COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2827

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

CHEVRON CHEMICAL COMPANY,

Plaintiff-Respondent-
Cross Appellant,

FIRST BRANDS CORPORATION,

Plaintiff,

v.

DELOITTE & TOUCHE LLP,

Defendant-Appellant-
Cross Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Deloitte & Touche LLP (Deloitte) appeals from a judgment rendered in favor of Chevron Chemical Company (Chevron) for the sum of $2,364,043 in claims plus double costs. Chevron cross-appeals from the same judgment denying it an award of attorney fees as taxable costs.

Deloitte claims the trial court erred both: (1) because it failed to hold an evidentiary hearing on the issue of damages on its negligent misrepresentation claim; and (2) because it employed an erroneous methodology in computing damages. Chevron claims the trial court erred as a matter of law in failing to exercise its discretionary power to determine whether attorney fees should be awarded as taxable costs.

Because the trial court erred as a matter of law in failing to hold an evidentiary hearing on damages resulting from negligent misrepresentation and because the trial court failed to exercise its discretionary power to determine whether the award of attorney fees was appropriate, we reverse.[1]

[1] Because of our conclusion, it is not necessary for us to address the method in which the trial court determined damages. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

I. BACKGROUND

Because this litigation between Deloitte and Chevron has had such a contorted past, in the interest of clarity, we trouble the reader with a brief synopsis of this modern-day version of ***Jarndyce v. Jarndyce***.[2]

Deloitte, a certified public accounting firm, audited American Fuel and Supply Co.'s (AFSCO) financial condition for the year ending December 31, 1985. AFSCO was a distributor of Chevron products. In August 1986, Deloitte discovered that the financial statements of the year 1985 were materially false and withdrew its audit report. Deloitte, however, failed to disclose its withdrawal of the audit to Chevron. Chevron sued Deloitte claiming it had extended credit to AFSCO in reliance upon Deloitte's audit report. Chevron alleged both negligence in auditing and negligent misrepresentation based on Deloitte's failure to disclose to Chevron that it had withdrawn its audit report.

Prior to trial, Chevron was granted partial summary judgment on its misrepresentation-by-nondisclosure claim. The parties proceeded to a jury trial on the negligent audit and the remaining misrepresentation claim. Throughout the trial, Chevron complained about Deloitte's counsel's trial conduct (which included repeatedly violating court orders, making inappropriate outbursts, levelling charges against opposing counsel in front of the jury, and mischaracterizing the contents of exhibits), and moved for judgment as a sanction. The trial court took the motion under advisement. The jury absolved Deloitte of any liability and made no findings on damages regarding the misrepresentation claim. In postverdict motions, Chevron moved for judgment of $1.6 million and alternatively sought a new trial plus attorney fees. The trial court granted the request for judgment for negligent misrepresentation, but did not reach the motion for a new trial plus attorney fees.

Deloitte appealed to this court and we issued a published opinion. ***Chevron Chemical Co. v. Deloitte & Touche***, 168 Wis.2d 323, 483 N.W.2d 314 (Ct. App. 1992) [hereinafter ***Chevron I***]. This court affirmed the judgment,

[2] *See generally*, CHARLES DICKENS, BLEAK HOUSE (1st Modern Library ed. 1985) (1853).

holding Deloitte liable as a matter of law on the merits of Chevron's negligent misrepresentation by nondisclosure claim, but remanded because issues of fact remained regarding damages. ***Id.*** at 327, 483 N.W.2d at 315. We further concluded that the "cause must now be remanded to the trial court for the determination of damages." ***Id.*** at 342, 483 N.W.2d at 322. Our decision was appealed to our supreme court by both parties resulting in the published decision ***Chevron Chemical Co. v. Deloitte & Touche***, 176 Wis.2d 935, 501 N.W.2d 15 (1993) [hereinafter ***Chevron II***]. The supreme court, exercising its statutory authority under §§ 805.03 and 804.12, STATS., as well as its inherent authority, affirmed the liability of Deloitte as a sanction, but remanded the case to the trial court "for a hearing on damages," because there were "genuine issues of fact remaining regarding damages," ***Chevron II***, 176 Wis.2d at 950-51, 501 N.W.2d at 22, as in a typical default judgment case. ***Id.*** at 950, 501 N.W.2d at 22.

