COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP961 **Cir. Ct. No. 2004SC1357**

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

AMERICAN TOTAL SECURITY, INC.,

PLAINTIFF-APPELLANT,

V.

GENEVA SCHULTZ LIVING TRUST,
BY ROANN HARPER, TRUSTEE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed in part, reversed in part, and cause remanded.*

¶1 KESSLER, J.[1] Plaintiff-Appellant American Total Security, Inc. (ATS), appeals from a judgment denying ATS any recovery based on *quantum*

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

meruit and awarding the Geneva Schultz Living Trust[2] double damages in the amount of $8,150.86, costs in the amount of $2,389.45, and actual attorney fees in the amount of $55,518.70, for ATS's violation of WIS. ADMIN. CODE § ATCP 110.05(2) (Sept. 2001),[3] as found by this court in ***American Total Security, Inc. v. Schultz***, No. 2004AP3147, unpublished slip op. (WI App Sept. 27, 2005) (***ATS I***).

¶2 As ATS has failed to address the trial court's denial of any recovery based on *quantum meruit*, we affirm the trial court's holding. WISCONSIN STAT. § 100.20(5)[4] (2003-04)[5] allows for recovery of double damages of pecuniary loss, for costs and for reasonable attorney fees. Because the record demonstrates that the trial court erred in its calculation of the pecuniary loss suffered by Schultz, we reverse. We conclude that Schultz has demonstrated a pecuniary loss of $500. Accordingly, under § 100.20(5), Schultz is entitled to double damages in the

---

[2] Geneva Schultz has passed away during the pendency of this case and the Geneva Schultz Living Trust has been substituted as a party. Throughout this opinion, "Schultz" refers to either Geneva Schultz herself or the Trust, as the party-in-interest, as applicable.

[3] All references to WIS. ADMIN. CODE §§ ATCP 110.02 and 110.05 are to the September 2001 publication date in the Wisconsin Administrative Register.

[4] WISCONSIN STAT. § 100.20 provides, in pertinent part:

> **Methods of competition and trade practices.**
>
> ….
>
> **(5)** Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

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

amount of $1,000. Because we further determine that the trial court failed to exercise its discretion in its award of costs and attorney fees, we reverse the trial court's judgment as to attorney fees and costs and remand with instructions as set forth below.

BACKGROUND

¶3 The facts of this case were recited in ***ATS I*** and will not be repeated here, except for those facts which are relevant to this appeal or which occurred following the remand. ATS and Schultz entered into a "sales agreement" for the purchase and installation of seventeen windows for a total price of $9,000, executed on November 11, 2003, by both Schultz and Michael R. Marble, as ATS's sole shareholder. (Uppercasing omitted.) Pertinent to this appeal, the sales agreement reflected Schultz's down payment of $3,000 and, in hand-printed descriptions, recited her purchase of the following:

> 15 DOUBLE HUNG REPLACEMENT
> WINDOWS ½ SCREEN
> 2 PICTURE WINDOWS
>
> ALL WINDOWS BEIGE COLOR IN BEIGE
> COLOR OUT
> LOW E/ARGON 7/8" THERMO PANE GLASS
> ALL WINDOWS
> BATH ROOM WINDOW OBSCURE GLASS.
> LOWER SASH.
> ALL DOUBLE HUND [sic] TOP & BOTTOM
> SASH TILT IN.
> ALUMINUM TRIM ALL WINDOWS
> COMPLETE
> ALUMINUM TRIM BOTH FRONT & REAR.
> BREEZE WAY EXTERIORS.
> ALUMINUM TRIM OVER HEAD GARAGE
> DOOR OPENING
> ALUMINUM TRIM COLOR ALCOA LEATHER.
> AND MATCHING CALK. [sic]
> APPROX 4–6 WEEKS FOR DELIVERY &
> INSTALLATION

Additionally, the windows were described, also in hand-printing, as "Soft Lite Replacement Windows." (Uppercasing omitted.) Marble testified that "Low e/Argon" described "a film that is applied to the window that helps keep the house cooler in the summer and warmer in the winter" and that "[t]he argon is a gas that is between the window panes that it [*sic*] also provides more energy efficiency in there."

