COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2014AP1561 Cir. Ct. No. 2011CV13116

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

MICHAEL ORDING AND CHERYL ORDING,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN STATE HOME SERVICES, INC. D/B/A/EVERDRY WATERPROOFING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed in part; reversed in part; cause remanded for further proceedings*.

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. Wisconsin State Home Services, Inc. d/b/a Everdry Waterproofing ("Everdry") appeals a judgment entered after a jury found that Everdry violated the Wisconsin Home Improvement Practices Act when it made a false representation inducing Michael and Cheryl Ording to contract with Everdry to waterproof their basement. Specifically, the Everdry salesman told the Ordings they would *never* have water in their basement again. The jury awarded $7,000 in damages, which the trial court doubled to $14,000 under WIS. STAT. § 100.20(5) (2013-14).[1] Also, pursuant to WIS. STAT. § 100.20(5), the trial court ordered Everdry to pay the Ordings' attorney fees of $41,000 and costs for its expert witness of $4,126. Everdry argues the trial court erred in finding that credible evidence existed to support the jury's verdict. Specifically, it contends: (1) that the oral representation by its salesman cannot be the basis to support the jury verdict because the contract contradicts the salesman's promise and the contract has an integration clause, which voided the oral representation; and (2) there is no causal connection between the false promise and any damages. We conclude there is credible evidence to support the jury's verdict, and we reject Everdry's untimely attempt to apply its integration clause. Accordingly, we affirm that part of the judgment.

¶2 Everdry further argues the trial court erred in ordering it to pay the Ordings' attorney fees and costs. In deciding this issue, we need to determine

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WISCONSIN STAT. § 100.20 governs "Methods of competition and trade practices" and provides as relevant: "(5) Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee."

whether to apply WIS. STAT. § 814.045, which governs how to calculate a reasonable attorney fees award.[2] The Ordings argue the statute does not apply

[2] WISCONSIN STAT. § 814.045 provides:

> **(1)** Subject to sub. (2), in any action involving the award of attorney fees that are not governed by s. 814.04 (1) or involving a dispute over the reasonableness of attorney fees, the court shall, in determining whether to award attorney fees and in determining whether the attorney fees are reasonable, consider all of the following:
>
> (a) The time and labor required by the attorney.
>
> (b) The novelty and difficulty of the questions involved in the action.
>
> (c) The skill requisite to perform the legal service properly.
>
> (d) The likelihood that the acceptance of the particular case precluded other employment by the attorney.
>
> (e) The fee customarily charged in the locality for similar legal services.
>
> (f) The amount of damages involved in the action.
>
> (g) The results obtained in the action.
>
> (h) The time limitations imposed by the client or by the circumstances of the action.
>
> (i) The nature and length of the attorney's professional relationship with his or her client.
>
> (j) The experience, reputation, and ability of the attorney.
>
> (k) Whether the fee is fixed or contingent.
>
> (L) The complexity of the case.
>
> (m) Awards of costs and fees in similar cases.
>
> (n) The legitimacy or strength of any defenses or affirmative defenses asserted in the action.

(continued)

because it was not in effect when they filed suit against Everdry and cannot be applied retroactively because it affects substantive rights. Everdry argues the statute should apply retroactively because it was in effect when this case went to trial and is procedural in nature. The trial court held the statute applied and considered several of the statutory factors at the post-verdict attorney fees hearing, but, in its final letter-decision, it did not discuss the statute; instead, it found that Everdry stipulated to the $41,000 the Ordings requested. We conclude the trial court correctly ruled that § 814.045 applies here retroactively because it is not substantive; however, we reverse and remand that part of the judgment on attorney fees and costs because the trial court erred when it found Everdry stipulated to the $41,000. We also conclude the trial court erroneously exercised its discretion in awarding the expert witness fees because it did so without giving any explanation for its decision. On remand, the trial court shall hold a hearing to properly complete the application of § 814.045, and determine whether the expert witness fees are proper costs. We further hold the Ordings are entitled to attorney fees and

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> (p) Other factors the court deems important or necessary to consider under the circumstances of the case.
>
> **(2)** (a) In any action in which compensatory damages are awarded, the court shall presume that reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded but this presumption may be overcome if the court determines, after considering the factors set forth in sub. (1), that a greater amount is reasonable.
>
> (b) In any action in which compensatory damages are not awarded but injunctive or declaratory relief, rescission or modification, or specific performance is ordered, reasonable attorney fees shall be determined according to the factors set forth in sub. (1).
>
> **(3)** This section does not abrogate the rights of persons to enter into an agreement for attorney fees, and the court shall presume that such an agreement is reasonable.

costs associated with this appeal and direct the trial court on remand to determine and award the Ordings reasonable appellate fees and costs.

