).

exemption for evictions based on material non-compliance with lease terms such as rent obligations. In connection with that finding, it found that Seaverson's notice of intent to vacate "is not rescinded at any time and the credible evidence is consistent with that."

¶17 The trial court found that "withholding of the rent was unreasonable and there was a breach" of the lease's terms, which had been extended by Seaverson's failure to move his personal property out. It granted no damages to Bottomley as to the partially unpaid rent from August through November 2016. It granted damages in the amount of $3,046 to Bottomley, equal to the unpaid rent of $677 for four and a half months—January through the first half of May 2017.

Postjudgment.

¶18 Seaverson filed a motion in the trial court seeking a stay of the order pending appeal. Before the trial court ruled on that motion, Seaverson filed a motion for a stay of the order pending appeal in this court.

¶19 The record reflects that the trial court believed at that point that the "unusual procedural posture" that had been created by Seaverson's appellate motions raised jurisdictional questions about the trial court's ability to decide motions absent a remand for that purpose from the court of appeals. Given the lack of a remand, the trial court did not rule on the motion for stay pending appeal. The record reflects that Seaverson did not seek a remand for the purpose of having the motion decided by the trial court.

¶20 This court denied Seaverson's motion for a stay pending appeal because Seaverson's motion was not compliant with the applicable statute's requirement that he provide an undertaking that provides, among other things, that

he "will obey the order of the appellate court upon the appeal and will pay all rent and other damages accruing to the plaintiff during the pendency of the appeal." *See* WIS. STAT. § 799.445. Seaverson then filed a petition for supervisory writ with our supreme court. That petition was denied.

DISCUSSION

Standard of review.

¶21 "[W]hen the trial court acts as the finder of fact, it is the ultimate and final arbiter of the credibility of witnesses." ***Salveson v. Douglas Cty.***, 2000 WI App 80, ¶18, 234 Wis. 2d 413, 610 N.W.2d 184.

¶22 "The standard of review we apply to a circuit court's findings of fact is highly deferential." ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. "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." WIS. STAT. § 805.17(2). We defer to the trial court's findings of fact unless they are unsupported by the record and are, therefore, clearly erroneous. ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). "[W]here more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the one reached by the fact finder." ***Landrey v. United Servs. Auto. Ass'n***, 49 Wis. 2d 150, 157, 181 N.W.2d 407 (1970) (citation omitted).

¶23 Conclusions of law are reviewed "independently and without deference to the decision of the circuit court." ***Hillegass v. Landwehr***, 176 Wis. 2d 76, 79, 499 N.W.2d 652 (1993) (citation omitted).

I. The five-day notice was sufficient.

¶24 Seaverson argues that the five-day notice is insufficient under the terms of the lease (which requires the landlord to "give [the] resident written notice of the violation and give [the] resident an opportunity to correct the violation" prior to terminating a lease) and under WIS. STAT. § 704.17(2) (which states that "the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly[]").

¶25 The reason Seaverson argues that the notice is insufficient under both is that the language of the notice "is so ambiguous that it fails to provide the statutorily required opportunity to remedy" and that it failed to "specify … the alleged noncompliance problem(s)[.]"

¶26 We understand Seaverson to be arguing that because the notice did not spell out that he could remedy the nonpayment of the rent and the noncompliance within the five days, he was unlawfully deprived of the protections of the lease and the statute.

¶27 First, as to Seaverson's reliance on the language of the statute, his argument fails. The applicable section is WIS. STAT. § 704.17(2)(a), having to do with notices based on nonpayment of rent. The statute also contains subsection (2)(b), which has to do with other material breaches of a lease other than rent nonpayment. Notably, Seaverson never specifies which subsection of § 704.17(2) he is relying on. But the case he relies on to support his argument is ***Milwaukee City Housing Authority v. Cobb (Cobb I)***, 2014 WI App 70, 354 Wis. 2d 603, 849 N.W.2d 920, and ***Cobb I*** was a construction of subsection

(2)(b).[5] The two subsections are significantly different and in that difference, Seaverson's argument fails.

¶28 WISCONSIN STAT. § 704.17(2)(a) states in pertinent part:

> If a tenant under a lease for a term of one year or less, or a year-to-year tenant, *fails to pay any installment of rent when due*, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

(Emphasis added.) Thus, it is clear that subsection (2)(a) applies to notices based on failure to pay rent. Subsection (2)(b), on the other hand, applies to other types of material violations of a lease—*other than nonpayment of rent*.

¶29 WISCONSIN STAT. § 704.17(2)(b) states in pertinent part as follows:

> If a tenant under a lease for a term of one year or less, or a year-to-year tenant, commits waste or a material violation of s. 704.17(3)[6] or breaches any covenant or condition of the tenant's lease, *other than for payment of rent*, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate

[5] Because the case construes a subsection of the statute that does not apply here, we need not further address Seaverson's reliance on ***Milwaukee City Housing Authority v. Cobb (Cobb I)***, 2014 WI App 70, 354 Wis. 2d 603, 849 N.W.2d 920. However, we note that ***Cobb I*** was reversed by ***Milwaukee City Housing Authority v. Cobb (Cobb II)***, 2015 WI 27, ¶4, 361 Wis. 2d 359, 860 N.W.2d 267, which held that federal law "preempt[ed] the right-to-remedy provision of WIS. STAT. § 704.17(2)(b) when a public housing tenant is evicted for engaging in drug-related criminal activity within the meaning of [federal law]." ***Id.*** (quotation omitted).

