COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0930 **Cir. Ct. No. 01CV000061**

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

HORST W. JOSELLIS,

PLAINTIFF-APPELLANT,

V.

PACE INDUSTRIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Horst Josellis, pro se, appeals a judgment and an order awarding Pace Industries $20,938 for attorney fees it incurred in responding to Josellis's frivolous appeal to this court. Because we conclude the trial court erroneously exercised its discretion in determining the amount of reasonable

attorney fees, we reverse and remand to the trial court for further proceedings consistent with this opinion.

BACKGROUND

¶2 This case arises from Pace's termination of Josellis's employment in February 1999. On the day of his termination, Pace personnel escorted Josellis from the facility. Josellis filed this action against Pace alleging that the manner of his dismissal was defamatory.[1]

¶3 Pace moved to dismiss Josellis's defamation claim for failure to state a claim pursuant to WIS. STAT. § 802.06(2)(6) (2001-02).[2] The trial court granted the motion. Josellis filed motions to stay execution of judgment and to file a third amended complaint, which the trial court denied. The court also determined the motions were frivolous and awarded Pace $414 for attorney fees pursuant to WIS. STAT. § 814.025. Josellis moved for reconsideration, which the court also denied. The court found this motion frivolous as well and awarded Pace $2597 for attorney fees.

¶4 Josellis appealed all three of these orders to this court, which held that only the appeal of the order denying his motion for reconsideration was timely. We concluded the trial court properly denied reconsideration and did not err in determining the motion to be frivolous. We also concluded Pace was

[1] Josellis also brought a claim for discriminatory discharge; Pace removed the case to the United States District Court, where the court dismissed the discrimination claim and returned the case to state court for the resolution of the defamation claim.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

entitled to "reasonable attorney fees and costs incurred during the appeal" and remanded to the trial court to determine the appropriate reasonable amount.[3]

¶5 On remand, the trial court held a hearing to determine the reasonable amount of attorney fees for Josellis's frivolous appeal. The court received affidavits and billing statements from Pace's counsel, Wessels & Pautsch, P.C., which requested $20,938 in attorney fees and $304.40 in costs for the appeal. The billing statements and accompanying affidavits showed that three attorneys worked on the appeal: Joseph Gumina, who spent 4 hours at an hourly rate of $190; Mark Goldstein, who spent 26.4 hours at an hourly rate of $175; and Heather Langemak, who spent 105.6 hours at hourly rates of $135 and $145. At the hearing, Josellis objected to the amount of the fees in a lengthy argument, pointing out a number of entries which in his view showed a duplication of work by the three attorneys or work that was not necessary, and asserting that other entries were too vague to inform him what the attorneys did. He also asserted he was entitled to additional proof that the attorneys actually spent the time described in the billing statements. The court also heard brief argument from Pace's counsel.

¶6 The court determined that the amount Pace's counsel requested was appropriate and ordered Josellis to pay that amount. In its oral decision, the court stated that Josellis made two major arguments: (1) the affidavits and billing statements submitted by Pace's attorneys were not sufficient for Josellis to determine the reasonableness of the fees, and (2) by having three attorneys work on the case, there was significant overlap on work done that resulted in bills he

[3] WISCONSIN STAT. § 809.25(3)(a) provides that this court shall award to the successful party on a frivolous appeal costs, fees, and reasonable attorney fees.

should not have to pay for. As to the first argument, the court stated that submission of billing statements is the usual way to decide attorney fee amounts.

¶7 As to the second argument, the court stated that it had reviewed the billing statements and found no evidence that the Pace attorneys "ran up the bill" by having attorneys' work overlap. The court explained that it is often necessary for more than one attorney to work on a case because the first attorney might be busy with another case or might go on vacation, leaving work for a second attorney. The court added that the first attorney to handle this case, Attorney Gumina, billed at a significantly higher rate than Attorney Langemak, who billed the most hours on the case; the court stated this showed that, had Gumina prepared the entire appeal himself, the bill would have been higher than it was with three attorneys working on the appeal. The court rejected Josellis's argument that all the research was unnecessary, stating that Josellis's ideas of how attorneys should conduct their work and how much they should remember from prior cases was not based on the reality of legal work. The court also stated that "Mr. Josellis [was], in large part, responsible for the extra work generated by defendant's counsel, which he now comes into court and complains [about]." The court concluded that considering the totality of the circumstances, the attorney fees requested by Pace were reasonable.[4]

[4] Josellis also made some comments that appeared to object to the hourly rates charged by the attorneys, but these were not focused arguments and the trial court did not address this issue. On appeal, Josellis objects to the hourly rates. We do not address this issue because we conclude he did not adequately develop it in the trial court; the trial court therefore did not have an obligation to address it, and Josellis does not adequately develop it on appeal. The same is true with respect to his comments on the payment arrangements between Pace and its counsel.

