COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3008 **Cir. Ct. No. 01-CV-74**

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

LICKETY SPLIT DRIVE-IN, INC., A WISCONSIN CORPORATION, PETER SALZMAN AND POK-HUI SALZMAN,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN STATES INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Peter and Pok-Hui Salzman, as owners of Lickety Split Drive-In, Inc. (collectively, the Salzmans), appeal a judgment dismissing their claims against American States Insurance Company and awarding American

costs. The final judgment incorporated the trial court's two earlier summary judgments. The first summary judgment determined that the policy claims the Salzmans submitted to American[1] for wind damage to their restaurant was barred by the statute of limitations and their claim for water damage to their restaurant was barred by a policy exclusion. The second summary judgment dismissed the Salzmans' bad faith claims against American because, by virtue of the first judgment, the trial court concluded that the claims were "fairly debatable."

¶2 The Salzmans contend the trial court erred by dismissing the policy claims because genuine issues of material fact exist. They also argue that the trial court erred by dismissing the bad faith claims because (1) in regard to the first bad faith claim, the court exceeded the scope of the parties' reconsideration motions, and (2) regarding the second bad faith claim, a material fact underlying the claim is disputed. The Salzmans further appeal an award of costs to American because they had no opportunity to object and because they claim certain costs are impermissible. We reject these arguments and affirm the judgment.

Background

¶3 The Salzmans own a building that houses the Lickety Split Drive-In restaurant. The building allegedly suffered wind damage on July 8, 1999, and water damage in January 2001. The Salzmans promptly tendered a claim for the wind damage. American denied the claim on September 13, 1999, because the engineering firms that evaluated the property concluded that the damage the

[1] American points out that it is incorrectly captioned and that its name is really American Economy Insurance Company. Because it apparently did not attempt to change the caption in the trial court or challenge jurisdiction based on the naming of an incorrect party, we conclude such an error is harmless and irrelevant for purposes of this appeal.

Salzmans reported was not caused by wind. The Salzmans contacted American on March 20, 2001, asking the company to reopen the 1999 claim but were told only that their request would be forwarded to the agent who had originally handled the claim. The Salzmans also submitted a claim for the water damages, which American denied on the basis of policy exclusions for damage caused by earth movement, water, or "other types of loss."

¶4 After American denied coverage on both claims, the Salzmans brought this action seeking payment on the claims and alleging American had handled the claims in bad faith.[2] American sought summary judgment, arguing that the statute of limitations on the 1999 claim had expired, that the 2001 claim was excluded by the terms of the policy, and that the allegations of bad faith were insufficiently pled. The trial court granted American judgment on the insurance coverage claims, but ruled that the bad faith claims were sufficiently pled and allowed them to stand.

¶5 Both parties sought reconsideration. The Salzmans argued that there were material facts still in dispute regarding the insurance coverage claims. American argued that if the 2001 claim could not be maintained, then the 2001 bad faith claim could not succeed as a matter of law. It also protested what it contended was the Salzmans' attempt to submit new information not previously considered when the initial summary judgment was granted. The trial court rejected the Salzmans' motion for reconsideration, ruling it was not convinced it

[2] The claims in the complaint will be referred to as the "1999 claim" for the wind damage claim, the "2001 claim" for the water damage claim, the "1999 bad faith claim" for the allegation that American acted in bad faith in handling the 1999 claim, and the "2001 bad faith claim" for the allegation that American acted in bad faith in handling the 2001 claim.

had erred the first time and that the attempt to add more information was inappropriate on a motion for reconsideration.

¶6 The trial court further ruled that it had erred by denying summary judgment of the bad faith claims. It vacated the portion of the earlier summary judgment allowing the bad faith claims to proceed and then dismissed the case in its entirety. Following dismissal, the trial court allowed American costs. The costs, totaling approximately $415, were entered by the clerk before the Salzmans could object. The Salzmans appeal, arguing that there are genuine issues of material fact regarding the timing of the 1999 claim, the cause of the damages in the 2001 claim, and the merits of the bad faith claims. They further contend the award of costs was inappropriate without the opportunity to object, that it was excessive, and was not authorized by statute.