¶4 ATS filed this small claims action on January 16, 2004. The court commissioner found for ATS. Schultz demanded a trial on the matter, filed counterclaims, and the trial court[6] held a *de novo*-review evidentiary hearing. *See* WIS. STAT. §§ 757.69(8); 799.207(2) & (3). Schultz did not testify at the hearing, apparently because of her health problems. Based on testimony by Marble and Daniel Harper (Schultz's son-in-law), around Thanksgiving Harper contacted ATS and attempted to get ATS to cancel the November 11, 2003 sales agreement because Schultz had suffered a heart attack and could no longer afford the additional $6,000 for the windows. Marble testified that because the windows were ordered, a cash and carry price was "the best that [he] could do." Marble testified that thereafter he sent to Schultz a proposed contract for the windows, dated January 8, 2004. The proposed new agreement recited in hand-printing that it was an "amended sales agreement from installation contract to cash and carry purchase." (Uppercasing omitted.) It listed the "BALANCE COD" as $2,140, reflecting a $5,140 "SALE AMOUNT" and a deposit of $3,000. This "amended sales agreement" was never signed.

[6] The original trial court proceedings were before the Honorable Michael J. Dwyer.

¶5 Marble testified that prior to the signing of the November 11, 2003 sales agreement, he and Schultz met four times at her home to discuss the types of windows which she wanted installed and that, in his perception, she "knew exactly what she was doing" in ordering the window-installation and in signing the November 11 sales agreement. He told the trial court that Schultz had requested windows manufactured by Soft Lite and, as phrased by Marble, "was imperative that she wanted" Soft Lite's "Imperial" window. He described the Imperial window as Soft Lite's "high end" window, as opposed to Soft Lite's "low-end" Barrington window. Marble also testified, however, that the description of the ordered windows on the November 11, 2003 sales agreement could apply to either the Imperial or Barrington window. Although conceding that there would be a "big difference" between the high-end Imperial window and the low-end Barrington window, Marble testified that the price differential was "not a basically significant" factor. Marble told the trial court that the November 11, 2003 sales agreement did not specify the Imperial window Schultz had wanted because he "forgot to write down" Imperial on the document. When asked by the trial court how, based on what was written in the sales agreement, Schultz would "know that what she was paying for was Imperial not Barrington," Marble replied, "[b]y the product that's delivered."

¶6 Schultz contended before the trial court that the November 11, 2003 sales agreement violated WIS. ADMIN. CODE § ATCP 110.05(2)(b).[7] ATS conceded that § ATCP 110.05(2)(b) applies to that sales agreement.

---

[7] WISCONSIN ADMIN. CODE § ATCP 110.05 provides, in pertinent part:

(continued)

¶7 The trial court determined that the November 11, 2003 sales agreement did not violate WIS. ADMIN. CODE § ATCP 110.05(2)(b). The trial court awarded ATS the $3,000 already paid as the down payment, the additional $575.43 representing the remainder of the cost of the windows which ATS paid to Soft Lite, the manufacturer, and $500.01[8] profit which ATS calculated it was due

> **(1)** The following home improvement contracts and all changes in the terms and conditions thereof, shall be in writing:
>
> (a) Contracts requiring any payment of money or other consideration by the buyer prior to completion of the seller's obligation under the contract.
>
> (b) Contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller, mail or telephone solicitation away from the regular place of business of the seller, mail or telephone solicitation, or handbills or circulars delivered or left at places of residence.
>
> **(2)** If sub. (1) requires a written home improvement contract or the buyer signs a written contract, the written contract shall be signed by all parties and shall clearly, accurately and legibly set forth all material terms and conditions of the contract, including:
>
> ….
>
> (b) A description of the work to be done and the principal products and materials to be used or installed in performance of the contract. The description shall include, where applicable, the name, make, size, capacity, model and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products or materials are to be used, a description of such products or materials shall be clearly set forth in the contract.

