COURT OF APPEALS DECISION DATED AND FILED

July 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 2005AP443

Cir. Ct. No. 2002PR131

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE ESTATE OF HOWARD GROSSEN:

DANIEL GROSSEN,

APPELLANT,

V.

GARY GROSSEN, PERSONAL REPRESENTATIVE, GARY GROSSEN, INDIVIDUALLY, AND SANDRA GROSSEN,

RESPONDENTS.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 DEININGER, J. Daniel Grossen appeals an order awarding him attorney fees under WIS. STAT. § 879.63 (2003-04)[1] after he partially prevailed in his action to secure additional property for his deceased father's estate. He claims the circuit court erroneously exercised its discretion in awarding him only $500 in attorney fees by failing to apply the proper legal standard for determining an award of attorney's fees under a fee-shifting statute. We conclude that, because Daniel did not submit information to the circuit court regarding the amount of attorney fees he incurred, his attorney's billing rate or the amount of time his attorney expended pursuing his various claims, he cannot now claim the circuit court erred in failing to begin its fee determination with a "lodestar" calculation.

¶2 Daniel also complains that the circuit court erred by not "allowing" him to file a "petition" for reasonable fees and expenses. Nothing in the record, however, suggests that the court prevented Daniel from presenting his request for an award of reasonable attorney's fees or from filing affidavits and billing statements in support of the request. Because Daniel made no showing in the circuit court that would support a higher fee award, and because the court employed a logical rationale based on appropriate legal principles and the facts of record, we cannot conclude on the present record that the circuit court erroneously exercised its discretion by awarding Daniel a minimal reimbursement of attorney's fees.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

BACKGROUND

¶3 Before he died, Howard Grossen established a living trust, to which he transferred most of his assets. The trust provided that, on Howard's death, after payment of several specific bequests, the trust residue was to be divided equally among Howard's three children or their descendants. He also executed a will directing that any assets he had not transferred to the trust during his lifetime be distributed to the trust from his estate. Howard was survived by three children, Gary, Daniel and Sandra. Gary petitioned for informal administration of Howard's estate, and, with Daniel's and Sandra's consent, the court appointed Gary personal representative. Gary, who was also then serving as trustee of Howard's living trust, filed an estate inventory showing as the sole estate asset an investment account having a value of about $70,000.

¶4 Daniel objected to the inventory, alleging "that it does not include all property subject to administration." Extensive discovery followed, including the taking of numerous depositions. Daniel's claims that additional assets should be inventoried in the estate were eventually tried to the court over the course of three days in June and November 2004. The record contains a transcript of counsel's closing arguments and the court's bench decision at the conclusion of the trial, but there are no transcripts in the record of the testimony presented during the trial, nor of any other arguments or court rulings. It appears that during the course of the trial, Daniel and Gary stipulated to the treatment of two disputed assets. They agreed that a truck worth $22,500, which had been titled in Gary's name, was to be included in the estate, and that Gary, individually, would pay Daniel an additional $3,333 to settle a dispute regarding the handling of a $25,000 check drawn on Howard's account. (Daniel had apparently previously received $5,000 from the proceeds of this check.)

¶5 During his closing argument to the circuit court, Daniel's attorney cited WIS. STAT. § 879.63 and requested the court to "entertain a petition and documentation for reasonable attorney fees not to exceed the value of the property secured for the estate."[2] Gary's attorney opposed the request, as did the attorney for the estate, who told the court that there had been "nine depositions … six status conferences, and two and a half days of trial. This case has been over, over litigated. Over litigated tremendously." Counsel for the estate also asserted that the litigation concerning Gary's claims of omitted property had resulted in expenses for the estate that "far exceeded" the value of any property recovered for the estate. In response, Daniel's counsel conceded that "all of the fees that were incurred in all of the litigation would [not] be recoverable," but he maintained that Daniel was entitled under the statute to some fees to the extent his actions benefited the estate. Counsel also disputed the estate's assertion that Daniel had over-litigated his claims and again argued that, because "there has been a recovery[,] … the Court should entertain at least a petition that would set forth the fees in connection with the assets that have been recovered."