Standards of Review

¶7 Our methodology for reviewing summary judgments is well known and need not be repeated here. *See* ***Policemen's Annuity & Benefit Fund v. City of Milwaukee***, 2001 WI App 144, ¶9, 246 Wis. 2d 200, 630 N.W.2d 236; ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Our review is de novo. ***Policemen's Annuity***, 246 Wis. 2d 200, ¶9. The interpretation of an insurance contract and whether coverage exists are questions of law we also review independently of the trial court. ***Ledman v. State Farm Mut. Auto. Ins. Co.***, 230 Wis. 2d 56, 61, 601 N.W.2d 312 (Ct. App. 1999).

Discussion

The 1999 Insurance Claim

¶8 The Salzmans admit that the alleged wind damage occurred on July 8, 1999, but that they did not file this action until August 6, 2001. The trial court concluded that the 1999 claim was precluded by the statute of limitations, WIS. STAT. § 631.83(1)(a), requiring property indemnity claims to be brought within one year of the date of loss. The policy contains a two-year time limit for the filing of claims. Regardless which limit is considered, the Salzmans filed to recover on their 1999 claim after both time limits had expired.

¶9 The Salzmans, however, raise two defenses to the statute of limitations. First, they contend the time limits begin when the claim is denied by the insurance company, not when the loss occurs.[3] Second, they argue that they were fraudulently induced to inaction by American and thus the time limits should have been tolled. We reject both contentions.

¶10 The Salzmans rely on ***Yocherer v. Farmers Ins. Exch.***, 2002 WI 41, 252 Wis. 2d 114, 643 N.W.2d 457, to argue that the date of loss is the date the insurance company makes a final determination on the claim. *See* ***id.***, ¶¶1, 22. Because the Salzmans claim there is a factual dispute as to the date American denied the claim, they argue that summary judgment was improper. We disagree that ***Yocherer*** applies.

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[3] Although this argument was not raised until the reply brief, we choose to address it. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188 (if an appellant fails to discuss an alleged error in its main brief, it may not do so in the reply); *see also* ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980) (an administrative rule does not affect our ability to address the issue).

¶11 ***Yocherer*** involved underinsured motorist policies and the statute of limitations in WIS. STAT. § 893.43. That statute requires that an action be commenced within six years after the claim accrues. As the Wisconsin Supreme Court pointed out, the Yocherers' claim against their insurer was predicated upon whether the underinsured motorist provision applied under the circumstances. To make such a determination, the Yocherers had to ascertain whether they were entitled to recover damages from the tortfeasor, whether injuries they sustained arose from the use of the tortfeasor's vehicle, and whether the tortfeasor's insurance would be insufficient to cover the Yocherers' losses. ***Id.***, ¶21. For that reason, the court determined the Yocherers' claim against their insurer could not begin until the date they resolved the underlying tort claim, as opposed to the date of their accident.

¶12 In this case, the statute of limitations is WIS. STAT. § 631.83(1)(a), which requires suit be brought within twelve months of "inception of the loss." Previously, we have determined that under § 631.83(1)(a), "'inception of the loss' clearly and unambiguously means the date on which the loss occurs," not when it is discovered. ***Borgen v. Economy Preferred Ins. Co.***, 176 Wis. 2d 498, 504-05, 500 N.W.2d 419 (Ct. App. 1993). Because another case is on point, it is unnecessary to rely on ***Yocherer***, which addressed a different statute and a different type of insurance with different underlying public policy concerns.[4] The one-year statute of limitations under § 631.83(1)(a) begins on the date the loss occurs, not when an insurance claim is denied.

[4] Equally dispositive, we are not empowered to modify, overrule, or otherwise change a previously published court of appeals decision. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶13 Additionally, we note the insurance policy's two-year limitation starts on the "date on which the direct physical loss or damage occurred." Thus, under either the statute of limitations or the insurance policy, the Salzmans filed an action on their 1999 claim too late.

¶14 The Salzmans contend, however, that American induced them to inaction. First, they contend that a September 1999 denial letter was ambiguous and, second, that in March 2001 when Peter sent a letter to American, American's response implied it was reinvestigating the claim. We are unpersuaded.

