

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 2001

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.

No. 00-3435

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**DUANE P. REUSCH, LAURA K.
REUSCH, KAREN M. NEWTON,
AND ROGER A. NEWTON,**

PLAINTIFFS-RESPONDENTS,

V.

MARK W. ROOB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed and cause remanded with directions.*

¶1 SCHUDSON, J.¹ Mark W. Roob appeals from the trial court judgment awarding Duane P. Reusch, Laura K. Reusch, Karen M. Newton, and Roger A. Newton (collectively, “the Reusches”) \$38,368.16 for damages and costs, including attorney fees. Roob argues that the trial court exceeded the scope of this court’s remand order in *Reusch v. Roob*, 2000 WI App 76, 234 Wis. 2d 270, 610 N.W.2d 168, and that the trial court erred in concluding that the Reusches sustained pecuniary loss as a result of his unfair trade practices. This court affirms, and also remands for determination of costs associated with this appeal.

¶2 The background is provided in this court’s decision in *Reusch*. Following remand, the trial court conducted a hearing, described in the small-claims court record as a “court trial,” to determine what pecuniary loss, if any, the Reusches had suffered as a result of Roob’s unfair trade practices. To make that determination, the court heard and considered evidence that had not been presented at the original small-claims trial—that on February 8, 1997, almost four months after the wedding, Karen Newton, the mother of the bride, hired Lombard Studios to photograph her daughter in her wedding gown because the Reusches had not received the wedding photographs Roob had taken. Ultimately, the court concluded that the \$504.48 payment to Lombard Studios constituted the Reusches’ pecuniary loss.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

I. SCOPE OF THE REMAND ORDER

¶3 Roob argues that the trial court erred in even considering evidence related to the Lombard Studios transaction. He contends that this court's decision in *Reusch* specifically limited the hearing on remand in a manner that precluded consideration of such evidence when it stated:

If Roob retains the photos, the Reusches are clearly entitled to the value of the photos and this amount constitutes a pecuniary loss flowing from the unfair trade practice. If, however, the Reusches receive the wedding photos that they bargained for under the first part of the contract, they cannot also recover all the money paid under that portion of the contract, and there does not appear to be any pecuniary loss. We cannot resolve this factual matter and therefore remand this matter to the trial court to determine what amount of pecuniary damages, if any, resulted from Roob's unfair trade practice.

Reusch, 2000 WI App 76 at ¶32. Thus, Roob maintains, because the trial court should have determined only whether he had retained the photos, and because, he further maintains, he had not done so, the trial court erred in concluding that the Reusches had established pecuniary loss.

¶4 The Reusches respond by pointing to this court's more expansive language at the conclusion of the decision: "We remand the matter to the trial court for a determination as to what pecuniary loss, if any, flowed from Roob's conduct." *Id.* at ¶38. They also counter that although they eventually received eighty photos from Roob, that occurred "four months after the court of appeals decision and presumably as a result thereof," and more than three years after Karen Newton had hired Lombard Studios.

¶5 On remand, a trial court "may ... determine any matters left open, and in the absence of specific directions, is generally vested with a legal discretion to take such action, not inconsistent with the order of the upper court, as seems

wise and proper under the circumstances.”” *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, ¶25, 233 Wis. 2d 428, 608 N.W.2d 679 (quoted source omitted); *see also Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984) (“The power to reopen a case for additional testimony lies in the sound discretion of the trial court,” and the trial court’s decision to do so will not be reversed “unless there was no reasonable basis for that decision.”).

¶6 Here, while Roob has pointed to portions of this court’s earlier decision that could seem to confine the trial court’s purview on remand, the Reusches are able to point to more expansive language arguably allowing for the trial court’s broader hearing. Keeping in mind the supreme court’s “preference for providing a circuit court with discretion on remand,” this court concludes that the trial court’s consideration of evidence of the Lombard Studios transaction was “not inconsistent with the order” of *Reusch*. *See Findorff*, 2000 WI 30 at ¶25.

