

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 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.

**Appeal No. 01-1515
STATE OF WISCONSIN**

Cir. Ct. No. 00-SC-910

**IN COURT OF APPEALS
DISTRICT IV**

CENTURY 21 - OLYMPIA, INC.

**PLAINTIFF-RESPONDENT-CROSS-
APPELLANT,**

v.

JEFFREY J. CHAYER AND AMY J. CHAYER,

**DEFENDANTS-APPELLANTS-CROSS-
RESPONDENTS.**

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Century 21-Olympia, Inc. prevailed in a small claims action to recover a real estate commission from Jeffrey and Amy Chayer,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). In addition, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

and, pursuant to a contractual provision for reasonable attorney fees, the circuit court awarded Century 21 \$6,000 in attorney fees. The Chayers appeal the award of attorney fees on several grounds, and Century 21 cross-appeals the circuit court's decision to deny attorney fees related to the Chayers' failed post-judgment motion for reconsideration. We affirm the initial award of attorney fees made by the circuit court and its denial of Century 21's motion for additional fees attributed to the motion for reconsideration. Additionally, because Century 21 lost its cross-appeal, it is not entitled to additional fees as the prevailing party in this court. Accordingly, we affirm the judgment and post-judgment order of the circuit court.

BACKGROUND

¶2 Century 21 filed a small claims action to recover a \$3,000 real estate commission under its listing contract with the Chayers. The Chayers, *pro se*, answered by filing a \$5,000 counterclaim "based on the addition[al] cost incurred for the revision to our original survey requested by Gail Slosarek, Century 21-Olympia, [a]ttorney fee, closing costs, lost wages, damage to character, and difference of asking price which is in excess of the \$5,000.00." Century 21 interpreted the counterclaim to allege professional negligence and tendered representation to its liability insurer.

¶3 After the trial, the circuit court determined that Century 21 was entitled to the commission, awarded \$3,000 in contract damages and dismissed the Chayers' counterclaim. Century 21 petitioned for attorney fees under the listing contract, which provided:

SHOULD LITIGATION ARISE BETWEEN THE
PARTIES IN CONNECTION WITH THIS LISTING,
THE PREVAILING PARTY SHALL HAVE THE RIGHT
TO REASONABLE ATTORNEY FEES.

The fee petition was supported by an affidavit and two exhibits, one listing fees of \$4,031.86 and disbursements of \$235.84 related to Century 21's claim for breach of contract and the other listing \$2,974.50 in fees and \$28.36 in disbursements related to Century 21's defense of the Chayers' counterclaim. The Chayers argued that the claimed fees were excessive and that, in any event, the court's fee award combined with the contract damages could not exceed the \$5,000 jurisdictional limit for small claims actions.

¶4 The circuit court ruled that the contract provided for an award of attorney fees to the prevailing party and that the combination of attorney fees and the damage award could exceed the \$5,000 small claims limit because such fees were independent of any compensatory damages. The court then awarded \$6,000 as reasonable attorney fees, explaining its decision as follows:

You will note that this constitutes a reduction of \$1,308.06 in the amount of attorney fees requested. The reason I am doing so is because I understand that this was Attorney Nova's first trial. A number of the time listings by Attorney Nova indicated that he consulted with another member of his firm tutoring him; in order to confirm that Attorney Nova was properly preparing for trial. Certainly that was appropriate because this was Attorney Nova's first trial. However, I believe reasonable attorney fees should not include time spent educating Attorney Nova. As to be expected, a brand new attorney will take more time to perform the same tasks as an experienced attorney would need. Because the contract allows for reasonable attorney fees as opposed to actual attorney fees, judicial discretion is appropriate in determining the reasonableness of plaintiff's requested attorney fees.

Even though I have reduced plaintiff's attorney fees request to \$6,000, I am satisfied that all of the services performed by counsel were fair, reasonable, and necessary in representation of plaintiff.

¶5 Following entry of judgment, the Chayers hired an attorney and filed a motion for reconsideration of the decision on attorney fees.² Century 21 responded by seeking additional attorney fees related to the cost of defending against the motion for reconsideration and/or sanctions for the filing of frivolous motions. The circuit court denied all aspects of all pending post-judgment motions:

[M]y decision is that there is no modification from the attorney fees that I awarded at the previous hearing. ... I cut the request here by eighteen or twenty percent or whatever it was for the reason that I did. And I also concur with the contention that it's still high. There is no doubt about it. I also understand that the costs of doing business for somebody who is new in the business, as Attorney Nova is, is going to be higher than someone who is experienced. ... But you take the situation as you find it in terms of the work and effort that was put into it. And one of the reasons that it's higher than what would normally be associated with this case is that you have pro se litigants on the other side. That increases the costs of litigation because there is that inability that non-legally-trained people cannot bring to the table as lawyers, competent lawyers.