¶15 The 1999 letter clearly denies coverage.[5] The Salzmans contend it is ambiguous because it concludes with "We appreciate your cooperation and understanding during our review of this matter" and there is a clause in the policy requiring cooperation with investigation of claims. However, it is obvious that in the denial letter, the phrase is included as a courteous closing, not a policy reference. In any event, the Salzmans' March 2001 letter asking American to *reopen* the claim belies their argument that the denial was ambiguous. This

[5] American's letter to the Salzmans first summarizes various reports regarding the wind damage claim. Encompass, Inc., concluded that the damage "did not result from a windstorm" and that "the building is experiencing significant deterioration over time due to lack of maintenance." Lakewind Engineering concluded that damage had been caused "by the settlement of the slab" and that there were "no visible signs of uplift of the roof or twisting of the building." Finally, Frontier Adjusters advised American that there were "no visible signs of wind damage as claimed."

American next quotes the exclusion for "Other types of Loss," including settling or inadequate maintenance of the property. The letter then lists American's four "reasons for denying any coverage," most notably that, "The engineers, Frontier Adjusters and the contractor have stated they see no evidence of wind damage …." American concludes by stating, "It is for these reasons that we are not able to make payment on this claim. We appreciate your cooperation and understanding during our review of this matter."

evidence fails to raise a dispute of material fact regarding the Salzmans' reasonable beliefs.

¶16 The 2001 letter asked American to reopen the claim because the Salzmans claimed to have information that the earlier engineering reports were in error. American responded that it was forwarding the request to the agent who originally handled the claim, but made no further contact. The Salzmans now contend that the reply suggested American was reinvestigating the claim and induced the Salzmans to inaction while they waited for American to complete a new investigation. We reject this argument because nothing, other than the Salzmans' own misconceptions, indicated that American was reopening, reinvestigating, or reconsidering the Salzmans' claim.[6] Forwarding the request to the original agent merely indicated to whom the Salzmans could direct subsequent inquiries.

¶17 While the Salzmans ask us to consider ***Dishno v. Home Mut. Ins. Co.***, 256 Wis. 448, 41 N.W.2d 375 (1950), we are not satisfied the case applies. There, the insurance company was actively engaged in negotiations and offers with the insureds. ***Id.*** at 450. When the statute of limitations expired, the company ceased discussions. ***Id.*** at 451-52. Here, the claim had already been

[6] The law is unclear whether American, through its policy terms, could waive the one-year limit found in WIS. STAT. § 631.83(1)(a). There is case law that implies the statute controls regardless of the policy language. *See* ***Borgen v. Economy Preferred Ins. Co.***, 176 Wis. 2d 498, 504, 500 N.W.2d 419 (Ct. App. 1993). ***Borgen***, though, involved a one-year limitation in the policy, which may have proscribed a shorter time limit depending on how it was interpreted. Shortening the time limit is prohibited by WIS. STAT. § 631.83(3)(a). We see no reason why the insurance company—whose interests the statute is designed to protect—could not choose to waive the limits to create a longer time limit. In any event, we note that if the one-year limit does indeed trump the policy language, then this discussion of inducement to inaction would be irrelevant because the one-year limitation expired before the Salzmans requested American to reopen the claim.

denied and there was no legitimate reason to believe it had been reopened.[7] Summary judgment barring the 1999 claim was appropriate.

The 2001 Claim

¶18 Damage to Lickety Split allegedly occurred after a water main ruptured and flooded parts of the building and seeped into the surrounding ground. Once in the ground, the water apparently froze, causing "frost heaving." The insurance company denied coverage under its policy exclusions for earth movement, certain water damage, and general failure to maintain or heat the building.[8] The trial court determined the Salzmans had not contested the application of the exclusions, but claimed only that human error may have caused the damage. The court agreed with American that the earth movement exclusion precluded recovery and granted summary judgment to American. The Salzmans allege that the damage was due to a break in plumbing when a solder joint in the heated building failed and was thus due to human error, which is not part of any exclusion. Therefore, they argue that there is a dispute over cause, rendering

[7] The Salzmans also claim they were engaged in negotiations with American, but there is nothing in the record to so indicate. Assertions of fact outside the record will not be considered. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981).

