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DISTRICT IV

May 29, 2026

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You are hereby notified that the Court has entered the following opinion and order:

2025AP453 Dillon Bean v. Mary Jane Errio (L.C. # 2022CV82)

Before Graham, P.J., Nashold, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mary Jane Errio and the Mary Jane Errio Revocable Living Trust (hereinafter "Errio") appeal a circuit court judgment in the amount of $79,226.92 following a jury trial. Errio argues that the special verdict form was incorrect and that the amount the court awarded for attorney fees was excessive. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] We reject Errio's arguments and affirm the judgment. We remand for a determination of reasonable appellate attorney fees.

[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

This appeal arises from Errio's sale of a cabin to Dillon and Makayla Bean and Hatfield Resort, LLC (collectively "the Beans"). According to the Beans, Errio misrepresented the age and condition of the cabin, and the undisclosed defects required extensive repairs. The Beans sued Errio on a variety of common law and statutory theories of liability, culminating in a jury trial on the Beans' claim for misrepresentation under WIS. STAT. § 100.18. The jury entered a special verdict in favor of the Beans and awarded them $19,000. The Beans filed a post-verdict motion seeking attorney fees totaling $56,732.50, which the circuit court granted following a hearing.

Errio's first set of arguments relates to the jury's special verdict form. Specifically, Errio contends that the jury should have been required to make two additional factual findings. First, Errio argues that the jury should have made a specific finding as to whether the Beans reasonably relied on Errio's representations. Errio contends that there is ample evidence to support the conclusion that the Beans' pecuniary loss was caused by their own conduct, including their "speed in closing the deal, their waiver of the home inspection, … their experience in real estate and dismissal of the warning of" Errio's realtor. Errio further contends that this evidence supports a defense that the Beans' reliance on her representations was not reasonable. *See* ***Novell v. Migliaccio***, 2008 WI 44, ¶49, 309 Wis. 2d 132, 749 N.W.2d 544 (holding that for "a [WIS. STAT.] § 100.18 claim, the reasonableness of a person's actions in relying on representations is a defense and may be considered by a jury in determining cause").

Second, Errio argues that the protections of WIS. STAT. § 100.18 only extend to members of "the public."[2] Because Dillon Bean was a realtor and had access to non-public information

[2] This argument is based on the text of WIS. STAT. § 100.18, which provides in pertinent part:

(continued)

regarding the subject property, Errio contends that the provisions of § 100.18 do not apply to her transaction with the Beans.

Errio argues that because the special verdict form did not require the jury to make specific findings on these two issues, the verdict did not cover all issues of material fact. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶49, 318 Wis. 2d 148, 769 N.W.2d 82 ("A special verdict must cover material issues of ultimate fact.").

The Beans argue that Errio has forfeited these arguments by not preserving them in the circuit court. Alternatively, the Beans argue that we can reject both arguments on the merits.

"It is well-established law in Wisconsin that those issues not presented to the [circuit] court will not be considered for the first time at the appellate level." ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (citation omitted). "The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court." ***Id.***, ¶26 (citation omitted).

In her opening brief, Errio contends that these "potentially material issues of ultimate fact necessary to sustain the judgment were brought to the attention of the [circuit] court, but omitted." To support her assertion that she raised her argument regarding reasonable reliance,

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> No person … with intent to sell … any real estate … or with intent to induce the public in any manner to enter into any contract or obligation relating to the … sale … of any real estate … shall make, publish, disseminate, circulate, or place before the public … an advertisement, announcement, statement, or representation of any kind to the public … relating to such … sale … of such real estate … which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

§ 100.18(1).

Errio directs us to an exchange that occurred during the first day of trial. We have reviewed the cited portion of the trial transcript, and it relates to the Beans' objection to Errio's opening statement in which Errio suggested to the jury that the Beans needed to establish that their reliance was reasonable. In the portion of the transcript Errio cites, Errio conceded that "a plaintiff is not required to prove reasonable reliance as an element of a misrepresentation claim under this section." Instead, Errio argued that "the reasonableness of a plaintiff's reliance may be relevant in considering whether the representation materially induced the plaintiff to sustain the loss." The portion of the transcript Errio cites does not address the content of the special verdict form.

To support her assertion that she raised the issue of whether the Beans were members of "the public" entitled to the protections of WIS. STAT. § 100.18, Errio observes that the transcript from the second day of trial shows that "the term, 'the public,' occurs roughly seventy-six times in the context of Dillon Bean's status as a realtor." Errio does not explain the significance of this observation, nor is the significance obvious to us. Errio also points to other evidence presented at trial that relates to Dillon Bean's access to non-public information. At best, these portions of the trial transcript could possibly have helped Errio argue that this evidence created a question of material fact for the jury to resolve. However, Errio has not directed our attention to any place in the record where she actually made the argument to the circuit court that the Beans should not be considered members of the public.

Meanwhile, the Beans direct our attention to several instances in the record where Errio acquiesced to the form and content of the special verdict form. According to the Beans, the parties "reached an agreement on the language to be used" when instructing the jury, and Errio "made no objection to the verdict questions as included in the instructions."

