

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 5, 2012

A. John Voelker
Acting 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. 2010AP3062

Cir. Ct. No. 2008CV3951

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE AWARD OF ATTORNEY FEES AND COSTS IN:

GARY A. ZIMMERMAN AND SANDRA E. ZIMMERMAN,

PLAINTIFFS-APPELLANTS,

v.

CHRYSLER GROUP LLC AND EWALD CHRYSLER LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Gary and Sandra Zimmerman (collectively “Zimmerman”) appeal an order regarding an award of attorney fees in a “lemon

law” case. Zimmerman argues the circuit court erred by awarding none of the attorney fees incurred to litigate the amount of the fee award. We reverse and remand.

¶2 Zimmerman filed suit against Chrysler LLC¹ and Ewald Chrysler LLC, seeking relief under the Wisconsin “lemon law,”² and the federal Magnuson-Moss Warranty Act due to problems with their 2006 Chrysler Town and Country. The parties reached a potential settlement with Chrysler paying Zimmerman \$10,000 and Zimmerman retaining the vehicle. However, the parties could not agree on payment of Zimmerman’s attorney fees and costs. At the time of the settlement, Zimmerman’s attorneys were demanding \$27,500 in attorney fees.

¶3 Ultimately, the parties agreed to have the circuit court determine the amount of Zimmerman’s fees and costs to be awarded. In this regard, a stipulation and order were executed, which provided:

In accordance with applicable law ... Chrysler Group LLC shall pay the Plaintiffs’ reasonable attorney fees and costs incurred in bringing this action (including attorney fees incurred in litigating the amount of attorney fees to be awarded), in an amount to be determined by the Court. The parties have agreed that Plaintiffs are entitled to reasonable attorney fees and that they are not asking the Court to decide whether costs and attorney fees should be awarded to the Plaintiffs in this matter, but rather how much should be awarded to the Plaintiffs utilizing the following procedure

¹ Chrysler LLC filed bankruptcy proceedings, which resulted in a stay of Zimmerman’s action. Chrysler LLC’s assets were sold to Chrysler Group LLC, which assumed liability for lemon law and Magnuson-Moss Warranty Act claims including attorney fees. Chrysler Group was substituted as a defendant in this action.

² See WIS. STAT. § 218.0171. References to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶4 The matter was heard over several days, at which time Zimmerman’s attorneys were demanding more than \$80,000 in attorney fees and costs. The circuit court issued an oral decision on November 10, 2010, awarding Zimmerman \$21,289.50 in attorney fees, \$1,029 in paralegal fees and \$1,570.18 in costs. The court’s award represented payment for time incurred between September 4, 2008, and November 12, 2009. The court did not award any attorney fees for time spent after resolution of Zimmerman’s claim. Zimmerman now appeals.

¶5 Reasonable attorney fees are recoverable for time necessary to litigate the recovery of reasonable attorney fees under a fee-shifting statute, unless the statute precludes that result. *Chmill v. Friendly Ford-Mercury*, 154 Wis. 2d 407, 415, 453 N.W.2d 197 (Ct. App. 1990). The parties in the present case also stipulated that Chrysler “[i]n accordance with applicable law ... shall pay [Zimmerman’s] reasonable attorney fees and costs incurred in bringing this action (including attorney fees in litigating the amount of attorney fees to be awarded), in an amount to be determined by the Court.” The stipulation also provided that the parties were not asking the court to decide whether fees and costs should be awarded but, rather, how much should be awarded.

¶6 We affirm a challenge to the reasonableness of a circuit court’s award of attorney fees unless the court erroneously exercised its discretion. *See Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. A court properly exercises its discretion when it employs a logical rationale based on correct legal principles and the facts of record. *Id.*

¶7 The starting point for any award of attorney fees is the calculation of the “lodestar” methodology established in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Our supreme court adopted *Hensley* and directed circuit courts “to

follow its logic when explaining how a fee award has been determined.” *Kolupar*, 275 Wis. 2d 1, ¶30. Under this lodestar approach, the starting point is a determination of the number of hours reasonably expended multiplied by a reasonable hourly rate, with upward or downward adjustments then made based on a number of factors.³ *Id.*, ¶29.