[8] The Salzmans, in their main brief, suggest that American denied the claim on the basis of the water damage only. However, it is evident that American cited all three exclusions in denying the claim.

summary judgment inappropriate. We conclude that the trial court properly applied the policy exclusions.[9]

¶19 At the time of summary judgment, the Salzmans submitted an engineering firm's letter that accounted for the Salzmans' allegation that the water main had ruptured. The firm, however, determined the water seeped into the ground, froze, and ultimately caused damage by frost heaving.[10] American's expert firm, which had previously viewed the property in 1999 after the wind damage claim, concluded upon inspection in 2001 that any new damage was due to settling or deterioration—also excluded by the policy—although this firm could not determine what damage was new and what damage remained from 1999.

¶20 Although there is an apparent dispute over the cause of the damage, summary judgment was still appropriate because the ultimate fact, whether there is coverage, is indisputable. The two conflicting inferences are the views of the Salzmans' expert or American's expert. Whichever view is accepted by a fact finder, a policy exclusion applies.

[9] We note that American challenges the Salzmans' solder joint theory, arguing that this was never presented to the trial court during summary judgment proceedings but was first presented with the motion to reconsider. We agree that a motion to reconsider is an inappropriate time to present new evidence to the trial court, especially if the evidence could have been discovered for the summary judgment proceedings, and that the appropriate method would be to request relief from judgment based on newly discovered evidence. WIS. STAT. § 806.07(1)(b). Nonetheless, our review of the record indicates the Salzmans had claimed there was a broken pipe and human error before the summary judgment award.

[10] The parties do not define "frost heaving," but the dictionary definition is "an upthrust of ground caused by freezing of moist soil …." WEBSTER'S THIRD NEW INT'L DICTIONARY 915 (unabr. 3rd ed. 1993). Moreover, the Salzmans do not dispute that this is a type of earth movement, only that the movement caused their damages.

¶21 The policy's exclusions section reads in pertinent part:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> ….
>
> b. Earth Movement
>
> (1) Any earth movement (other than sinkhole collapse), such as an earthquake, landslide, mine subsidence, or earth sinking, rising or shifting. …
>
> ….
>
> 2. We will not pay for loss or damage caused by or resulting from any of the following:
>
> ….
>
> k. Other Types of Loss:
>
> ….
>
> (2) Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
>
> ….
>
> (4) Settling, cracking, shrinking or expansion; ….

¶22 The Salzmans suggest the actual cause of their loss was the human error that led to a broken pipe, and human error is not excluded. We reject this reasoning. The Salzmans do not claim, for instance, that the plumbers had recently installed the pipe in a defective manner and so the plumbers were responsible for the error. Rather, their logic seems to be that because the pipes are man-made and installed by humans, any failure is human error. We decline to adopt such a broad concept of "human error." Even the most well-made items

deteriorate over time, but this is not necessarily attributable to human *error*. It ay simply be the course of nature.

¶23 Assuming, however, that we were to accept that the water main rupture was due to human error, the Salzmans cannot escape the policy language for the earth exclusion. The exclusions apply to "damages caused directly or indirectly" and "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The broken water main is irrelevant—it was simply the first part of a sequence the Salzmans' own expert concluded culminated in frost heaving, which is earth movement excluded by the policy.

¶24 Also, if we were to consider American's expert's opinion, recovery would still be precluded under the "other types of loss" exclusion, which excludes coverage for deterioration or settling and expansion of a building over time. American's experts concluded this to be the likely cause of the Salzmans' damages.

¶25 Thus, although there is an apparent issue of fact, there is no genuine issue of material fact. *See* ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 635, 545 N.W.2d 495 (1996) (a material fact is consequential to the litigation's merits); ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (a factual issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party). The fact finder would either accept the Salzmans' expert's testimony that the damage was caused at least in part by frost heaving or American's expert's conclusion that the damage was due to settling. Both are excluded manners of loss as a matter of law. *See* ***Ledman***, 230 Wis. 2d at 61

(Interpretation of the contract to determine whether coverage exists is a question of law, not fact.). Summary judgment was appropriate on the 2001 claim.

