**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 10, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-1880** **Cir. Ct. No. 02CV000257**

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

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**ANTHONY R. ANDERSON AND NAOMI ANDERSON,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**MSI PREFERRED INSURANCE COMPANY,**

**DEFENDANT,**

**ACCIDENT FUND COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Anthony Anderson appeals an order approving the distribution of settlement proceeds. Specifically, Anderson protests the amount of

attorney fees awarded to the worker's compensation carrier Accident Fund Company. We reject his argument and affirm. Accident Fund has brought a motion asking us to find Anderson's appeal frivolous. We reject its argument and deny the motion.

## Background

¶2 Anderson was injured in a car accident during the course of his employment. The driver at fault was Shawn Jones, insured by Acceptance Insurance Company with a policy limit of $25,000.[1] Accident Fund paid worker's compensation benefits to Anderson, obtaining a subrogation lien in the process. *See* WIS. STAT. § 102.29(1) ("the employer, insurance carrier or, if applicable, uninsured employer's fund shall be reimbursed for all payments made by it ….").[2]

¶3 In July 2002, Anderson filed suit against Jones without naming Accident Fund as a party to the action or notifying it of the litigation. *See* ***id.*** ("each shall give to the other reasonable notice and opportunity to join in the making of such claim ….). In August 2002, Accident Fund referred Anderson's worker's compensation claim to Walther Law Offices, SC.[3] Walther began searching for Jones' insurer. Once confirming coverage for Jones, Walther learned of Anderson's suit against Jones. Accident Fund became concerned

[1] MSI Preferred Insurance Company is Anderson's insurer, and he has underinsured motorist coverage. MSI was a party to the suit in the circuit court because of a potential subrogation interest, but it is not participating in the appeal.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] For brevity's sake, "Walther" refers to both the law firm and attorney Christopher Walther.

Anderson would attempt to circumvent the requirements of WIS. STAT. § 102.29 and asked Walther to intervene on its behalf. Walther drafted a motion to intervene, although Anderson voluntarily amended his complaint to bring Accident Fund into the suit in October 2002.

¶4 In March 2003, Walther traveled from Milwaukee to Eau Claire to attend mediation between Jones and Anderson. En route, he received a phone call from an attorney in the firm representing Anderson. She asked if Walther would agree to cancel the session, believing it would not be fruitful. Walther refused, and the mediation session proceeded. At the session, Jones' insurer offered to tender the policy limits of $25,000 to settle the case. Anderson agreed.

¶5 Because WIS. STAT. § 102.29(1) provides the formula for distributing the proceeds in a worker's compensation case involving third-party liability, Walther sought to recover its "reasonable cost of collection" for Accident Fund. During the mediation, Walther offered to accept payment of about $3,500 as the firm's costs if Anderson settled the matter that day. Anderson refused to pay the $3,500.

¶6 A month later, Anderson filed a motion to approve his settlement with Jones and distribution of the proceeds with the circuit court. He listed $3,500 as the amount to be distributed to Accident Fund. Accident Fund viewed the motion as an attempt to circumvent WIS. STAT. § 102.29.[4] The court approved the settlement but set a hearing for arguments on the distribution.

[4] For purposes of the particular issues on appeal, it is not necessary for us to delve into the specific distribution mechanism of WIS. STAT. § 102.29(1).

¶7 At the motion hearing in June, Accident Fund sought payment of nearly $7,500 in costs while claiming to have incurred even greater expenses. Anderson objected, contending the employee's attorney usually also protects the worker's compensation payor. Anderson also argued that it was unreasonable to incur $7,500 in costs when Accident Fund had only made $8,500 in payments.[5]

¶8 Accident Fund argued that because Anderson initially neglected to name it in the suit, it had no reason to believe its rights would be protected. Thus, all incurred costs were necessary. After the attorneys for Accident Fund and Anderson submitted affidavits regarding the costs, the court approved Anderson's attorney's one-third contingent fee as well as Walther's $7,500 fees and costs. From the $25,000 settlement, Anderson received only $2,400. He appeals, claiming that Accident Fund's attorney fees and costs are unreasonable and unsupported by the record.

## Discussion

¶9 The only issue Anderson raises on appeal is the reasonableness of Accident Fund's fees. "In reviewing the circuit court's ruling as to the value of attorney fees, we consider whether the court properly exercised its discretion." ***Meyer v. Michigan Mut. Ins. Co.***, 2000 WI App 53, ¶11, 233 Wis. 2d 493, 609 N.W.2d 167. "A circuit court properly exercises its discretion if it 'employs a logical rationale based on the appropriate legal principles and facts of record.'" ***Id.*** (citation omitted).

