

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 13, 2009**

David R. Schanker  
Clerk of Court of Appeals

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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. 2007AP2339**

**Cir. Ct. Nos. 1999CV289  
1999SC712  
2000CV4  
2002CV270**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**KENNEDY HOUSEBOATS, INC.,**

**PLAINTIFF-APPELLANT,**

**v.**

**CITY OF ST. CROIX FALLS,**

**DEFENDANT-RESPONDENT,**

**COREGIS GROUP,**

**DEFENDANT,**

**POLK COUNTY,**

**PETITIONER.**

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**CITY OF ST. CROIX FALLS,**

**PLAINTIFF-RESPONDENT,**

V.

**KENNEDYS, INC.,**

**DEFENDANT.**

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**CITY OF ST. CROIX FALLS,**

**PLAINTIFF-RESPONDENT,**

V.

**KENNEDY HOUSEBOATS, INC.,**

**DEFENDANT-APPELLANT.**

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**BERNARD KENNEDY,**

**PLAINTIFF,**

V.

**CITY OF ST. CROIX FALLS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from judgments and orders of the circuit court for Polk County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kennedy Houseboats, Inc. (hereinafter Kennedy) appeals judgments and orders relating to the calculation of post-verdict and post-judgment interest. Kennedy also appeals the denial of attorney fees incurred in a previous appeal in this matter. We affirm in part, reverse in part and remand for the circuit court to calculate the interest and disperse funds consistent with this decision.

¶2 These consolidated cases arose from a development agreement between Kennedy and the City of St. Croix Falls in which the City agreed to provide certain inducements to Kennedy in exchange for Kennedy's agreement to build a manufacturing facility in the City. Problems arose between the parties, which spawned a series of lawsuits that have proceeded for nearly a decade.

¶3 In the prior appeal in this matter, we reversed a circuit court decision denying Kennedy post-verdict interest following a \$900,000 jury verdict finding the City breached the development agreement. *Kennedy Houseboats, Inc. v. City of St. Croix Falls*, Nos. 2003AP2816 and 2005AP434, unpublished slip op. ¶¶ 2-3 (WI App Aug. 8, 2006). We also reversed a portion of the judgment concerning a rental dispute with Kennedy that awarded back rent and double rent to the City. We reversed the award of double rent pertaining to a 120-day period where occupation was consensual. *Id.*, ¶2. Further, we affirmed a summary judgment in the City's favor dismissing a separate lawsuit by Kennedy alleging violation of open meeting laws. *Id.*, ¶4. This lawsuit pertained to the city counsel meeting in closed session to discuss court rulings in the other cases and further litigation options. *Id.*

¶4 We instructed the circuit court upon remand to add interest consistent with our decision and disperse funds placed in escrow by the City

pending appeal. *Id.*, ¶2. The court ordered the escrowed funds be distributed as follows: \$5,174.33 to the clerk of circuit court for fees pursuant to WIS. STAT. §§ 757.25 and 804.61(12)(a);<sup>1</sup> \$69,567.51 to the City in accordance with the judgment for unpaid rental damages; and \$1,066,941.31 to Kennedy. In the present appeal, Kennedy argues the circuit court erred in its calculation of interest and by failing to award Kennedy attorney fees associated with the prior appeal.

¶5 We turn first to the calculation of interest on Kennedy's claims. On appeal, Kennedy does not directly address the circuit court's interest calculations. Instead, Kennedy offers its own analysis of the varying calculations necessary to reach a final distribution of the funds held in escrow. Kennedy claims the court overpaid the City \$43,445.17 and demands a refund.<sup>2</sup> We are not persuaded.

¶6 On January 31, 2003, the jury returned the \$900,000 verdict. There is no dispute Kennedy was entitled to statutory interest on the verdict at 12% for the three-day period through February 2, 2003, the date on which \$70,000 earlier placed in escrow by Kennedy pursuant to a court order was returned to Kennedy and credited against the verdict. This amounts to interest in the sum of \$887.67 ( $3/365 \times 12\% \times 900,000 = \$887.67$ ).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>2</sup> The City concedes the circuit court erred in its calculations in the amount of \$8,287.40. We agree with the City's analysis, with the exception that we conclude the court also erred by deducting the \$5,174.33 fee to the clerk of courts from the amount Kennedy was entitled to receive.

¶7 The parties also do not dispute \$861.21 in interest was earned on the \$70,000 escrowed money returned to Kennedy on February 2. By court order not challenged by Kennedy, the \$70,000 represented rent money Kennedy owed the City, and the City was therefore entitled to this interest.<sup>3</sup> We agree with the City that the amount to be credited against the verdict from the amount returned to Kennedy equals \$70,000 plus interest of \$861.21, totaling \$70,861.21. The amount of the net verdict owed Kennedy is thus \$900,000 minus \$70,861.21, which equals \$829,138.79.