Bad Faith Claims

¶26 When American sought summary judgment on the insurance claims, it also asked for dismissal of the bad faith claims arguing that the pleadings were insufficient. The trial court granted summary judgment on the insurance claims, but it allowed the bad faith claims to stand based solely on its finding that the complaint was sufficient. American had not challenged the merits of the bad faith claims.

¶27 Following summary judgment, American asked the court to reconsider its decision to allow the 2001 bad faith claim to proceed. The trial court reconsidered both claims and dismissed them, stating that because the insurance claims could not be maintained, as a matter of law they were fairly debatable and the insurance company had a right to deny them.

¶28 The Salzmans argue that the court exceeded its authority by reconsidering the 1999 bad faith claim when American only sought reconsideration of the 2001 bad faith claim. They also argue that dismissing the 2001 bad faith claim was inappropriate because there are underlying issues of material fact.

¶29 The 2001 bad faith claim was properly excluded. We have determined that there is no genuine issue of material fact and that the claim is precluded under the policy language. We have repeatedly held that where the policy precludes coverage, as a matter of law a bad faith claim cannot be maintained. *See, e.g.,* ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 745, 593

N.W.2d 814 (Ct. App. 1999); ***Richland Valley Prods. v. St. Paul Fire & Cas. Co.***, 201 Wis. 2d 161, 177, 548 N.W.2d 127 (Ct. App. 1996).

¶30 A trial court has the inherent authority to correct its own error of law. WIS. STAT. § 802.08(6). When American sought reconsideration of the 2001 bad faith claim, it argued that the court made an error of law because if the 2001 insurance claim was precluded, so was the bad faith claim. In reviewing the 2001 claims, the trial court agreed it had made the error but apparently also determined it made the same error regarding the 1999 bad faith claim. We cannot conclude that the trial court erred by *sua sponte* reconsidering the 1999 bad faith claim.

¶31 We conclude, however, that the trial court erred by ruling the 1999 bad faith claim was barred because the 1999 insurance claim was barred. The ***Richland*** rule applies when the insurance policy precludes coverage, not when the statute of limitations prevents an action. *See* ***id.***, 201 Wis. 2d at 164 (dispositive issue is whether the policy covered the loss). Because of the time limit, the court never addressed whether the 1999 claim was barred by the policy. The tort claim for bad faith, however, can exist independently of the insurance claim. *See* ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶31, 249 Wis. 2d 623, 638 N.W.2d 575.

¶32 We conclude nonetheless that the 1999 bad faith claim was properly dismissed. We may uphold the trial court on appeal if it reaches the right result, even if it does so by erroneous reasoning. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶33 "In order to succeed on a claim of bad faith, the insured must show (1) an absence of a reasonable basis for denying the policy benefits and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." ***Trinity Evang. Luth. Church v. Tower Ins. Co.***, 2002 WI

App 46, ¶24, 251 Wis. 2d 212, 641 N.W.2d 504. A bad faith tort can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim. ***Id.***, ¶25. While the test itself involves questions of fact, sufficiency of the pleadings is a question of law. ***Koestler v. Ballard***, 162 Wis. 2d 797, 802, 471 N.W.2d 7 (1991).

¶34 Here, the Salzmans pled nothing that would meet the objective standard. They alleged there was "no reasonable basis for the defendant denying plaintiffs' claim for benefits under their policy and that the defendant, in denying the claim, knew or recklessly failed to ascertain that the claim should have been paid." Later, in his supporting affidavit, Peter alleged only that the contractors and experts they retained supported both the 1999 and 2001 insurance claims. The Salzmans do not show how the evidence might support their bad faith claim.

¶35 The trial court concluded, over American's challenge, that the complaint sufficiently stated a claim because Wisconsin is a notice-pleading state. *See* ***Hlavinka v. Blunt, Ellis, & Loewi***, 174 Wis. 2d 381, 403, 497 N.W.2d 756 (Ct. App. 1993). This is generally true; we do not require parties to plead every single fact upon which the complaint is based. *See* ***Studelska v. Avercamp***, 178 Wis. 2d 457, 463, 504 N.W.2d 125 (Ct. App. 1993).