BACKGROUND

¶3 The Ordings' basement leaked during rain storms. In July 2008, an Everdry salesman went to the Ordings' home and created a plan to repair their basement. According to the Ordings, the salesman represented that if they hired Everdry, they would *never* have water in their basement again. Based on this representation, the Ordings signed the contract for Everdry to waterproof their basement. When the work was completed, the Ordings started storing property in their basement. On July 15, 2010, the Ordings repeatedly called Everdry because they noticed water leaking into the basement. According to the Ordings, Everdry never returned their calls. According to Everdry, they scheduled a service call for a week later. On July 22, 2010, however, the area near the Ordings' home flooded during a huge storm. Homes, including the Ordings', were evacuated. The Ordings' basement flooded five feet high and the water had to be pumped out. The flooding caused structural damage to the home in addition to damaging the contents of the basement. When the Ordings called Everdry, Everdry provided a pump to remove the water from the basement, but told the Ordings their damages were not covered. The Ordings estimated their personal property loss for the items stored in the basement totaled $19,765.50. In addition, they spent five times that amount on additional repairs.

¶4 In August 2011, the Ordings sued Everdry for breach of express warranty, breach of contract, negligent waterproofing and repairs, violation of the Home Improvement Practices Act in WIS. ADMIN. CODE § ATCP 110 (Feb. 2015), and violation of the basement waterproofing practices code. The case was tried to

a jury in October 2013. Michael and Cheryl Ording testified that the Everdry salesman promised if they hired Everdry, they would *never* have water in their basement again and there was no qualification on that representation, such as excluding big storms. Michael testified he would not have signed the waterproofing contract if the salesman had told him he could still get water in the basement and that the guarantee did not apply to big storms. The Ordings' expert testified Everdry's work was improperly performed, which caused structural damage, and the Ordings would have had less water if Everdry had not performed the home improvement repairs. The jury rejected the Ordings' claims for breach of express warranty, breach of contract, and negligent waterproofing and repairs. Those jury findings are not appealed. However, the jury found in favor of the Ordings on their ATCP § 110 claim and awarded them damages of $7,000.

¶5 Everdry filed motions after verdict asking the trial court to change the jury's verdict against it on the grounds that no evidence supported the verdict. Everdry raised the issue of the contract's integration clause for the first time, asserting that the clause voided any oral representations made before the contract was signed. The trial court found Everdry waived this argument and denied its motions after verdict.

¶6 The trial court granted the Ordings' request that the court double the $7,000 awarded by the jury, pursuant to WIS. STAT. § 100.20(5). On February 18, 2014, the trial court held a hearing to determine reasonable attorney fees. The Ordings' lawyer submitted documentation by affidavit estimating he incurred $41,400 in attorney fees based on 138 hours of work at $300/hour. The Ordings' lawyer did not have actual billing records because he took the case based on a contingent fee. At the start of this hearing, Everdry's attorney, Jennifer Bauman, stipulated to $41,400 being the appropriate figure but only as a starting point in

determining reasonable attorney fees. Later in the hearing, however, Bauman argued that under WIS. STAT. § 814.045(2)(a), the $41,400 should be reduced to $21,000 because the statute directs "the court shall presume that reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded," which Bauman argued was $7,000. The Ordings argued the compensatory damages were $14,000 after the statutory doubling, thereby making $42,000—three times the $14,000—the proper figure to use for reasonable attorney fees. After ruling that § 814.045 applied retroactively because it did not affect substantive rights, the trial court started applying § 814.045's factors; however, the trial court did not decide fees at the hearing because it wanted to know how much Bauman had charged Everdry in attorney fees in this case. Bauman did not know what fees were charged, but told the trial court she could have Doug Rose (the other Everdry attorney who was not at the hearing) provide this information to the trial court. The trial court also took argument on costs, including whether to award the $4,126 for the Ordings' expert witness. The Ordings argued the expert witness costs were recoverable either because the false representation led to the necessity of an expert witness or because expert witness fees were ultimately subsumed into its attorney fees under the contingent fee agreement. Everdry, however, argued the expert witness fees were not recoverable because the expert witness's testimony only applied to the claims rejected by the jury. The trial court did not decide costs because no expert witness bills had been submitted. The Ordings' lawyer agreed to submit the expert witness bills, which it did immediately after the hearing.

