

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 8, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0133

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CITICORP CREDIT SERVICES, INC.,

PLAINTIFF-RESPONDENT,

V.

LINDA L. JUSTMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Linda Justmann appeals from a judgment entered against her emanating out of a collection suit brought by Citicorp Credit Services, Inc. She contends that the trial court erred when it: (1) failed to detect a jurisdictional defect in the pleadings because Citicorp's summons and complaint

were unsigned; (2) failed to determine that Citicorp's summons and complaint did not comply with the dictates of § 425.109, STATS., and 15 U.S.C. § 1692 (1994); (3) denied her the right to make an oral statement at the summary judgment proceeding; (4) failed to enforce the local and statutory rules dealing with summary judgment time limitations which rendered Citicorp's motion untimely; (5) permitted her former counsel to withdraw without assessing costs; (6) enforced the credit agreement's collection clause by improperly including attorney fees incurred in the defense of her counterclaim, in violation of 15 U.S.C. § 1692 (1994); (7) found that the attorney fees and charges were reasonable when the documentation submitted was inaccurate; (8) ruled on the matter of attorney fees after improperly finding that service was made on her; (9) proceeded on the garnishment action when the original document was missing; and, finally, (10) permitted the garnishment to proceed without proper notice to her that the stay was lifted.

Justmann did not raise the jurisdictional issue involving the unsigned summons and complaint until the appellate level. She also failed to object to the pleadings in the trial court on the grounds that they violated § 425.109 and 15 U.S.C. § 1692 (1994). Additionally, she failed to argue that Citicorp's summary judgment motion was untimely until reaching the appellate level. Therefore, all of those issues are deemed waived.

Further, Justmann lacks standing to contest the trial court's failure to assess costs when her attorney withdrew because she was not harmed by the trial court's decision on the matter; thus, we will not hear this issue. Justmann also failed to file a notice of appeal from the garnishment order entered against her. Since any arguments related to the garnishment embrace an order entered

following the final judgment from which Justmann appeals, this court lacks jurisdiction and will not address these issues.

With respect to the rest of the issues Justmann raises, we affirm the trial court's judgment.

I. BACKGROUND.

Justmann entered into an open-end credit plan with Citicorp. When she failed to pay the minimum monthly balance, Citicorp brought a small claims suit against her. Justmann filed an answer denying that she owed the balance due and denying that certain charges were made. She also filed a counterclaim, alleging violations of § 427.104(1)(f) & (j), STATS., and sought damages for Citicorp's alleged failure to honor her letter objecting to certain charges and for Citicorp's alleged unlawful damage to her credit rating. As a result of her counterclaim, the amount in controversy exceeded the statutory small claims limit and the case was converted into a large claims action. Approximately seven months after the litigation was started, Justmann's original counsel brought a motion to withdraw, claiming, in an affidavit, that Justmann had not been entirely candid with him. Citicorp opposed the motion to withdraw and asked the trial court to assess costs against Justmann. The trial court, while allowing Justmann's attorney to withdraw, declined to assess costs against Justmann.

Citicorp then brought a summary judgment motion which the trial court heard and granted. At the time of the summary judgment motion, Justmann was acting as her own attorney. She submitted neither affidavits nor any other written documents in opposition to the motion, and, consequently, the trial court did not permit her to make an oral argument at the hearing in opposition to the motion. The trial court also granted Citicorp's request for attorney fees, finding

that the credit agreement required Justmann to pay Citicorp's collection-related attorney fees. The trial court also ordered Citicorp to submit documentation of the attorney's hours and fees attributable to the suit.

A short time later, Citicorp submitted an order for summary judgment and a ledger itemizing Citicorp's legal costs. Citicorp mailed this information to Justmann, and, when no objection was received, the trial court signed the summary judgment order and ordered Justmann to pay attorney fees of \$10,039.68. Citicorp then filed a garnishment action. Justmann, who was then represented by new counsel, filed a notice of appeal from the trial court's final judgment in the original action and apparently filed an answer to the garnishment action citing her appeal from the original action. Justmann then filed a motion for relief pending appeal with the trial court. The trial court granted her request but required her to post a *supersedeas* bond within three days. She also filed a motion for relief pending appeal, complaining of the requirement to file a *supersedeas* bond, and this court denied the motion. Due to the signing of the stay order, the garnishment action was temporarily halted. When no bond was posted after more than a month, Citicorp petitioned the court commissioner to lift the stay order and permit the garnishment action to proceed. Citicorp gave no notice to Justmann that it would be petitioning the court to lift the stay. The trial court signed an order lifting the stay premised on Justmann's failure to post the bond. A final order granting the garnishment was entered against Justmann's wages. This appeal followed.

