COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3579

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

RAY A. PETERSON D/B/A MASTER BUILDERS,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, AND BRUCE BOULDEN,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Ray Peterson appeals pro se from a circuit court judgment and order awarding attorney fees, costs and interest to Bruce Boulden, who prevailed on a housing discrimination complaint against Peterson before the administrative agency and successfully defended against Peterson's appeals.

Peterson contends the attorney fees and costs awarded to Boulden for successfully defending Peterson's appeal to the circuit court were not timely requested, were prohibited by the Wisconsin Supreme Court and are limited by §§ 814.04(1), STATS.,[1] to $100. He also challenges the interest the trial court ordered he pay on the amount awarded by the administrative law judge (ALJ) because, he contends, that order was a "pre-final determination." We conclude the circuit court correctly awarded Boulden attorney fees and costs. We also conclude the court's award of interest was proper. We therefore affirm. We deny Boulden's request for attorney fees under § 809.25(3), STATS.

BACKGROUND

This case began in December 1993 when Boulden filed a housing discrimination complaint against Peterson under § 101.22, STATS., 1991-92.[2] The ALJ of the Department of Industry, Labor and Human Relations (now the Department of Workforce Development) issued a decision on August 25, 1995, concluding that Peterson had discriminated against Boulden based on race; ordering Peterson to cease and desist from refusing to rent to Boulden because of his race; and ordering Peterson to pay Boulden $7,229.74 for his economic and non-economic losses, and $13,305.83 for attorney fees and costs. Peterson's request for a rehearing was denied, and he sought judicial review in the circuit court pursuant to §§ 227.52-227.58, STATS. The circuit court affirmed DILHR's decision on October 10, 1996. Peterson appealed to this court, and we affirmed

[1] Except where noted, all references to the Wisconsin Statutes refer to the 1997-98 statutes.

[2] Section 101.22, STATS., was renumbered to § 106.64, STATS., by Wis. Act 27, § 3687, effective July 1, 1996.

the circuit court's decision on July 3, 1997.[3] After the Wisconsin Supreme Court denied Peterson's petition for review and his motion for reconsideration, Peterson petitioned for a writ of certiorari in the United States Supreme Court, which was denied, and then petitioned for a rehearing, which was also denied.

Shortly after the United States Supreme Court denied Peterson's petition for a rehearing, Boulden filed a motion on July 10, 1998, requesting a judgment for the amounts awarded by the ALJ plus interest at twelve percent and attorney fees and costs incurred since the date of the ALJ's decision.[4] The motion was accompanied by an affidavit of Boulden's counsel, detailing the procedural history of the case, the time spent and work done since the ALJ's decision, and the costs incurred since that date. The circuit court determined that Boulden was entitled to judgment against Peterson for the following: the damages, attorney fees and costs awarded by the ALJ; $7,598.17 interest on those amounts; attorney fees and costs of $7,386.18[5] incurred from the ALJ's decision to July 8, 1998, the last date itemized in counsel's affidavit accompanying the motion; and attorney fees and costs of $658.56 incurred from July 8, 1998, to the date of the trial court's decision. In deciding that Boulden was entitled to attorney fees and costs incurred

[3] *See* ***Peterson v. DILHR***, No. 96-3418, unpublished slip op. (Wis. Ct. App. July 3, 1997).

[4] While Peterson was pursuing appellate review of the circuit court's decision, Boulden had filed two motions attempting to obtain the amounts awarded by the ALJ. The first, filed shortly after the circuit court's decision, sought the amounts awarded by the ALJ plus interest and attorney fees incurred on the judicial review in circuit court. The second, filed after the Wisconsin Supreme Court denied Peterson's request for reconsideration, sought, in addition, attorney fees incurred in defending against the appeal to this court and the petitions in the Wisconsin Supreme court, and additional interest on amounts previously awarded. It appears there were hearings on these motions, but, because of Peterson's continuing appeals, no orders were entered.

[5] Of this amount, $210.58 was for costs and the remainder for attorney fees.

from the date of the ALJ decision to July 8, 1998, the court observed that § 101.22(6)(i), STATS., 1991-92, authorized DIHLR to award attorney fees to a prevailing complainant. The court then relied on ***Richland Sch. Dist. v. DIHLR***, 174 Wis.2d 878, 911, 498 N.W.2d 826, 838-39 (1993), which holds that if a statute authorizes a party to recover attorney fees either at an administrative proceeding or a court proceeding, the party may also recover fees on appeal. However, the court excluded from the award those fees and costs incurred for defending against Peterson's appeals and petitions in this court, the Wisconsin Supreme Court, and the United States Supreme Court. The court reasoned that it did not have the authority to award attorney fees and costs for appellate work in the absence of a directive from the appellate court, and there was no such directive. It observed the Wisconsin Supreme Court had denied Peterson's petition for review "without costs" and Boulden had not requested costs under § 809.25(1), STATS., in this court.[6]

DISCUSSION

Peterson's Appeal

Peterson first challenges the award of attorney fees and costs for work performed before the circuit court. He argues that since Boulden did not request costs within fourteen days as required by § 809.25(1)(c), STATS.,[7] which

[6] Boulden has not filed a cross-appeal challenging the trial court's ruling denying attorney fees and costs for appellate work. Therefore, we do not further consider this aspect of the trial court's ruling.

[7] Section 809.25(1), STATS., provides:

> (1) COSTS. (a) Costs in a civil appeal are allowed as follows unless otherwise ordered by the court:

(continued)

governs the award of costs in this court, and since the Wisconsin Supreme Court

---

1. Against the appellant before the court of appeals when the appeal is dismissed or the judgment or order affirmed;

2. Against the respondent before the court of appeals when the judgment or order is reversed;

3. Against the petitioner before the supreme court when the judgment of the court of appeals is affirmed by the supreme court;

4. Against the respondent before the supreme court when the judgment of the court of appeals is reversed by the supreme court and the costs in the court of appeals are canceled and may be taxed by the supreme court as costs against another party.

5. In all other cases as allowed by the court.

(b) Allowable costs include:

1. Cost of printing and assembling the number of copies and briefs and appendices required by the rules, not to exceed the rates generally charged in Dane County, Wisconsin, for offset printing of camera-ready copy and assembling;

2. Fees charged by the clerk of the court;

3. Cost of the preparation of the transcript of testimony or for appeal bonds;

4. Fees of the clerk of the trial court for preparation of the record on appeal;

5. Other costs as directed by the court.

(c) A party seeking to recover costs in the court shall file a statement of the costs within 14 days of the filing of the decision of the court. An opposing party may file, within 7 days of the service of the statement, a motion objecting to the statement of costs.

(d) Costs allowed by the court are taxed by the clerk of the court of appeals irrespective of the filing by a party of a petition for review in the supreme court. In the event of review by the supreme court, costs are taxed by the clerk of the supreme court as set forth in pars. (a) and (b). The clerk of the supreme court shall include in the remittitur the costs allowed in the court. The clerk of circuit court shall enter the judgment for costs in accordance with s. 806.16.

ordered that costs not be assessed when it denied the petition for review and motion for reconsideration, attorney fees are limited by § 814.04(1), STATS., to $100.[8] Boulden responds that § 809.25(1) and § 814.04(1) are not applicable because case law establishes that, as the prevailing complainant on a discrimination complaint, he is entitled to attorney fees, subject only to the limitation that the fees be reasonable.

The interpretation and application of statutes and case law to a set of undisputed facts presents a question of law, which we review de novo. *See* ***Bahr v. State Ins. Bd.***, 186 Wis.2d 379, 386, 521 N.W.2d 152, 153 (Ct. App. 1994). We agree with Boulden that § 809.25(1), STATS., is not applicable and that § 814.04(1), STATS., does not limit the amount of attorney fees in this case. We conclude the trial court correctly decided that Boulden was entitled to reasonable attorney fees and costs related to the proceedings in the circuit court.

As the circuit court stated, DIHLR is authorized to award reasonable attorney fees to the prevailing complainant on a housing discrimination complainant. Section 101.22(6)(i), STATS., 1991-92. The ALJ did award Boulden attorney fees incurred in the administrative proceeding under that provision. Although no statute authorizes attorney fees for a prevailing complainant who successfully defends against an appeal of the administrative decision to circuit court, the supreme court in ***Richland Sch. Dist.***, 174 Wis.2d at 911, 498 N.W.2d at 838-39, held that when a statute authorizes an administrative agency to award

[8] Section 814.04, STATS., provides in part:

> **Items of Costs.** Except as provided in [various statutes], when allowed costs shall be as follows:
>
> (1) ATTORNEY FEES. (a) When the amount recovered or value of property is $1000 or over, attorney fees shall be $100….

attorney fees to a successful complainant, the complainant may also recover attorney fees for each of the three levels of court review if he or she is successful. The statute at issue in ***Richland Sch. Dist.*** was the Family Medical Leave Act, § 103.10(12)(d), STATS. The court in ***Richland Sch. Dist.*** relied on its reasoning in ***Watkins v. LIRC***, 117 Wis.2d 753, 763-64, 345 N.W.2d 482, 487 (1984). ***Watkins*** held that, although the Fair Employment Act, § 111.36(3)(b), STATS., 1975, did not expressly authorize DIHLR to award attorney fees for the administrative proceeding to a successful complainant, DIHLR had the authority to do so. The court in ***Watkins*** concluded the purpose of the Fair Employment Act was to make victims of discrimination whole, and the victim had not been made whole unless attorney fees were awarded: without that award, the complainant was in a worse position economically than she was before filing the complaint. ***Id.*** at 763-64, 345 N.W.2d at 487.

The court in ***Richland Sch. Dist.*** also discussed three cases besides ***Watkins*** that supported the award of attorney fees for all levels of court proceedings to a successful complainant vindicating rights under a statute, even though the statute does not expressly provide for attorney fees in those proceedings. In ***Shands v. Castrovinci***, 115 Wis.2d 352, 358-59, 340 N.W.2d 506, 509 (1983), the court held a tenant was entitled to attorney fees for successful representation in appellate courts, even though the statute expressly authorized fees in circuit court only, because the attorney's efforts on behalf of a tenant at the appellate level are just as essential to vindication of a tenant's rights under the statute as is the attorney's work in circuit court. In ***Siegel v. Leer, Inc.***, 156 Wis.2d 621, 632-33, 457 N.W.2d 533, 538 (Ct. App. 1990), we held that the Wisconsin Fair Dealership statute authorizing "actual costs of the action, including reasonable actual attorney fees," § 135.06, STATS., included work in the court of

appeals, because this was necessary to carry out the purpose of the statute and make the prevailing party whole. In ***Sheely v. DHSS***, 150 Wis.2d 320, 339-40, 442 N.W.2d 1, 10 (1989), the court held that although § 814.245, STATS., (governing actions by state agencies) authorized costs in the administrative proceeding and circuit court review only, the prevailing party was entitled to costs, which included reasonable attorney fees, for proceedings in appellate courts to obtain these costs, because this is necessary to fulfill the purpose of the statute.

Like the statute at issue in ***Richland Sch. Dist.***, and the other statutes at issue in the cases discussed there, the statute pursuant to which Boulden filed his discrimination claim has the purpose of remedying a particular wrong. Section 101.22, STATS., 1991-92,[9] provides in pertinent part:

> (1) INTENT. It is the intent of this section to render unlawful discrimination in housing. It is the declared policy of this state that all persons shall have an equal opportunity for housing regardless of sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status, lawful source of income, age or ancestry and it is the duty of the political subdivisions to assist in the orderly prevention or removal of all discrimination in housing....

Richland Sch. Dist. is the controlling precedent and it allows only one conclusion in this case: Boulden is entitled to reasonable attorney fees for the representation his attorney provided him in the circuit court, including representation necessary to obtain the attorney fees, costs and damages awarded him by the ALJ and to obtain the attorney fees and costs for work in the circuit court.

[9] Section 101.22, STATS., was renumbered to § 106.04, STATS., by 1995 Wis. Act 27, §3687.

Peterson's argument that § 814.04(1), STATS., limits Boulden's attorney fees to $100 in circuit court has no merit. That statute allows attorney fees up to $100 but does not prevent a court from ordering actual attorney fees, if otherwise authorized. ***Richland Sch. Dist.***, 174 Wis.2d at 887, 498 N.W.2d at 829, does so authorize.

Peterson also suggests that § 809.25(1)(c), STATS., and the supreme court's order that no costs be assessed for Peterson's petition for review and motion for reconsideration have a bearing on the award of attorney fees and costs for work in the circuit court. They do not. Section 809.25(1) plainly applies only to costs for proceedings in the court of appeals and supreme court. The supreme court's denial of the petition for review "without costs" and the dismissal of the motion for reconsideration with "no costs" addresses only costs incurred with respect to that petition and that motion, and does not address the authority of the circuit court to award costs or attorney fees for work performed in the circuit court.

Peterson's second challenge is to the interest the trial court ordered on the ALJ's award of damages, attorney fees and costs. The circuit court correctly described the background law on this point. By statute, a party recovering a money judgment is entitled to interest at the rate of twelve percent per year "from the time of the verdict, decision or report until judgment is entered," with this amount being added to costs when judgment is entered. Section 814.04(4), STATS.[10] In addition, at common law, a party is entitled to pre-verdict or pre-decision interest when the damages are liquidated, meaning that

[10] By statute also, post-judgment interest at twelve percent per year is collected by every execution on a judgment for the recovery of money. *See* § 815.05(8), STATS.

they are a fixed sum, or readily capable of determination by reference to some objective standard. *See* ***Allstate Ins. Co. v. Konicki***, 186 Wis.2d 140, 158, 519 N.W.2d 723, 730 (Ct. App. 1994).[11] The trial court concluded that Boulden was due interest on the award of damages, attorney fees and costs awarded by the ALJ from the date of that decision because on that date, the amount Peterson owed Boulden was a fixed sum, or alternatively, that was a "decision" for purposes of § 814.04(4).