II. PECUNIARY LOSS

¶7 Roob also argues that the trial court erred in concluding that the Reusches sustained pecuniary damages. He contends:

(1) The additional portrait [from Lombard Studios] is an entirely different product than what was ordered from Roob; (2) Karen Newton was not a party to the design session where the unfair trade practice occurred (and therefore, the fact that she did not receive prints could not have been caused by Roob’s unfair trade practice at the design session); and (3) Even if the purchase of the Lombard portrait was a reasonable “cover” [in substitution for the photos not received], the measure of pecuniary loss is the difference in price between the original contract and the cover price (the Uniform Commercial Code does not permit the buyer [to] accept the original contract goods and to then get the cover goods for free).”

¶8 Roob fails to explain how Karen Newton’s absence from the design session would undermine the Reusches’ claim. Throughout this case, the courts have viewed the four plaintiffs as having a unified interest, and Roob has not directed this court to anything in the record indicating that he ever challenged their claims based on any arguable division among them. *See* WIS. STAT. RULE 809.19(1)(e) & (3)(a) (Arguments in appellate briefs must be supported by authority and references to the record.). Similarly, Roob’s brief argument based on the Uniform Commercial Code is unclear and relatively undeveloped, *see Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider “amorphous and insufficiently developed” arguments), and he again fails to direct this court to any point at which he presented such a theory to the trial court.

¶9 Thus, this court further considers only Roob’s assertion that the Lombard Studios portrait was not a substitute for photos he had not delivered and, therefore, that it could not form the basis for a finding of pecuniary loss. He notes, among other things, that the size of the Lombard portrait was different from those the Reusches had ordered from him. He further contends that the Reusches should not be allowed to justify the Lombard transaction by arguing the urgency of obtaining substitute photos because “any delay in receiving the pictures was due to the Reusches[’] attempt to cancel a contract which the court of appeals held they had no legal right to cancel[,], and any delay in receiving the 80 prints, then, was due to litigation caused by their illegal attempt to cancel the contract.”

¶10 This court disagrees. Pecuniary loss may include “indirect or consequential damages caused by the misrepresentation in addition to or in lieu of direct damages.” *See Ollerman v. O’Rourke Co.*, 94 Wis. 2d 17, 53, 288 N.W.2d 95 (1980). Here, regardless of the status of the original contract, Roob’s unfair

trade practice consisted of withholding services he had the ability to provide. *See Reusch*, 2000 WI App 76 at ¶26 & n.4; *see also* WIS. STAT. § 100.20(1t). As a result, Karen Newton arranged for Lombard Studios to take a portrait of her daughter in her wedding gown so that, should the Reusches never receive the photos from Roob, the family would have at least some photographic semblance of a wedding portrait. The costs of doing so were “consequential damages caused by the misrepresentation” constituting Roob’s unfair trade practice. *See Ollerman*, 94 Wis. 2d at 53. Accordingly, the trial court correctly concluded that those costs were pecuniary losses to the Reusches.²

By the Court.—Judgment affirmed and cause remanded with directions.

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

² In their responsive brief on appeal, the Reusches argue that the trial court erred in denying their claim for additional pecuniary losses consisting of a \$23.00 stop-payment fee on a check they wrote to Roob, and interest “on the money Roob held for almost four years without producing photographs.” The Reusches, however, have not cross-appealed from the judgment and, therefore, this court will not address their arguments. *See* WIS. STAT. RULE 809.10(2)(b).

The Reusches also seek reinstatement of the original monetary damage award this court reversed. They explain that Roob, in 2000, was convicted of eight crimes involving his photo business practices, including two stemming from the very transactions in this case. Thus, they maintain, because this court’s prior decision was premised, at least in part, on the existence of a valid contract with Roob, and because his criminal convictions were based, in part, on the voidness of that contract, the original award should be reinstated. The Reusches, however, have provided no authority that would allow this court, in the absence of a trial court evaluation of the issue, to determine the consequences flowing from the interplay of the judgments in the small-claims and criminal courts.

Finally, the Reusches request an order “for all costs, including reasonable attorney fees, associated with this appeal.” This request is granted, and the cause is remanded to the trial court for its determination of those amounts.