DISCUSSION

¶8 On appeal, Josellis renews his contention that the amount awarded Pace for attorney fees for the appeal is unreasonable because the work done was duplicative and excessive.

¶9 As Pace correctly points out, case law has established that, when the reasonableness of a trial court's award of attorney fees is challenged on appeal, we affirm unless the trial court erroneously exercised its discretion. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 575, 597 N.W.2d 744 (1999). Trial courts properly exercise their discretion when they apply the correct law to the relevant facts and, through a rational process, reach a reasonable result. ***Beaudette v. Eau Claire County Sheriff's Dep't***, 2003 WI App 153, ¶31, 265 Wis. 2d 744, 668 N.W.2d 133.

¶10 The rationale for our deference to a trial court's determination of reasonable attorney fees is that the trial court has observed the quality of the services rendered, has access to the record to see all the work that has gone into the action from its inception, and has the expertise to evaluate the reasonableness of the fees sought for the services rendered. ***Jandrt***, 227 Wis. 2d at 575-576. Thus, even though reasonableness is a question of law, due to the trial court's superior position, we give weight to that court's determination. ***Id.*** at 576. However, in the cases applying this deferential standard of review, the fees were for work done before the trial court. *See, e.g.*, ***Id.*** at 579; ***Hughes v. Chrysler Motors Corp.***, 197 Wis. 2d 974, 977, 987, 542 N.W.2d 148 (1996); ***Siegel v. Leer, Inc.***, 156 Wis. 2d 621, 630-32, 457 N.W.2d 533 (Ct. App. 1990). The parties do not address whether this same deference is appropriate for work done in the appellate court, when, as here, no evidentiary hearing was held and the

reasonableness of the hourly rate was not in issue on appeal. In such a case it would appear this court is in at least as good a position as the trial court to evaluate the reasonableness of the amount of hours expended for the briefs and other papers filed in this court. Nonetheless, we will assume for purposes of this discussion that we are to apply a deferential standard of review. In our review, we bear in mind that the attorney submitting the fee petition has the burden to prove that the requested fees are reasonable. ***Standard Theatres v. DOT***, 118 Wis. 2d 730, 748, 349 N.W.2d 661 (1984).

¶11 In this case, while the trial court stated the general conclusion that the fees were reasonable, it did not explain why the number of hours expended was reasonable given *this particular appeal*. The court stated that it was aware of "what is a reasonable range to process a Court of Appeals case," but never explained what a reasonable range was for an appeal of this type; indeed, it never referred specifically to the issues on the appeal, their degree of complexity, or the length and nature of the brief filed. In response to Josellis's objection that the time spent on research was unnecessarily long, the court explained that its role was to decide "whether [the totality of the bill was] in line with other bills that other attorneys in the same area would bill for a Court of Appeals case." However, the court never referred to the issues that had to be researched in this case or explained why the time expended on research was reasonable. The general statement that attorneys cannot be expected to remember everything from prior cases is certainly true but does not answer the question.

¶12 The court did address Josellis's objections based on overlap among the three attorneys, but the court's explanation of the need for overlap—when the attorney starting the work needs to pass it on to another because of a vacation or other obligations—has no support in the record in this case. The attorneys'

affidavits do not address the reasons three attorneys worked on the case, and the billing statements show that Goldstein and Langemak both billed a substantial number of hours, 20 and 62.7, respectively, from October 30, 2002, to November 9, 2002. In other words, one did not take over from the other; rather, both were working on the same tasks during the same time period. This is not in itself inappropriate, but its reasonableness depends on how many hours they spent in relation to what was required for this appeal. The court's statement—that the bill would have been higher had Gumina spent the time that Langemak did—assumes that Langemak spent a reasonable number of hours but does not explain that assumption.

¶13 Because the trial court did not adequately explain its decision, we undertake our own search of the record to determine if it provides a reasonable basis for the trial court's decision. ***Siegel,*** 156 Wis. 2d at 631. We focus on the time expended in responding to Josellis's main brief on appeal because the bulk of the hours expended were directed to that task.