¶7 On February 24, 2014, Rose sent a letter to the trial court, explaining Bauman's and Rose's firm had charged Everdry $118,896, and told the court: "There is no doubt that the Defendants' legal fees are significantly higher than the

Plaintiffs" and explained why its fees were so much. The letter closes with: "We reluctantly stipulated that $41,500 was reasonable attorney fees, but the fact of the matter is [Ordings' Attorney] should have maintained billing records."[3] The $21,000 figure is not mentioned at all in Rose's letter.

¶8 The trial court issued a letter-decision setting reasonable attorney fees at $41,000, explaining:

> Respondent initially vigorously disputed the amount of attorney fees sought by plaintiff. However, now, per Rose's February 24, 2014, letter, respondent has "reluctantly stipulated" that $41,500 was reasonable. Respondent also acknowledges that its attorneys' itemized bill was $118,896.

The trial court closes the letter-decision with:

> However, there remaining no dispute between the parties, the court will award to plaintiffs the amount of $41,000 in attorney fees. With respect to costs, the court will award plaintiffs $4,126, based on the billings of Biehl Engineering, the expert who testified at trial.

¶9 The trial court did not address any of the WIS. STAT. § 814.045 factors in this letter-decision. It also did not address whether $7,000 or $14,000 should be used as the amount to triple under the statute. Further, it did not address the parties' arguments on the $4,126 expert witness costs or explain its decision to award them. Judgment was entered.

[3] We note that there are three amounts referred to with respect to Ordings' attorney fees: $41,400, $41,500 and $41,000. Because the trial court ultimately awarded $41,000, we will use that amount.

DISCUSSION

A. Sufficient Credible Evidence to Support the Jury's Verdict.

¶10 Everdry argues the trial court erred in ruling the contract's integration clause did not trump the oral representation forming the basis of the ATCP violation. The trial court ruled that Everdry's reliance on the integration clause came too late: "I understand that today the argument made by defendant focuses on the contract and the contract interpretation. And I listened to your presentation and I thought, why do we bother with juries? The jury did not hear any of this. It wasn't argued and it wasn't presented and we spent three and a half days trying the case to the jury." The trial court then denied Everdry's post-verdict motions, including its integration argument. We agree with the trial court's ruling.

¶11 We generally reject arguments raised for the first time on appeal. ***State v. Moran***, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884. This principle also applies when a party waits until after a jury verdict to raise an issue that should have been raised before or during trial. ***Reuben v. Koppen***, 2010 WI App 63, ¶28, 324 Wis. 2d 758, 784 N.W.2d 703 (A party cannot use motions after verdict to assert a new defense that was not asserted at trial.). Further, a party will not be allowed to "save its legal arguments until after trial, only to present those arguments if the party dislikes the jury's ultimate conclusion." ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶41, 340 Wis. 2d 307, 814 N.W.2d 419.

¶12 Whether an integration clause bars a claim is an issue that should be raised before a case even goes to the jury. *See* ***Peterson v. Cornerstone Prop. Dev., LLC***, 2006 WI App 132, ¶12, 294 Wis. 2d 800, 720 N.W.2d 716 (integration

clause raised in summary judgment motion). Everdry failed to timely raise the integration clause issue. It waited until after the jury reached a verdict in favor of the Ordings and then asked the trial court to change the jury's answers based on the integration clause. Accordingly, Everdry forfeited its right to raise this issue. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612.

¶13 In addition, Everdry claims there is insufficient evidence to support the jury's verdict and there is no causal connection between the violation and damages. The trial court rejected Everdry's contentions, ruling the Ordings' testimony and list of itemized damages were sufficient to uphold the jury's verdict. We agree.