II. ANALYSIS.

A. *Waived Issues.*

While Justmann raised no objection at the trial court level, she now argues that the trial court erred when it: (1) failed to decide that the unsigned summons and complaint deprived the trial court of jurisdiction over Justmann; (2) declined to declare that Citicorp's pleadings violated § 425.109, STATS. and 15 U.S.C. § 1692 (1994); and (3) failed to find Citicorp's summary judgment motion untimely. An issue that does not appear in the record at the trial court level should not be considered for the first time on appeal. *See Allen v. Allen*, 78 Wis.2d 263, 270-71, 254 N.W.2d 244, 248-49 (1977). Accordingly, these issues are waived and we will not address them.

B. Garnishment Order Issues.

Justmann also raises two issues related to an order entered against her in the separate garnishment proceeding that Citicorp instituted following the original collection judgment. First, Justmann claims that the trial court lacked jurisdiction because Citicorp's original notice of garnishment is not on file. Second, she complains that she did not receive notice before Citicorp obtained the garnishment order.

Garnishment actions are separate actions that are distinct from the principal actions which form the basis for garnishment. *See* § 812.01(2a), STATS. The garnishment order in this case was entered over five months after the final judgment in the collection action was filed. While Justmann filed a notice of appeal from the final judgment in the original collection action, she never filed a notice of appeal from the subsequent order in the garnishment action. Therefore, this court does not have jurisdiction to consider arguments related to the order entered in the garnishment action. *See Chicago & N.W. R.R. v. LIRC*, 91 Wis.2d 462, 473, 283 N.W.2d 603, 609 (Ct. App. 1979) (stating “[a]n appeal from a

judgment does not embrace an order entered after the judgment” and therefore is not reviewable). Since we lack jurisdiction, we will not address either of the preceding issues.

C. Withdrawal of trial counsel without costs.

Justmann asserts that the trial court erred when it allowed her original attorney to withdraw without assessing costs against that attorney. She bases her assertion on the claim that her former counsel violated § 802.05(1), STATS., by failing to make reasonable inquiry before filing a counterclaim on her behalf. She also suggests the trial court “punished” her for bringing the counterclaim by later ordering her to pay Citicorp’s attorney’s fees.

To have standing to sue, a party must have a personal stake in the outcome of the controversy. *City of Madison v. Town of Fitchberg*, 112 Wis.2d 224, 228, 332 N.W.2d 782, 784 (1983). Justmann lacks standing on this issue since Citicorp originally requested costs and the trial court’s decision did not aggrieve her. Therefore, we will not address this issue.

D. Denial of Justmann’s request for oral argument.

Justmann also claims that the trial court erred by forbidding her oral argument at the summary judgment hearing. The standard summary judgment methodology which trial courts follow is defined by § 802.08, STATS. *See also Universal Die & Stampings, Inc. v. Justus*, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993) (stating that an appellate court applies the same methodology as a trial court in reviewing a grant or denial of summary judgment). In addition, local court rules for the First Judicial Administrative District provide

further requirements and procedures local trial courts enforce when presented with summary judgment motions. *See* LOCAL RULE 364.¹

¹ LOCAL RULE 364, provides:

(a) A motion for summary judgment under sec. 802.08, Wis. Stats., or a motion for dismissal under Sec. 802.06, Wis. Stats., shall be filed with the deputy court clerk of the assigned judge, together with supporting documents. Prior to the service and filing, movant shall obtain from the deputy court clerk a hearing date set not less than 30 days from the service and filing of the motion and supporting documents. Prior to filing, the movant shall serve a copy of any supporting documents upon all counsel of record and/or parties not appearing by counsel of record with notice of the hearing date. If a movant files a motion without supporting documents or without obtaining in advance an appropriate hearing date, the clerk shall return such written papers with a copy of this rule.

(b) A respondent shall have 15 days from the receipt of the movant's motion within which to serve and file an opposing brief or supporting documents.