¶14 Josellis's main brief on appeal was ten pages, and the argument section was four pages. He argued that he could have proved the employer's conduct had the court allowed him limited discovery; the court erroneously exercised its discretion in not allowing him to amend his complaint again; contrary to what the court said in denying his motion for reconsideration, he had filed a motion under WIS. STAT. § 806.07 for relief from judgment, which he thought would get to the court before it denied his postjudgment motion to amend his complaint; if he had been allowed to amend his complaint again, there would have been genuine issues of material fact; contrary to the court's statement in awarding fees on the motion for reconsideration, he was not engaged in a pattern of trying to keep Pace embroiled in meritless and costly litigation; and the court erroneously

exercised its discretion in awarding fees for his motion because he is a pro se litigant.

¶15 Pace's responsive brief was seventeen pages. In nine pages Pace argued that the court properly exercised its discretion in denying Josellis's motion to amend his complaint after it had entered judgment, in denying the motion for reconsideration, and in awarding attorney fees for the motion on the ground of frivolousness. In four pages, Pace argued that it was entitled to attorney fees for the appeal because the appeal was frivolous.

¶16 Gumina spent 1.3 hours reviewing Josellis's brief; Goldstein spent 20.5 hours analyzing, researching, and drafting Pace's responsive brief, exclusive of time spent on preparing the record; and Langemak spent 105.6 hours analyzing, researching, and drafting Pace's brief.

¶17 We can see no basis in the record for concluding that the number of hours Goldstein and Langemak spent working on Pace's brief were reasonably required. As we have already stated, the only order we permitted Josellis to appeal was the order denying his motion for reconsideration and awarding attorney fees for that motion. Pace also reasonably addressed the preceding order denying Josellis's motion to amend the complaint after judgment, because that was the subject of the reconsideration motion and because Josellis argued the merits of that prior motion in his main brief. In addition, it was of course reasonable for Pace to raise and argue the issue of fees for the appeal. All the issues that Pace addressed were straightforward, involving the application of settled principles of law to a recurring fact situation, as Pace recognized in its statement on publication in its brief. The settled law was uncomplicated, and the record of the relevant facts was

limited and uncomplicated. This is born out by our per curiam decision, which was less than three pages of text.

¶18 At the hearing before the trial court, Pace's counsel acknowledged that the fees were "extensive," but stated that extra work was necessary because Josellis's "citations as a pro se plaintiff are often convoluted. Sometimes he misinterprets the law and makes obscure cites to cases, and sifting through cases that may only be marginally relevant to the issue at hand takes extra time." The trial court apparently accepted this argument when it found that Josellis was "in large part, responsible for the extra work generated by defendant's counsel, which he now comes into court and complains [about]." However, the court did not explain this finding with reference to the record of the appeal.[5] We recognize that, even when the issues on an appeal are not complex, the approach taken by an appellant not trained in the law may require more time to adequately respond to than if the appellant had had legal training. However, in this case we cannot see, based on the record before us, how the contents of Josellis's brief reasonably required the number of hours expended by Pace in responding. As we have already stated, the argument section of Josellis's brief was only four pages, and, even if his citations were convoluted or obscure, he cited to only six cases.

¶19 In short, we cannot find in the record a reasonable basis for the great number of hours—127.4 total—spent on Pace's responsive brief. We are therefore persuaded that it is necessary to reverse the trial court's award of fees and remand to the trial court. We recognize that the trial court and Pace justifiably

[5] We assume the court was not referring to Josellis's pleadings, motions, and arguments in the trial court prior to the appeal, because the remand was for the purpose of determining the fees incurred during the appeal.

feel that Josellis has unnecessarily prolonged this litigation by filing frivolous motions after judgment and a frivolous appeal, but we are unable to affirm the trial court's award of attorney fees. On remand, the court should consider again the reasonableness of the fees requested, taking into account the brief Pace filed and the nature of the issues addressed, as well as any other factors the court views as relevant. Whatever fee the court decides is reasonable, it should explain what facts of record it considered relevant and how it arrived at its conclusion.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶20 DYKMAN, J. (*concurring in part; dissenting in part*). Horst Josellis attempted to build a case on the fact that Pace fired him and escorted him out of its building. It is not surprising that he lost. He filed a motion for reconsideration, which the trial court denied, concluding that the motion was frivolous. Josellis appealed, and we affirmed, remanding for a determination of appellate attorney fees. The trial court awarded those fees. Josellis appealed again. In my view, this should be the end of the line. I agree with eighteen of the majority's nineteen paragraphs in its opinion. But I respectfully dissent to paragraph nineteen. "Just say stop" should be the new catch-phrase for handling frivolous lawsuits. Remanding for more frivolous litigation solves nothing.