[8] While there is testimony in the record that ATS's profit was $500.01, the SOFT-LITE invoice paid by ATS was in the total amount of $3,575.43, while the total paid by Schultz to ATS was $4,075.43. Accordingly, the amount of pecuniary loss to Schultz is $4,075.43 minus $3,575.43 or $500.

under its normal billing practices associated with cash and carry sales. The trial court also ordered that upon payment of the remaining $1,075.43, ATS was to deliver the seventeen windows to Schultz. Schultz paid the $1,075.43 and ATS delivered the windows to Schultz. The windows have been installed in Schultz's home. The record is silent on the cost expended by Schultz for the installation of the windows.

¶8 Schultz appealed the trial court's judgment, but did not appeal the dismissal of her counterclaims for violation of WIS. ADMIN. CODE §§ ATCP 110.02(6)(e), 110.05(2)(d) and 110.05(7) and for unjust enrichment. This court, in ***ATS I***, made the following determinations:

(1) That ATS had, in fact, violated § ATCP 110.05(2);

(2) That, because of the violation of § ATCP 110.05(2), the November 11, 2003 sales agreement was unenforceable; and

(3) That because "the trial court directed that Schultz pay [ATS] and that [ATS] deliver the windows to Schultz, and both parties have complied … [r]eturning the parties to the *status quo ante* may not be viable or just."

¶9 Based on the above, this court then remanded this matter for a determination "of whether [ATS] may recover from Schultz on either a *quantum meruit* theory, or some other basis" and "whether Schultz has suffered a 'pecuniary loss' because of [ATS's] violation of the Department's general order, and, if so, the damages, costs, and reasonable attorney's fees she should recover pursuant to WIS. STAT. § 100.20(5)."

¶10 On remand, the trial court[9] held a hearing on March 16, 2006. ATS appeared by only its attorney. Schultz (now deceased) appeared by her attorney, and by Roann Harper (the trustee of the Geneva Schultz Living Trust). Daniel Harper was also present. Through its briefing and oral argument, ATS waived any claim to any additional *quantum meruit* recovery above the $4,075.43 previously awarded by the trial court. Through her briefing and oral argument, Schultz argued that her pecuniary loss was, at minimum, the $500.01 of profit which she had paid to ATS. Schultz's counsel also represented to the trial court that it was providing its representation to Schultz on a *pro bono* basis.

¶11 At the conclusion of the argument, the trial court made the following determinations:

(1) ATS was not entitled to any recovery under *quantum meruit* due to its violation of WIS. ADMIN. CODE § ATCP 110.05;

(2) The windows, which were already installed by a third party in Schultz's house, would remain in the house; and

(3) Schultz's pecuniary loss was $4,075.43.

The trial court then ordered, pursuant to WIS. STAT. § 100.20(5), for ATS to pay to Schultz's estate:

(1) double damages (pecuniary loss) in the total amount of $8,150.86;

(2) costs; and

[9] On remand, this case was assigned to the Honorable Jean W. Di Motto.

(3) actual attorney fees.

¶12 On March 24, 2006, Schultz filed a form order of judgment and an affidavit averring to attorney fees and costs incurred. The affidavit regarding attorney fees and costs provided a one-page print-out listing the attorney, the billing rate and the number of hours. No information regarding what work the attorney did on the matter or when, and no background information on the attorney to support the billing rates was provided. The documentation of costs was actually a computer-generated summary of the attorney's out-of-pocket expenses.

¶13 That same day, March 24, 2006, ATS filed a motion for reconsideration of the trial court's determination that Schultz incurred a pecuniary loss as a result of ATS's violation of WIS. ADMIN. CODE § ATCP 110.05(2), with its accompanying brief. On April 3, 2006, Schultz filed papers in opposition to ATS's motion for reconsideration. Also on April 3, 2006, without any hearing on the reconsideration request or on the amounts requested as attorney fees and costs, the trial court signed the judgment. The trial court made no record of its reasoning for allowing all of the undocumented attorney fees and claimed out-of-pocket expenses. The trial court refused to grant ATS a hearing on its motion for reconsideration and denied ATS's motion for reconsideration. ATS appealed. Additional facts will be included within the body of this opinion as necessary.