¶6 On appeal the Chayers challenge the \$6,000 assessment of attorney fees on the following grounds: (1) the request for attorney fees was not adequately pled; (2) even if attorney fees can be awarded, Century 21's total recovery in the action cannot exceed the small claims limitation of \$5,000; (3) it was improper to award fees related to Century 21's defense of the Chayers' counterclaim; (4) Century 21's documentation in support of its motion for fees was insufficient; and (5) the overall amount of fees requested and awarded was excessive.

² The Chayers' post-judgment motion also sought a new trial in the interest of justice. However, the motion for a new trial was withdrawn and is not an issue that the Chayers have raised on appeal.

¶7 Century 21 cross-appeals the circuit court's refusal to award attorney fees incurred responding to the Chayers' reconsideration motion. In addition, Century 21 seeks an award of fees incurred on this appeal under the attorney fees provision of the listing contract or, in the alternative, under WIS. STAT. § 809.25(3).

DISCUSSION

Standard of Review.

¶8 Century 21 asserts a right to recover reasonable attorney fees as a prevailing party pursuant to the terms of the listing agreement. The interpretation of a written contract is a question of law. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Accordingly, we review the question of whether Century 21 is entitled to fees *de novo*. *Id.*

¶9 To the extent a party is entitled to attorney fees, the circuit court has discretion to determine what amount of fees are reasonable in a given case. *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57, 62 (1993); *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 153, 502 N.W.2d 918, 925 (Ct. App. 1993). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Crawford County v. Masel*, 2000 WI App 172, ¶5, 238 Wis. 2d 380, 617 N.W.2d 188. However, we decide the question of whether the attorney fees awarded here apply to the \$5,000 jurisdictional limit for small claims actions without deference to the circuit court. *See, e.g., Reusch v. Roob*, 2000 WI App 76, ¶33, 234 Wis. 2d 270, 610 N.W.2d 168.

The Chayers' Appeal.

1. Pleading and small claims limit on damages

¶10 The Chayers contend that Century 21 failed to adequately plead a claim for contractually-based attorney fees. Century 21 initiated the action by filling out a form complaint for small claims court that states that Century 21 demands judgment for \$3,000 “[p]lus interest, costs, attorney fees, if any, and such other relief as the court deems proper.” Century 21 also attached a copy of the listing contract to the complaint, including the relevant provision regarding attorney fees. Documents attached to the complaint may be used to determine the sufficiency of the pleading. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶11, 239 Wis. 2d 78, 619 N.W.2d 271, *review denied*, 2001 WI 1, 239 Wis. 2d 775, 621 N.W.2d 630. Here, there was adequate notice to the Chayers that Century 21 sought damages for breach of contract and the reasonable attorney fees it incurred in establishing those damages. Therefore, the complaint is sufficient.

¶11 The Chayers next contend the attorney fees awarded to Century 21 should be treated as compensatory damages, which are limited to \$5,000 in small claims court, rather than as a taxable cost of the action, because Century 21’s asserted right to fees is based on the listing contract rather than a statute.

¶12 Wisconsin continues to adhere to the American Rule where the prevailing litigant generally may not recover attorney fees and expenses of litigation as damages or costs. However, fees and expenses may be recovered when authorized by statute or contract. *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 510-11, 577 N.W.2d 617, 624 (1998). In this case, the listing agreement establishes a contractual exception to the American Rule. The contract provides that “the prevailing party shall have the right to reasonable attorney fees”

in litigation that arises “in connection with” the listing. We note that the contract’s attorney fees provision grants fees to the “prevailing party,” independent of proof that the other party breached the listing agreement. For example, if Century 21 had sued the Chayers for breach of contract and failed to prove the breach, the Chayers would have been entitled to fees attributable to the cost of defending against the claim. Relying on the reasoning in *Reusch*, we conclude that where attorney fees are attributable to the cost of bringing or defending against a lawsuit and are awarded independent of proof of a legal wrong, they are costs and not damages. See, e.g., *School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis.2d 347, 375-76, 488 N.W.2d 82, 92 (1992) (concluding that where complaint sought “costs and reasonable attorneys’ fees” pursuant to 42 U.S.C. § 1988, the fees should be treated as costs rather than damages; statute specifically provided that “the court, in its discretion, may allow the prevailing party ... a reasonable attorney’s fee as part of the costs”).

