

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2007

A. JOHN VOELKER
Acting 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. 2006AP576

Cir. Ct. No. 2004CV2890

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JAY GILKAY AND SARAH GILKAY,

PLAINTIFFS-RESPONDENTS,

v.

COMMUNITY ROOFING, INC.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

v.

CAROL SONDAG,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Community Roofing, Inc. (Community Roofing) appeals from a judgment entered against it for, among other matters, violating Wisconsin’s Home Improvement Act, WIS. ADMIN. CODE § ATCP 110 (Oct. 2004). The judgment included \$23,821.50 in attorney’s fees. The issues raised in this appeal are: (1) who prevailed for the purposes of awarding attorney’s fees; and (2) was the amount of attorney’s fees properly determined? Because Jay and Sarah Gilkay prevailed, we affirm on that issue, but because the amount of attorney’s fees awarded was improperly determined, we reverse that part of the judgment and, while retaining jurisdiction, remand for an appropriate determination.

BACKGROUND

¶2 The Gilkays filed this lawsuit to recover damages arising from Community Roofing’s alleged violations of Wisconsin’s Home Improvement Act, from Community Roofing’s alleged negligence in installing the roof on their residence and for breach of contract. Community Roofing counterclaimed, alleging that the Gilkays failed to perform on the contract by withholding the final payment. The case was presented to a jury. The verdict form contained the following questions and answers:

QUESTION NO. 1: Did Community Roofing, Inc. (hereinafter “Community Roofing”) substitute products or material without prior written consent of Jay and Sarah Gilkay?

ANSWER: Yes.

QUESTION NO. 2: If you answered Question No. 1 “yes,” then answer this question: Was said substitution a cause of damages to plaintiffs, Jay and Sarah Gilkay?

ANSWER: No.

QUESTION NO. 3: Did Community Roofing make any false, deceptive or misleading representations in order to induce the Plaintiffs ... to obtain or keep any payment under the contract?

ANSWER: Yes.

QUESTION NO. 4: If you answered Question No. 3 “yes,” then answer this question: Was such false, deceptive or misleading representation a cause of damage to Jay and Sarah Gilkay?

ANSWER: Yes.

QUESTION NO. 5: Was Community Roofing negligent with respect to the installation and construction of the roof of ... [the] [h]ome?

ANSWER: Yes.

QUESTION NO. 6: If you answered Question No. 5 “yes,” then answer this question: Was such negligence a cause of damage to Jay and Sarah Gilkay?

ANSWER: Yes.

QUESTION NO. 7: If you answered Question Nos. 2 or 4 “yes,” what sum of money would fairly and reasonably compensate Jay and Sarah Gilkay for their loss suffered because of said actions?

ANSWER: \$500.00.

QUESTION NO. 8: Regardless of how you answered any previous questions, you must answer this question: What sum of money, if any, will fairly and reasonably compensate Jay and Sarah Gilkay for damages resulting from the negligence of Community Roofing?

ANSWER: \$3560.00.

QUESTION NO. 9: Did Community Roofing substantially perform its contract with Jay and Sarah Gilkay?

ANSWER: Yes.

QUESTION NO. 10: If you answered Question No. 9 “yes,” then answer this question: How much money is

owing for non-payment to Community Roofing as damages for its performance?

ANSWER: \$3351.00.

QUESTION NO. 11: If you answered Question No. 9 “no,” then answer this question: Do you believe that a benefit was conferred upon the Gilkays by Community Roofing in the installation of the roof?

ANSWER: [Blank]

QUESTION NO. 12: Did the Gilkays accept and retain the benefit conferred upon them by Community Roofing in installing the new roof such that it is inequitable for them to retain it without paying the value thereof?

ANSWER: Yes.

QUESTION NO. 13: If you answered Question No. 12 “yes,” then answer the following: What is the value of this benefit conferred upon the Gilkays?

ANSWER: \$10,935.00.

¶3 As pertinent to this appeal, in motions after verdict, the trial court concluded that the Gilkays had prevailed in their misrepresentation claim. As a consequence, in assessing attorney’s fees as provided in WIS. STAT. § 100.20(5) (2003-04),¹ the trial court initially determined that \$47,643 was an appropriate calculated amount for attorney’s fees, but the court then halved that sum based upon the fact that the Gilkays “did not prevail on two of the four claims that were before the jury.” It is because of these two post-verdict decisions that Community Roofing appeals.

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

ANALYSIS

¶4 Community Roofing first contends it is not subject to the assessment of “reasonable attorney fees” for violations of the Home Improvement Act (“Act”) because the total sum of the jury’s verdict answers demonstrates that the Gilkays did not “prevail” in their claims against Community Roofing. Community Roofing, in part, reasons as follows. In their claim, the Gilkays sought in excess of \$20,000 in damages for violation of the Act and for negligent installation. The jury awarded the Gilkays only \$500 as a result of misrepresentations under the Act. The jury also awarded the Gilkays \$3560 for negligence on the part of Community Roofing. The jury, however, found that the Gilkays owed Community Roofing a remaining \$3351 on the improvement contract and it had conferred a benefit upon the Gilkays of \$10,935. Thus, Community Roofing concludes the Gilkays did not prevail and attorney’s fees are not warranted.

¶5 Next, Community Roofing contends that even if it is assumed that the Gilkays “prevailed,” the trial court applied an erroneous methodology in assessing attorney’s fees. We shall address each issue in turn.

STANDARDS OF REVIEW AND APPLICABLE LAW

¶6 When construing a statute, in this instance WIS. STAT. § 100.20(5), we do so independent of the trial court’s interpretation, benefiting however, when appropriate, from the analysis performed by the trial court. The principle objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. We ascertain that intent by examining “the language of the statute and the scope, history, context, subject matter and purpose of the statute.” *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 979, 542 N.W.2d 148 (1996). We also acknowledge “that remedial statutes should be liberally construed to

suppress the mischief and advance the remedy that the statute [is] intended to afford.” *Id.*

¶7 We review an award of attorney’s fees by examining whether the trial court properly exercised its discretion in determining the fees. Generally, we uphold the trial court’s determination giving deference to the trial court’s greater familiarity with the local billing norms and its opportunity to have witnessed firsthand the quality of the representation. We do not substitute our judgment but examine the court’s explanation to determine if it employed a logical rationale based upon appropriate legal principles and the facts of record. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58.

A. WHO PREVAILED?

¶8 As set forth above, Community Roofing claims that when one takes into account the net effect of the jury’s verdict, the Gilkays could not have prevailed. We disagree for two reasons.

¶9 First, Community Roofing, in effect, bases its contention on the premise that only after a balancing of the results of the claims versus the results of the counterclaims, if the claimant economically predominates, is it entitled to an award of attorney’s fees. This is a misreading of WIS. STAT. § 100.20(5).

¶10 The jury, without question, found that Community Roofing made misleading representations to the Gilkays contrary to WIS. ADMIN. CODE § ATCP 110.02(11), which was enacted pursuant to WIS. STAT § 100.20. Section 100.20(5) provides: “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.” (Emphasis added.)

¶11 From this reading, it is unquestionably clear that the correct standard for review is whether a claimant suffered a “pecuniary loss because of a violation” of the Act. The jury determined that the Gilkays suffered a pecuniary loss of \$500 because of misrepresentations. This constitutes a violation of the Act. Suffice it to say, if it is proven that a claimant suffered a pecuniary loss, the claimant prevailed.

¶12 Second, in *Paulik v. Coombs*, 120 Wis. 2d 431, 438, 355 N.W.2d 357 (Ct. App. 1984), a case in which a landlord was found to have violated the administrative code, but was successful on a counterclaim producing damages that exceeded the tenant's statutory damages under WIS. STAT. § 100.20(5), we held that the tenants were entitled to double damages and reasonable attorney's fees, even though the tenants were unsuccessful in defending against the landlord's counterclaim. The basis for our decision was: “To require the tenant to also prevail on any claims brought by the landlord over and above the tenant's damages claim would undercut the purpose of this statute” *Paulik*, 120 Wis. 2d at 438. The Gilkays' procedural posture stands on all fours with that of the *Paulik* claimant, and we hereby adopt the same rationale in rejecting Community Roofing's claim. We affirm that part of the judgment wherein the trial court ruled the Gilkays prevailed. Thus, they are entitled to double damages and reasonable attorney's fees.

B. AWARD OF REASONABLE ATTORNEY'S FEES

¶13 Community Roofing next claims that the trial court erroneously exercised its discretion when it awarded attorney's fees in the amount of \$23,821.50 to the Gilkays.

¶14 In *Kolupar*, our supreme court adopted the United States Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), which set forth a "lodestar methodology" for measuring the award of attorney's fees.² *Kolupar*, 275 Wis. 2d 1, ¶¶24-31. In essence, the methodology consists of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Significantly, our supreme court, adopting language from *Hensley*, 461 U.S. at 434, counsels a court not to end its analysis after arriving at the lodestar figure. *Kolupar*, 275 Wis. 2d 1, ¶29. The calculation may then be modified upward or downward by any one of the factors in SCR 20:1.5(a) (2005) that had not been incorporated in the initial computation and which in the court's discretion is relevant. *Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, ¶39, 281 Wis. 2d 66, 697 N.W.2d 73. With this model of analysis in mind, we now review

² This methodology, without limitations, consists of the following factors to be considered: (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; (7) the experience, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. SCR 20:1.5(a). The factors in SCR 20:1.5(a)(1), (3), and (7) essentially are subsumed in the determination of a reasonable number of hours and a reasonable rate. *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶40, 275 Wis. 2d 171, 684 N.W.2d 141.

the oral decision of the trial court following the Gilkays' request to determine reasonable attorney's fees.

Now, in terms of the Court's determination as to what fees to award, it appears to me that the correct methodology is the Lodestar Methodology, but there is going to be some adjustment in that given the overall picture of this case and this verdict.

So in terms of the question as to whether or not the Gilkays are entitled to attorney fees, and I'm ruling that they are entitled to attorney fees, in terms of the issue of the \$500 and the double damages, they are entitled to double damages on the 500. So that in that respect, they'll receive their \$1000.

Now, in terms of the amount of the attorney's fees, I reviewed the submissions, and I have to agree with you, Mr. Ramirez, there are some things about the submissions that it's difficult for me to figure out in terms of the time spent. But in terms of the fees that were at least established, it appears that the rates are reasonable for the various parties that were involved. Mr. Wagner's partner \$200 an hour, that appears reasonable. It goes down from there based on, I'm assuming, his experience, and there was substantial work done by law clerks at a much, or at least at a reduced rate. So in that sense, the rates themselves appear to be reasonable.

The amount of time, based on the submissions in terms of the hours that were spent, in terms of that aspect of it, I have to say that, as I indicated, I do have concerns that in many respects, this case may have been either -- I'm reluctant to use the phrase "over-trying," but at this point, I'm at a loss for words. There were many aspects of the case that appear to me, based on the hours that were spent, that it could reasonably have been done in less time. But, you know, it's only speculation on my part at this point without the precise detail or explanation as to why things took as long as they did; for example, even you pointing out the time spent drafting the complaint. There was time in terms of filing a motion or drafting motions or researching motions that were fairly routine.

With that said, on the attorney's fees, I'm inclined to first rule that having ruled that the rates were reasonable, I don't see any basis in which to strike any of the particular entries in terms of the hours that were spent. And so I'm

accepting that the amount of time that was spent, multiplied by the various rates from the standpoint that I'm using in this determination, it is 47,643.

Now, logically, that doesn't sit very well with me, given the verdict because I don't think the plaintiffs prevailed on all of their claims. So therefore, I have to make an adjustment, a deduction. Even though the jury found that there was substitution of materials, they found that there was no damage. So in that sense, I don't think they prevailed on that claim. There is no dispute that there was a substitution of materials, particularly, with respect to the gutter valleys. There is no dispute on that. So I don't think you prevailed on that claim.

I also found that based on this verdict that the defendants in this matter prevailed on their claim in that the Gilkays -- In essence, that the defendants substantially performed the contract, but that the Gilkays received the benefit.

So, in essence, out of the four causes of action that were before the jury, the substitution of products, I feel that the plaintiff's lost. On the misrepresentation, I felt that the plaintiffs won that claim. On the negligence aspect, I feel that the plaintiffs won that claim, and then on the substantially performing of the contract, I feel that the defendants won on that claim.

MR. RAMIREZ: Your Honor, can I just

THE COURT: Well, I will hear argument, but I'm going -- I'm trying to rule and wrap this up. So is there anything you want me to hear?

MR. RAMIREZ: Yeah, if the Court is going to consider attorney fees, then I think by statute, it can only consider the entitlement to actual reasonable attorney fees on the claims that the Court believes that the plaintiff was successful on, and those would be -- If you're looking at the 100.20, it would only be the first two claims. The negligence claim is a different standard. The Court doesn't consider -- should not consider actual reasonable attorney fees for the negligence claims. Those are awarded by statute, I think, 814.04. So we're really looking here at what are the attorney fees to prosecute this one misrepresentation claim. That would be my argument.

MR. WAGNER: And just in response, Your Honor, the Hensley case U.S. Supreme Court says: “Litigants in good faith --

THE REPORTER: Excuse me. Can you read a little slower?

THE COURT: Now, you can respond. Just slow down. Thank you. I see at times you get excited.

MR. WAGNER: I understand. Okay. In response to Mr. Ramirez, I would point out in the Hensley case, which essentially authorizes lawyers on behalf of their clients, and we had it in our reply brief, and I quote: “Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection or failure to reach grounds is not a sufficient reason for reducing a fee.”

Secondly, the Benkoski case, which involved whether or not a plaintiff in defending counterclaims should get their attorney’s fees, and Judge Nettesheim said in that case: If the claims are inextricably intertwined is the phrase that was approved by the trial court and adopted by Judge Nettesheim saying that the attorney’s fee should not be reduced based upon that. And we would indicate for both of those reasons, Mr. Ramirez’ arguments are misplaced.

Thanks.

THE COURT: In terms of the attorney’s fees, and I appreciate the arguments and the distinctions that the parties are making, and I tried to take that into account when making my determination. The issue of attorney’s fees have to be determined, and the plaintiffs are entitled to those fees. Having determined that the rate is appropriate, the Court, unfortunately, is in a position not to -- based on the submissions, not been able to say whether or not they’re reasonable in terms of the amount of hours. Although I did have concerns about the amount of hours that were put in on this case, I am awarding attorney’s fees.

The figure that I’m arriving at is a process, in essence, reducing the total amount that is being sought, the 47,000, by 50 percent. My rationale for that is that, essentially, they lost or did not prevail on two of the four claims that were before the jury, and so I feel that this is a logical and reasonable approach to arriving at what I feel is a reasonable attorney’s fee in this matter, and that’s with respect to the Gilkays, the Gilkays’ aspect of the case. I

don't feel that any fees are appropriate with respect to Mrs. Sondag based on my previous ruling. So the amount that I'm going to award as attorney's fees is 23,821.50. Okay.

MR. WAGNER: I believe, Your Honor, that would conclude the plaintiff and third party defendant's motions.

¶15 From our review, Community Roofing does not contest the use of the lodestar methodology nor the attorney's rates as employed by the trial court. Rather, it challenges the trial court's application of the recognized relevant factors of adjustment to the lodestar calculation and, more specifically, the factor of "the amount involved and the results obtained."

¶16 Community Roofing, citing *Kolupar*, which adopts language from *Hensley*, teaches us that "a court ought not end its analysis after arriving at [the so-called lodestar figure]. A court may adjust the lodestar figure up or down to account for any remaining ... factors not embodied in the lodestar calculation." *Kolupar*, 275 Wis. 2d 1, ¶29.

¶17 Here, as in *Kolupar*, the primary SCR 20:1.5 factor on which the trial court had objective reliable information based on the answers to the special verdict questions, was paragraph (a)(4) "the amount involved and the results obtained." *Kolupar*, 275 Wis. 2d 1, ¶43. Adopting additional language from the *Hensley* court, the *Kolupar* court queried: "[D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" It then stated: "In evaluating this factor ... 'the most critical factor is the degree of success obtained.'" *Id.*, ¶43 (citation omitted). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.*

¶18 In reviewing the trial court's oral decision, we learn that it readily acknowledged the propriety of using the lodestar methodology and that other relevant factors may cause an adjustment in the calculation of reasonable attorney's fees.