DISCUSSION

¶14 On our previous remand, we instructed the trial court to make the following determinations:

(1) "[[W]hether ATS] may recover from Schultz on either a *quantum meruit* theory, or some other basis," citing ***Zbichorski v. Thomas***, 10 Wis. 2d 625,

628, 103 N.W.2d 536 (1960) and ***Ramsey v. Ellis***, 168 Wis. 2d 779, 784–785, 484 N.W.2d 331 (1992) (discussing distinctions between unjust enrichment and *quantum meruit*); and

(2) "[W]hether Schultz has suffered a 'pecuniary loss' because of [ATS's] violation of the Department's general order, and, if so, the damages, costs, and reasonable attorney's fees she should recover pursuant to WIS. STAT. § 100.20(5)," citing § 100.20(5) and ***Snyder v. Badgerland Mobile Homes, Inc.***, 2003 WI App 49, ¶19, 260 Wis. 2d 770, 659 N.W.2d 887.

¶15 As we noted in ***ATS I***, WIS. ADMIN. CODE § ATCP 110.05(2) contains:

> [T]wo imbricated requirements: (1) if "specific representations are made that certain types of products or materials will be used," the contract must "clearly set forth" "a description of such products or materials," and (2) if the "buyer has specified that certain types of products or materials are to be used," the contract must also "clearly set forth" "a description of such products or materials."
>
> In our view, and absent any legislative history to the contrary (and, as noted, we have been presented none), the Department's three-fold insistence that home-improvement buyers be able to ascertain from the face of the agreements they sign "the name … model … and the type, grade, quality, size or quantity of principal building or construction materials to be used," as well as be assured *in the contract* that home-improvement sellers will comply with both the sellers' oral promises and the buyers' "specified" requests that "certain types of products or materials are to be used," indicates that the clauses are at the core of the Department's legislative charter to discourage unfair business practices. *See* ***Baierl*** [***v. McTaggart***], 2001 WI 107, ¶¶19, 21, 245 Wis. 2d at 642–643, 629 N.W.2d at 282 (intent of the general order violated determines whether the contract is enforceable by the violating party).

ATS I, ¶¶9-10 (emphasis in original). Enforcing sanctions for violations of this code provision, in any way which allows a consumer not only to recover twice the amount of all money paid the contractor, but also retain full use of the contractor's work product or materials, with no equitable off-set in equity, is not supported by the case law. *See e.g.*, ***Huff & Morse, Inc. v. Riordon***, 118 Wis. 2d 1, 12, 345 N.W.2d 504 (Ct. App. 1984), *abrogated on other grounds*, ***Baierl v. McTaggart***, 2001 WI 107, ¶¶16-17, 19, 245 Wis. 2d 632, 629 N.W.2d 277. An appropriate reading of the statutes and regulations in this case would not allow the consumer to retain the product and recover twice what was paid. Rather, a calculation of pecuniary loss, with equitable off-sets, as outlined in our decisions in ***Benkoski v. Flood***, 2001 WI App 84, 242 Wis. 2d 652, 626 N.W.2d 851, and ***Riordon***, discussed *infra*, is the appropriate measure of pecuniary loss under WIS. STAT. § 100.20(5).

Quantum Meruit

¶16 The trial court ruled that it would "not allow a quantum meruit recovery of any amount by ATS … because any quantum meruit recovery is an equitable or an equity based recovery and [the trial court] disallow[s] equity as the basis for any recovery in this matter." ATS did not address this issue in its briefing. Accordingly, we will not address this issue. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998) ("[W]hen a party fails to argue an issue in its main appeal brief, the appellate court may treat the issue as having been abandoned, even though the issue was presented to the trial court.").

Damages for Pecuniary Loss

¶17 ATS argues that the trial court erred in determining that Schultz's pecuniary loss was the entire amount Schultz paid for the windows, and that it failed to follow the instructions of ***ATS I*** to hold an evidentiary hearing to determine the pecuniary loss suffered by Schultz. Schultz argues that because ATS waived any right to recovery under *quantum meruit*, Schultz's pecuniary loss was, as a matter of law, the entire monetary amount she paid ATS, although she does not dispute that she retains the windows and they have been installed in her house.