Peterson argues that the trial court erred in awarding any interest, because it may not award "pre-final determination interest." He argues that in another case he was involved in, ***Dane County v. Peterson,*** Dane County Case No. 88CSC5483,[12] the circuit court ruled that pre-final determination interest was not legal, and that we affirmed the decision in ***Dane County v. Peterson***, No. 90-1007, unpublished slip op. (Wis. Ct. App. Sept. 27, 1990).

We can discern no relationship between the issue of interest on the ALJ's award and either the circuit court's decision or our decision in ***Dane County v. Peterson***. The circuit court there found Peterson in violation of DANE COUNTY ORDINANCE § 46.25(3) from February 25, 1988 until August 22, 1989, for a malfunctioning septic system and ordered Peterson to pay $10 per day with the exception of a thirty-day period, plus a penalty assessment. ***Dane County v. Peterson***, No. 90-1007, unpublished slip op. at 1. On appeal to this court,

[11] We use the term "pre-verdict or pre-decision interest," rather than "pre-judgment" interest, which some cases use. The former phraseology tracks the language of § 814.04(4), STATS., and makes clear the distinction between interest assessed prior to the date of verdict or decision and interest assessed between the date of the verdict or decision and the date of the entry of judgment.

[12] Peterson has not provided us with a copy of the circuit court's decision.

Peterson contended that there was no evidence he violated the ordinance at all, and, alternatively, that his efforts to comply, a stay of the county's order to comply, and various other factors justified a fine for a lesser period of time. We rejected all Peterson's arguments and affirmed. ***Id.***

Possibly Peterson means that the circuit court's decision not to impose the fine for thirty days while he was appealing to the Board of Health supports his position in this case. However, we conclude it does not. Our discussion in ***Dane County v. Peterson*** of the circuit court's decision not to impose a fine for thirty days, consists of the following:

> In spite of the trial court's doubt regarding Mr. Peterson's entitlement, the court gave him credit for a 30-day period in which soil borings were to be made. The court said that Mr. Peterson "displayed confusion for his own purposes and really a great deal of skill in utilizing litigation … which undermined his credibility." The court believed he used the proceedings to delay compliance.

Id. Since Peterson was not appealing this thirty-day "credit" and Dane County did not cross-appeal, we did not further address the propriety of this thirty-day "credit." We did not hold that the circuit court *could not* assess the fine while he appealed to the Dane County Board of Health. More importantly, however, the law governing the time period for which a fine should be imposed under a county ordinance is different from that governing the imposition of interest on an amount already awarded by a tribunal.

The rationale for pre-verdict or pre-decision interest is not that of a penalty but rather the value of the use of the money—a value which should have been accruing to the plaintiff or creditor rather than to the defendant or debtor. *See* ***Nelson v. Travelers Ins. Co.***, 102 Wis.2d 159, 169, 306 N.W.2d 71, 76

(1981). Where the amount of damages has been determined by a verdict or decision, the amount due is known to the defendant or debtor and he or she is theoretically able to make an offer to pay the amount at that point, and avoid accrual of interest. *See* ***Fehrman v. Smirl***, 25 Wis.2d 645, 659, 131 N.W.2d 314, 321 (1964). Similarly, if the amount owed is a fixed sum or readily capable of determination according to an objective standard, the defendant or debtor is theoretically able to offer to pay that amount, thereby avoiding accrual of interest. *See* ***Beacon Bowl v. Wisconsin Elec. Power Co.***, 176 Wis.2d 740, 776-77, 501 N.W.2d 788, 802 (1993). The fact that a party contests liability does not insulate him or her from paying interest. If the damages are fixed, even if liability is contested, pre-verdict or pre-decision interest is still proper. *See* ***City of Merrill v. Wenzel Bros., Inc.***, 88 Wis.2d 676, 698, 277 N.W.2d 799, 808 (1979). Similarly, once the damages are fixed by a verdict or decision, if the plaintiff finally prevails, he or she is due interest back to the date of that verdict or decision, even if the defendant has temporarily been successful in having that verdict or decision set aside. *See* ***Management Computers Servs. Inc. v. Hawkins, Ash, Baptie & Co.***, 224 Wis.2d 312, 324, 592 N.W.2d 279, 283 (Ct. App. 1998), *review denied*, 225 Wis.2d 488, 594 N.W.2d 383 (1999).