[6] WISCONSIN STAT. § 704.17(3) is the 30-day notice provision for non-payment of rent, waste, or other material breach of a covenant or condition of the lease and is not operative here.

> protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for the tenant's breach.

(Emphasis added.) The plain language of subsection (2)(b) makes it inapplicable here because here the notice was for nonpayment of rent.[7] The extensive language of this subsection as compared to subsection (2)(a) demonstrates how different subsection (2)(b) is from subsection (2)(a) because the type of material violation of the lease is open-ended in the subsection (2)(b) situation, whereas it is limited to nonpayment of rent in subsection (2)(a). That difference supports Bottomley's argument that his notice for nonpayment of rent complied with the statute's right to cure. The only possible cure was payment.

¶30 Seaverson's argument relied on ***Cobb I*** for support. ***Id.***, 354 Wis. 2d 603. We note that it was reversed on appeal. ***Milwaukee City Hous. Auth. v. Cobb (Cobb II)***, 2015 WI 27, ¶4, 361 Wis. 2d 359, 860 N.W.2d 267, on grounds that federal law "preempt[ed] the right-to-remedy provision of WIS. STAT. § 704.17(2)(b) when a public housing tenant is evicted for engaging in drug-related criminal activity within the meaning of [federal law]." ***Id.*** (quotation omitted). Besides, that case was a challenge to the sufficiency of a notice of a completely different type from this case. The notice challenged there was a five-day right to cure under § 704.17(2)(b), and the lease provision allegedly breached was one prohibiting a criminal violation. In any event, a notice under § 704.17(2)(b) requires greater specificity than one under § 704.17(2)(a) where

[7] Although the March 31, 2016 notice also contained the word "noncompliance," we deem it inconsequential to our decision because it was totally unexplained. The notice is quite clear that the basis is "due to nonpayment of rent."

nonpayment of rent is at issue. Seaverson's March 31, 2017 notice was clear and the cure was apparent: pay the past-due rent.

¶31 Second, we reject Seaverson's argument that the March 31, 2017 notice violates the lease provision which states, "Prior to terminating the lease, landlord shall give resident written notice of the violation and give resident an opportunity to correct the violation." As shown above, the notice plainly told Seaverson that he had not paid rent and had to leave in five days. It was implicit that if he paid the past-due rent within five days, he would have cured the violation. Because non-payment was the reason, payment was the clear cure. It is undisputed he did not pay. The lease does not require that the written notice *itself* make any statement about "the opportunity to correct"—it requires only that the landlord "give … an opportunity to correct." The notice Seaverson received therefore did not violate the terms of the lease.

¶32 But even more importantly, the lease provision on which Seaverson relies for this argument does not apply to this situation. It applies when the landlord seeks to terminate a lease that is still in effect. As the trial court found, this lease ended November 30, 2016. Seaverson himself gave written notice on October 4, 2016, that he was ending the lease on November 30, 2016. Bottomley was entitled to rely on that. Then, as the trial court found, when Seaverson failed to vacate on November 30, 2016, he became a hold-over. Pursuant to the lease, in that situation, the "term" of the lease continues until he is out. Accordingly, he is required to pay rent until he removes himself and his belongings. But that does not mean that the lease is renewed. Neither side renewed the lease, and it plainly was not automatically renewable. So, as the trial court stated, the lease provision is not even applicable here.

II. The heightened notice requirements in 7 C.F.R. § 3560.159(b) do not apply to the property in this case because it is not an "Agency-financed housing project" and Bottomley is not "a borrower."

¶33 The restrictive covenant referenced above required the new owner to use the housing complex for the purpose of housing low-income residents. That restrictive covenant includes a requirement that the owner "use the Property in compliance with … 7 C.F.R. part 3560[.]"

¶34 Seaverson argues that Bottomley is subject to one subsection of that regulation, 7 C.F.R. § 3560.159(b), which imposes heightened notice requirements for terminating tenants from certain housing projects. That section reads as follows:

> A tenant's occupancy *in an Agency-financed housing project* may not be terminated by a *borrower* when the lease agreement expires unless the tenant's actions meet the conditions described in paragraph (a) of this section, or the tenant is no longer eligible for occupancy in the housing.