¶18 WISCONSIN STAT. § 100.20(5) allows for recovery of pecuniary losses caused by an administrative code violation. WIS. STAT. § 100.20(5). The meaning of "pecuniary loss" as used in § 100.20(5) "and how that term bears upon the methodology intended by the legislature in calculating damages under that section … presents a question of statutory interpretation that we review de novo." ***Benkoski***, 242 Wis. 2d 652, ¶24. ***Benkoski*** involved a statutory violation by a mobile home park operator which adversely affected the mobile home owner's ability to sell the mobile home. The park operator argued that the pecuniary loss should be calculated by subtracting the fair market value of the mobile home from the sum of the purchase price and advertising expenses the owner lost and incurred. ***Id.***, ¶¶25-26. The ***Benkoski*** court rejected this argument, and finding support in the law of contracts, noted:

> [t]he measure of damages for a breach of contract is the amount which will compensate the plaintiff for the loss suffered because of the breach. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the contract been performed.

Id., ¶32. The ***Benkoski*** court "conclude[d] that the 'pecuniary loss' concept set out in WIS. STAT. § 100.20(5) is similar to this concept of damages set out in the law of contracts." ***Id.*** Consequently, as part of a court's determination of Schultz's pecuniary loss, it must determine what Schultz's position would have been had the unenforceable contract been performed.

¶19 Implicit in this determination is what damages, or pecuniary loss, flowed from the violation of WIS. ADMIN. CODE § ATCP 110.05(2)(b). *See* WIS. STAT. § 100.20(5); ***Snyder***, 260 Wis. 2d 77, ¶19 (pecuniary loss must result from the violation in order to sue for recovery under WIS. STAT. § 100.20(5)). In our remand, we specifically instructed the trial court to determine "whether Schultz has suffered a 'pecuniary loss' because of [ATS's] violation of the Department's general order, and, if so, the damages, costs, and reasonable attorney's fees she should recover pursuant to WIS. STAT. § 100.20(5)." ***ATS I***, ¶12.

¶20 In ***Riordon***, the court found that because only an oral estimate for the car repair was given and agreed to, there was a technical violation of the Wisconsin Administrative Code. ***Id.***, 118 Wis. 2d at 12. In ***Riordon***, the customer, Riordon, claimed double damages as a result of his pecuniary loss relating to the violation. ***Id.*** The court concluded, however, that Riordon could not collect double damages on the cost of repair that he received to his car, which was $1,000, because he had received the fair value of the $1,000. ***Id.*** This amount, therefore, was not a pecuniary loss. ***Id.*** The court also found that because he had cancelled payment on his check for the balance due and owing of the repairs, he also could not claim that amount as a pecuniary loss. ***Id.*** ***Riordon*** is instructive because, in that case, the court concluded that it is appropriate to credit the value of goods and services received against the amount of the claimed damages in order to determine pecuniary loss.

¶21 Accordingly, we apply the methodology we adopted in ***Benkoski***. We determine those damages arising from ATS failing to put the term "Imperial" in the sales agreement. ***Benkoski***, 242 Wis. 2d 652, ¶32. We also apply our holding in ***Riordon*** regarding the use of off-set in the determination of pecuniary loss. ***Riordon***, 118 Wis. 2d at 12. In reviewing the record, we find that the invoices provided by the window manufacturer indicate that Imperial-style windows were invoiced to and paid for by ATS. We find no evidence in the record that indicates that ATS did not deliver the invoiced windows to Schultz; only the unsupported assertion by Schultz's counsel at the March 16, 2006 hearing that he does not know whether the windows that were delivered were the Imperial-style windows. It is also undisputed in the record that the windows which ATS delivered to Schultz pursuant to the September 10, 2005 judgment have been installed in Schultz's house. The record shows that the original, unenforceable contract was for a total price of $9,000, which included all materials and installation. The record also shows that the manufacturer's, Soft-Lite's, invoiced cost for the custom-ordered windows was $3,575.43, that ATS paid this cost for the windows, and that pursuant to the September 2005 judgment of the trial court, Schultz paid to ATS $4,075.43 for the windows, whereupon ATS delivered the windows, along with coil and caulk, at no additional charge to Schultz. ATS did not install the windows. The record before us establishes that Schultz received the windows she bargained for. Because of ATS's violation of WIS. ADMIN. CODE § ATCP 110.05(2)(b) and the subsequent unenforceability of the "sales agreement," however, Schultz could either keep the windows uninstalled, sell the windows or obtain a third party to install her windows; she elected to have a third party install her windows. The record does not establish what, if anything, Schultz paid for the installation. ***Id.*** Because Schultz has received the benefit of the windows, pursuant to ***Riordon***, we determine that the only pecuniary loss Schultz