¶36 However, when the issue is considered on summary judgment, simply pleading the test itself is insufficient because it is conclusory. *See* WIS. STAT. § 802.08(3) (adverse party to summary judgment may not rest on the pleadings but must set forth specific facts showing there is a genuine issue for trial). Without some sort of objective supporting evidence tending to show the insurance company was unreasonable in denying the claim, the Salzmans' argument that there was no reasonable basis for the denial is meritless. *See*

Physicians Plus Ins. v. Midwest Mut. Ins. Co., 2001 WI App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59. This is especially true considering American, in response to the complaint, submitted the denial letter explaining the engineers' findings and applicable policy exclusions. At first blush, this appears to establish the required reasonable basis.

¶37 A summary judgment opponent may not rely on conjecture, but has an obligation to counter with evidentiary materials demonstrating there is a dispute.[11] ***Id.*** There is no proof that the 1999 claim was inappropriately denied. Without some specific facts the trial court was free, as we are now, to reject the Salzmans' assertion that American had no reasonable basis for denying their claim.

Costs

¶38 The Salzmans challenge the award of costs, claiming the court failed to comply with WIS. STAT. §§ 814.07 and 814.04. They also complain they had no opportunity to object to the costs and that photocopy and facsimile costs are not chargeable under WIS. STAT. § 814.04(2). They further argue that if we affirm the judgment, American should be allowed to recover only attorney fees of $100 under WIS. STAT. § 814.04(1). Alternatively, they argue that the maximum American may recover is $50 for prevailing on a motion. *See* WIS. STAT. § 814.07. We review an award of costs under the erroneous exercise of discretion

[11] Because we are reviewing a summary judgment, we review the information on file to determine whether it shows any "genuine issue as to any material fact." *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

standard. ***Lane v. Sharp Pkg. Systems***, 2002 WI 28, ¶66, 251 Wis. 2d 68, 640 N.W.2d 788.

¶39 The plaintiff is allowed costs if he or she recovers on the complaint. WIS. STAT. § 814.01(1). When the plaintiff does not prevail and therefore cannot recover under this section, the defendant may recover costs. WIS. STAT. § 814.03(1). The award of costs may include attorney fees and "all necessary disbursements." WIS. STAT. §§ 814.04(1) and 814.04(2).

¶40 Here, American's bill charges for attorney fees, postage, long distance, photocopying, and facsimile transmissions. The Salzmans only question the photocopies and facsimiles. We have specifically held that those items are costs a prevailing party may recover at the trial court's discretion. ***Wausau Medical Ctr. v. Asplund***, 182 Wis. 2d 274, 298, 514 N.W.2d 34 (Ct. App. 1994). The Salzmans do not contend that the trial court erroneously exercised its discretion or that ***Wausau Medical*** does not apply.

¶41 After the clerk entered the costs, the Salzmans filed a motion that included a request for modification of the costs. The trial court's response addressed a different issue in the motion and was silent on the cost issue. The court's response affirmed its October 9 judgment, which included a blank line in anticipation of notification of American's costs. While the amount was apparently unknown when the judgment was signed, it had been entered by the time the court responded to the Salzmans' motion. This court looks for reasons to sustain a trial court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Because the October 9 judgment, which the court explicitly affirmed, allowed the award of costs, we infer from the trial court's silence that it intended to uphold the costs entered. *See* ***State v. Pallone,*** 2000 WI

77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568 (appellate court may assume a missing finding on an issue was determined in a manner that supports the final decision). Thus, we conclude that the trial court entertained the Salzmans' objection to the costs but nonetheless rejected it.

¶42 We disagree that American is only entitled to $50 for prevailing on a motion. While it is true that the court faced motions for summary judgment and reconsideration, the Salzmans did not prevail on their complaint. That is sufficient to remove recovery from WIS. STAT. § 814.07 and into WIS. STAT. § 814.03. The $415.30 award is appropriate.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.