

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 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. 2005AP2486

Cir. Ct. No. 2004CV923

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NIC J. EICHENSEER,

PLAINTIFF,

**BRIAN DOUGHERTY AND ERIC B. STENER,
ON BEHALF OF THEMSELVES AND ALL OTHER
SIMILARLY SITUATED PERSONS,**

PLAINTIFFS-APPELLANTS,

v.

**MADISON-DANE COUNTY TAVERN LEAGUE, INC.,
AMY'S CAFE, INC., THE ANGELIC BREWING
COMPANY, LLC, BROTHERS OF WISCONSIN, INC.
D/B/A BROTHERS, OSCAR, INC. D/B/A BUFFALO
WILD WINGS GRILL & BAR, BULL FEATHERS, INC.,
ZAPEL, INC. D/B/A CITY BAR, WISCONSIN VENTURES
D/B/A CLUB AMAZON, KOLLEGE KLUB, INC.,
SCHOONERS BAR & GRILL D/B/A LAVA LOUNGE,
THE CHURCH KEY D/B/A MAD DOG'S PUB &
PIZZERIA, B.A.T., INC. D/B/A/ MADHATTERS,
ORBUT OF STATE STREET, INC. D/B/A MONDAYS,
NITTY GRITTY, LLC, PAUL'S CLUB, INC., PLAZA
TAVERN AND GRILL, INC., THE PUB, INC., THE RED
SHED, INC., SPICES RESTAURANTE, INC., STATE BAR**

**& GRILL, LLC, STATE STREET BRATS, A LIMITED
PARTNERSHIP, STILLWATERS, INC., VINTAGE LLC
D/B/A VINTAGE SPIRITS & GRILL, WANDO VENTURES,
INC., THE BULL RING OF MADISON, INC. D/B/A
THE IRISH PUB AND DOES 1-50,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Brian Dougherty and Eric Stener appeal an order granting costs to the respondents after the latter prevailed in the circuit court action.¹ WIS. STAT. § 814.04(2) (2003-04),² as amended effective July 1, 2004, includes a party's photocopying, faxing and overnight delivery expenses in the list of allowable costs. Formerly, § 814.04(2) did not authorize awarding those costs. *See* WIS. STAT. § 814.04(2) (2001-02). Because Dougherty and Stener commenced their action before July 1, 2004, they contend the trial court erred by applying the amended version of § 814.04(2) retroactively to award a substantial amount of photocopying, faxing and overnight delivery costs to the respondents. They also contend the court erred by awarding excessive costs for those items

¹ We are also releasing today our decision affirming the circuit court's granting of summary judgment to the respondents. *See Eichenseer v. Madison-Dane Co. Tavern League, Inc.*, No. 2005AP1063, unpublished slip op. (Wis. Ct. App. Oct. 26, 2006).

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

even if the amendment to § 814.04(2) applies retroactively. We affirm on both issues.

¶2 We conclude Dougherty and Stener waived their retroactivity argument. Dougherty and Stener correctly note that their written objection to costs contended that photocopying, faxing and overnight delivery costs were not permitted under WIS. STAT. § 814.04(2). However, they failed to argue that the recent amendment is not retroactive. They were apparently not aware of the amendment at the time they filed their written objection. When counsel for a respondent mentioned the potential retroactivity issue at the hearing on costs, counsel for Dougherty and Stener stated that the issue was not clear, and no law existed that clearly resolved it. Counsel made no other reference to retroactivity and gave no indication to the trial court that it was an issue he wished to pursue. To preserve an issue for appeal a party must make “a specific objection which brings into focus the nature of the alleged error” in order to provide the trial court an opportunity to correct it. *Wright v. Mercy Hosp. of Janesville, Wis., Inc.*, 206 Wis. 2d 449, 463, 557 N.W.2d 846 (Ct. App. 1996). Dougherty and Stener did not do so here.

¶3 We also conclude the trial court properly allowed costs in the amount ordered. The trial court exercises its discretion when awarding necessary costs under WIS. STAT. § 814.04(2). See *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing, Ltd. P’ship*, 2004 WI 92, ¶54, 273 Wis. 2d 577, 682 N.W.2d 839. Here, attorneys for the respondents averred that the claimed costs were necessary, and the trial court accepted the averments as true with one minor

exception.³ The court concluded that overnight delivery costs were necessary because one of the plaintiffs' attorneys resided out-of-state and the respondents' overnight deliveries to him were appropriate given the court's scheduling order. The court also concluded that the respondents necessarily retained copies of discovery material turned over to Dougherty and Stener, given the complicated nature of the case and the "high risk legal environment" surrounding the litigation. The court also specifically found necessary the decision to photocopy relevant case authority, which the court stated it found helpful.

¶4 We will affirm a trial court's exercise of discretion when it examined the relevant facts, applied a proper standard of law and used a demonstrated rational process to reach a reasonable conclusion. *DeWitt Ross & Stevens, S.C.*, 273 Wis. 2d 577, ¶54. The trial court's decision here meets that standard.

By the Court.—Order affirmed.

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

³ The court disallowed \$141.00 for copies of back issues of "a student newspaper."