¶14 We "will sustain a jury verdict if there is any credible evidence to support it," including evidence that "under any reasonable view" supports "an inference supporting the jury's finding." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. "[I]t is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses." ***Id.***, ¶39. For this reason, we "search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id.***

¶15 The jury found Everdry violated WIS. ADMIN. CODE § ATCP 110 by making a false, deceptive or misleading representation to induce the Ordings to enter into a home improvement contract, and the Ordings suffered a monetary loss because of that representation. Section ATCP 110.02 provides:

> No seller shall engage in the following unfair methods of competition or unfair trade practices:
>
> **(11)** MISREPRESENTATIONS; GENERAL. Make any false, deceptive, or misleading representation in order to

> induce any person to enter into a home improvement contract, to obtain or keep any payment under a home improvement contract, or to delay performance under a home improvement contract.

Violations of § ATCP 110 are actionable under WIS. STAT. § 100.20(5), which provides: "Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee."

¶16 Both Ordings testified about the false representation that Everdry's salesman made that if they hired Everdry, they would *never* have water in their basement again. Both Ordings testified the salesman did not make any exclusion or qualification for big storms. Michael testified he would not have signed the contract but for that representation. Further, the Ordings testified about and provided a listing of the damage to their personal property they stored in the basement based on Everdry's representation. As we have seen, the Ordings estimated this property to be worth almost $20,000. Although the jury did not award this amount, it had the discretion to decide what amount properly compensated the Ordings for the damages resulting from the misrepresentation. The jury could have reasonably concluded the Ordings overestimated the property value and as a result awarded $7,000 instead. The jury assesses the credibility of the witnesses and is free to accept or reject a witness's testimony. *See* ***Morden***, 235 Wis. 2d 325, ¶39 ("[I]t is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses."). There is credible evidence to support the jury's findings both on liability and causation. Accordingly, we affirm this part of the trial court's judgment.

B. *Attorney Fees/Costs.*

¶17 The second issue on appeal is whether the trial court erred in awarding the Ordings $41,000 in attorney fees and $4,126 in costs for its expert witness. As we have seen, the trial court held that WIS. STAT. § 814.045 applied retroactively and addressed several of the statutory factors, but could not finalize a reasonable attorney fees award because it needed additional information. Also, although it heard argument on whether the $4,126 witness fee was a proper item of costs, it did not offer any explanation on why the $4,126 should be awarded. As noted, the Ordings believe § 814.045 should not apply retroactively because the right to attorney fees is substantive. The Ordings wanted the trial court to use the guidelines set forth in ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58, because ***Kolupar*** was the law governing an award of attorney fees in effect at the time they filed this lawsuit. Further, the Ordings believe the expert witness costs are recoverable either because the false representation led to the necessity of an expert witness or because expert witness fees are ultimately subsumed into its attorney fees under the contingent fee agreement. The Ordings also argue on appeal that "costs" under WIS. STAT. § 100.20(5) would be meaningless if its expert witness fees are not included under the statute. Everdry, on the other hand, argues § 814.045 should apply retroactively because it is procedural in that it simply sets forth guidelines for determining an attorney fees award; it further argues the expert witness fees are not recoverable because the expert witness's testimony only applied to the claims rejected by the jury.

¶18 Generally speaking, in reviewing an award of attorney fees and costs, we defer to the trial court and will not overturn its decision unless there was an erroneous exercise of discretion. *See* ***Hughes v. Chrysler Motors Corp.***,

197 Wis. 2d 973, 988, 542 N.W.2d 148 (1996). "The trial court's decision must 'be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 541-42, 504 N.W.2d 433 (Ct. App. 1993) (citation omitted). "To comply with this requirement, a court must not only state its findings of fact and conclusions of law, but also state the factors upon which it relied in making its decision." ***Id.*** at 542.

¶19 This case, however, requires us also to address whether to apply WIS. STAT. § 814.045. Whether a statute applies retroactively to a particular set of facts is a question of law we review *de novo*. *See* ***Chappy v. LIRC***, 136 Wis. 2d 172, 180, 401 N.W.2d 568 (1987). Generally, statutes are applied prospectively but may be applied retroactively: (1) when the statute contains express language saying so or the language can be interpreted to inferentially support retroactive application; or (2) the statute is procedural or remedial rather than substantive. *See* ***Snopek v. Lakeland Med. Ctr.***, 223 Wis. 2d 288, 293-94, 588 N.W.2d 19 (1999).

¶20 Prior to the enactment of WIS. STAT. § 814.045, our courts followed the guidelines set forth in ***Kolupar***, which adopted the United States Supreme Court's decision in ***Hensley v. Eckerhart***, 461 U.S. 424, 434 (1983), to determine the reasonable amount of attorney fees to award. *See* ***Kolupar***, 275 Wis. 2d 1, ¶¶23-34. Under ***Kolupar***, the trial court started with the "lodestar" value which is the number of hours worked multiplied by a reasonable hourly rate. ***Id.***, ¶¶28-29. That number would then be adjusted up or down based on any of the factors found in SCR 20:1.5(a) (2005). *See* ***Kolupar***, 275 Wis. 2d 1, ¶25 (listing SCR 20:1:5(a) factors).

¶21 In December 2011 (four months after the Ordings sued Everdry), our legislature passed 2011 Wis. Act 92, which created WIS. STAT. § 814.045. As we have seen, this statute identifies factors for courts to consider in a dispute over the reasonableness of attorney fees and creates a presumption that "reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded." Sec. 814.045(2)(a). The trial court can exceed this cap if, after considering the listed factors, the trial court finds a greater amount is reasonable. ***Id.***

¶22 The issue presented then is whether WIS. STAT. § 814.045, enacted after the Ordings filed their lawsuit but before the jury reached its verdict, should be applied retroactively. As noted, this depends on whether § 814.045 is substantive or procedural. *See* ***Snopek***, 223 Wis. 2d at 293. A statute is procedural if it prescribes the method, or legal machinery, by which a right or remedy is enforced. *See* ***City of Madison v. Town of Madison***, 127 Wis. 2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985). A statute is substantive in nature if it creates, defines, or regulates rights and obligations. ***Id.*** Remedial statutes are related to remedies or modes of procedure and do not create new rights or take away existing rights, but operate only to further a remedy or right that already exists. ***Id.***

¶23 Based on these definitions, we determine that WIS. STAT. § 814.045 is both a procedural and remedial statute. It is procedural because it addresses the procedure of how a trial court shall determine reasonable attorney fees, giving guidance to trial courts as to how to reach a reasonable award. It is not substantive because it does not add new rights or take rights away. WISCONSIN STAT. § 100.20(5) gives a prevailing party the right to have their attorney fees paid by the losing party. It did so before enactment of § 814.045 and the new statute does not

take that right away. Section 814.045 is also remedial because it facilitates the pre-existing right to collect reasonable attorney fees. *See* ***Bruner v. Kops***, 105 Wis. 2d 614, 619, 314 N.W.2d 892 (Ct. App. 1981). The statute does not create any additional burden because the party seeking attorney fees has always borne the burden of demonstrating that the amount of fees requested is reasonable. *See* ***Southeast Wis. Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.***, 2007 WI App 185, ¶52, 304 Wis. 2d 637, 738 N.W.2d 87.[4]

¶24 Based on the foregoing, we agree with the trial court that WIS. STAT. § 814.045 should apply in this case because it can be applied retroactively. The record shows the trial court began to apply the statute at the attorney fees hearing but could not complete the analysis because it needed additional information. When that information came in after the hearing, the trial court abandoned the application of the statute and issued a letter-decision ruling that Everdry stipulated

[4] After briefing in this case, the Ordings' lawyer submitted an "additional authority" letter about the recently-decided case, ***Johnson v. Cintas Corp. No. 2***, 2015 WI App 14, ___ Wis. 2d ___, ___ N.W.2d ___. The Ordings believe ***Johnson*** supports its argument that WIS. STAT. § 814.045 is substantive and therefore cannot be applied retroactively. We disagree. ***Johnson*** addressed the retroactive application of WIS. STAT. § 807.01(4), which is the statute governing the appropriate amount of a post-verdict judgment when a party has made an offer of settlement that "is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement." Sec. 807.01(4). ***Johnson*** held that the new version of § 807.01(4) (setting the proper interest at one percent plus prime), which was in effect at the time of the jury verdict in ***Johnson***, did not apply retroactively where the offer of settlement was made at the time the older version of § 807.01(4) (setting the proper interest at 12%) was in effect. ***Johnson*** so held because the 12% vested at the time the settlement offer was made. ***Johnson***, 2015 WI App 14, ¶¶25-27. ***Johnson*** is distinguishable from the case before us for two reasons. First, we are dealing with § 814.045, not § 807.01. Second, the revision in ***Johnson*** affected a substantive vested right because at the time the offer to settle was made, the interest was locked in at 12%. This was not the case for the Ordings. At the time the Ordings filed this lawsuit, they had the right to attorney fees if they succeeded on the ATCP claim, but the *specific* amount was not locked in at a particular figure. Rather, the amount of fees to award remained within the trial court's discretion. This distinction makes § 814.045 procedural. Consequently, we conclude that ***Johnson*** does not apply to this case.