¶35 The conditions described in the cross-referenced paragraph are relevant to this analysis only if Seaverson's occupancy is an occupancy in "an Agency-financed housing project" and Bottomley is "a borrower" such that the regulation applies to this action. The trial court made a finding of fact that the housing complex is not "an Agency-financed housing project" and that Bottomley is not "a borrower" within the meaning of the definitions provided in the regulations. *See* 7 C.F.R. § 3560.11 (defining "borrower" as "[a]n individual … or other entity that has received a loan from the Agency"). Seaverson offers no argument that these findings of fact are clearly erroneous. He merely argues, without any authority, that this court "should" find that an owner is a borrower. We uphold findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The findings of fact are supported by the record, and they are

dispositive as to this issue. In any event, the record shows that Seaverson failed to complete the Rural Development forms timely, making him, for that period, ineligible for rent subsidies and thereby exempted from the requirements of 7 C.F.R. § 3560.159(b).

III. Neither the rent increase nor the eviction action violated the retaliation statute.

¶36 The trial court's findings of fact are also fatal to Seaverson's argument that the eviction violated WIS. STAT. § 704.45(1)(c), the anti-retaliation statute. WISCONSIN STAT. § 704.45, "Retaliatory conduct in residential tenancies prohibited," states as follows:

> (1) Except as provided in sub. (2), a landlord in a residential tenancy may not increase rent, decrease services, bring an action for possession of the premises, refuse to renew a lease or threaten any of the foregoing, if there is a preponderance of evidence that the action or inaction would not occur but for the landlord's retaliation against the tenant for doing any of the following:
>
> (a) Making a good faith complaint about a defect in the premises to an elected public official or a local housing code enforcement agency.
>
> (b) Complaining to the landlord about a violation of s. 704.07 or a local housing code applicable to the premises.
>
> (c) Exercising a legal right relating to residential tenancies.
>
> (2) Notwithstanding sub. (1), a landlord may bring an action for possession of the premises if the tenant has not paid rent other than a rent increase prohibited by sub. (1).

¶37 The trial court's findings of fact included the finding that Seaverson refused to pay the difference in his base rent of $297 and the increased rent of $677 per month from August through November 2016, and that he failed to pay the entire $677 rent from January to May 2017. That finding is not clearly

erroneous, and Seaverson makes no argument that it is. Pursuant to WIS. STAT. § 704.45(2) above, retaliation under that statute is not applicable here because the rent increase in this case was not a prohibited rent increase; it was a rent increase that applied equally to all tenants with two-bedroom apartments and it was imposed by the federal housing agency. There was therefore no violation of this statute in either the agency-approved rent increase or the eviction action based on unpaid rent.

IV. The courts did not violate Seaverson's statutory right to appeal when they failed to grant his motion for a stay pending appeal.

¶38 Apart from the merits of the eviction judgment, Seaverson argues that in failing to grant him a stay of the eviction order pending appeal, the trial court and this court deprived him of his right to appellate review of the final judgment because neither granted his motion for stay pending appeal. *See* WIS. STAT. § 808.03(1) ("A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law."). In connection with that argument, he asks this court to "order that when an indigent litigant presents an arguably meritorious claim for reversal of their eviction on appeal, the writ of eviction must be stayed" even if the litigant fails to provide the undertaking and surety required by WIS. STAT. § 799.445.

¶39 We decline to do so. We reject as unsupported by law his underlying premise, which is that the statutory requirement for an undertaking and surety is a waivable fee. We also reject the argument that in the case of certain

eviction judgments, the statutory *right of appeal* automatically encompasses a *right to a stay of an order* pending appeal.[8]

¶40 In addition, the new rule Seaverson seeks would require this court to overrule supreme court precedent to the contrary, which we cannot do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

V. Bottomley is not entitled to attorney fees pursuant to WIS. STAT. RULE 809.25(3).

¶41 Bottomley asks this court to award attorney fees on the grounds that this appeal is frivolous. WISCONSIN STAT. RULE 809.25(3) authorizes this court to award costs and attorney fees upon determining that an appeal is frivolous. *See* ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134. "[A]n appeal is frivolous if '[t]he party or the party's attorney knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.'" ***Id.*** (citation omitted). "Whether an appeal is frivolous is a question of law." ***Id.*** "To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous." ***Id.*** (citation omitted).

[8] In his reply brief, Seaverson makes an additional constitutional argument based on article I, section 9 of the Wisconsin Constitution. We do not address this argument. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999) (court will not address issues raised for the first time in a reply brief). We note, however, that this court has previously made clear that "while 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).

¶42 The trial court addressed this question in its ruling on Seaverson's motion for waiver of transcript fees. In its order granting the waiver of fees, the trial court stated:

> [T]he question is not whether Mr. Seaverson will prevail on appeal. The question is, in effect, whether the arguments made at this point are frivolous on their face such that there is no arguable merit. I cannot say that the arguments made by Mr. Seaverson's counsel are frivolous on their face at this point in the proceeding. As a result, I conclude there is arguable merit as defined in the applicable statute and case law.

We agree with the trial court and conclude that the entire appeal is not frivolous within the meaning of WIS. STAT. § 809.25(3). We therefore do not award attorney's fees to Bottomley.

¶43 Because Seaverson has not shown that the trial court's relevant findings of fact were clearly erroneous, and because we independently conclude that the notice was sufficient, we affirm.

By the Court.—Order affirmed.

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