Upon remand, the trial court, after reviewing this court's decision (***Chevron I***) and the supreme court's decision (***Chevron II***) concluded that "Chevron ... is entitled to have deemed proved all elements of the claim of negligent misrepresentation ... except the extent of damages." Instead of conducting an evidentiary hearing, the trial court determined that it would decide the damages issue based on the trial record, together with briefs and oral argument from the parties. Using only this information, the trial court determined that Chevron was entitled to $2,364,043 in damages plus double costs. The trial court also concluded that it did not have authority to award attorney fees. Both Deloitte and Chevron now appeal.

II. DISCUSSION

A. Appeal: Evidentiary Hearing on Damages.

Deloitte asserts that the trial court erred when it refused to hold an evidentiary hearing on damages. We agree.

In ***Chevron II***, our supreme court acknowledged this court's conclusion in ***Chevron I*** that "there had been a genuine dispute over damages throughout the trial." ***Chevron II***, 176 Wis.2d at 950, 501 N.W.2d at 22. It then

concluded that the determination of the amount of damages "is to be treated as it is in typical default judgment cases." ***Id.*** Citing ***Hedtcke v. Sentry Insurance Co.***, 109 Wis.2d 461, 478-79 n.5, 326 N.W.2d 727, 735-36 n.5 (1982), and ***Midwest Developers v. Goma Corp.***, 121 Wis.2d 632, 651-53, 360 N.W.2d 554, 564 (Ct. App. 1984), the court then declared: "Because Deloitte has challenged the amount awarded and because there are genuine issues of fact remaining regarding damages, we remand for a hearing on damages." ***Id.*** at 950-51, 501 N.W.2d at 22.

By mentioning the ***Hedtcke*** and ***Midwest*** cases in support for its remand, the court was referring to § 806.02(2), STATS., the default judgment statute. Although the procedural posture of neither ***Hedtcke*** nor ***Midwest*** required a contested hearing to determine damages, both cases relied on ***Bartelt v. Braunsdorf***, 57 Wis. 1, 3-4, 14 N.W. 829, 830 (1883), and ***Smithers v. Brunkhorst***, 178 Wis. 530, 533, 190 N.W. 349, 350 (1922), for the proposition that a defendant in a default judgment setting is entitled to introduce evidence to mitigate or to be heard as to the diminution of damages. Both ***Hedtcke*** and ***Midwest*** then logically suggest that if the amount of damages is challenged, it is necessary to conduct a hearing to present proof.[3] In the instant case, it is undisputed that Deloitte has consistently challenged the amount of damages. A plain reading of § 806.02(2), STATS., only requires that if proof of any fact is necessary, the court should receive proof be it by hearing or some other means of submission. In reviewing ***Bartlett*** and ***Smithers***, (decided long before § 806.02(2) was amended to its present form, *see* 101 Wis.2d xii), an evidentiary hearing is a proper alternative means to resolve disputed issues of fact relating to damages. Thus, in the context of the dispute between Chevron and Deloitte about the amount of consequential damages suffered by Chevron, the supreme court's mandate line reasonably contemplates an evidentiary hearing.

Although it is not altogether clear from its brief, Chevron appears to base its reply to Deloitte's claim of trial court error on the mandate line language of the supreme court, i.e., "and the cause is remanded for a

[3] In ***Hedtcke v. Sentry Insurance Co.***, 109 Wis.2d 461, 478-79 n.5, 326 N.W.2d 727, 735-36 n.5 (1982), our supreme court, after hypothesizing a default judgment scenario, declared "if Sentry contests the amount of damages claimed in the complaint, it may appear at the hearing to assess damages, cross-examine the plaintiff's witnesses and present evidence to contest the amount of recovery."

determination by the circuit court of the amount of damages to be awarded as a judgment against Deloitte." ***Chevron II***, 176 Wis.2d at 951, 501 N.W.2d at 22. Thus, argues Chevron, the trial court acted properly in deciding the damage issue based on letter briefs, the record of the five-week long trial, and oral argument because to allow an evidentiary hearing "would, in effect, erase the sanction by rewarding Deloitte" with a new trial for its misconduct. The trial court reached the same conclusion, reasoning:

> Chevron would have obtained a Pyrrhic victory--nominally declared to be the winner yet forced to spend yet more money on a second trial as well as incurring the almost certain delay that another evidentiary hearing would entail given the conflicting schedules of witnesses, counsel and the court.

We share the trial court's concern that justice is not served by hollow victories after trial, but at the same time, we recognize the superintending administrative authority of our supreme court and the clearly expressed language implementing its order remanding the issue of consequential damages to the trial court. Although the effect of § 806.02(2), STATS., may entail a contentious damage determination, it does not require a new trial. Because of the dispute as to how those damages were to be calculated and because it would be sheer speculation how the proofs would develop, the trial court ought not be encumbered by any conclusions or restrictions from this court. *See* ***Lingott v. Bihlmire***, 38 Wis.2d 114, 129, 156 N.W.2d 439, 446-47 (1968) (trial court is free to make any order or direction not inconsistent with appellate court when confronted with a remand for further proceedings). We conclude, therefore, that the intention of the supreme court is clear and unequivocal and that an evidentiary hearing must be held on the total question of damages.[4]

[4] We summarily reject Deloitte's additional contention that Chevron's damages cannot exceed the $715,000 mark found by the jury on the negligent auditing claim. ***Chevron II*** clearly contemplated a damage award not bound by the $715,000 figure. ***Chevron II***, 176 Wis.2d at 951, 501 N.W.2d at 22.

B. Cross-Appeal: Attorney Fees.

Chevron cross-appeals from the trial court's decision that it did not have the authority to entertain Chevron's motion seeking attorney fees. Chevron contends that our supreme court's mandate in ***Chevron II*** does not preclude the trial court from considering the additional sanction of attorney fees. Deloitte responds that the trial court appropriately determined that it did not have the authority to consider the attorney fees issue. Deloitte further argues that even though it is within the trial court's authority to consider the issue, Chevron waived it.

Because this issue goes to the power of a trial court under a supreme court mandate, it is a question of law that we review *de novo*. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 138, 441 N.W.2d 292, 295 (Ct. App. 1989) (questions of law are reviewed *de novo*).

1. Authority to Consider Attorney Fees.

Ordinarily, the trial court has inherent and statutory authority to impose attorney fees as a sanction. ***Chevron II***, 176 Wis.2d at 946-47, 501 N.W.2d at 20. The disputed issue presented in this case, however, is whether that authority still exists given the procedural posture of this case; that is, whether the authority exists upon remand from a decision by the supreme court. We conclude that the supreme court's mandate in ***Chevron II*** does not preclude the trial court from exercising its inherent and statutory authority to consider Chevron's motion seeking attorney fees.

The ***Chevron II*** court decided that the trial court's order granting judgment to Chevron was somewhat ambiguous—that is, it was unclear whether the trial court granted judgment against Deloitte on the merits, *or* whether the trial court granted judgment against Deloitte as a sanction for egregious misconduct. ***Id.*** at 943-46, 501 N.W.2d at 19-20. The supreme court decided that "regardless of whether the circuit court actually entered judgment as a sanction, in furtherance of our obligation to maintain professionalism and civility in the courts, we address the sanction issue." ***Id.*** at 946, 501 N.W.2d at 20. The foregoing history is important to our assessment of whether the

supreme court's mandate forecloses the trial court's authority to consider attorney fees as an additional sanction. When a matter is remanded to the trial court for further proceedings, the trial court "is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision." ***Lingott***, 38 Wis.2d at 129, 156 N.W.2d at 446-47.