¶8 The parties further do not dispute 164 days of interest was owed at the statutory rate of 12% from February 2, 2003, through July 17, 2003, the date of the circuit court's decision awarding Kennedy \$180,492.26 in attorney fees pursuant to the development agreement. We conclude it is appropriate to use the net verdict of \$829,138.79 as the amount from which to calculate the statutory interest from February 2 to July 17, 2003. This results in interest in the sum of \$44,705.34 ( $164/365 \times 12\% \times \$829,138.79 = \$44,705.34$ ).

¶9 Adding the \$180,492.26 in attorney fees to the net verdict amount of \$829,138.79 equals \$1,009,631.05. There is no dispute that seventy-seven days of interest was owed at the statutory rate of 12% between July 17 and October 2, the date of judgment. We conclude this amounts to interest in the sum of \$25,558.88 ( $77/365 \times 12\% \times \$1,009,631.05 = \$25,558.88$ ).

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<sup>3</sup> Kennedy claims without any support that it "is entitled to the benefit of any interest earned." We will not consider arguments unsupported by legal authority. *Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

¶10 Accordingly, we conclude the total amount of post-verdict, prejudgment interest owed Kennedy as of October 2, 2003, was \$71,151.89 ( $\$887.67 + \$44,705.34 + \$25,558.88$ ). Adding this amount to the base of \$1,009,631.05 equals \$1,080,782.94 owing as of the date of judgment.

¶11 The date of the City's escrow deposit was December 11, 2003. This escrow satisfied the judgment according to the plain language of the December 11 order. Kennedy did not contest the December 11 order. It is undisputed that seventy days of interest at 12% was owed between October 2 and December 11. We conclude this amounts to interest in the sum of \$24,872.81 ( $70/365 \times 12\% \times \$1,080,782.94 = \$24,872.81$ ). Thus, the total sum due Kennedy as of December 11, 2003, equals \$1,105,655.75 ( $\$1,080,782.94 + \$24,872.81$ ).

¶12 The parties vigorously dispute the interest owed from December 11, 2003 through January 31, 2007, the date used by the circuit court to calculate the ultimate distribution of funds. Kennedy argues entitlement to 12% interest during that time period. However, Kennedy misrepresents the record by contending the October 2 order provided Kennedy "shall recover ... 12% from and after the date of entry of judgment until it is paid in full." Kennedy ignores the clear language of the subsequent December 11 order, which specifically stated "no interest shall accrue pursuant to [WIS. STAT.] § 815.05(8) from date of deposit forward." The December 11 order specifically provided in part:

[I]nterest shall accrue from the date of the City's deposit (as described in ¶2 above) forward at the same rate as obtained by the Clerk of the Polk County Circuit Court with respect to the City's deposit and not pursuant to § 815.05(8) of the Wisconsin Statutes.

As mentioned previously, the December 11 order also specifically indicated the funds escrowed by the City “shall constitute payment by the City of the Judgment entered by this court on October 2, 2003....”<sup>4</sup>

¶13 Kennedy insists 3.15% “is an arbitrary number chosen by the City and then erroneously utilized by the Circuit Court.” Kennedy contends the “interest rate actually earned on the escrow account as of January 17, 2007 was significantly higher at 5.31%.” However, Kennedy concedes interest on the

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<sup>4</sup> Kennedy’s counsel, Michael D. Schwartz, as required by WIS. STAT. RULE 809.19(2)(a) certified in his main brief on appeal that he submitted “an appendix that complies” with that rule and “that contains ... (3) the findings or opinions of the trial court, and (4) portions of the record essential to an understanding of the issues raised, including the trial court’s reasoning regarding those issues.” See WIS. STAT. RULE 809.19(2)(b). This certification is false. Significantly, Schwartz fails to include the December 11, 2003 order in the voluminous appendix, although the order is essential to understanding the issues Schwartz raised. (We also note that Schwartz did not mention the December 11 order in the statement of facts section of his brief, nor did he even attempt to reply to the City’s assertion that he failed to challenge the December 11 order.) Filing a false certification with this court is a serious infraction not only of the rule, but also violates SCR 20:3:3 (2006) (“A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal.”). *State v. Bons*, 2007 WI App 124, ¶24, 301 Wis. 2d 227, 731 N.W.2d 367. In this regard, we note that Schwarz misrepresents the record in this appeal and we admonished attorney Schwartz in a previous appeal for misrepresenting the record. See *Schwark v. M+S Brugg AG*, No. 2006AP561, unpublished slip op. ¶12 n.7 (WI App July 10, 2007). Attorney Schwartz’s disregard of the rules unnecessarily complicates our review. Because this is the second significant rules violation, we sanction Schwartz and direct that he pay the clerk of this court \$500 within thirty days of the release of this opinion. See WIS. STAT. RULE 809.83(2) (Failure of a person to comply ... with a requirement of these rules ... is grounds for ... imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.”). We advise him that if future noncompliance occurs, this court will not hesitate to invoke penalties or sanctions under RULE 809.83(2) or other authority.

escrow account was adjusted weekly.<sup>5</sup> We conclude Kennedy has failed to sufficiently challenge the 3.15% interest rate utilized by the circuit court.

