COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP569 **Cir. Ct. No. 2002SC4191**

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

PATRICK HART,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MEADOWS APARTMENTS,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, J.[1] This is the second appeal of this case. The first appeal was reversed and remanded with two specific directions: The small claims court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

was to determine the costs and reasonable attorney fees based upon Patrick Hart's successful prosecution of his security deposit claim, and the small claims court was to "further explain why Meadows Apartments' business practices are not contrary to the landlord/tenant law requiring the preservation of a tenant's personal property." On that remand, neither of this court's two directions was satisfied. The small claims court refused to allow Hart his attorney's fees due to Hart's failure to respond to Meadows' objections to the attorney's bill, and the court held against Meadows on the issue regarding Hart's personal property based on its belief that Meadows had conceded the issue in the original appeal. In short, both issues resulted in sanction-based rulings. Both Hart and Meadows appeal, and we hold that both sanction-based rulings are contrary to law. We remand with specific directions.

¶2 It is rare that an appellate decision turns on the procedural status of the case leading to the appeal, and it is rarer still that this court's decision is based on the law related to procedural status. But that is exactly what this case is about.

¶3 We will start with a brief sketch of the factual issues before the small claims court. Hart was a tenant of Meadows Apartments. After he vacated the premises, he sued Meadows for a return of his security deposit and for twice the value of some neckties that he had inadvertently left behind, pursuant to Wisconsin's landlord/tenant law. The case went to trial, and both parties appeared pro se. At the conclusion of testimony, the small claims court found that the security deposit was wrongfully withheld but deducted certain amounts from the deposit based on its reading that such deductions were required under the lease. The small claims court also rejected the neckties claim. Hart appealed.

¶4 Now, we get to the procedural history. In the first appeal, Hart hired a lawyer and the lawyer wrote a brief. Meadows did not submit a brief within the time period provided by the appellate rules, so, as is customarily the case, this court sent out a form order directing it to file a brief within five days or request an extension. This order was dated March 30, 2004. Meadows did not respond. On May 11, 2004, the presiding judge of this court issued an order explaining that, since Meadows had not submitted a brief, the appeal was to be submitted without the benefit of a brief from Meadows. As part of the order, the presiding judge warned Meadows that "[t]he [f]ailure to file a respondent's brief tacitly concedes that the trial court erred … and allows this court to assume the respondent concedes the issues raised by the appellant." The presiding judge further explained that this court "may exercise [its] discretion and summarily reverse the circuit court."

¶5 The appeal was assigned to Judge Harry G. Snyder. Judge Snyder decided not to summarily reverse the case for the above procedural reasons. Rather, Judge Snyder decided the case on its merits. The lone sanction Judge Snyder imposed on Meadows was that the amount due and owing to Hart on the security deposit was taken as true.

¶6 Having determined that Hart was entitled to an amount certain on his return of the security deposit, Judge Snyder further held that Hart was entitled to attorney fees for having prevailed on the security deposit claim. Regarding the neckties issue, Judge Snyder found the small claims court's decision to be ambiguous. Initially, the small claims court made a finding of fact that Hart had inadvertently left the neckties behind and had not abandoned them. But then the small claims court appeared to rule that, as a bright-line rule, the landlord had no obligation under the law to hold onto the property. Judge Snyder took issue with

this apparent holding. Judge Snyder pointed out that WIS. STAT. § 704.05(5) and WIS. ADMIN. CODE § ATCP 134.09(4) conflicted with the small claims court's understanding of the law. Rather than reverse the small claims court outright, however, Judge Snyder decided to remand the case with directions that the small claims court apply § 704.05(5) and § ATCP 134.09(4) to whatever facts would be found by the small claims court. Judge Snyder thus remanded with two specific directions to the small claims court. On the security deposit issue, the court was to find the amount of attorney fees due and, on the neckties issue, the court was to apply the law to whatever facts the small claims court found.

¶7 Here, the procedural history gets murky. First, in direct contradiction to the remand instructions of Judge Snyder that the small claims court hear the attorney fees issue, Hart's attorney listed the sum of $8817.25 in its statement of costs to this court following the first appeal. We rejected this request and for good reason. This is a court of review. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals limited to appellate jurisdiction and does not find facts). We are not equipped to determine the amount or reasonableness of attorney fees. Moreover, there is no statute or authority that allows prevailing parties to seek a determination as to the amount or reasonableness of attorney fees in this court. The request for attorney fees to this court was clearly wrong.

¶8 The error was then compounded by the actions of Meadows, which was now represented by counsel. After remittitur and with no date set by the small claims court to act on our remand order to determine the amount and reasonableness of attorney fees, Meadows filed a motion with the small claims court objecting to the amount requested in the court of appeals statement of costs that this court had already denied. Clearly, since Hart had yet to submit a

statement of attorney fees to the small claims court, the objection to the appeals court statement of costs was premature to say the least. Meadows now claims that its objection was timely because the small claims court had jurisdiction over the case once remittitur had occurred. This is nonsense. There was no claim for any specific amount of attorney fees pending before the small claims court at the time of the objection. We had denied the claim and Hart had yet to make his claim before the small claims court.

¶9 What happened next gets at the heart of the attorney fees issue. The small claims court, having received the motion objecting to fees, wrote the attorneys for both parties on October 12, 2004. The small claims court duly observed that it had no knowledge concerning the attorney fees request that had been sent to the court of appeals. As the small claims court pointed out, "This court also notes that no information or copy of the bill of cost is provided to this court. Nor does this court receive copies of the appellate briefs." But because Meadows had moved the court for a denial of the attorney fees request in its entirety or for a substantially reduced amount, the small claims court considered that the attorney fees issue was now before the court. The small claims court noted that it could not award attorney fees approximating $8000 without sufficient information. Therefore, the small claims court wrote that Hart's attorney "should … respond to the defendant's objections to the plaintiff's bill of costs."