has established is $500.[10] Therefore, we reverse the trial court's finding of pecuniary loss in the amount of $4,075.43 and determine, pursuant to WIS. STAT. § 100.20(5)'s double damages provision, that Schultz is entitled to recover $1,000 from ATS. Because we determine that the record establishes a pecuniary loss associated with ATS's violation of § ATCP 110.05(2)(b), in addition to double damages, Schultz is entitled to her reasonable attorney fees and costs pursuant to § 100.20(5).

Reasonable Attorney Fees

¶22 In Wisconsin, attorney fees are not recoverable unless authorized by statute or contract. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). WISCONSIN STAT. § 100.20(5) allows for the recovery only of a "reasonable attorney's fee." Sec. 100.20(5). If otherwise recoverable, attorney fees are also recoverable even when the person is represented at no charge by a legal services organization. ***Shands v. Castrovinci***, 115 Wis. 2d 352, 361, 340 N.W.2d 506 (1983). However, the right to attorney fees is not a blank check signing payment of any amount billed, regardless of whether it is reasonable.

¶23 Courts "have inherent authority to regulate members of the bench and bar." ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999). The court also has inherent authority to determine whether attorney fees are reasonable and to refuse to enforce those that are not. ***Herro, McAndrews & Porter, S.C. v. Gerhardt***, 62 Wis. 2d 179, 183, 214 N.W.2d 401 (1974), *overruled on other grounds by* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 747, 349

[10] For discussion of this calculation, *see* footnote eight, *supra*.

N.W. 29, 661 (1984); *see also* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 572, 538 N.W.2d 849 (Ct. App. 1995) (holding award of attorney fees is within the trial court's discretion). A trial court properly exercises its discretion when it applies the appropriate legal standard to the facts of record and, using a logical reasoning process, draws a conclusion that a reasonable judge could reach. ***Herro***, 62 Wis. 2d at 183. "[W]e hold that the proper standard upon review of attorney fees is that the trial court's determination of the value of these fees will be sustained unless there is an abuse of discretion." ***Standard Theatres, Inc.***, 118 Wis. 2d at 747.

¶24 The Wisconsin Supreme Court Rules governing lawyers and the legal profession also provide guidance for how reasonable attorney fees are to be determined. *See* SCR 20:1.5[11]; ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI

[11] **SCR 20:1.5 Fees**

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

(continued)

112, ¶¶28-31**,** 275 Wis. 2d 1, 683 N.W.2d 58. The Wisconsin Supreme Court, in ***Kolupar***, adopted a "lodestar" methodology for determining what constitutes reasonable compensation. ***Kolupar***, 275 Wis. 2d 1, ¶30. The "lodestar" number is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. ***Id.*** A court then uses this number to provide an objective basis from which to make an initial estimate of the value of a lawyer's services, adjusting as necessary to account for the factors identified in Wisconsin SCR 20:1.5. ***Kolupar***, 275 Wis. 2d 1, ¶¶28 n.5, 30.

¶25 In ***Kolupar***, the trial court, in seeking to determine a reasonable attorney fees award, chose to "not consider any billing invoices or other documentation of the hours worked as a sanction" for the plaintiff's untimely providing the documentation under a local rule. ***Id.***, ¶31. In order to make the determination in the absence of this information, the trial court obtained the testimony of the plaintiff's attorney and a former judge who had participated as a referee during the discovery phase. ***Id.***, ¶¶10, 13. In analyzing the trial court's findings under the lodestar method, the supreme court found that, even with the limited information available to it, the trial court provided a record of its reasoning for the amount of fees it awarded and therefore, it had exercised its discretion and the court affirmed the award of attorney fees. ***Id.***, ¶52.