The ALJ's decision on August 25, 1995, fixed the sums that Peterson owed Boulden up to that date. Peterson's appeal to the circuit court did not stay enforcement of the ALJ's decision, *see* § 227.54, STATS., nor did his appeal to this court stay enforcement of the circuit court's decision affirming the ALJ decision. *See* § 808.07, STATS. Peterson has owed the amount ordered by the ALJ to Boulden since August 28, 1995, but has not paid. He has a right to exhaust his appeals of the ALJ's decision but, having done so unsuccessfully, he has had the use of money which Boulden should have had since August 28, 1995. We

conclude the trial court properly ordered Peterson to pay interest on the ALJ's award.

Attorney Fees for Frivolous Appeal

Boulden requests that we award attorney fees for this appeal because it is frivolous in that it is unsupported by fact or law. We may award attorney fees for an appeal under § 809.25(3)(c)(2), STATS., if we determine that the appeal is without any reasonable basis in law or equity, could not be supported by a good faith argument for an extension, modification or reversal of existing law, and the attorney or litigant knew or should have known that. ***Holz v. Busy Bees Contracting Inc.***, 223 Wis.2d 598, 608, 589 N.W.2d 633, 637 (Ct. App. 1998). However, we may do so only if the whole appeal is frivolous. ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994), *aff'd*, 199 Wis.2d 268, 544 N.W.2d 428 (1996).

Even though an appellant is pro se, he or she is "required to make a reasonable investigation of the facts and the law before filing an appeal." ***Holz***, 223 Wis.2d at 608, 589 N.W.2d at 637. The standard to be applied in determining the possible frivolousness of an appeal is an objective one: "what should a reasonable person in the position of this pro se litigant know or have known about the facts and the law relating to the arguments presented[?]" ***Id.***

Peterson contends the appeal is not frivolous because he "sincerely believes" the trial court improperly granted "pre-final disposition interest, under his reading of ***Dane County v. Peterson***," and, further, the Wisconsin Supreme Court did not assess costs in denying his petition for review on the merits. Peterson's argument also concentrates on the merits of the discrimination complaint and the reason the decision against him is erroneous, contending that he

should "be afforded every legal means to restrict the enhancement of costs" resulting from that decision.

We conclude that Peterson's argument that Boulden is not entitled to attorney fees in excess of $100 for work performed before the circuit court is frivolous. The circuit court explained in its decision the basis for its award of these attorney fees, including a discussion of the controlling case, ***Richland Sch. Dist.*** A reasonable pro se litigant would know that he or she should read that case before filing an appeal, and having read the case, would understand that the case supports the circuit court's decision. Peterson's argument based on § 814.04(1), STATS., does not have a reasonable basis in law or fact because it is based on a statute that does not prohibit attorney fees in excess of $100, and wholly ignores the basis for awarding actual attorney fees in ***Richland Sch. Dist.*** Peterson has presented no reasonable legal or factual basis for distinguishing ***Richland Sch. Dist.***, and we can see none. He also presents no argument for modifying the law as set forth in ***Richland Sch. Dist.*** and the cases the court there relies on.[13] Peterson's argument based on § 809.25(3), STATS., and the supreme court's orders not assessing costs is also without a reasonable basis in law or fact. A reasonable pro se litigant would understand from reading that statute and those orders that they do not prevent the circuit court from awarding attorney fees and costs for work done in the circuit court under ***Richland Sch. Dist.*** A reasonable pro se litigant would also understand that the merits of Boulden's complaint have been fully and finally litigated, and that the belief of the litigant that Boulden should not

[13] While this court does not have the authority to modify or overrule our cases or cases of the supreme court, and must apply them as binding precedent, *see* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997), an argument to modify or overrule precedent may be made in this court, in order to obtain supreme court review of the issue.

have prevailed on the merits is not relevant to whether the circuit court properly awarded attorney fees under ***Richland Sch. Dist.***

We next consider whether Peterson's challenge to the court's award of interest on the ALJ's award of damages and attorney fees was frivolous. Although the case he cited has no bearing on this appeal, we conclude that the underlying argument he is making is not without a legal or factual basis—that the ALJ's decision is not the verdict or decision from which interest runs. We are aware of no published case that has established the entitlement to interest on the award of an ALJ. We agree with the trial court that the reasoning of the case law entitles Boulden to interest. However, we are not persuaded that there is no reasonable basis for an argument otherwise. Because Peterson's entire appeal is not frivolous, we deny Boulden's request for attorney fees.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.