

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1953

Cir. Ct. No. 2012CV24

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PAMELA L. WEBER AND JONATHAN D. WEBER,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

**AUTO OWNERS INSURANCE COMPANY, JENNA P. TURNQUIST AND ANN M.
TURNQUIST,**

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 STARK, J. Pamela and Jonathan Weber appeal a judgment denying Pamela statutory costs incurred in obtaining a jury verdict in the amount of \$2900

on her negligence claim against Auto Owners Insurance Company and its insureds, Jenna and Ann Turnquist.¹ Auto Owners cross-appeals, arguing the circuit court erred by refusing to award it statutory costs incurred in successfully defending against Jonathan's loss of society and companionship claim.

¶2 We conclude the circuit court erroneously exercised its discretion by declining to award Pamela statutory disbursements on her negligence claim, but it did not err by refusing to award Auto Owners disbursements on Jonathan's loss of society and companionship claim. However, the court should have awarded each party statutory attorney fees on its successful claim or defense. We therefore affirm in part, reverse in part, and remand for the circuit court to award statutory attorney fees to both parties and appropriate disbursements to Pamela on the negligence claim.

BACKGROUND

¶3 The Webers filed the instant lawsuit against Auto Owners on February 21, 2012. The complaint alleged Pamela was injured in a car accident with a vehicle negligently operated by Jenna Turnquist. The complaint sought damages for Pamela's injuries, and it also asserted Jonathan had suffered a loss of Pamela's society and companionship.

¶4 On December 16, 2013, the Webers filed a statutory offer of settlement in the amount of \$100,000 for both the negligence and loss of society

¹ We refer to Auto Owners, Jenna Turnquist, and Ann Turnquist collectively as Auto Owners throughout the remainder of this opinion. We refer to Pamela and Jonathan Weber collectively as the Webers, and individually by their first names.

and companionship claims.² Auto Owners rejected the offer, and the case proceeded to trial in March 2014. The jury awarded Pamela \$2900 in past damages on her negligence claim. It declined to award Pamela future damages, and it also declined to award Jonathan damages for loss of society and companionship.

¶5 Following trial, Pamela asserted she was entitled to statutory costs on her negligence claim, pursuant to WIS. STAT. § 814.01(1), and she submitted a bill of costs in the amount of \$8278.40. Auto Owners asserted it was entitled to statutory costs on Jonathan’s loss of society and companionship claim under WIS. STAT. § 814.03(1), and it submitted a bill of costs in the amount of \$9176.82. The circuit court held a hearing regarding costs, and the parties submitted numerous briefs on the issue.

¶6 The court ultimately entered an order regarding costs on June 2, 2014. It determined Pamela was entitled to recover costs on her negligence claim, and Auto Owners was entitled to recover costs on Jonathan’s loss of society and companionship claim. However, citing *Gorman v. Wausau Insurance Cos.*, 175 Wis. 2d 320, 499 N.W.2d 245 (Ct. App. 1993), the court stated each side was required to show which costs were related to the claim or defense on which it prevailed. The court concluded the evidence was “inadequate from both sides to determine what disbursements are related to each side’s successful claim and which disbursements are related to each side’s unsuccessful claim.”

² See WIS. STAT. § 807.01(3). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶7 The court then observed it could hold another hearing to determine which costs were related to which claim or defense. Instead, however, the court stated it would proceed under WIS. STAT. § 814.036, which states, “If a situation arises in which the allowance of costs is not covered by ss. 814.01 to 814.035, the allowance shall be in the discretion of the court.” Pursuant to this grant of discretion, the court decided not to award costs to either party, reasoning:

[Auto Owners was] completely successful on the claim brought by Jonathan Weber. Although ... Pamela Weber did obtain a recovery, the recovery was significantly less than what she had proposed [in her] offer of settlement and what she had requested from the jury. “In Wisconsin, costs are awardable to a prevailing party. They are payable by the defeated party upon the completion of the litigation process. Although it has been recognized that the assessment of costs is in part a penal measure, the costs statute is designed to recompense the prevailing party for some of the cost of the vindication of his rights. These are the salient features of the statute which authorizes the imposition of taxable costs on a defeated litigant.” *State v. Foster*, 100 Wis. 2d 103, 107[-08, 301 N.W.2d 192] (1981) [footnotes omitted]. [The Webers] brought a large claims civil action, Jonathan Weber got no recovery. Pamela Weber got a recovery that could have been had in small claims court. While ... Pamela Weber was awarded a recovery, her success was extremely limited.

¶8 The court subsequently entered a judgment awarding Pamela \$2900, plus interest. The Webers now appeal, arguing the court should have awarded Pamela statutory costs on her negligence claim. Auto Owners cross-appeals, arguing the court should have awarded it statutory costs on Jonathan’s loss of society and companionship claim.

DISCUSSION

¶9 WISCONSIN STAT. ch. 814 governs costs in civil actions. WISCONSIN STAT. § 814.01(1) states, “Except as otherwise provided in this chapter, costs shall

be allowed of course to the plaintiff upon a recovery.” WISCONSIN STAT. § 814.03(1), in turn, provides, “If the plaintiff is not entitled to costs under s. 814.01(1) ... the defendant shall be allowed costs to be computed on the basis of the demands of the complaint.” WISCONSIN STAT. § 814.04 enumerates the costs recoverable under §§ 814.01 and 814.03. As relevant to this case, § 814.04(1) allows recovery of limited attorney fees, and § 814.04(2) permits recovery of disbursements, which are defined as:

All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff’s fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding \$100 for each item; an expert witness fee not exceeding \$300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands

Sec. 814.04(2).

¶10 An award of costs to a successful plaintiff under WIS. STAT. § 814.01 or a successful defendant under WIS. STAT. § 814.03 is mandatory, not discretionary. *See Duesterbeck v. Town of Koshkonong*, 2000 WI App 6, ¶33, 232 Wis. 2d 16, 605 N.W.2d 904 (Ct. App. 1999) (addressing § 814.01); *Taylor v. St. Croix Chippewa Indians*, 229 Wis. 2d 688, 695-96, 599 N.W.2d 924 (Ct. App. 1999) (addressing § 814.03). While WIS. STAT. § 814.04(2) enumerates the types of disbursements that may be taxed as costs, it “does not constrain the [circuit] court’s exercise of discretion in determining the amount of costs.” *Aspen Servs.*,

Inc. v. IT Corp., 220 Wis. 2d 491, 511, 583 N.W.2d 849 (Ct. App. 1998). Specifically, a court has discretion to determine whether a particular disbursement was “necessary,” as required by § 814.04(2). *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P’ship*, 2004 WI 92, ¶54, 273 Wis. 2d 577, 682 N.W.2d 839. “We will uphold the circuit court’s exercise of discretion, so long as it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a conclusion that a reasonable judge could reach.” *Id.*

¶11 Here, the circuit court concluded Pamela was entitled to costs on her negligence claim, pursuant to WIS. STAT. § 814.01(1), and Auto Owners was entitled to costs on Jonathan’s loss of society and companionship claim, pursuant to WIS. STAT. § 814.03(1). However, the court nevertheless declined to award either party costs, relying on WIS. STAT. § 814.036. That reliance was misplaced. Section 814.036 applies in situations where “the allowance of costs is not covered by ss. 814.01 to 814.035[.]” In this case, the allowance of costs to Pamela was clearly covered by § 814.01(1), and the allowance of costs to Auto Owners was clearly covered by § 814.03(1). Accordingly, § 814.036 was inapplicable.

¶12 We therefore proceed to consider whether, despite its improper reliance on WIS. STAT. § 814.036, the circuit court properly declined to award costs to Pamela and Auto Owners. For the reasons explained below, we conclude the court erred by refusing to award Pamela statutory disbursements. However, the court properly declined to award statutory disbursements to Auto Owners. Finally, we conclude the court should have awarded each party statutory attorney fees on its successful claim or defense.

I. Pamela's negligence claim

¶13 The circuit court declined to award Pamela statutory disbursements on her negligence claim for two reasons: (1) the evidence was inadequate to determine which of Pamela's claimed expenses were related to her negligence claim, as opposed to Jonathan's loss of society and companionship claim; and (2) Pamela's recovery on the negligence claim was disproportionate to the amount claimed on her bill of costs. We conclude the court erroneously exercised its discretion in three respects.

¶14 First, the court did not provide any analysis in support of its conclusion that Pamela failed to show which of her claimed expenses were related to her negligence claim. When a litigant prevails on one claim, but not another, it may recover statutory disbursements on the successful claim, but it must first demonstrate which of its claimed expenses were related to the successful claim. *Gorman*, 175 Wis. 2d at 327. In *Gorman*, Terry Gorman and his wife, Mari-Jo, sued Wausau Insurance Companies after Terry was injured in a car accident. *Id.* at 325. Terry sought recovery for his personal injuries, and Mari-Jo asserted a loss of consortium claim. *Id.* A jury awarded Terry damages totaling \$381,797, but it declined to award Mari-Jo damages. *Id.* at 326.

¶15 On appeal, Wausau Insurance argued it was entitled to statutory disbursements on Mari-Jo's loss of consortium claim, pursuant to WIS. STAT. § 814.03(1). *Gorman*, 175 Wis. 2d at 326. We agreed that Wausau Insurance was the prevailing party on Mari-Jo's claim and was therefore entitled to costs. *Id.* at 326-27. However, we then stated:

[I]n order to recover costs for actual disbursements, Wausau Insurance must show how those expenses were spent in defending itself against Mari-Jo's claim. Wausau

Insurance requested costs for such experts as their accountant who analyzed Terry's wage claim, their economist who analyzed Terry's wage loss and even their doctor who examined Terry. Any disbursements to those experts relate solely to Terry. Wausau Insurance cannot recoup disbursements it incurred in defending itself against Terry, a successful party.

Id. at 327. We later reiterated that, to recover statutory disbursements, a successful party “must show a necessary expenditure relating to the losing party’s case.” *Id.* at 328.

¶16 The circuit court here correctly relied on *Gorman* for the proposition that Pamela was required to show which of her claimed costs were related to her successful negligence claim. However, the court then summarily concluded, without further explanation, that the evidence Pamela provided was insufficient to make that determination. The court did not analyze any of the evidence Pamela provided, nor did it address Pamela’s argument that, with the exception of Jonathan’s deposition, all of her claimed expenses were related to her negligence claim. By failing to provide any reasoning in support of its conclusion, the court erroneously exercised its discretion.

¶17 Second, the circuit court improperly relied on the fact that Pamela’s recovery on the negligence claim was disproportionate to her claimed expenses. Auto Owners argues a court can properly consider proportionality when awarding statutory disbursements, pursuant to *Aspen Services*. However, *Aspen Services* does not stand for that proposition.

¶18 In *Aspen Services*, the primary issue was whether Aspen Services was entitled to attorney fees and costs under the terms of a lease, which stated, “Lessee shall pay all costs, expenses and reasonable attorney fees that may be incurred or paid by Lessor in enforcing the covenants and agreements of this

Lease.” *Aspen Servs.*, 220 Wis. 2d at 493-94. Aspen Services requested a total of \$112,985.37 in costs and attorney fees, but the circuit court allowed only \$68,011.30. *Id.* at 494. The court relied on the fact that Aspen Services’ attorney’s incivility had resulted in overtrial, which caused the attorney fees and costs to be “out of proportion to the result.” *Id.* at 496.

¶19 We concluded the circuit court properly exercised its discretion. We noted one factor a court is required to consider when determining reasonable attorney fees is “the amount of money or value of the property affected.” *Id.* at 497 n.5 (citing *Herro, McAndrews & Porter, S.C. v. Gerhardt*, 62 Wis. 2d 179, 184, 214 N.W.2d 401 (1974)). We agreed with the circuit court that Aspen Services’ request for over \$100,000 in attorney fees and costs to secure a judgment of \$18,329.03 was “grossly out of proportion to the final result.” *Id.*

¶20 After resolving this primary issue, we then considered Aspen Services’ argument that the circuit court was required to award certain expenses as statutory disbursements under WIS. STAT. § 814.04(2). *Aspen Servs.*, 220 Wis. 2d at 510-11. We rejected this argument, reasoning the expenses were not “necessary,” as required by § 814.04(2). *Aspen Servs.*, 220 Wis. 2d at 511. In reaching this conclusion, we did not rely on the fact that the expenses were disproportionate to the recovery Aspen Services obtained. Thus, while *Aspen Services* held that a court may consider proportionality when awarding reasonable attorney fees and costs under the terms of a contract, it did not hold that a court may consider proportionality when awarding statutory disbursements under § 814.04(2).

¶21 The plain language of the relevant statutes further supports a conclusion that a court cannot consider proportionality when awarding statutory

disbursements. WISCONSIN STAT. § 814.01(1) simply states that costs “shall be allowed of course to the plaintiff upon a recovery.” WISCONSIN STAT. § 814.03(1) states that if the plaintiff is not entitled to costs, “the defendant shall be allowed costs to be computed on the basis of the demands of the complaint.” Finally, under WIS. STAT. § 814.04(2), taxable costs include “[a]ll the necessary disbursements and fees allowed by law[.]” None of these statutes suggests that a court may reduce the disbursements awarded to a successful litigant based on the fact that the litigant’s recovery was disproportionate to its claimed expenses.

¶22 In support of its proportionality argument, Auto Owners also cites WIS. STAT. § 814.01(3), which provides, “In an action for assault and battery, false imprisonment, libel, slander, malicious prosecution, invasion of privacy or seduction, a plaintiff who recovers less than \$50 damages shall recover no more costs than damages.” Auto Owners asserts the same principle “should be adopted in a case such as the instant action, where [Pamela’s] recovery is about one-fourth of the costs incurred.” However, § 814.01(3) actually cuts against Auto Owner’s position because it shows the legislature understands how to limit costs based on the amount recovered when it wants to do so. The absence of similar language in WIS. STAT. §§ 814.01(1) and 814.03(1) suggests the legislature did not intend proportionality to be a factor in cases governed by those statutes.

¶23 Third, while a court has discretion to determine whether a litigant’s claimed expenses are “necessary,” as required by WIS. STAT. § 814.04(2), the circuit court did not find that any of Pamela’s claimed disbursements were unnecessary. In general, an expense is necessary when it is required either for a party to prepare its case or for the court to decide the case. An expense is not necessary when it is incurred merely for the convenience of a party. *See, e.g., DeWitt Ross & Stevens*, 273 Wis. 2d 577, ¶58 (cost of deposition transcripts was

necessary because the transcripts were used in support of the plaintiff's summary judgment motion; the transcripts were not obtained solely for the convenience of counsel); *Alswager v. Roundy's Inc.*, 2005 WI App 3, ¶14, 278 Wis. 2d 598, 692 N.W.2d 333 (cost of transcribing secretly recorded conversations was not a necessary disbursement because the transcriptions were made solely for the litigant's own convenience); *see also Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1340 (10th Cir. 1998) ("Necessarily obtained," as used in the federal costs statute, 28 U.S.C. § 1920, does not mean that the materials added to the convenience of the parties or made the task of the trial judge easier; the most direct evidence of necessity is the actual use of materials by counsel or the court; however, costs may be awarded for materials not used at trial, as long as the materials were reasonably necessary for use in the case.).

¶24 Other factors may be relevant on a case-by-case basis. For instance, in *Aspen Services*, we concluded Aspen Services' share of a referee's fee was not a necessary disbursement because the fee was imposed as a sanction against both parties "for the necessity of appointing a referee to control the discovery process." *Aspen Servs.*, 220 Wis. 2d at 511. We also concluded fees for video depositions were not necessary because Aspen Services "was in part to blame for creating an atmosphere of untrustworthiness which prompted [the circuit court's] decision to use videotape proceedings." *Id.* In *Rhiel v. Wisconsin County Mutual Insurance Corp.*, 212 Wis. 2d 46, 57, 568 N.W.2d 4 (Ct. App. 1997), we concluded express mail charges were necessary due to a short briefing schedule and last minute changes and cancellations.

¶25 The circuit court did not consider these or any other factors when declining to award Pamela statutory disbursements on her negligence claim. In fact, the court completely failed to analyze whether Pamela's claimed expenses

were necessary, instead focusing on the fact that the expenses were disproportionate to her recovery. By failing to consider necessity, the court erroneously exercised its discretion.

¶26 For the foregoing reasons, we reverse the circuit court’s judgment to the extent it declined to award Pamela statutory disbursements. We remand for the circuit court to award Pamela appropriate disbursements on her negligence claim.

¶27 Before turning to the next issue in this case—Auto Owners’ claim for disbursements on Jonathan’s loss of society and companionship claim—we pause to address an issue that, while not strictly necessary to the disposition of the Webers’ appeal, is likely to arise on remand. Specifically, the parties dispute whether, under **Gorman**, a litigant must show that its claimed expenses were *solely* related to its successful claim or defense, or merely related. We conclude a litigant need only show that the expenses were related to the successful claim.