to the attorney fees amount requested. The trial court awarded $41,000 in fees and $4,126 without much explanation except that there was no dispute remaining between the parties.

¶25 The trial court erroneously exercised its discretion both in respect to its award of attorney fees based on the "stipulation" in Rose's letter, and in regard to the expert witness costs. Its letter-decision finds that Everdry stipulated to the $41,000 in fees based on the part of Rose's letter that says: "We reluctantly stipulated that $41,500 was reasonable attorney fees, but the fact of the matter is [the Ordings' attorney] should have maintained billing records." This letter, however, followed the attorney fees hearing where the record shows Everdry *only* stipulated to the $41,000 *as the lodestar starting point* but argued vehemently that it should be reduced to $21,000 under WIS. STAT. § 814.045. Given this backdrop, Rose's letter cannot be interpreted to be a stipulation to $41,000. Although Rose does not mention the $21,000 or argue for it in his letter, he also does not explicitly stipulate that they now are willing to accept $41,000 as the reasonable amount.

¶26 The trial court's letter-decision suggests that it either forgot the position Everdry took at the February 18, 2014 hearing where it fought for a $21,000 attorney fees award and, as a result, the trial court misinterpreted Rose's reference to the "reluctant stipulation," *or* the trial court thought that Rose's February 24, 2014 letter's failure to ask for $21,000 meant Everdry had abandoned its earlier position. The trial court also may have concluded that in light of the fact that Everdry paid almost $120,000 in attorney fees in this case, the Ordings' request for $41,000 *was* reasonable. In any event, the trial court's letter-decision fails to properly exercise discretion because it erroneously finds that the parties are no longer disputing the amount of attorney fees. The Rose letter does not say that

and basing a fees award on this erroneous interpretation constitutes an erroneous exercise of discretion. In addition, the trial court's letter-decision does not address whether $7,000 or $14,000 should be used as the base figure before tripling, which was another dispute between the parties. Accordingly, we reverse this part of the judgment and remand to the trial court to address the disputed issues and to fully apply WIS. STAT. § 814.045 in order to properly exercise its discretion in determining an appropriate attorney fees award. Further, on remand, the Ordings are entitled to reasonable appellate attorney fees and costs for successfully defending this appeal. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 361-62, 340 N.W.2d 506 (1983). Thus, the trial court shall also award the Ordings whatever appellate attorney fees and costs it finds are reasonable for defending this appeal.

¶27 The trial court's letter-decision also erroneously exercised its discretion when it simply ordered Everdry to pay the $4,126 expert witness fee without any explanation. The record shows the trial court took argument on whether the expert witness fees should be awarded but made no findings and provided no reasoning on this issue at the hearing or in its final decision. The trial court's letter-decision simply ordered Everdry to pay the expert witness fees as costs permitted under WIS. STAT. § 100.20(5). The trial court did not address the parties' argument on expert witness fees nor did it explain why it awarded these fees as costs. As a result, it erroneously exercised its discretion with respect to the costs award. *See* ***Johnson v. Roma II-Waterford LLC***, 2013 WI App 38, ¶¶33, 37-38, 346 Wis. 2d 612, 829 N.W.2d 538 (failure to give any explanation for a decision is an erroneous exercise of discretion). On remand, we direct the trial court to address the argument as to whether expert witness fees should be awarded

as part of the costs permitted under WIS. STAT. § 100.20(5), and to explain why or why not expert witness fees are appropriate.

By the Court.—Judgment affirmed in part; reversed in part; cause remanded for further proceedings.

Not recommended for publication in the official reports.