¶14 In addition, Kennedy does not reply to the City's assertion that Kennedy failed to challenge the December 11 order. Therefore, Kennedy's argument that the circuit court erroneously limited the interest on the escrowed funds to the amount obtained by the clerk of courts is waived in any event. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶15 As mentioned, the total sum due Kennedy on December 11, 2003, was \$1,105,655.75. The total sum in escrow was \$1,032,866.69, leaving a shortfall of \$72,789.06. The circuit court correctly calculated the interest from December 11, 2003, through January 31, 2007, at 3.15%, the same interest rate as that earned by the escrowed funds, resulting in \$7,205.22 additional interest ( $1147/365 \times 3.15\% \times \$72,789.06 = \$7,205.22$ ). Adding that interest produces a total shortfall of \$79,994.28.

¶16 We next turn to the issue of interest on the City's claim. The circuit court ruled on the City's eviction claim on April 25, 2003, issuing an oral decision for money damages in the form of back rent and double rent. An order for

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<sup>5</sup> Kennedy's arguments are undeveloped and supported only by general citations to record documents. We will not abandon our neutrality to develop arguments. *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). It should also be clear to all lawyers that appellate briefs must give reference to pages of the record on appeal for each statement and proposition made in an appellate brief. *See Haley v. State*, 207 Wis. 193, 198-99, 240 N.W.2d 829 (1932). A reviewing court is not required to fish through record documents for facts supporting a party's arguments where the rules make clear that a party's briefs should make appropriate reference to the record. *See Fuller v. Riedel*, 159 Wis. 2d 323, 330 n.3, 464 N.W.2d 97 (Ct. App. 1990).

judgment was issued July 17 and judgment was entered October 2, 2003. The parties agree that, as correctly reduced pursuant to the prior appeal, the amount of back and double rent properly awarded the City was \$119,378.10. Prejudgment interest from April 25 to October 2, 2003, at the statutory 12% rate equals \$6,279.62 ( $160/365 \times 12\% \times \$119,378.10 = \$6,279.62$ ).<sup>6</sup> This results in a corrected judgment of \$125,657.72.

¶17 Post-judgment interest from October 2 through December 11, 2003, the date of the City's escrow deposit, amounts to \$2,891.85 ( $70/365 \times 12\% \times \$125,657.72 = \$2,891.85$ ). Adding this interest to the corrected judgment amount leads to a total sum due the City as of December 11, 2003, of \$128,549.57. Although the parties again dispute the proper interest rate to be applied after the City's escrow deposit, we conclude it is equitable to apply the same 3.15% interest rate obtained by the clerk of courts from December 11 until January 31, 2007. This yields additional interest in the sum of \$12,724.82 ( $1147/365 \times 3.15\% \times \$128,549.57 = \$12,724.82$ ). Adding this sum to the amount due the City on December 11, 2003, results in a total sum of \$141,274.39 due the City as of January 31, 2007 ( $\$128,549.57 + \$12,724.82 = \$141,274.39$ ).

¶18 We turn next to the fees owed to the clerk of courts. The clerk of the circuit court was entitled under WIS. STAT. § 757.25 to a fee for depositing and handling the escrowed funds. The circuit court calculated the fee for handling the funds deposited with the clerk of courts on December 11, 2003, as \$5,174.33. Kennedy does not contest this calculation on appeal. However, Kennedy asserts

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<sup>6</sup> The City concedes the circuit court improperly calculated interest from January 31, 2003, rather than the date of the decision awarding back and double rent, April 25.

the circuit court erred by first deducting the \$5,174.33 fee from the amount in escrow. We agree.

¶19 A fee of 0.5% was required “at the time the money is deposited with the clerk.” WIS. STAT. § 814.61(12)(a). The proper amount of fees owed to the clerk was \$5,174.33. However, when ordering the disbursement of the funds in escrow, the circuit court deducted this fee first from the amount Kennedy was entitled to receive. Because a plain reading of the statutes required the fee to be paid at the time the money was deposited with the clerk, and the funds deposited with the clerk on December 11 were the City’s, it was properly responsible by statute for the entire \$5,174.33. This amount should have been paid in addition to the amount ordered to be placed in escrow or deducted from the amount Kennedy owed the City. The court therefore erred by deducting these fees from the amount Kennedy was entitled to receive.