Our review of ***Chevron II*** demonstrates that the supreme court intended to make a strong statement about the type of conduct evinced by Deloitte. The supreme court proclaimed that if legal professionals engage in such egregious, repeated conduct, the most harsh penalty of *judgment* is appropriate. ***Id.*** at 946-50, 501 N.W.2d at 20-22. The supreme court's opinion does not address whether, in addition to the sanction of judgment, other sanctions such as attorney fees may be imposed. ***Id.*** We conclude that the supreme court's mandate in ***Chevron II*** does not supplant the trial court's authority to impose any additional sanctions that may be appropriate given the egregious nature of Deloitte's conduct. Our conclusion is based on the following factors: (1) the supreme court's remand was pursuant to § 808.08(3), STATS.; (2) considering the attorney fees issue on remand is not inconsistent with the supreme court's mandate, *see* ***Lingott***, 38 Wis.2d at 129, 156 N.W.2d 446-47; and (3) when a decision of a trial court is overturned on appeal, any motions pending which were superseded by the overturned order must be considered, *see* ***Kennedy-Ingalls Corp. v. Meissner***, 8 Wis.2d 126, 132, 98 N.W.2d 386, 389 (1959).

Section 808.08(3), STATS., provides in pertinent part: "If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings."

The supreme court remanded ***Chevron*** to the trial court for further proceedings regarding the damage issue. Accordingly, the remand falls under § 808.08(3), STATS. Where a matter is remanded under § 808.08(3) for further proceedings, consideration of awards of costs are typically deemed open for determination upon remand. *See* ***Boehck Constr. Equip. Corp. v. Voigt***, 17 Wis.2d 62, 78a, 115 N.W.2d 627, 117 Wis.2d 372, 372 (1962). In accord with the statute, Chevron moved for further proceedings. Included within its motion was a request for the attorney fees to be included as costs. As long as Chevron's

requested relief is not inconsistent with and is not precluded by the supreme court's mandate in ***Chevron II***, the trial court has authority to entertain the request.

As noted above, our review of the record and case law governing this case demonstrates that considering the attorney fees issue on remand would not be inconsistent with the supreme court's mandate in ***Chevron II***. The supreme court issued a strong statement regarding attorney misconduct in holding that the facts presented in this case support imposing the most severe sanction available—judgment. The decision did not, however, supplant the trial court's authority to, in its discretion, consider requests for further sanction.

Further, Chevron had moved for sanctions prior to Deloitte taking an appeal. Because judgment was entered against Deloitte and Deloitte appealed, the sanction issue was not addressed. On remand, the trial court has the authority to consider motions that were pending prior to appeal. *See* ***Kennedy-Ingalls Corp.***, 8 Wis.2d at 132, 98 N.W.2d at 389. Accordingly, the trial court in the instant case has the authority to consider the attorney fees motion which was raised prior to the appeal.

2. Waiver.

Deloitte contends that even if the trial court has the authority to consider the issue of attorney fees at this stature, Chevron did not preserve this issue. We disagree.

To preserve the issue of attorney fees, Chevron is required to request that the trial court exercise its discretion to impose sanctions and to present the range of sanctions available. The record demonstrates that Chevron complied with this requirement.

We hold, therefore, that the trial court in this case has the authority to consider Chevron's motion seeking attorney fees. Accordingly, we reverse the trial court's decision on the cross-appeal and remand for a hearing to

determine whether any additional sanctions are appropriate, and if so, the extent of those sanctions.

III. CONCLUSION

In accordance with this opinion, on remand, we direct the trial court to: (1) conduct an evidentiary hearing limited to the issue of the appropriate amount of damages regarding the negligent misrepresentation claim; and (2) to consider Chevron's motion seeking attorney fees. Further, because each party has prevailed in part on this appeal and cross-appeal, we conclude that neither party is entitled to appeal costs. *See* § 809.25, STATS.

By the Court. – Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.