¶8 Here, Zimmerman argues they “had a right to recover at least some of the attorney fees incurred litigating the underlying fees and costs based upon the parties’ stipulation and Wisconsin precedent.” Zimmerman also contends that “[t]he trial court may have been within its discretion to award only a portion of the fees for litigating the underlying claims, but the court’s failure to award ANY of the Zimmerman’s fees for litigating the fees and costs claim was clearly illogical and erroneous.”

¶9 To the extent Zimmerman suggests that the parties’ stipulation created an explicit agreement that *required* the circuit court to award post-settlement fees, we disagree. The parties’ stipulation and the relevant statutes authorize only *reasonable* fees.⁴ It necessarily follows that attorney fees for litigating the amount of attorney fees must also be reasonable. No part of the parties’ stipulation in the present case, or the relevant fee-shifting statutes, *required* the court to award a certain amount of fees for litigating fees. Under appropriate facts, a proper lodestar analysis could result in an award of zero.⁵

³ The factors to be considered in determining the reasonableness of a fee are specified in Supreme Court Rule 20:1.5(a).

⁴ See WIS. STAT. § 218.0171(7) and 15 U.S.C. § 2310(d)(2).

⁵ Chrysler cites *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶31, 275 Wis. 2d 1, 683 N.W.2d 58, for the proposition that a circuit court is within its discretion to reduce the fee

(continued)

¶10 Here, the circuit court utilized the lodestar analysis, after which the court concluded:

I find that reasonable attorneys' fees in this case were those fees which were generated between the time of the initial contact between the Zimmermans and their attorneys and the resolution of the case in 2009. Understanding that by stipulation, the parties could litigate and could be awarded fees for the fight about attorneys' fees, I believe that the continued disputed debate was not reasonable under the circumstances and that defense counsel had ample grounds to believe that this Court should really closely scrutinize the fees requested by the plaintiff.

I do not believe it is reasonable under the circumstances of this case for me to award any more fees for the time period that occurred after the resolution of the underlying issue.

¶11 The court's findings regarding the excessiveness of fees are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Indeed, the court rendered a lengthy oral decision and stated that it had "a credibility problem with requests [for attorney fees made by Zimmerman's counsel] ... especially after the resolution of the case." The court characterized the attorney fees as "disturbing," "outrageous," and "mindboggling." The court also stated that requests for attorney fees after the resolution of the underlying matter "appear not to reflect so much efforts to rigorously represent the Zimmermans as much as efforts to geometrically compound attorneys' fees."

¶12 That does not mean, however, that Zimmerman's attorneys were entitled to *no* attorney fees for litigating the amount of fees. Chrysler presents reasons supporting a substantial reduction in the amount awarded compared with

award to nothing. In *Kolupar*, the court noted the documentation of hours was inadequate. *See id.*

the amount Zimmerman requested. But Chrysler does not present an argument that reconciles Zimmerman’s success—in showing that his attorneys’ fees substantially exceeded Chrysler’s attorneys’ fees offer—with the court’s conclusion that “the continued disputed debate was not reasonable.” Here, Chrysler offered \$8,000 for fees and costs allegedly incurred pre-settlement and Zimmerman demanded \$27,500. The court’s decision to award \$23,888.50 in fees and costs for the underlying litigation—an amount close to the amount Zimmerman offered and Chrysler rejected, and substantially above the amount Chrysler had offered—seemingly acknowledges at least some merit to Zimmerman’s efforts to obtain more than Chrysler offered. We do not hold that a proper exercise of discretion precludes awarding no attorney fees for litigating fees. Rather, we conclude only that the circuit court’s explanation of its decision and the arguments before us do not provide a basis on which to affirm the circuit court’s exercise of discretion.

¶13 Accordingly, we conclude that the circuit court erroneously exercised its discretion. We reverse and remand for the circuit court to reconsider its determination of reasonable attorney fees incurred litigating attorney fees. As the ones seeking to be paid, Zimmerman’s attorneys have the burden of demonstrating on remand the reasonableness of their fees. *Kolupar*, 275 Wis. 2d 1, ¶34.⁶

By the Court.—Judgment reversed and cause remanded.

⁶ We note that Chrysler improperly cites to an unpublished per curiam decision in its brief to this court, which will not be discussed further. *See* WIS. STAT. Rule 809.23(3)(b).

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