¶26 This methodology of analyzing a request for attorney fees to determine reasonableness is not reflected in the record before us. The trial court

---

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

awarded actual attorney fees with no determination of their reasonableness. The award of $55,518.70—more than ten times the amount of pecuniary loss the trial court awarded and over $54,000 more than the actual pecuniary loss—requires a hearing, fact finding and the reasoned exercise of discretion. The record reflects that the trial court relied only on Schultz's attorney's affidavit, which included only the name of the attorney, billing rate charged by the law firm and number of hours worked, with no specification of the work performed, when each task was done or how that task related to Schultz's pecuniary loss. The trial court merely inserted the requested dollar figure in the judgment, giving ATS no hearing or opportunity to challenge the reasonableness of the requested fee. The trial court made no findings and conducted no analysis as to the reasonableness of the fees requested, as required by ***Kolupar***. ***Id.***, 275 Wis. 2d 1, ¶50. The paucity of the record in support of the fees does not permit us to make an independent determination as to a reasonable fee. Consequently, we have no choice but to remand this case to the trial court for a second time to determine reasonable attorney fees that directly relate to the pecuniary loss Schultz suffered, as determined in this opinion.

Costs

¶27 WISCONSIN STAT. § 100.20(5) allows for the recovery of costs. *See supra*, ¶2, n.2 (§ 100.20(5)). To determine what is included in the legislature's meaning of costs under § 100.20(5) is a question of statutory interpretation which we undertake *de novo*. ***State ex rel. Kalal v. Circuit Court of Dane County***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. The legislature does not separately define "costs" in § 100.20. Nor does it specifically award out-of-pocket expenses.

¶28 The legislature has defined *statutory* costs recoverable in litigation by the prevailing party under WIS. STAT. § 814.04. *See, e.g.*, ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2006 WI App 85, ___ Wis. 2d ___, 716 N.W.2d 547 (comparing definition of taxable costs to actual costs under offer of settlement statute). WISCONSIN STAT. § 814.04 states, in pertinent part:

> **Items of costs.** Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.33 (4) (d), 769.313, 814.025, 814.245, 895.035 (4), 895.110 (3) 895.75 (3),895.77 (2), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:
>
> ….
>
> **(2)** DISBURSEMENTS. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding $100 for each item; an expert witness fee not exceeding $300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

WIS. STAT. § 814.04.[12] The record in this case identifies a variety of out-of-pocket expenses which, at least without specific explanation of why they were reasonable

[12] WISCONSIN STAT. § 814.04 (intro.) has been modified eff. 04-01-07 by Supreme Court Order 03-06 and four acts of the 2005 Wisconsin legislature and as merged by the Revisor of Statutes under WIS. STAT. § 13.93(2)(c). Prior to April 1, 2007, it reads as noted in the text above. The amended statute is below. Identified within the amended statute is, shown by single brackets, the language that was erroneously inserted by 2005 Wis. Act 155 and shown by double-
(continued)

or necessary in a small claims action, seem unlikely to be taxable costs. For example, numerous claims for Federal Express mailings and use of bicycle messengers appear at least questionable. Because of the lack of any factual findings that the costs awarded to Schultz in the amount of $2,389.45 were reasonable or necessary, we direct on remand for a determination of those costs allowable under WIS. STAT. §§ 100.20(5) and 814.04.

By the Court.—Judgment affirmed in part, reversed in part, and cause remanded.

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

---

brackets, the language erroneously omitted from the Act. Corrective legislation is pending according to the Legislative Reference Bureau annotation to this statute.

> **Items of costs.** Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.553 (4) (d), 769.313, [814.025], 802.05, [[814.245]], 895.035 (4), 895.506, 895.443 (3), 895.444 (2), 895.445 (3), 895.446 (3), 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3), when allowed costs shall be as follows: