COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2610

Cir. Ct. Nos. 2004CV7635
2004CV7789

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

RHI HOLDINGS, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WALLACE ENTERPRISES, INC. AND WEST MILWAUKEE RETAIL LIMITED PARTNERSHIP,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

WASTE MANAGEMENT OF WISCONSIN, INC.,

DEFENDANT.

WASTE MANAGEMENT OF WISCONSIN, INC.,

PLAINTIFF,

V.

WEST MILWAUKEE RETAIL LIMITED PARTNERSHIP,

DEFENDANT-RESPONDENT,

RHI HOLDINGS, INC.,

DEFENDANT-APPELLANT,

BANK OF NORTH GEORGIA,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Judgment affirmed; order affirmed in part and reversed in part and cause remanded with directions.*

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

¶1 WEDEMEYER, J. RHI Holdings, Inc. appeals from a final order and judgment of the trial court in favor of Wallace Enterprises, Inc. and West Milwaukee Retail Limited Partnership (collectively "Wallace"), dismissing its claims for declaratory judgment, breach of contract, and accounting, and granting Wallace's motion for attorney's fees. Wallace cross-appeals from an order and judgment in which the trial court denied its full claim for attorney's fees and costs in the amount of $239,021.49, instead awarding only $116,600.86 of the requested amount.

¶2 On the appeal, RHI claims: (1) Wallace's motion was brought under the wrong statute and was premature; (2) the trial court erred in ruling that RHI needed an expert witness to prevail; (3) Wallace wrongly retained $166,310 RHI paid; and (4) Wallace is not entitled to attorney's fees. On the cross-appeal, Wallace claims the trial court erroneously exercised its discretion when it reduced the awarded attorney's fees by half. Because RHI did not obtain the required expert testimony necessary to sustain its burden of proof, the trial court did not err

in dismissing its complaint. We affirm on the appeal. Because the trial court did not provide a sufficient explanation justifying halving the attorney's fee award, we reverse and remand on the cross-appeal for further proceedings consistent with this opinion.

BACKGROUND

¶3 The genesis of this appeal was the purchase and sales agreement executed on May 3, 2002, between RHI as the seller and Wallace, the buyer, of an undeveloped parcel of real estate located in West Milwaukee, Wisconsin. Wallace planned to develop a retail-shopping complex on the site. Because the property was impacted by contaminated soil, Wallace asked RHI to amend the Purchase Agreement to address this issue. On February 12, 2003, the parties entered into an "Environmental Remediation and Indemnity Agreement," which is the subject of this appeal. The agreement consists of seven sections introduced by a two-paragraph "RECITAL."

The RECITAL states in pertinent part:

> Due to environmental concerns relating to the Property and in order to induce Purchaser to close on the purchase of the Property, Seller has agreed to remediate Environmental Existing Contamination and indemnify Purchaser from and against Environmental Matters under the terms and conditions contained in this agreement.

Section 2 of the Remediation Agreement, entitled "SELLER'S REMEDIATION OF ENVIRONMENTAL EXISTING CONTAMINATION," in relevant part provides:

> Seller hereby covenants to retain from the date hereof responsibility for and diligently commence and complete any and all Environmental Remedial Action required by the Wisconsin Department of Natural Resources (WDNR) for such Environmental Existing Contamination as is required

> by the WDNR to issue, and until such time as the WDNR has issued, a voluntary party liability exemption (VPLE) to both Seller and Purchaser and has granted closure to the Property. Seller shall diligently perform any such Environmental Remedial Action in a good, safe and workmanlike manner, and in compliance with all Environmental Laws. Seller shall promptly pay all costs, expenses and charges, for such Environmental Remediation Action and VPLEs for Seller and Purchaser.

Section 3, entitled "INDEMNIFICATIONS," states in pertinent part:

> By Seller. Seller agrees to indemnify and hold harmless Purchaser from and against any and all claims, losses, demands, costs (including but not limited to reasonable attorney's fees), penalties, fine, expenses, liabilities, encumbrances, liens or damages (including by not limited to all costs of investigation and remediation), except consequential damages, arising directly from or in connection with any environmental condition at the Property resulting from any release, spill, discharge or deposit of Environmental Hazardous Materials from, on, at or under the Property which has occurred prior to the date of Closing or is otherwise the result of Seller's or its agents' acts, errors or omissions caused during Seller's remediation of the Property.

¶4 Prior to the execution of this Remediation Agreement, it was known by the parties that the property was contaminated. Between 1989 and 2002, six environmental studies had been conducted to determine the scope of the problem. To implement this Remediation Agreement, RHI hired Gannett Fleming as its environmental consultant. In addition to testing the soil of the property, and providing environmental reports, it also formulated a two-pronged plan: a conceptual Remedial Plan and a Soil Management Plan. The latter consists of twenty pages whose contents play a significant role in the disposition of this appeal.

¶5 By the terms of the February 13, 2003 document, RHI agreed to take whatever environmental remedial action was required by the WDNR until the

WDNR issued a voluntary party liability exemption to both itself and Wallace, so that Wallace could proceed with the development. The existence of contamination was not in doubt. RHI's environmental consultant readily acknowledged that remediation of such contamination was subject to the approved terms and conditions of the WDNR.

¶6 The dispute here involved determining which party was responsible for some of the costs attributed to the removal and disposal of certain quantities of soil from the property. The dispute was precipitated by Wallace's demand to RHI for reimbursements of monies that Wallace expended to remove and dispose of "allegedly" contaminated soil.

¶7 RHI questioned the justification for the request and responded by filing suit against Wallace. RHI's complaint contained three counts. Count I sought a declaratory judgment that under the agreements between the parties, RHI should not be required to pay any outstanding soil disposal costs, and that Wallace should be ordered to return $166,310 which RHI had already paid to Wallace. Count II alleged that Wallace breached the contracts it entered into with RHI by improperly charging RHI for soil disposal. Count III sought an accounting to provide an explanation as to how Wallace spent the $166,310 RHI had paid it.

¶8 This dispute was scheduled for a bench trial. A series of adjournments were requested by RHI to comply with a scheduling order to list any expert witnesses it might call. RHI failed to provide the required list. Wallace moved to dismiss the complaint. The motion was based on the contention that RHI could not prevail on its claims without expert testimony showing that non-contaminated soil had been excavated, causing overcharges. The court granted the

motion to dismiss and subsequently awarded Wallace $116,600.86, which was one-half of its requested attorney's fees and costs. Both parties now appeal.

ANALYSIS

A. Appeal.

¶9 RHI first contends that the trial court erred in dismissing its complaint for failure to timely name an expert witness to support its causes of action for declaratory judgment, breach of contract, and for an accounting.

STANDARD OF REVIEW AND APPLICABLE LAW

¶10 A "trial court has both the inherent power and statutory authority to sanction parties for failure to comply with procedural statutes or rules and for failure to obey court orders." ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 446, 482 N.W.2d 134 (Ct. App. 1992); *see also* WIS. STAT. §§ 802.10(3)(d), 805.03 and 804.12(2)(a). "If [required] expert testimony is lacking, the case may be dismissed for insufficient proof." ***Kujawski v. Arbor View Health Care Ctr.***, 132 Wis. 2d 178, 181, 389 N.W.2d 831 (Ct. App. 1986), *rev'd on other grounds*, 139 Wis. 2d 455, 407 N.W.2d 249 (1987). "Whether expert testimony is necessary in a given situation is a question of law, which we decide" independently. ***Grace v. Grace***, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995).

¶11 If a trial court fails to adequately explain its reasoning in exercising its discretion, this court should independently review the record for a basis to uphold the trial court's ruling. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). If a trial court reaches the proper result for the wrong reason, it will be affirmed. If a second, error-free trial would lead to the same result, the first decision should be affirmed. "An appellate court may sustain a lower court's

holding on a theory or on reasoning not presented to the lower court." ***State v. Patricia A.M.***, 176 Wis. 2d 542, 549, 500 N.W.2d 289 (1993) (citation omitted).

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¶12 As part of pre-trial preparation, the record reflects that the trial court executed its original scheduling order December 1, 2004. By that order, RHI was to submit the names and addresses of any expert witnesses it anticipated calling to testify as well as their reports on or before May 2, 2005. RHI failed to meet this deadline and was granted an extension to August 1, 2005. It failed to meet this deadline and received another extension until October 1, 2005. RHI missed this deadline as well. By letter dated November 1, 2005, RHI disclosed a witness list, but named no expert witnesses. Additionally, RHI informed Wallace that no expert witness names or reports would be forthcoming.

¶13 On November 16, 2005, because RHI failed to name any expert witnesses, Wallace filed a motion requesting that RHI be barred from calling any expert witnesses in rebuttal or otherwise. The basis for Wallace's motion was that allowing RHI to name experts at that late date would result in very little time for it to conduct discovery and to prepare any challenge to any expert testimony or report before the close of the discovery deadline and the necessity to submit a pre-trial report. In addition, Wallace argued it would not have sufficient time to submit any dispositive motions relating to any experts RHI might propose at the eleventh hour, and to allow RHI to conduct the prosecution of its claims in such a fashion would severely prejudice Wallace's defense. The trial court granted Wallace's motion as a sanction against RHI. Based on the above related sequence of procedural events and their consequences, we conclude that the trial court did not erroneously exercise its discretion in granting this motion.

¶14 Subsequently, on January 25, 2006, Wallace moved to dismiss RHI's complaint in its entirety because RHI lacked the "ability to provide sufficient evidence through expert testimony to meet the burden of proof as to all of its causes of action." After two hearings, the trial court granted Wallace's motion essentially because RHI was unable to show, by required expert testimony, the necessary underlying support for its claims that non-contaminated soil had been excavated from the site and hauled to a licensed landfill.

¶15 From a careful reading of RHI's appellate brief, we conclude that RHI has attempted to create a distinction between contaminated soils, which had to be excavated and removed from the property to be delivered to a properly licensed landfill, and soils that were not suited to support building construction; the assumption being that the latter were non-contaminated. This assumption itself is a false hypothesis, and for reasons to be stated, lacks any validity to support the intended consequences of the RHI distinction. Further, RHI's claimed distinction is not supported by the record.

¶16 A reasonable reading of the Remediation Agreement requires the conclusion that RHI was responsible for all the costs reasonably associated with remedial efforts to obtain a voluntary party liability exemption for both RHI and Wallace from the WDNR. To discharge these responsibilities, RHI hired Gannett Fleming as its environmental consultant. Gannett crafted a Soil Management Plan that established the specifications to guide contractors for the re-use and disposal of contaminated soils on the property. The contractors were to handle all soils in accordance with the Soil Management Plan. RHI had direct responsibility for remediating two areas of the property that are not germane to this appeal. The balance of the property was the direct responsibility of Wallace. Regardless of

who had direct responsibility of remediating certain areas, by the clear terms of the Remediation Agreement, RHI was responsible for the cost of the work.

¶17 The Soil Management Plan established the number of elements construed to be contaminants, such as polychlorinated biphenyls (PCBs), lead, and arsenicpolycyctic arommalic hydrocarbons (PAHs), as well as foundry sand, peat, and other organic soils unsuited for construction purposes. The Soil Management Plan required that:

> The peat and organic soil excavated from these areas will either be reused on site in green spaces in the same general area from which they were excavated or taken off site for disposal. Because most of the organic soils contain low concentrations of contaminants, the soils taken off site will need to be disposed at a landfill as a special waste.

Section 4.0 of the Soil Management Plan, entitled "Final Remedial Outcome" concluded:

> Because contamination in one form or another was encountered throughout the site during the series of site investigations, we do not believe that clean closure without restrictions at this site is technically feasible or economically practical …. Portions of the property where only low concentrations of contaminants in the soil … will be submitted for closure once the highly-contaminated soil is removed….

Based on the analysis by the environmental consultant as set forth in the Soil Management Plan, it was reasonable to conclude that the site was predominantly impacted by contaminants of one form or another.

¶18 To arrive at a resolution of the dispute before us, it is important to bear in mind what the Soil Management Plan does not include. It does not contain any estimate of soil quantities. Nor does it require a sampling or analysis plan to investigate or segregate the peat and organic material based upon chemical

concentrations either during or after excavation. No distinction is made between contaminated versus non-contaminated soil. No mention is made of clear or non-contaminated soil—the determination of which, the excavation of which, and the cost for which were not included within the terms of the approved plan. As succinctly stated in the Wallace brief: "there is no discussion in the Soil Management Plan about low-level contaminated soil versus clean soils." The disposition of clean soils was not in the contemplation of the seller or the buyer. Otherwise, it would have been stated. Therefore, contrary to RHI's contention, there is no basis to impose the obligation to separate soil types upon Wallace.

¶19 To succeed on its claims, therefore, the burden fell on RHI to prove that a portion of the excavated and removed soils was not contaminated. Common sense dictates that when non-contaminated soil had not been detected on a site in seven investigations, proof of the existence of non-contaminated soil at the same site requires specialized knowledge for testing and analysis far beyond the ordinary training and intelligence of a lay jury. The average juror is not going to be able to look at a soil sample and determine whether it is clean or if it is contaminated by PCBs or other chemical contaminants.

¶20 The trial court ruled that it was a plausible inference that all the soil excavated and removed from the site to the landfill was contaminated. The record supports that inference. The Soil Management Plan supports that inference. Accordingly, the trial court did not err in so ruling. Consequently, we conclude, as a matter of law, that the trial court did not err in deciding that RHI could not succeed without the necessity of expert testimony to support its basic claim. Absent the required expert testimony, proof of the presence of non-contaminated soils was impossible. Hence, each and every argument raised by RHI that depended upon proof of the presence of non-contaminated soil must fail.

¶21 As a subset of its accounting claim, RHI asserted that the trial court erred when it dismissed its claim of an $84,000 overpayment to Wallace for soil disposal charges. It claims it was deprived of the opportunity to conduct discovery on the accounting issue to ensure that payments it made to Wallace were actually incurred and passed on to the company that did the soil-disposal work. The record belies this assertion.

¶22 RHI commenced this litigation in September 2004. It served its discovery request in March 2005. Wallace responded to the request by informing RHI's counsel that it could come to Wallace's counsel's office to inspect and copy the documents it desired. Instead, in June 2005, counsel for RHI requested counsel for Wallace to send him the documents. In July 2005, counsel for Wallace complied. In the meantime, the trial court had set a discovery deadline of March 16, 2006. As of that deadline, RHI had conducted no further discovery on the accounting issue. Further, as of the hearing date to consider dismissal of the accounting claim, RHI had not conducted any further discovery nor requested any additional depositions. In addition, RHI sought no extensions of the scheduling deadlines. In dismissing RHI's accounting claim, the trial court did not deprive it of the opportunity for discovery. Rather, the record demonstrates that RHI waived any right to discovery by its own inaction.

¶23 At the same time that the trial court dismissed the accounting claim, it considered whether RHI was responsible for Wallace's other remediation costs. The record reflects the trial court took into account the likelihood that RHI might have been overcharged, but it also found that there were other costs attributed to remediation under the terms of the Soil Management Plan, and the clearly stated provisions of the Remediation Agreement warranted balancing the equities. In engaging in this exercise, the trial court determined that based upon the

submissions, the costs in dispute were associated with the required remediation. In reviewing the full record before the trial court, under its inherent equitable powers, its determination was not clearly erroneous. ***Wisconsin Mut. Ins. Co. v. Manson***, 24 Wis. 2d 673, 677, 130 N.W.2d 182 (1964); ***Mattek v. Hoffmann***, 272 Wis. 503, 508, 76 N.W.2d 300 (1956).[1]

B. Cross-Appeal.

¶24 Wallace's cross-appeal is from a final order and judgment entered September 6, 2006. A part of this final judgment is an order dated July 26, 2006, awarding Wallace only one-half of the requested attorney's fees incurred in this litigation. Wallace challenges this decision.