(c) Movant shall have 7 days from the receipt of the respondent's answering brief, affidavits, or other supporting documents to serve and file a reply brief limited to matters in reply.

(d) A court order may prescribe a procedure different from this rule.

(e) Briefs may not exceed the following page limitations, exclusive of pages containing a statement of facts, exhibits and affidavits:

- (1) Movant Principal Brief – 30 pages;
- (2) Briefs in opposition – 30 pages;
- (3) Movant Reply Brief – 10 pages.

(f) Briefs in excess of the permitted length may be disregarded by the court.

(g) Copies of non-Wisconsin authorities shall be filed with the court and received by all parties at the same time as the brief, and shall not be included in the page limitations set forth in subsections (e) and (f).

Justmann claims that she was free to argue her position orally at the summary judgment hearing because no local rule explicitly precludes oral argument by any party. Justmann concedes that LOCAL RULE 367 treats the failure of a respondent to submit briefs, affidavits, or other supporting documents within fifteen days as a waiver of the litigant's right to do so, but she asserts that oral argument falls outside the rule. *See* LOCAL RULE 367.²

Although neither the statutory sections outlining the summary judgment procedure nor the local rules explicitly forbid oral argument at a summary judgment hearing without accompanying documentation, the procedure implicitly prohibits litigants from opposing a request for summary judgment solely by oral argument. *See* JAY E. GRENIG & WALTER L. HARVEY, CIVIL PROCEDURE § 208.4 at 299 (West Wis. Practice Services, Vol. 3, 2d ed. 1994) (“There is no Wisconsin authority permitting the use of oral testimony on a motion for a summary judgment, as oral testimony involves the assessment of credibility of the witness offering the testimony.”). The summary judgment procedure obligates trial courts to evaluate *documentation* presented by both sides to determine whether any material facts are in dispute. Section 802.08(3), STATS., provides: “Supporting and opposing *affidavits* shall be made on personal knowledge and shall set forth such evidentiary facts as would be *admissible in evidence*.” (Emphasis added.) Section 802.08(2), STATS., provides that “judgment sought shall be rendered if the *pleadings, depositions, answers to interrogatories, and*

² LOCAL RULE 367, provides:

Any motion, brief, affidavit, or other supporting documents received and/or filed in an untimely fashion may be disregarded by the court and a decision may be based on the record as timely filed. The time periods set forth in these rules may be altered by leave of the court for good cause shown by the party requesting a special exception.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Emphasis added.)

A bald statement by the appellant without any underlying documentation violates this statutory scheme because the argument of the appellant is not evidence and ordinarily is not admissible. *See, e.g., James v. H.M.S. Port Lyttleton Port Line Ltd.*, 51 F.R.D. 216, 218 (E.D. Pa. 1971) (holding that when plaintiff in a personal injury action files no affidavit in support of its opposition to defendant’s summary judgment motion, the statements of plaintiff’s counsel in oral argument were not evidence and could not create an issue of fact). Courts require litigants to present their summary judgment arguments in document form within proscribed time limits in order to allow sufficient time for each side to fairly counter the opposing side’s position. Should oral argument be allowed in lieu of document submission, a party would lack the time to muster a defense to the opposing side’s oral statement. In addition to unfairly prejudicing litigants, such a system would inefficiently waste judicial resources. Therefore, the trial court properly prevented Justmann from orally arguing her opposition to summary judgment because she had waived her right to file any documentation countering Citicorp’s motion.

E. Interpretation of the credit agreement to include attorney fees.

Justmann also challenges the trial court’s determination that the credit agreement Justmann entered into with Citicorp allowed the trial court to assess attorney fees against Justmann. Specifically, Justmann argues that the trial

court erred when it interpreted the credit agreement's term "lawyer's fee" to include fees generated in defense of Justmann's counterclaim.³

The construction of an unambiguous contract is a matter of law which this court reviews *de novo*. *Kane v. Employer's Ins. of Wausau*, 142 Wis.2d 702, 705, 419 N.W.2d 324, 326 (Ct. App. 1987). The construction of an ambiguous contract involves a question of fact, and the trial court's finding regarding the intended meaning of a term will be upheld by this court unless it is clearly erroneous. *Patti v. Western Machine Co.*, 72 Wis.2d 348, 353-54, 241 N.W.2d 158, 161 (1976).