¶21 I disagree with the majority's mandate because it remands this case for a re-determination of the attorney fees to be assessed against Josellis. Fortunately, Pace has realized the futility of asking for attorney fees for this appeal.[6] Had it done so, this case would never end. As it is, the trial court's decision will be an appealable order or judgment. Given the history of this case, we will again be faced with another appeal asserting trial court error in determining those fees. Enough is enough. If the $21,000 attorney fees are typical of the fees Pace will be required to pay for just the appellate litigation of this case, Pace will have paid $61,000, and probably is not finished yet. This result is unconscionable. Josellis's case has exceeded its life expectancy. I cannot

[6] Experience tells me that Pace will recover its judgment for fees only after expending substantial fees to do so, if it can recover at all from Josellis.

join in the majority's decision to remand for more litigation. Were I able to write for a majority, I would determine the amount of attorney fees reasonably incurred for the previous appeal in this case and modify the judgment against Josellis to provide for that amount. This case would end now.

¶22 This result is not unprecedented. In ***Lakeshore Commercial Finance Corp. v. Bradford Arms Corp.***, 45 Wis. 2d 313, 173 N.W.2d 165 (1970), the court considered attorney fees incurred in a mortgage foreclosure. It concluded that attorney fees of $28,247.64 were not reasonable, and said:

> Therefore, reviewing the reasonable value of professional services in this case, it is our considered judgment that $16,500 is the reasonable value of such services, together with taxable costs, and the judgment entered by the trial court is so modified.

Id. at 330.

¶23 The court considered attorney fees incurred in obtaining judgment on a cognovit note in ***Home Bank v. Becker***, 48 Wis. 2d 1, 15-17, 179 N.W.2d 855 (1970). It said: "This court has also held that the reasonableness of the amount of attorney's fees charged may be determined by this court on appeal, based on the judge's own knowledge of the value of services rendered by attorneys." ***Id.*** at 16. It concluded: "Therefore, reviewing the reasonable value of professional services in this case, it is the judgment of this court that $5,942.78 is the reasonable value of such services." ***Id.*** at 17.

¶24 The supreme court considered a reasonable allowance for attorney fees in the divorce action ***Hennen v. Hennen***, 53 Wis. 2d 600, 608-10, 193 N.W.2d 717 (1972). It concluded that the fee charged, $10,000, was excessive. ***Id.*** at 610. It said:

> Furthermore, we are of the opinion that the interest of justice and of both parties will be best served by the resolution of this issue on appeal, rather than by remand for further litigation….
>
> The judgment is modified to provide that $5,000 is the reasonable value of professional legal services performed in behalf of the plaintiff, and that the sum of $2,500 is a fair and reasonable sum to direct the defendant to contribute toward payment of such services.

Id.

¶25 In another divorce case, ***Markham v. Markham***, 65 Wis. 2d 735, 754, 223 N.W.2d 616 (1974), the trial court made no determination as to the reasonableness of the total fee, a necessary prerequisite before determining the appropriate contribution from appellant's husband. The supreme court said:

> This court has also held that the value of attorney's fees or services, as determined by the trial court, is not subject to the usual test of "great weight and clear preponderance" on appeal. This is because the expertise necessary for such a determination is shared alike by the members of this court with trial courts.
>
> ….
>
> We deem this an appropriate case in which to make an independent determination, not of the reasonableness of the appellant's attorneys' fees, but of the reasonableness of the time spent by the appellant's attorneys in relation to the complexity of the case.

Id. (citation omitted). The court concluded:

> After a review of the record, and giving consideration to all the factors, it is our independent judgment that reasonable contribution by the respondent to the appellant's attorneys' fees is $1,500 instead of $800, as ordered by the trial court, and the judgment is so modified.

Id. at 755.

¶26 The supreme court has also independently reviewed attorney fees in ***Herro, McAndrews & Porter, S.C. v. Gerhardt***, 62 Wis. 2d 179, 214 N.W.2d 401 (1974); ***Theuerkauf v. Schnellbaecher*,** 64 Wis. 2d 79, 218 N.W.2d 295 (1974); ***Disciplinary Proceedings Against Marine***, 82 Wis. 2d 602, 264 Wis. 2d 285 (1977); and ***First Wisconsin National Bank v. Nicolaou***, 113 Wis. 2d 524, 541, 335 N.W.2d 390 (1983).