[5] Accident Fund claims that it made much higher worker's compensation payments, but the amount was the subject of another case not before us on appeal. No additional information regarding those payments is contained in this record.

¶10 Anderson claims there is no factual basis in the record to support Accident Fund's claimed costs and that the trial court erred when it interpreted ***Zentgraf v. Hanover Ins. Co.***, 2002 WI App 13, ¶14, 250 Wis. 2d 281, 640 N.W.2d 171, as requiring the court to award the "entire claimed costs of collection." Anderson believes the court relied on the following language from ***Zentgraf*** :

> [One of the parties] further relies on ***Kohlberg v. Sullivan Foods, Inc.***, 644 N.E.2d 809 (Ill. App. Ct. 1994), a case in which the court stated that ***Diedrick*** [***v. Gehring***, 62 Wis. 2d 759, 216 N.W.2d 193 (1974)] "clearly indicates that the court must allocate some portion of the fee to the compensation carrier's attorney *when that attorney participates on behalf of the carrier, regardless of whether that attorney's participation aided the employee,"* … and held that the law firm for the worker's compensation carrier was entitled to fees for the services it provided "regardless of whether it contributed anything to plaintiffs' settlement."

¶11 It is true that a decision based on misapplication or an erroneous view of the law constitutes an erroneous exercise of discretion. ***Sullivan v. Waukesha County***, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998). However, the trial court did not rely on the interpretation Anderson presents. Rather, it was responding to Anderson's complaint that because the employee's attorney will normally protect the worker's compensation carrier's lien, Accident Fund unnecessarily and unreasonably incurred fees. The trial court correctly reasoned that ***Zentgraf*** allows the worker's compensation carrier to recover attorney fees, regardless whether its attorneys provide any benefit to the employee. ***Zentgraf***, 250 Wis. 2d 281, ¶14. Indeed, the trial court noted that it did not believe Accident Fund had aided Anderson, but "that's not the basis here."

¶12 Moreover, it is apparent the trial court did not misinterpret ***Zentgraf*** as requiring an award of the "entire claimed costs of collection" because it had

requested an affidavit detailing the basis for each side's costs and indicated it reviewed the affidavits at least three times. In other words, the court carefully considered the "entire claimed costs of collection" on their own merit.[6]

¶13 Anderson also contends there is no basis in the record for the court to determine the reasonableness of the fees, especially considering that at the mediation session, Accident Fund only sought $3,500 in costs. Anderson complains that the affidavit Walther submitted contains neither an hourly rate nor an hourly summary, but merely a list of each activity undertaken by the firm.

¶14 WISCONSIN STAT. § 102.29(1) provides the formula for distribution of the settlement in a case like this. It allows "reasonable cost of collection," including attorney fees, to be deducted before calculating the distribution to the employee. "The statute 'requires the court approving the settlement to determine the attorneys' fees to be allowed.' … While § 102.29(1) refers to the 'reasonable cost of collection,' it does not mandate what that cost should be." ***Meyer***, 233 Wis. 2d 493, ¶12 (citation omitted). "[T]he SCR 20:1.5(a) factors provide an appropriate assessment of reasonable attorney fees." ***Id.***, ¶15.

¶15 SUPREME COURT RULE 20:1.5(a) (1999) states:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

[6] Moreover, the court did not award all of Accident Fund's attorney fees. Walther had informed the court that $7,500 was only part of the total costs it had incurred, but the court did not seek elaboration or further documentation.

> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

¶16 Each and every factor need not be examined. ***Meyer***, 233 Wis. 2d 493, ¶22. Rather, all circumstances of the case must be considered. The trial court noted that Anderson's actions, particularly at the beginning of his case, probably were at least in part responsible for the increased fees. The court also noted that it had reviewed the attorneys' affidavits regarding their fees. The court did not, however, explicitly address the SCR 20:1.5 (1999) factors.

¶17 We will not consider the court's decision to be an erroneous exercise of discretion if there is a rational basis for the decision. ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698. Although the proper exercise of discretion contemplates the trial court will explain its reasoning, when the court does not do so we may search the record to determine if it supports the court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We need not agree with the circuit court's decision to sustain it. *See* ***State v. Shanks***, 2002 WI App 93, ¶6, 253 Wis. 2d 600, 644 N.W.2d 275.

¶18 By noting that it had reviewed the affidavits multiple times, we conclude that the trial court implicitly based its decision on the information contained in the affidavits. Thus, we review Walther's affidavit to determine whether it supports the trial court's decision.

¶19 The first factor we consider is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." SCR 20:1.5(a)(1) (1999). Walther's affidavit listed each action for which labor was required, such as filings, phone calls, or traveling, and the dates on which each task was performed. There is a timeline, even if it is not broken down into hours. Also, Anderson admitted that normally, the worker's compensation carrier is or should be joined when the suit begins. Thus, a motion to intervene and other preliminary steps that Walther completed were a "novelty" in this case.

¶20 The second factor we consider is "the fee customarily charged in the locality for similar legal services." SCR 20:1.5(a)(3) (1999). The only basis in the record for comparison is Anderson's attorney fees, which were computed on a one-third contingency. Anderson's attorney will receive at least $8,333 for pursuing this action, plus costs. Thus, on the record before us, the $7,500 Accident Fund sought for its attorney fees and costs is commensurate with the customary charges.

¶21 Next, we consider "the amount involved and the results obtained." SCR 20:1.5(a)(4) (1999). Anderson would have us compare Accident Fund's

$4,800 recovery[7] for worker's compensation payments to its $7,500 attorney fees. However, in this particular case, we think the results are more important. Anderson does not dispute Accident Fund's claim that Walther was the one responsible for getting the tortfeasor's insurance company to tender its policy limits in settlement by insisting the mediation session proceed. Indeed, Anderson's attorney wanted to cancel that session, believing it would not be fruitful.

¶22 We also note "the nature and length of the professional relationship with the client." SCR 20:1.5(a)(6) (1999). There is no information in Walther's affidavit regarding whether the firm had worked with Accident Fund before this case. The affidavit establishes that at the time of the trial court's decision, Walther had been Accident Fund's attorney for at least fifteen months.

¶23 Finally, we note SCR 20:1.5(a)(7) (1999): "the experience, reputation, and ability of the lawyer or lawyers performing the services." According to Walther, his firm has extensive experience representing worker's compensation insurance carriers and has been given the highest ranking, "preeminent status," by the Martindale-Hubbell Law Directory, which rates law firms based on peer review.

¶24 Our review of the record reveals a rational basis for the trial court's conclusion that Walther's fees were reasonable. Its award of attorney fees to Accident Fund is not an erroneous exercise of discretion.

[7] Although Accident Fund paid at least $8,500, *see* ¶7, *infra*, the distribution formula sometimes means there is less than full reimbursement of benefits paid.

**Whether Anderson's Appeal is Frivolous**

¶25 Whether an appeal is frivolous is decided by this court as a matter of law. ***Grochowski v. Larson***, 196 Wis. 2d 231, 236, 538 N.W.2d 802 (Ct. App. 1995). Accident Fund claims the appeal is frivolous under WIS. STAT. RULE § 809.25(3)(c)(1)[8] because it was filed "in bad faith, solely for purposes of harassing or maliciously injuring" Accident Fund. It makes two arguments in this regard. First, Accident Fund claims the amount in controversy establishes the appeal is frivolous. Second, Accident Fund claims that Anderson is merely asking us to adopt reasoning already rejected by the circuit court. We disagree with both contentions.

¶26 Accident Fund uses the WIS. STAT. § 102.29(1) formula to calculate that even should Anderson prevail on appeal and Accident Fund's "reasonable cost of collection" is reduced to $3,500, Anderson will only regain about $1,300, which will immediately be surrendered to Anderson's attorney for the cost of the appeal. Accident Fund argues, "It appears unquestionable that an appeal that is

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[8] WISCONSIN STAT. RULE § 809.25(3) reads in relevant part:

> (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. …
>
> ….
>
> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

pursued over an amount in controversy of less than $1,309 meets the legal standard of being frivolous under Rule 809.25(3)(c)(1) ….” We disagree.

¶27 Accident Fund provides absolutely no authority for using the dollar value of a claim to determine its merit. *See* WIS. STAT. RULE 809.19(1)(e). There is certainly nothing in the rule’s text that requires such a measure. Moreover, there is no practical way for us to determine when to apply a dollar value standard or what that standard should be. Accident Fund offers no guidance as to what cost-benefit ratio should define when an action crosses the line into frivolity. Finally, lawsuits involving money often involve other meritorious issues that need determination, even if the actual amount in controversy is de minimus.

¶28 Accident Fund also argues that Anderson is merely asking us to “adopt arguments rejected by the circuit court without fulfilling the standard of review,” which is generally considered frivolous. ***Lessor v. Wangelin***, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998). However, Anderson alleged the trial court made an erroneous exercise of discretion by misinterpreting the law. *See* ***Sullivan***, 218 Wis. 2d at 470. Although we conclude that there was no erroneous exercise, this does not mean the argument was frivolous.

*By the Court.*—Order affirmed. Costs denied.

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