¶28 In **Gorman**, we concluded Wausau Insurance had failed to show that its claimed expenses were incurred in its defense of Mari-Jo Gorman’s loss of consortium claim. **Gorman**, 175 Wis.2d at 327. We then listed examples of expenses claimed by Wausau Insurance that were solely related to Terry Gorman’s personal injury claim, and thus were not related to Mari-Jo’s claim. **Id.** However, we never explicitly stated Wausau Insurance was precluded from recovering expenses related to both claims. In fact, we specifically stated that, to recover statutory disbursements, a successful party “must show a necessary expenditure *relating to* the losing party’s case.” **Id.** at 328 (emphasis added). The parties do not cite, and we have not found, any other authority for the proposition that a litigant who is successful on one claim but not another can only recover

disbursements that are solely related to the successful claim. Accordingly, on remand, the circuit court must determine which of Pamela's claimed expenses were related to her negligence claim.

II. Jonathan's loss of society and companionship claim

¶29 The circuit court determined Auto Owners was the prevailing party on Jonathan's loss of society and companionship claim and was therefore entitled to statutory disbursements under WIS. STAT. § 814.03(1). However, the court then declined to award Auto Owners disbursements, based solely on the court's conclusion that Auto Owners had failed to prove which of its claimed expenses were related to its defense of Jonathan's claim. The court completely failed to discuss the evidence or explain its reasoning for this conclusion.

¶30 As with Pamela's claim for statutory disbursements, we could therefore reverse and remand for the court to properly exercise its discretion. However, unlike Pamela, Auto Owners does not develop any argument on appeal as to which of its claimed expenses were related to its successful defense of Jonathan's claim.³ Instead, Auto Owners argues it is entitled to all of its claimed expenses because any expenses incurred to defend against Pamela's negligence claim were also necessarily related to the loss of society and companionship claim. Auto Owners asserts the loss of society and companionship claim was "a logical

³ In its final brief in the circuit court, Auto Owners made an attempt to separate its expenses by claim, conceding that certain expenses in its original bill of costs were solely related to its defense of Pamela's negligence claim. Auto Owners submitted an amended bill of costs that omitted these expenses. On appeal, however, Auto Owners fails to develop any argument that its expenses can be separated by claim, arguing instead that all of its expenses are necessarily related to both claims. "[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned." *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

extension or modification directly related to [Pamela's] injury (or lack thereof)." Therefore, Auto Owners argues it "logically follows that if [Pamela] was able to prove a more severe injury than she did, the loss of [society and companionship] claim would have survived to some degree." In other words, Auto Owners argues it defeated Jonathan's loss of society and companionship claim by limiting Pamela's recovery on the negligence claim. In essence, Auto Owners asserts its expenses cannot be separated by claim.

¶31 This argument is foreclosed by *Gorman*. If Auto Owners were correct that all expenses incurred in defending against one spouse's personal injury claim are also necessarily related to the other spouse's loss of society and companionship claim, the *Gorman* court would not have required Wausau Insurance to show which of its claimed expenses were related to Mari-Jo Gorman's loss of society and companionship claim. The court would simply have concluded Wausau Insurance was entitled to all of its claimed expenses.

¶32 We therefore reject Auto Owners' argument that all of the expenses it incurred in its defense of Pamela's claim were also related to Jonathan's loss of society and companionship claim. Because Auto Owners does not develop any other argument on appeal as to which of its expenses were related to which claim, we affirm that portion of the circuit court's judgment denying Auto Owners statutory disbursements on the loss of society and companionship claim.

III. Statutory attorney fees

¶33 Finally, we conclude the circuit court erred by declining to award each party statutory attorney fees on its successful claim or defense. A prevailing plaintiff or defendant is entitled to statutory attorney fees as an item of costs, *see* WIS. STAT. § 814.04(1), regardless of whether he or she is also entitled to statutory

disbursements under § 814.04(2), *see Gorman*, 175 Wis. 2d at 327-38. Here, it is undisputed that Pamela prevailed on her negligence claim and Auto Owners prevailed on Jonathan's loss of society and companionship claim. Accordingly, on remand, in addition to awarding Pamela appropriate statutory disbursements, the circuit court shall also award each party statutory attorney fees on its successful claim or defense.

¶34 Only Pamela may recover WIS. STAT. RULE 809.25 appellate costs.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

