

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0055

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JOSEPH P. KRAUSE, EXECUTOR OF ESTATE OF JOSEPH
J. KRAUSE,**

PLAINTIFF-APPELLANT,

V.

MYRE ELECTRIC, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Lincoln County:
J. MICHAEL NOLAN, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Joseph P. Krause, personal representative for the estate of Joseph J. Krause, appeals from an order determining that, pursuant to WIS. STAT. § 799.25(10), Joseph P. could recover not more than \$100 in attorney fees

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

resulting from his small claims action against Myre Electric, Inc. Joseph P. alleged four causes of action: (1) false and misleading advertising; (2) negligence; (3) breach of an express contract; and (4) breach of an implied contract. He argues that because he accepted Myre's offer of judgment on these claims, the circuit court erred by awarding him \$100 statutory attorney fees pursuant to WIS. STAT. § 814.04, rather than reasonable attorney fees under WIS. STAT. § 100.18(11)(b)2, Wisconsin's false advertising law. Because Joseph P. is a party plaintiff, the small claims statute precludes his recovery of attorney fees.² The judgment is affirmed.

BACKGROUND

¶2 In 1997, Joseph J. Krause contracted with Myre for electrical services at his cabin in Tomahawk. In March 1999, Joseph J. initiated a small claims action against Myre alleging that it had failed to follow written instructions and had created a dangerous condition. On March 29, Joseph J. died, and under the terms of his will, his son, Joseph P., became executor and personal representative of the estate. In May, Joseph P., a nonresident attorney, was granted *pro hac vice* admission to appear as counsel for his father's estate. Shortly thereafter, the circuit court additionally granted Joseph P.'s motion to substitute himself as party plaintiff, pursuant to WIS. STAT. § 803.10.³

² Because Myre failed to cross-appeal the \$100 award for attorney fees, this court will not address the propriety of the award.

³ WISCONSIN STAT. § 803.10(1)(a) provides:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in s. 801.14 and upon persons not parties in the manner provided in s. 801.11 for the service of a summons. Unless the motion for

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¶3 In June, Joseph P. filed an amended complaint against Myre, alleging negligence, breach of an implied contract and breach of an express contract. The amended complaint also noted: “By order of this Court, Joseph P. Krause has been substituted as the named plaintiff in the action.” On August 16, Joseph P. filed a second amended complaint adding the allegation of false and misleading advertising, contrary to WIS. STAT. § 100.18(11)(b)2. Specifically, he claimed that: (1) Myre falsely advertised that it was a “state certified master electrician”; (2) Joseph J. relied on this advertisement to hire Myre; and (3) Joseph J.’s estate suffered pecuniary loss “to correct the dangerous condition created by Myre’s unqualified employees.” Joseph P. subsequently moved the court for judgment on the pleadings. Shortly thereafter, Myre, pursuant to WIS. STAT. § 807.01(1), made an offer of judgment for \$1,889.32, “together with statutory taxable costs.”

¶4 Joseph P. accepted the offer of judgment and filed his bill of costs, seeking \$13,678.73 in statutory costs, of which \$12,856.25 was for attorney fees that had accrued to that date. Myre objected to the proposed bill of costs, and the parties proceeded to a hearing on the issue of attorney fees. The circuit court awarded Joseph P. \$100 attorney fees pursuant to WIS. STAT. § 814.04. This appeal followed.