STANDARD OF REVIEW AND APPLICABLE LAW

¶25 The term "discretion" contemplates an exercise of judicial judgment based on three factors: (1) the facts of record; (2) logic; and (3) the application of proper legal standards. ***Shuput v. Lauer***, 109 Wis. 2d 164, 177-78, 325 N.W.2d 321 (1982). Where the court has undertaken "a reasonable inquiry and examination of the facts as the basis of its decision" and has made a "reasoned

[1] RHI's final claim was that the trial court should not have awarded attorney's fees. This argument is based on its contentions that the trial court erred and its belief that we will agree with it and reverse the trial court's ruling. Because we are affirming the trial court, RHI's claim that attorney's fees should not have been awarded fails. We are further not convinced that the lack of any affirmative damages renders the attorney's fees award erroneous. The language of the Remediation Agreement clearly states that: "If either party … incurs any costs (including reasonable attorney's fees and court costs) to collect and enforce the obligations hereunder of the other party …" then attorney's fees and costs, including appeals should be paid. In defending the lawsuit by RHI, Wallace was enforcing its rights under the contract. Wallace was the prevailing party. Accordingly, Wallace is entitled to reasonable attorney's fees and court costs, including those incurred in this appeal. *See generally* ***Borreson v. Yunto***, 2006 WI App 63, 292 Wis. 2d 231, 713 N.W.2d 656.

application of the appropriate legal standard to the relevant facts in the case," it has properly exercised its discretion and we will affirm if there is a reasonable basis for its determination. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). When a trial court awards attorney fees, the amount of the award is left to the discretion of the court. ***First Wis. Nat'l Bank v. Nicolaou***, 113 Wis. 2d 524, 537, 335 N.W.2d 390 (1983). We give deference to the trial court's decision because it is familiar with local billing norms and will likely have witnessed first-hand the quality of service rendered by counsel. Thus, we do not substitute our judgment for the judgment of the trial court, but instead probe the explanation of the trial court to determine whether it applied a logical rationale based on the appropriate legal principles and facts of record. ***Hughes v. Chrysler Motors Corp.***, 197 Wis. 2d 973, 988, 542 N.W.2d 148 (1996).

¶26 In arriving at the appropriate legal principles, our supreme court has endorsed the following factors set out in SCR 20:1.5(a) to assist courts in determining or evaluating attorney's fees:

> (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 or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Kolupar v. Wilde Pontiac Cadillac, Inc., 2004 WI 112, ¶¶25-27, 275 Wis. 2d 1, 683 N.W.2d 58.

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¶27 In its written opinion, the trial court correctly set forth the methodology to be employed in determining the reasonableness of attorney's fees. The court is to multiply the reasonable number of hours billed by a reasonable hourly rate. As characterized in ***Kolupar***, the result is denominated the "lodestar" figure, which may be reduced or increased after the SCR factors are applied. ***Kolupar***, 275 Wis. 2d 1, ¶¶28-30.

¶28 In reviewing the trial court's calculation, at the very outset, we note an error in determining the lodestar amount. The trial court determined: "To date, Wallace's attorney's fees … total $235,636.25 ($3510.00 of that total was charged by the law firm of Cook & Franke, for its previous representation of Wallace.)." The record, however, indicates that this was incorrect. The Cook & Franke bill was incurred either before the Mawicke law firm was retained by Wallace or in the transition between the law firms. As a result, the Cook & Franke fees referred to were not included in the $235,636.25 figure. This is a mistake of fact and must be adjusted.

¶29 Initiating its analysis, the trial court determined that the amount of the fees charged should be reduced for the duplicative charges incurred on eleven instances by the attendance of two lawyers from the Mawicke law firm at the same

deposition or document production meetings. This resulted in a $9205.00 reduction, which we conclude was a reasonable determination, and is affirmed.

¶30 The trial court then began the process of applying the relevant factors set forth in SCR 20:1.5. The trial court found that a number of the factors were not relevant to affecting the lodestar amount; i.e., time constraints put upon counsel by the client; the experience, reputation and ability of counsel, and giving up opportunities to handle other legal work.