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[2] WISCONSIN STAT. § 879.63 provides as follows (emphasis added):

> Whenever there is reason to believe that the estate of a decedent as set forth in the inventory does not include property which should be included in the estate, and the personal representative has failed to secure the property or to bring an action to secure the property, any person interested may, on behalf of the estate, bring an action in the court in which the estate is being administered to reach the property and make it a part of the estate. *If the action is successful, the person interested shall be reimbursed from the estate for the reasonable expenses and attorney fee incurred by the person in the action as approved by the court but not in excess of the value of the property secured for the estate*.

¶6 After ruling against Daniel on the sole remaining dispute, which concerned some stock in a cheese factory cooperative, the circuit court ruled as follows on Daniel's request for attorney's fees:

> Now we get down to the matter of attorney's fees, and I'm aware of the statute here, but I want to look at the totality of the circumstances.
>
> We had questions without, I don't think, any basis at all about whether or not we had bank accounts in Switzerland, matters such as that, we had extreme amount of litigation about the limited partnership versus the trust, and it's clear that even before you were involved, Mr. [Daniel's counsel], that had been transferred into the trust and is equally shared by all three of the children. It was a foolish part of this litigation. It had no bearing on this case. It was litigated, and litigated, and litigated, and I think with the major thrust of this litigation, I have never in my mind figured out why it was being litigated.
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> It was clear to me, having done estates before, and having done estate tax returns, etcetera, that you were facing jeopardy for your client on this matter and could have cost your client a great deal of money, and could have cost the estate a great deal of money.
>
> So as to the attorney's fees, yes, there is a [de minimis] recovery based upon the entire amount of litigation. However, you did recover something. I will award five hundred dollars in attorney's fees, and that resolves this matter.

¶7 The court subsequently entered an order in which it (1) confirmed the stipulations that a truck valued at $22,500 would be included in the estate inventory and that Gary, individually, would pay Daniel $3,333 to resolve a second dispute; (2) found that the decedent owned no shares of the disputed cheese factory cooperative stock at the time of his death; and (3) awarded Daniel

$500 from the estate under WIS. STAT. § 879.63 for "reasonable and necessary expenses and attorney fees." Daniel appeals.[3]

ANALYSIS

¶8 We review a circuit court's determination of the amount of reasonable attorney fees awarded under a fee-shifting statute for an erroneous exercise of discretion. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. In doing so, we "give deference to the circuit court's decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel." ***Id.*** Hence, we do not substitute our judgment for that of the circuit court. ***Id.*** Rather, we will affirm if the circuit court "'employ[ed] a logical rationale based on the appropriate legal principles and facts of record.'" ***Id.*** (citation omitted). Whether the circuit court applied the appropriate legal principles is a question of law that we decide de novo. ***Gallagher v. Grant-Lafayette Elec. Coop.***, 2001 WI App 276, ¶15, 249 Wis. 2d 115, 126-127, 637 N.W.2d 80.

¶9 As we have noted (see footnote 2), WIS. STAT. § 879.63 provides that, if a person successfully brings "an action … to reach … property and make it a part of the estate," the person bringing the action is entitled to "be reimbursed

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[3] The respondents are Gary Grossen, as an individual and in his capacity as personal representative of the Estate of Howard Grossen, and Sandra Grossen, Daniel's and Gary's sister and an interested party in Howard's estate. The attorney for the estate and Gary's separate counsel filed a joint response brief. Sandra informed us by letter that she "fully support[s] the positions taken by Gary …, as personal representative, and … individually," and that she joins in the arguments made in the response brief. In our analysis that follows, we will refer to the respondents collectively as "the estate."