ANALYSIS

¶5 Joseph P. argues that the circuit court erred by awarding him \$100 attorney fees pursuant to WIS. STAT. § 814.04, rather than reasonable attorney fees

substitution is made not later than 90 days after the death is suggested on the record by service of a statement of the facts of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

under the false advertising law, WIS. STAT. § 100.18(11)(b)2. Appellate review of an attorney fee award is “limited to whether the trial court properly exercised its discretion.” *See Chmill v. Friendly Ford-Mercury*, 154 Wis. 2d 407, 412, 453 N.W.2d 197 (Ct. App. 1990). A trial court properly exercises its discretion if “it employs a logical rationale based on the appropriate legal principles and facts of record.” *Id.* Joseph P. contends that pursuant to WIS. STAT. § 799.25(10)(a), which governs recoverable costs arising from a small claims action, he is entitled to reasonable attorney fees under the false advertising law, as opposed to statutory attorney fees under § 814.04. This presents a question of statutory interpretation, a question of law that this court reviews de novo. *See State v. Kirch*, 222 Wis. 2d 598, 602, 587 N.W.2d 919 (Ct. App. 1998).

¶6 WISCONSIN STAT. § 799.25 provides in part:

The clerk shall without notice to the parties tax and insert in the judgment as costs in favor of the party recovering judgment the following:

....

(10) ATTORNEY FEES. (a) Attorney fees as provided in s. 814.04(1) and (6), *except if the amount of attorney fees is otherwise specified by statute.* (Emphasis added.)

WISCONSIN STAT. § 814.04(1) provides, in turn: “[A]llowed costs shall be as follows: (1) ATTORNEY FEES. (a) When the amount recovered or the value of the property involved is \$1,000 or over, attorney fees shall be \$100.” Joseph P. argues that under the plain language of § 799.25(10)(a), the statutory attorney fees provided under § 814.04(1) are inapplicable because the amount of attorney fees is otherwise specified by statute—namely, the false advertising statute.⁴ This court

⁴ WISCONSIN STAT. § 100.18(11)(b)2 provides, in relevant part:

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agrees. When a party obtains a judgment based on an underlying action that allows recovery of reasonable attorney fees, costs must be interpreted to include those fees. Here, it is undisputed that reasonable attorney fees are recoverable in a successful action under the false advertising statute. Thus, when the offer of judgment on this small claims action included recovery of costs, those costs included reasonable attorney fees related to the false advertising claim, as such fees were “otherwise specified” by the false advertising statute.

¶7 Although this court concludes that the false advertising statute specifies an amount of attorney fees as an alternative to the statutory attorney fees provided by WIS. STAT. § 814.04(1), an issue remains as to whether Joseph P. is entitled to recover reasonable attorney fees under the false advertising statute. The circuit court denied Joseph P. reasonable attorney fees, reasoning that Myre’s offer of judgment was not tantamount to an admission of liability on the false advertising claim. Myre made an offer of judgment pursuant to WIS. STAT. § 807.01(1), which provides, in relevant part:

After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly.

Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, *including reasonable attorney fees*, except that no attorney fees may be recovered from a person licensed under ch. 452 while that person is engaged in real estate practice, as defined in s. 452.01(6). (Emphasis added.)

¶8 Joseph P. accepted the offer of judgment, which allowed him to take judgment against Myre on all four claims, including the false advertising claim. Myre argues, however, that it was never found to have violated the false advertising law. The circuit court additionally determined that there was insufficient evidence to establish a causal link between the claimed violation and Joseph J.'s pecuniary loss. The fact remains, however, that a judgment of \$1,889.32, "together with statutory taxable costs," was awarded against Myre on all four claims of the amended complaint.⁵ This court therefore concludes that reasonable attorney fees were available under the false advertising law.⁶

¶9 Alternatively, Myre argues that although Joseph P. effectively took judgment against Myre on all four claims, the offer of judgment did not apportion the judgment amount among the four causes of action. Myre therefore argues that it is impossible to determine whether pecuniary loss flowed from a violation of the false advertising statute, as opposed to one or all of the other claims alleged. Because the money judgment was awarded against Myre on all four claims, it is reasonable to assume that the judgment addressed pecuniary losses flowing from all four claims. It is therefore unnecessary to apportion the judgment amount among the various claims.