¶31 It first considered subparagraph (a)(1), "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." SCR 20:1.5. It concluded:

> The legal issues presented in this case were not any more complicated than the Court's other cases. Despite this fact, there was extensive briefing on the issues presented. Moreover, the conduct of the parties during the course of this litigation did not suggest to the Court that efforts were made to resolve issues before turning to the Court for intervention. For these reasons, the attorneys fees award will be reduced.

Second, applying subparagraph (a)(3), it found the hourly fee rate to be reasonable. Third, under sub. (4), it found that the total amount of the calculated fees in excess of $200,000, where there was no actual monetary damages to be excessive; thereby requiring reduction. Fourth, under sub. (6), it found that the two-year period of rendering legal services weighed favorably for determining fees. Last, under sub. (8), it found that the fee was fixed by the terms of the Remediation Agreement and that rate was reasonable.

¶32 The trial court then reduced its computed lodestar total by the duplicative charge of $9205.00 to arrive at a figure of $226,431.25. It then halved

that number to $113,215.62. It then added costs of $3,385.24 for a total award of $116,600.86.

¶33 The expressed rationale for the reduction is stated in the last paragraph of the trial court's written decision: "(1) the relatively straightforward nature of the legal issue involved; (2) the fact that Wallace did not seek (nor were they awarded) affirmative damages in the case; and (3) that most of the complications in the case were caused by the parties themselves." Earlier in this opinion, however, there are two other reasons stated that appear to form a basis for the reduction of the award for fees: "the legal issues … were not any more complicated than the court's other cases" and "the conduct of the parties during the course of the litigation did not suggest to the court that efforts were made to resolve issues before turning to the court for intervention."

¶34 From our review of the record, we find no evidence of a logical reasoning process. There is no expression of specific facts to support the conclusory rationale stated by the trial court. This is significant because we are examining the reduction of Wallace's fee award; not that of RHI. Second, we cannot ascertain from the record how Wallace's counsel's conduct warrants a reduction of fifty percent of the fees requested. The trial court also relied on the fact that Wallace did not suffer any pecuniary loss in its decision to halve the attorney's fee award. However, pecuniary loss is not required in order to award actual attorney's fees. Rather, a party must "prevail" in the prosecution or defense of an action in order to receive an award of attorney's fees either based on contract or fee-shifting statutes. *See generally* ***Borreson v. Yunto***, 2006 WI App 63, ¶18, 292 Wis. 2d 231, 713 N.W.2d 656. Here, the agreement clearly provided for an award of attorney's fees in order to enforce the parties' rights under the agreement. It must be remembered that although Wallace did not initiate these legal

proceedings, it by necessity had to defend its rights established by the Remediation Agreement. As indicated in footnote 1 of this opinion, Wallace was the prevailing party, and thus is entitled to have its attorney's fees, incurred in defending the action paid pursuant to the agreement. The trial court erred in relying on the lack of pecuniary loss in order to justify halving the attorney's fees.

¶35 Because of the absence of a logical reasoning process, we conclude the trial court erroneously exercised its discretion. The lack of a logical reasoning process in these circumstances prevents this court from engaging in an independent review and causes us to remand to afford the trial court the opportunity to re-analyze the lodestar factors, which then must be logically connected in the trial court's final determination on the amount of attorney's fees awarded. Accordingly, we reverse the order and remand this issue to the trial court to re-determine the award of attorney's fees in Wallace's favor. Upon remand, we also order the Cook & Franke legal bill to be added to the calculation.

CONCLUSION

¶36 In sum, we affirm on the appeal and reverse and remand on the cross-appeal. Upon remand, the trial court is instructed to re-examine the amount of attorney's fees to be awarded, noting that any reductions must be explained and supported by specific factors. We also order the trial court to include the Cook & Franke bill in the lodestar figure upon remand. As noted in footnote 1, the Remediation Agreement required attorney's fees on appeal, and therefore, the trial court should also determine the amount of attorney's fees and costs that Wallace incurred in this appeal. Such shall be included in the attorney's fees award.

By the Court.—Judgment affirmed; order affirmed in part and reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.