from the estate for the reasonable expenses and attorney fee incurred … as approved by the court but not in excess of the value of the property secured for the estate." ***Id***. Daniel argues that the circuit failed to apply the proper standard in awarding him only $500 for the attorney's fees he incurred in retrieving property for the estate. He points out that, as a result of the claims he litigated, an asset valued at $22,500 was added to the estate inventory.[4]

¶10 Daniel contends we must reverse the circuit court's award because the court failed to apply the "lodestar" approach, which the supreme court endorsed in ***Kolupar*** as the proper starting point for a circuit court's determination of a reasonable attorney's fees award. *See* ***Kolupar***, 275 Wis. 2d 1, ¶¶28-30. Under the lodestar approach, a court should begin by determining "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," and the amount so determined may then be adjusted up or down based on a number of factors that are often referred to as "the ***Johnson*** factors."[5] ***Id***.

¶11 The estate responds that, although the court did not compute the "lodestar figure," it could not do so because Daniel did not provide his attorney's billing statements. We agree that we should not reverse a circuit court's discretionary determination because the court failed to consider facts that were not before it. The prevailing plaintiff's request for attorney's fees in ***Kolupar*** suffered

[4] Daniel also notes the settlement regarding the allegedly "improper" transfer of $25,000, but the stipulated settlement as to that issue did not involve adding any amount to the estate's inventoried assets.

[5] The pertinent factors to be considered in determining a reasonable attorney's fee award are sometimes called the "***Johnson*** factors," a reference to ***Johnson v. Ga. Highway Express, Inc.***, 488 F.2d 714, 717-19 (5th Cir. 1974), where the court enumerated a list of pertinent factors that largely parallel those set forth in SCR 20:1.5. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶¶28-30, 275 Wis. 2d 1, 683 N.W.2d 58.

from the same infirmity, and the supreme court noted that the circuit court could have, on that basis alone, reduced "the attorney fee award to nothing or nearly nothing." ***Id.***, ¶31. As in ***Kolupar***, the circuit court in this case was "[w]ithout the billing invoices," and, thus, "the court could not know how much time [Daniel]'s attorney spent on particular tasks, and therefore could make no assessment as to whether the hours [his] attorney exercised in pursuing the [one successful] claim were reasonable. This rendered any analysis under a lodestar approach impractical." *See* ***id***., ¶32.

¶12 We also agree with the estate that, although the circuit court did not explicitly discuss the ***Johnson*** factors, its remarks show that the court implicitly applied pertinent factors based on the information available to it, such as the reasonableness of the claims Daniel pursued, the legal skills required and applied, the amount involved and the result obtained.[6] The court's comments show that it concluded many, if not most, of the claims Daniel had pursued were "foolish" and had "no bearing on this case," and that the court deemed the bulk of Daniel's claims as frivolous or nearly so. The court thus implicitly concluded that most of the fees Daniel may have incurred in pursuing his claims were unreasonable. These same comments indicate that the court took a dim view of Daniel's counsel's legal skills and judgment. Most significantly, the court viewed the result Daniel obtained—the recovery of $22,500 in value for the estate—as being

[6] With respect to many of the ***Johnson*** factors, the court had no information on which to apply them. For example, nothing in the record before us indicates whether Daniel's counsel forfeited other employment to take Daniel's case; what the attorney's customary fees were or what other attorneys in the community may have charged for similar work; whether Daniel's fee arrangement was fixed or contingent; whether time limitations affected the legal work; whether Daniel's case was "undesirable"; what his counsel's level of experience, reputation and ability may have been; the nature and length of the attorney's relationship with Daniel or awards in similar cases.

"de minimis" in view of the overall time and effort expended and the costs inflicted on the estate stemming from Daniel's over-litigation of his non-meritorious claims.