It is unclear whether the trial court believed the credit agreement's terms were ambiguous or unambiguous. Citicorp argues that the trial court believed the contract was unambiguous because it granted Citicorp's summary judgment motion. Justmann does not make any arguments on this point. Therefore, we assume that the trial court did find that the contract was unambiguous, and we will review its decision *de novo*.

It is Justmann's position that any attorney fees generated by Citicorp's defense of Justmann's counterclaim are not "collection" fees, and, thus, she should not be ordered to pay those fees pursuant to the credit agreement. As a corollary, she further posits that 15 U.S.C. § 1692(f) (1994) has been violated.⁴

³ The pertinent paragraph of the credit agreement reads: "If we have to refer collection of your account balance to a lawyer, you will pay our lawyer's fee plus court costs or any other fees as allowed by law. If we sue to collect and you win, we will pay your reasonable legal fees and court costs."

⁴ 15 U.S.C. § 1692(f) (1994), "unfair practices," states:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the

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This statute prohibits a debt collector from collecting a fee unless it is authorized by “the agreement creating the debt or permitted by law.” She cites no cases in support of this interpretation. Her theory is solely premised upon her literal reading of the contract and dictionary definitions of the word “collect.”

We disagree with Justmann’s theory and conclude that a reading of the open-end credit agreement supports the trial court’s decision. The referral of Justmann’s account balance to a lawyer began a process which culminated in the imposition of attorney fees. The account was referred only after Justmann refused to make the minimum payments. Justmann made a decision to file a counterclaim which was ultimately dismissed by the trial court and, by doing so, increased Citicorp’s legal costs. Had Justmann prevailed on her counterclaim, the credit agreement would have obligated Citicorp to pay her attorney fees. Because Citicorp prevailed, the contract language required Justmann to pay Citicorp’s attorney’s fees. In conclusion, we affirm the trial court’s decision that Citicorp, pursuant to the credit agreement, was entitled to actual, reasonable attorney fees.

F. Determination that opposing counsel’s fees were reasonable.

When a contract provides for attorney fees, we will sustain the trial court’s determination of the reasonable value of those attorney fees absent an erroneous exercise of discretion. *State Bank of Hartland v. Arndt*, 129 Wis.2d 411, 422-23, 385 N.W.2d 219, 224-25 (Ct. App. 1986). Citicorp concedes that

general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

there were mathematical errors, but points out that all mathematical errors were made in Justmann's favor. The trial court specifically found that the record contained an affidavit of mailing to Justmann, yet Justmann failed to send an objection to the amount of attorney fees to the trial court. Upon receipt of the documentation and after receiving no objections, the trial court properly determined that Citicorp's counsel's fees were "reasonable" and signed an order obligating Justmann to pay the attorney fees.

We conclude that the trial court properly exercised its discretion and agree with the trial court's finding. Given the complexity of the litigation, the fees sought were reasonable. Although Justmann claims some of the charges were unnecessary and suggests some of the charges reflect work actually done by a paralegal, this is only conjecture on Justmann's part.

G. Service of documents related to Citicorp's attorney's fees.

Justmann also contends that she was not served with a copy of a detailed ledger of Citicorp's counsel's hourly billing. The record, however, reflects an affidavit in the file declaring that the documents were sent to Justmann. Citicorp argues that it was not required to formally serve Justmann with the documentation relating to Citicorp's attorney's fees because § 801.14(2), STATS., permits service by first class mail.⁵ We agree that § 801.14(2), STATS., is controlling and affirm the trial court's decision on this point.

⁵ Section 801.14(2), STATS., provides:

(2) Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, *the service shall be made upon the attorney unless service upon the party in person is ordered by the court. Service upon the attorney or upon a party shall be*

(continued)

H. Citicorp's request for frivolous costs.

Finally, Citicorp has requested frivolous costs, pursuant to § 809.25(3), STATS. We conclude that Justmann or her attorney knew or should have known that this 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. Therefore, we find this appeal to be frivolous, grant Citicorp's motion, and remand the matter to the trial court for a hearing to determine costs, fees and reasonable attorney fees incurred in the defense of this appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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

made by delivering a copy or by mailing it to the last-known address, or, if no address is known, by leaving it with the clerk of the court.

(Emphasis added.)