⁵ Joseph P. argues, in the alternative, that Myre effectively admitted the false advertising allegation of the second amended complaint. Because Joseph P. was granted judgment on all four claims, we need not address this argument. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

⁶ Joseph P. cites case law interpreting FED. R. CIV. P. 68, the federal counterpart to Wisconsin's offer of judgment statute, for the proposition that offers of judgment that include costs are interpreted to include attorney fees if there is any underlying cause of action providing for the recovery of attorney fees as costs. Where, as here, a party recovers judgment in a small claims action, WIS. STAT. § 799.25 provides that attorney fees are a recoverable cost. Therefore, this court need not address Joseph P.'s arguments regarding WIS. STAT. § 807.01's federal counterpart. See *Sweet*, 113 Wis. 2d at 67.

¶10 Myre additionally argues that because Joseph P. seeks reasonable attorney fees under the false advertising statute only, Joseph P. had the burden of apportioning the time expended pursuing the false advertising claim, as opposed to the other claims. This court agrees that to the extent reasonable attorney fees are available under the false advertising statute, Joseph P. bears the burden of proving the time he spent pursuing that claim. *See Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 458, 405 N.W.2d 354 (Ct. App. 1987). Therefore, only those reasonable attorney fees that arose from Joseph P.'s pursuit of the false advertising claim would be recoverable.⁷

¶11 Myre, however, argues that Joseph P. is nevertheless precluded under WIS. STAT. § 799.25(10)(d) from seeking attorney fees.⁸ This court agrees.

⁷ *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 405 N.W.2d 354 (Ct. App. 1987), involved a dispute between Lyons, who owned various corporations engaged in the sale, lease and rental of motor vehicles, and both the Ford Motor Company and Ford Motor Credit Company. *See id.* at 411. The pleadings alleged over 300 causes of action. *See id.* at 412. After a jury trial and motions after verdict, judgment was entered in favor of Ford and Ford Credit. *See id.* at 416. On cross-appeal from the judgment, Ford argued that the trial court had erred by awarding Ford only statutory attorney fees and costs instead of reasonable attorney fees and costs arising from a deficiency judgment against Lyons for Ford's sale of repossessed vehicles. *See id.* at 458. An express contract between the parties provided for reasonable attorney fees related to the repossession and sale of the vehicles. *See id.*

In remanding the determination of Ford's reasonable attorney fees, this court recognized that the trial court should award only those reasonable attorney fees related to the repossession and sale of the vehicles. *See id.* Relevant to the instant case, this court recognized that the contract between the parties "did not cover the totality of Ford's costs and fees relating to other causes of action and defenses in this litigation." *Id.* at 458. Applying this reasoning to the present case, because Joseph P. seeks reasonable attorney fees under the false advertising statute, only those reasonable attorney fees that arose from Joseph P.'s pursuit of the false advertising claim would be recoverable.

⁸ In his reply brief, Joseph P. argues that Myre did not respond to the arguments in Joseph P.'s appellate brief, but rather raised issues, such as this pro se argument, that were not brought before the trial court. Although issues raised for the first time on appeal are generally waived, this waiver rule is purely one of administration. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). This court may exercise its discretion to reach questions of law that would otherwise be deemed waived. *See id.*

Section 799.25(10)(d) provides: “No attorney fees may be taxed in behalf of any party unless the party appears by an attorney other than himself or herself.” Joseph P. argues that para. (10)(d) is inapplicable because he did not represent himself, but rather represented his father’s estate. This court has recognized, in context of managing and settling an estate, that “it may be more efficient and less expensive to have an attorney act as personal representative as well as attorney for the personal representative.” *In re Estate of Clatt*, 195 Wis. 2d 225, 228-29, 536 N.W.2d 133 (Ct. App. 1995). Thus, Joseph P.’s argument creates a distinction without a difference. After the death of his father, Joseph P. substituted himself, personal representative of his father’s estate, as party plaintiff for the estate. Therefore, he effectively represented himself in the small claims action and is consequently precluded from recovering attorney fees under WIS. STAT. § 799.25(10)(d).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