¶13 In *Reusch*, we addressed the question of whether reasonable attorney fees awarded to a prevailing party by statute—another recognized exception to the American Rule—should be treated as an element of compensatory damages or as a taxable cost in a small claims action. In that case, the plaintiffs claimed and proved that the defendant had committed an unfair trade practice in violation of WIS. STAT. § 100.20. *Reusch*, 2000 WI App 76 at ¶¶24-30. The plaintiffs also sought attorney fees under § 100.20(5), which 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.

We concluded in *Reusch* that § 100.20(5) was intended to compensate attorneys, not the victims of unfair trade practice, and therefore, the “statutorily authorized attorney’s fees are not to be considered part of the pecuniary loss/damage award.” *Reusch*, 2000 WI App 76 at ¶¶35-36.

¶14 The Chayers argue that because the fee petition in this case was based solely on a contract, *Reusch* does not apply. However, the proffered distinction between fees based on statute and fees based on contract is unavailing. The analysis in *Reusch* focused on the purpose of the statutory fee provision, not the source of the plaintiffs’ asserted right to attorney fees. Here, we likewise focus on the purpose of the attorney fee provision and conclude that the contract’s prevailing-party fee provision, which by its terms would apply even where there is no proof of a legal wrong, was intended simply to change the American Rule as to attorney fees. Therefore, we conclude that the circuit court’s award of \$6,000 in attorney fees to Century 21 does not count toward the \$5,000 jurisdictional limit in small claims actions. *See id.* at ¶33.

2. *Fees related to the Chayers’ counterclaim*

¶15 The Chayers next contend that it was improper for the circuit court to award any fees attributable to Century 21’s defense against the Chayers’ counterclaim. The Chayers reason that because Century 21 tendered representation on the counterclaim to its insurance company, and because the insurance company was neither a party to the contract nor to the small claims action, Century 21 has no right to fees covered by their insurance contract. The Chayers cite no law in support of this proposition.

¶16 Attorney fees attributable to Century 21’s defense against the Chayers’ counterclaim unambiguously fall within the broad scope of the contract’s

fee provision, which covers any litigation that arises “in connection with” the listing agreement. *See, e.g., Aspen Servs., Inc. v. IT Corp.*, 220 Wis. 2d 491, 494, 583 N.W.2d 849, 851 (Ct. App. 1998) (holding that plaintiff was entitled to fees related to defense of a counterclaim under terms of an unambiguous contractual provision for attorney fees). In addition, the contract does not limit recovery of attorney fees to those who have no insurance. Accordingly, in the absence of any authority to the contrary from the Chayers, we conclude that Century 21 may recover fees related to its defense of the counterclaim.

3. *The reasonableness of the fee award*

¶17 The Chayers contend that Century 21’s documentation in support of its motion for fees was insufficient to support the circuit court’s decision and that the overall amount of fees requested and awarded was excessive. We defer to a circuit court’s discretionary determination of reasonable attorney fees because the circuit court has observed the quality of the services rendered and has observed the work that has gone into the action from its inception. *Siegel v. Leer, Inc.*, 156 Wis. 2d 621, 630, 457 N.W.2d 533, 537 (Ct. App. 1990). In determining the reasonableness of attorney fees, a circuit court may consider the factors listed in SCR 20:1.5, including the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly. *Wright v. Mercy Hosp. of Janesville, Wisconsin, Inc.*, 206 Wis. 2d 449, 470, 557 N.W.2d 846, 855 (Ct. App. 1996); *see also Pierce v. Norwick*, 202 Wis. 2d 587, 597, 550 N.W.2d 451, 455 (Ct. App. 1996) (listing relevant factors). The attorney submitting the fee petition has the burden to prove that the requested fees are reasonable. *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 748, 349 N.W.2d 661, 671 (1984).