¶27 I am aware that other cases use a deferential standard of review for part of an attorney fee determination. Among these are ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 496 N.W.2d 57 (1993); ***Milwaukee Rescue Mission, Inc. v. Milwaukee Redevelopment Authority***, 161 Wis. 2d 472, 468 N.W.2d 663 (1991); and ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). ***Standard Theatres*** adopts an "abuse of discretion" standard of review, but, because it affirms the trial court's determination that an attorney fee was reasonable, it does not reach a conclusion as to the appropriate remedy when a trial court's attorney fee determination is an erroneous exercise of discretion. These cases ultimately rely on ***Tesch v. Tesch***, 63 Wis. 2d 320, 217 N.W.2d 647 (1974), as authority for using a deferential standard of review. And yet, ***Tesch***, citing cases which use both standards of review, ultimately relied on ***Hennen***. ***Id.*** at 334. Using a de novo standard, ***Tesch*** reversed the trial court's award of a $2,000 contribution toward attorney fees. ***Id.*** at 335. It concluded that $2,500 was the reasonable amount the husband must contribute to the wife's attorney fees. ***Id.***

¶28 If ***Tesch*** created uncertainty as to the appropriate standard of review for attorney fee determinations, that uncertainty was laid to rest less than a month later when the court decided ***Theuerkauf*.** As I have noted, ***Theuerkauf*** discussed the appropriate standard of review for attorney fee determinations and concluded: "The court announced that henceforth on appeal an independent review as to the

reasonableness of an attorney's fee would be performed." ***Theurkauf***, 64 Wis. 2d at 93.

¶29 There is a difference between the standard of review for a trial court's determination that an attorney fee is reasonable, and the remedy to be used when reversing that determination. None of the cases I have cited, when discussing remedy, hold that an appellate court cannot independently set a reasonable attorney fee. The supreme court has set attorney fees on many occasions. Whether we review a trial court's determination of the reasonableness of an attorney fee de novo or deferentially, once we reverse that determination, there is no reason why we cannot independently set a reasonable fee.

¶30 ***Lakeshore***, ***Home Bank***, ***Hennen***, ***Markham***, ***Herro***, ***Theuerkauf*** and ***Marine*** remain unreversed. Their reasoning is applicable here: Appellate judges are lawyers too, and are aware of the reasonable value of legal services. Furthermore, here, as in ***Hennen***, the interest of justice and of both parties will best be served if this case is not remanded for further senseless litigation. I have again examined Pace's brief in the previous appeal in this matter. Its brief is seventeen-pages long. At $21,000, that comes to a fee of about $1,200 per page. The facts of this case were unremarkable; the case was typical of a pro se litigant who admitted that he did not understand legal procedure and law. Indeed, Josellis compared his ability and Pace's attorneys' ability to a high school football team playing the Green Bay Packers. He was certainly correct in that respect.

¶31 Pace's attorneys were the beneficiaries of a strong standard of review. They noted, correctly, that "Josellis fails to provide any factual or legal basis to conclude that the trial court improperly exercised its discretion in this case." Indeed, Pace's attorneys thought so little of Josellis's appeal that they

correctly concluded it was frivolous. The issue regarding amending pleadings after judgment was not difficult, and again, respondent's attorneys had the benefit of a strong standard of review. Defending the trial court's award of attorney fees for a frivolous motion for reconsideration was not a difficult exercise. There is adequate Wisconsin case law which makes this section of the brief unremarkable. The brief's explanation of Pace's request for appellate attorney fees was easy, for as Pace's attorneys noted, affirming a frivolous trial court finding makes the appeal frivolous.

¶32 Comparing Pace's brief to the thousands of appellate briefs I have read, I conclude that it was at best an average response to an appeal that had no chance of success. While preparing the brief was not quite comparable to "shooting fish in a barrel," and Josellis's pro-se status made the response a little more difficult, the $21,000 attorney fee charged for preparation of the brief was more than unreasonable. The 138 hours spent in responding to Josellis's nine-page brief was in excess of three weeks of full-time work. Independently reviewing the brief, and recognizing that my view is that of an appellate specialist, I conclude that an ordinary, competent practitioner would complete the brief in a little less than a week. Nonetheless, I conclude that a week's work would be the maximum reasonable time spent. I have calculated the percentage of time spent on the appeal by the three attorneys who worked on it, and their hourly rate for their services, with which I will not quibble. The result is a fee of about $6,000, which I independently conclude is the maximum reasonable fee for writing the respondent's brief.

¶33 I do not know why the majority refuses to adopt this method of terminating this appeal. It does not say. Nor do I understand why the majority does not recommend its opinion for publication, given the authority I have cited,

which authorizes a different result. Whatever those unstated reasons, the majority continues this ineffectual litigation. There will be no useful result, only additional attorney fees. The parties will consume more scarce judicial resources. Pace, this case's Pyrrhic victor, will discover that Josellis will be able to make another costly run at its treasury. Because I would terminate this litigation now, I respectfully concur with eighteen paragraphs of the majority's opinion, and dissent only to its remand for more frivolous litigation.