¶19 It noted that the special verdict finding of \$500 warranted the imposition of double damages for the Act violation and assessment of reasonable attorney's fees. It reviewed the Gilkays' counsel's detailed nine and one-quarter page billing summary and found that the rate for fees was reasonable. When it came to the time spent in preparation, it expressed reservation about the time spent on fairly routine matters.

¶20 In reviewing the verdict in its entirety, it found that the Gilkays lost on their claims for substitution of product and breach of contract, but prevailed on the misrepresentation and negligence claim. Because of this result, the court concluded that a downward adjustment was warranted.

¶21 At this juncture of the decision-making process, the court was interrupted by Community Roofing's counsel who argued to the court that reasonable attorney's fees under WIS. STAT. § 100.20(5) ought only be awarded for any Act violations. Thus, reasonable fees could not be awarded for services rendered on the negligence claim; fees which are governed by WIS. STAT. § 814.04(1).³

³ WISCONSIN STAT. § 814.04(1) provides, as material:

(continued)

¶22 The Gilkays’ counsel took issue with this position for two reasons. First, under the *Hensley* decision, the court stated: “Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.”⁴ *Id.*, 461 U.S. at 435.

¶23 Second, counsel, citing *Benkoski v. Flood*, 2001 WI App 84, ¶39, 242 Wis. 2d 652, 626 N.W.2d 851, argued that a trial court does not erroneously exercise its discretion in awarding a claimant his or her attorney’s fees incurred in the defense of a defendant’s counterclaim where the counterclaim is “inextricably intertwined” with the prosecution of the plaintiff’s claim.

¶24 In response, the court thanked counsel for the nature of their arguments and the distinctions made, noting that it would keep them in mind. The court then went on, and we repeat as stated above, the following:

Having determined that the rate is appropriate, the Court, unfortunately, is in a position not to -- based on the submissions, not been able to say whether or not they’re reasonable in terms of the amount of hours. Although I did have concerns about the amount of hours that were put in on this case, I am awarding attorney’s fees.

ATTORNEY FEES. (a) When the amount recovered or the value of the property involved is greater than the maximum amount specified in s. 799.01 (1) (d), attorney fees shall be \$500; when it is equal to or less than the maximum amount specified in s. 799.01 (1) (d), but is \$1,000 or more, attorney fees shall be \$300; when it is less than \$1,000, attorney fees shall be \$100. In all other cases in which there is no amount recovered or that do not involve property, attorney fees shall be \$300.

⁴ In using this quotation, the Gilkays neglected to include the last sentence of the paragraph which reads: “The result is what matters.”

The figure that I'm arriving at is a process, in essence, reducing the total amount ... the 47,000, by 50 percent. My rationale for that is that, essentially, they lost or did not prevail on two of the four claims that were before the jury, and so I feel that is a logical and reasonable approach to arriving at what I feel is a reasonable attorney's fee in this matter

¶25 Because of undisputed facts of record, the rationale for determining the attorney's fees utilized by the trial court raises several unanswered questions.

First, as enunciated in *Hensley*:

It remains important ... to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the ... court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.

Id., 461 U.S. at 437. Second, the difference in calculating an award for attorney's fees in a civil negligence action and for an Act violation is remarkably different and was not addressed by the trial court.

¶26 Third, the trial court failed to address the "inextricably intertwined" doctrine as articulated in *Benkoski* to determine whether fees attributable to the Gilkays' defense against the claims of Community Roofing were reasonably determined and assessed.

¶27 Last, because of these unanswered questions and the trial court's own observations about its inability to determine the reasonableness of the amount of hours consumed in the prosecution of the Gilkays' claims and defenses, the question arises, did the trial court appropriately apply the second prong of the lodestar methodology?

¶28 Because the “extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of attorney’s fees” and because “where the plaintiff achieved only limited success, the ... court should award only that amount of fees that is reasonable in relation to the results obtained,” *Hensley*, 461 U.S. at 440, we are unable to conclude whether discretion was exercised under the principles of law applicable to such a determination. Consequently, we retain jurisdiction, but we remand this issue to the trial court to examine the questions heretofore raised in view of the record it has before it and to conduct further proceedings if deemed warranted. On remand, the trial court shall conduct further proceedings necessary to answer the questions raised by this court, set forth its analysis of the lodestar methodology, and render a decision as to what amount of attorney’s fees is appropriate.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.