¶18 The Chayers argue that the affidavit supporting the award of fees was inadequate because it failed to assign time increments to each separate itemized activity. We conclude that the exhibit provided a sufficient basis for the court's exercise of discretion. See *Lucareli v. Vilas County*, 2000 WI App 157, ¶12, 238 Wis. 2d 84, 616 N.W.2d 153 (“[A]n itemized bill submitted by affidavit may be sufficient evidence to establish attorney fees.”), *review denied*, 2000 WI 121, 239 Wis. 2d 311, 619 N.W.2d 94. The circuit court could reasonably determine from the bill whether any listed activities were superfluous and whether the total time and total fees were reasonable given the nature of the case.³

¶19 The Chayers' final contention is that the total fees awarded were unreasonable and excessive. They identify several activities undertaken and billed by Century 21's counsel that they believe should not be allowed as fees in this action, and they also assert that the trial court did not adequately consider the relevant factors in determining a reasonable amount of fees. We conclude, however, that the circuit court applied the proper legal standard and did not erroneously exercise its discretion in determining a reasonable amount of fees.

¶20 First, we note that the circuit court discounted the total fees requested by about eighteen percent because Century 21's case was being handled by an inexperienced attorney. This reduction in fees represented the circuit court's judgment as to what amount of the fees could be attributed to the attorney's lack of experience and any duplicative and unnecessary time spent on the case.⁴ And

³ We note that when the Chayers first objected to the lack of a detailed itemization in their motion for reconsideration, Century 21 submitted a new copy of the bill that included the time increments spent on each itemized activity.

⁴ We also note that the inexperienced attorney who handled the bulk of the work charged at a lower hourly rate than other members of his firm who spent time on the case.

although the circuit court stated that the fees generated in this case were relatively high even after the eighteen percent reduction, the court explained that they were high due in part to the Chayers choosing to proceed *pro se*.

¶21 Second, to the extent that the Chayers contend that the circuit court's award of attorney fees is excessive because it exceeds the amount in controversy on Century 21's contract claim, we note that there is no *per se* rule that fees be awarded in some proportion to the amount recovered.⁵ Here, we are satisfied that the circuit court adequately considered the amount in controversy and the nature of the action in reaching a decision on fees, including its decision to reduce the requested fees by about eighteen percent.

¶22 Third, although the circuit court's oral decision did not explicitly address each and every item challenged by the Chayers as part of their motion for reconsideration, we conclude that none of the items challenged by the Chayers provides a basis for overturning the circuit court's exercise of discretion. *See Siegel*, 156 Wis. 2d at 631, 457 N.W.2d at 537 (“[I]f the trial court fails to set forth its reasoning when exercising its discretion, we may search the record and sustain the trial court's decision if there is a reasonable basis for it.”). For example, we see no reason to disturb the circuit court's implicit conclusions that fees related to Century 21's motion for a continuance were part of the normal cost of litigation and that, considering the nature of the Chayers' counterclaim, it was reasonable for Century 21's attorney to spend a short amount of time investigating a complaint the Chayers filed with the Department of Regulation and Licensing.

⁵ Additionally, the possibility that the cost of collection would render an attempt to collect contract damages economically infeasible is a logical reason to include a fee provision in the contract.

Therefore, we affirm the circuit court's judgment and the order denying the Chayers' post-judgment motion for reconsideration.

Century 21's Cross-Appeal.

1. Fees related to the Chayers' motion for reconsideration

¶23 Century 21 cross-appeals the circuit court's decision to deny its motion for attorney fees incurred in response to the Chayers' motion for reconsideration. Century 21 had argued that: (1) the Chayers' motion for reconsideration was frivolous; and (2) as the prevailing party, it was entitled to fees under the contract. The circuit court denied the motion, concluding that the Chayers' motion was not frivolous and that no additional award of fees was otherwise appropriate. We agree that the Chayers' motion was not frivolous. Further, the circuit court's observation that the fees awarded in this action were high, and its implicit finding that \$6,000 represented the maximum amount that would be a "reasonable fee" for all work on this matter, supports its exercise of discretion to deny additional fees.

2. Attorney fees on appeal

¶24 Finally, Century 21 seeks an award of attorney fees related to defending the circuit court's award of fees on this appeal. It contends that it is entitled to fees (1) under WIS. STAT. § 809.25(3) because the Chayers' appeal is frivolous, and (2) pursuant to the listing contract because it is the prevailing party on appeal. We conclude that the Chayers' appeal is not frivolous, and because Century 21 filed a cross-appeal which it lost, it is not the "prevailing party" in this court as the contract requires in order to receive an award of additional fees. Accordingly, we deny Century 21's claim for an award of fees on appeal.

CONCLUSION

¶25 We affirm the judgment and post-judgment order of the circuit court, and deny Century 21's request for attorney fees incurred in connection with the case in this court. No statutory costs on appeal are awarded to either party.

By the Court.—Judgment and order affirmed.

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