¶13 Our review of the record satisfies us that it provides no basis from which we might conclude that the circuit court's characterization that many of Daniel's claims were "foolish," or its determination that Daniel had over-litigated those claims, were erroneous. Some eight months before the trial began, Daniel's counsel filed a "Memorandum of Issues, Facts and Law Relating to [Daniel's] Objection to Inventory." Counsel asserted in this document that the following items were all "at issue": (1) whether Howard had the capacity to execute his living trust and did so properly; (2) whether Howard had the capacity to execute certain deeds; (3) whether a limited partnership interest and/or certain real estate should be included in Howard's estate; (4) whether Gary had improperly transferred the $22,500 truck; (5) whether a $25,000 check was improperly drawn on Howard's account just prior to his death; (6) whether there had been a bona fide sale of Howard's cheese-making equipment to Gary, or whether that equipment or an "account receivable" for it should be included in the estate; (7) whether Howard's cheese factory cooperative stock had been properly transferred to Gary or should be included in the estate; and (8) whether Gary, as personal representative or trustee, had made unreasonable or improper distributions from estate or trust assets for his own fees and for legal and accounting services.

¶14 The record does not disclose what happened to the majority of the issues Daniel's counsel identified in the memorandum. As we have noted, the record does not include transcripts of the testimony presented during the three days of trial. We know from the transcript of the parties' closing arguments, the

court's bench decision and the court's written order that followed, that the sole issue on which the court was asked to rule related to the status of the cheese factory cooperative stock. The court ruled against Daniel on that issue. We also know that, during the course of the trial, Gary stipulated to including the value of the truck in the estate and agreed to make a personal payment in the amount of $3,333 to Daniel relating to the disputed $25,000 check. As for the remainder of the issues (involving at least two parcels of real estate, a "hog operation," the cheese-making equipment, a limited partnership, the validity of the trust, and the reasonableness of certain fees paid out of the estate or trust), we can only assume that Daniel abandoned them for lack of proof of his claims. In short, to the extent the incomplete record before us sheds any light on the nature and outcome of the issues Daniel litigated, we cannot conclude the circuit court erred in determining that the matters were over-litigated and that Daniel's recovery was "de minimis" in relation to what he set out to accomplish.[7]

¶15 In sum, we conclude the circuit court "'employ[ed] a logical rationale based on the appropriate legal principles and facts of record'" in awarding Daniel $500 as a partial reimbursement of his attorney's fees for recovering property for the estate. *See* ***Kolupar***, 275 Wis. 2d 1, ¶22 (citation omitted). Daniel also argues, however, that the circuit court erred in failing "to even consider [Daniel]'s attorney's request to file a petition to determine the reasonable fees and expenses incurred in the proceedings." Daniel provides no

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[7] We note as well that Daniel has not filed a reply brief. Thus, he has made no effort to refute the estate's arguments that the court correctly characterized the lack of merit in the bulk of Daniel's claims and implicitly applied appropriate factors in awarding the attorney's fees it did. *See* ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 ("Arguments not refuted are deemed admitted.").

authority, however, for the proposition that he was required to file a separate petition setting forth requested fees or that he needed prior approval from the court to do so. We also note that, as early as eight months prior to the trial of his claims, Daniel asserted in the memorandum of issues referred to above that he was entitled under WIS. STAT. § 879.63 to an award of reasonable attorney's fees if he was successful in "recovering any assets for the benefit of the estate." He requested in the memorandum "that this Court set a date for hearing these matters." Daniel cites nothing in the record to support a contention that the circuit court prevented him from presenting testimony or documentation during the trial in support of his claim for reimbursement of attorney's fees.

¶16 Finally, as the estate points out, following the circuit court's bench decision, Daniel made no effort, either by way of a "petition" or a motion for reconsideration, to provide the court necessary information or additional argument regarding his request for a greater reimbursement of attorney's fees. We have little quarrel, therefore, with the estate's contention that Daniel "did not prove his claim for Attorney's fees and expenses and hardly made an effort to initiate the claim." As with the estate's contentions regarding the circuit court's implicit consideration of appropriate factors in awarding the fees it did, Daniel has not refuted the estate's argument that the circuit court did not deprive him of the opportunity to properly present and support a claim for reimbursement of reasonable attorney's fees. (See footnote 7.)

CONCLUSION

¶17 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.