¶20 Accordingly, the proper distribution of the funds is as follows: The funds on deposit totaled \$1,141,683.15. Adding the total shortfall amount of \$79,994.28 due Kennedy to the funds on hand amounts to \$1,221,677.43 owed Kennedy as of January 31, 2007. The amount owed the City as of January 31, 2007 was \$141,274.39. Thus, the proper distribution to Kennedy from the funds in escrow was \$1,080,403.04 ( $\$1,221,677.43 - \$141,274.39 = \$1,080,403.04$ ).

¶21 In turn, the proper distribution to the City from the funds in escrow, after subtracting the amount to be distributed to Kennedy and the fee to the clerk, was \$56,105.78 ( $\$1,141,683.15 - \$1,080,403.04 - \$5,174.33 = \$56,105.78$ ). The circuit court ordered the distribution of \$1,066,941.31 to Kennedy and therefore underpaid Kennedy \$13,461.73 ( $\$1,080,403.04 - \$1,066,941.31 = \$13,461.73$ ). This underpayment includes the conceded error in the calculations in the amount

of \$8,287.40, together with the \$5,174.33, which the City should have paid the clerk. We therefore reverse and remand for the circuit court to calculate the interest and disperse funds consistent with this decision.

¶22 Finally, we turn to the issue of Kennedy's request for attorney fees associated with the prior appeal. The circuit court denied Kennedy's request because of deficiencies in proof. We agree with the circuit court's analysis.

¶23 The circuit court began by observing Kennedy was not a prevailing party on the prior appeal regarding the open meeting laws action. The court then properly concluded the open meeting case was not intertwined with the four other cases related to the development agreement. The cases were not consolidated at the trial court level<sup>7</sup> and Kennedy did not need to rely upon facts or law relating to the development agreement to make its arguments in the open meeting laws case. The open meeting lawsuit was related to the other cases on appeal only in that the city council meeting in question was convened to discuss the status of the other four cases with its counsel. That Kennedy alleged a violation of the open meeting laws with regard to that meeting does not intertwine the open meeting lawsuit with the other actions relating to the development agreement appeals.

¶24 Kennedy argues the open meeting laws appeal was intertwined with the other cases because the circuit court stated, "from a billing perspective, [it] became so intertwined that separation of the costs and expenses and fees between the various causes of action was not practical or possible on my part." However, it does not follow that because Kennedy's bills were intertwined, therefore the

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<sup>7</sup> As the court noted, "I didn't have the open meeting case...."

actions themselves were intertwined. After correctly determining that Kennedy was not the prevailing party on the appeal of the open meeting lawsuit, the court considered whether attorney fees were appropriate for continued work on any of the other appeals. The court concluded it was unable to parse out “the attorneys fees that accumulated by reason of the appeal where Kennedy was successful.”

¶25 Kennedy insists that during the February 9, 2007 motion hearing, the parties were able to parse out \$37,873.53 in attorney fees specifically associated with the open meeting laws appeal. Kennedy therefore demands we segregate this amount from the total amount of attorney fees relating to the prior appeals and allow Kennedy to recover the difference. However, Kennedy is incorrect in stating the amount of fees related solely to the open meeting laws appeal was limited to \$37,873.53. The circuit court concluded that once the roughly \$38,000 in fees were removed, the remainder of the bills were still incapable of segregation between work performed on the other appeal matters and the open meeting lawsuit. That conclusion is not clearly erroneous. As the court further observed, Kennedy had the burden of proving its fees and it failed to do so. Based on Kennedy’s deficiencies in proof, the court appropriately denied its request.

¶26 We note in this regard that during the court’s oral decision Kennedy requested “leave to file a separate request for attorney fees parsing out, as you say, the fees for the appeal, given the court’s ruling with respect to the open meeting laws fees.” The circuit court denied the request, stating, “I think this litigation has gone on and on and on, and for whatever reason there needs to be an end.” The court did not erroneously exercise its discretion by denying the request for leave on the basis of finality. It is not the court’s burden to develop a party’s proof and Kennedy was provided an opportunity to properly document its application for fees but neglected to adequately separate its billings for the open meeting laws

appeal from those related to the other actions. The circuit court did not erroneously exercise its discretion denying Kennedy's request for attorney fees associated with the prior appeal.

*By the Court.*—Judgments and orders affirmed in part; reversed in part and cause remanded with directions; attorney sanctioned. No costs on appeal.

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