¶10 Hart inexplicably failed to respond to the court's order. He states in his appellate brief that he chose to stand "mute." This is a remarkable statement. According to this line of reasoning, when a trial court orders a brief or a response, a party can choose to stand "mute." Of course, there is absolutely no authority for this proposition. The authority is to the opposite. When the trial court orders briefs or orders a response, the party must follow the order or face sanctions.

Chevron Chem. Co. v. Deloitte & Touche, 176 Wis. 2d 935, 946-47, 501 N.W.2d 15 (1993) (holding that courts may impose sanctions on parties who fail to comply with applicable procedural rules and court orders in order to enforce such orders and ensure the prompt disposition of lawsuits). If the party thinks the order is onerous, there are avenues available for relief. Standing "mute" is not one of them.

¶11 Belatedly, Hart also argues that the attorney fees issue was not properly before the court at that time because only a "prevailing party" is entitled to fees and he was not a prevailing party as yet. This is nonsense as well. Hart won the appeal on the security deposit issue. He was entitled to attorney fees by reason of Judge Snyder's opinion. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 354, 357-58, 340 N.W.2d 506 (1983) (interpreting WIS. STAT. § 100.20(5) to require recovery of reasonable attorney fees for tenants who suffer pecuniary loss when landlord keeps a security deposit). He was the prevailing party. What makes this claim all the more preposterous is that Hart submitted a statement of costs to this court, a claim that may only be made by prevailing parties. *See* ***Shands***, 115 Wis. 2d at 357 (discussing recovery by "prevailing tenants").

¶12 Alternatively, Hart also claims that the attorney fees issue was not yet ripe because he had not yet made a claim for a specific amount of fees before the small claims court. Hart is correct that the attorney fees issue was not yet ripe when Meadows filed its objection to the fees claimed to this court. But he is wrong to say that the attorney fees issue did not mature until he filed an actual claim, which he notes he did on December 9, 2004. The small claims court joined the issue in its October 12, 2004 letter to the attorneys. The issue was before the court from that time on. Hart was duty bound to honor that joining of the issue instead of standing "mute."

¶13 Despite the fact that the issue was properly before the small claims court as of the date of the small claims court's letter of October 12, and despite the fact that Hart inexplicably failed to join that issue, we must reverse the court's denial of attorney fees. The law provides that attorney fees shall be awarded to a tenant who must use the judicial system to seek return of a security deposit. ***Id.*** Certainly, the courts have a right to sanction a party who fails to properly prosecute such a claim. *See* WIS. STAT. § 805.03; ***Trispel v. Haefer***, 89 Wis. 2d 725, 732, 279 N.W.2d 242 (1979). But just as certainly, the imposition of such a severe sanction as dismissal of a claim, where there is no other redress for the claim, requires a court to find that the disobedient party's conduct was egregious. *See* ***Smith v. Golde***, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999); ***Trispel***, 89 Wis. 2d at 732. We must reverse the sanction-based finding and remand with directions that the small claims court first determine whether such nonaction by Hart was egregious. If not, the court must consider less severe sanctions. *See* ***State v. Halko***, 2005 WI App 99, ¶¶14, 16, 281 Wis. 2d 825, 698 N.W.2d 832 (absent a finding of egregiousness, court may only consider lesser sanctions to dismissal); § 805.03 (court may consider such sanctions as are just when a party disobeys a court order). Finally, if the small claims court cannot determine that Hart's conduct was egregious, it must hear and decide the proper amount of attorney fees to be awarded as per Judge Snyder's remand instructions.

¶14 There is more. In the October 12 letter, the small claims court noted that Meadows had not filed a responsive brief to the court of appeals. As to the neckties issue, therefore, the small claims court wondered in its letter whether this failure was tantamount to an admission that Hart was entitled to double the value of his neckties claim. The court sought "comment" from the parties about this rationale. Neither party bothered to object to the court's proposed rationale. The

small claims court ultimately reversed itself on the neckties issue as a sanction for Meadows' failure to file a brief in this court. The small claims court relied on the May 11, 2004 order of our presiding judge that this court could assume that the respondent, by not filing a brief, has tacitly conceded the issues raised by the appellant.

¶15 Such reliance by the small claims court was error. First, as for the May 11 order, we never said that we *did* conclude that Meadows conceded the issues raised by Hart. The presiding judge only warned Meadows that we could, *in our discretion*, do so and we could summarily reverse on that basis. Second, Judge Snyder chose not to summarily reverse, held Meadows only to concession of the facts pertinent to the opinion of the court, and addressed both the security deposit and neckties issues on the merits. The small claims court's reliance on our May 11 order to assume that *it* could find a concession of the issues was error. The small claims court had a duty to hear and determine the neckties issue as had been directed by Judge Snyder. On remand, the small claims court shall apply the facts to the law that Judge Snyder discussed and that this court has discussed. As before, the small claims court may take further testimony if, in its discretion, it feels the necessity to do so. But it need not take testimony at all and may instead apply the facts to the law without further testimony, hearing, or briefs.

¶16 Before leaving this topic, this court fully understands the frustration that trial courts feel when a respondent, charged with supporting the trial court's decision on appeal, fails to file a brief in this court. The dignity of the judicial process demands that respondents do better. This observation applies with equal force to orders for briefs from the parties in our trial courts. As officers of the court, attorneys have a duty to crystallize the legal issues observed by the trial court to be important to the ultimate decision of the case. This case has seen

briefing failures at both the trial and appellate levels. This has resulted in a waste of scarce judicial resources.

¶17 This case is reversed and cause remanded with the specific directions stated.

By the Court.—Judgment and order reversed and cause remanded with directions.

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