The Beans also identify three instances in the record when Errio was given the opportunity to object to the questions included on the special verdict form, but did not do so. First, at the conclusion of the jury instruction conference, the circuit court asked Errio if she had "[a]ny further comments or inclusions" and Errio's attorney responded "No." Subsequently, when presenting the final version of the special verdict form, the court asked whether either party had "[a]ny corrections to the verdict form." Errio's attorney again responded "No." Finally, when the court asked the parties whether it had "missed any deletions" when instructing the jury, Errio's attorney responded, "I believe that your recitation of the instructions was exactly what we agreed on."

Our supreme court has explained that forfeiture is appropriate when, "despite ample opportunity to do so, [the appellant] failed to raise … issues during trial, in motions after the verdict, or in subsequent motions for reconsideration." ***Shadley***, 322 Wis. 2d 189, ¶26. Errio failed to file an appellate reply brief, so we deem her to have conceded that the Beans' forfeiture argument is correct. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). We therefore conclude that Errio has forfeited her arguments regarding the special verdict form.

Errio's second set of arguments relates to the circuit court's decision to award the Beans almost $57,000 in attorney fees. Errio contends that the amount awarded is excessive because the Beans recovered less than one-half of the compensatory damages they were seeking.

The circuit court considered the factors set forth in WIS. STAT. § 814.045 to evaluate whether the fees requested by the Beans were reasonable. This statutory provision requires the court to "consider all of the following" factors:

> (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.
>
> (p) Other factors the court deems important or necessary to consider under the circumstances of the case.

§ 814.045(1). In addition, this statute creates a rebuttable presumption that a reasonable attorney fee award will "not exceed 3 times the amount of the compensatory damages awarded." § 814.045(2).

Here, the circuit court began by noting that the attorney fees requested by the Beans were below the presumptive cap in WIS. STAT. § 814.045(2). The court then proceeded to examine

each of the factors in § 814.045(1). After reviewing the applicable factors, the court determined that the attorney fees the Beans requested were "reasonable as filed."

We review the circuit court's attorney fee award for erroneous exercise of discretion. *See* ***Borreson v. Yunto***, 2006 WI App 63, ¶6, 292 Wis. 2d 231, 713 N.W.2d 656. "A circuit court erroneously exercises its discretion when it fails to examine the relevant facts, applies the wrong legal standard, or does not employ a demonstrated rational process to reach a reasonable conclusion." ***Id.***

Errio argues that the circuit court did not apply the correct legal standard because it merely assumed that any number below the presumptive cap in WIS. STAT. § 814.045(2) was reasonable. In particular, Errio argues that the court "did not make an inquiry … as to whether the number of hours billed were reasonable." Errio appears to be arguing that the court was required to make this inquiry before considering other factors. *See* ***Lynch v. Crossroads Counseling Ctr.***, 2004 WI App 114, ¶47, 275 Wis. 2d 171, 684 N.W.2d 141 (concluding that the circuit court erroneously exercised its discretion "by not first determining a reasonable number of hours to expend on th[e] case").

We reject the premise of Errio's argument, because the circuit court did not rely solely on the fact that the attorney fees requested were below the presumptive cap in WIS. STAT. § 814.045(2). Instead, the court expressly acknowledged that it was still required to evaluate the factors in § 814.045(1) to determine whether the fees requested were reasonable. As part of its analysis of these statutory factors, the court concluded that the hours expended by the Beans were reasonable.

Our decision in ***Lynch*** does not undermine our conclusion that the circuit court applied the correct legal standard in the present case. In ***Lynch***, we vacated an attorney fee award that

was less than one-half the amount requested by the plaintiff because the court did not identify "which expenditures of time the court viewed as unnecessary or excessive." ***Id.***, ¶43. Instead, "the circuit court used the fee agreement to calculate the lowest attorney fee award that would not require [the plaintiff] to use part of his award to pay his attorney." ***Id.***, ¶42. We concluded that the circuit court erred by failing to "determin[e] whether the hours expended was reasonable and, if not, what would be a reasonable number." ***Id.***, ¶45. As part of this discussion, we stated that "a circuit court should start with a determination of a reasonable hourly rate and a reasonable number of hours and then make adjustments for other factors." ***Id.***, ¶41.

The analytic approach that we recommended in ***Lynch*** was intended to facilitate a clear record for appellate review. Specifically, "some explanation of the unnecessary tasks is needed to assist us in reviewing the circuit court's decision." ***Id.***, ¶44. We do not have the same concerns in the present case. When analyzing the factors in WIS. STAT. § 814.045(1), the circuit court provided a clear explanation for why the total hours expended by the Beans were reasonable.

Errio's reliance on ***Lynch*** is misplaced for two additional reasons. First, ***Lynch*** addresses a circuit court's determination of attorney fees using the factors set forth in SCR 20:1.5(a). *See* ***id.***, ¶¶38-41. In contrast, this case involves a determination using the statutory factors set forth in WIS. STAT. § 814.045(1). At the attorney fee hearing, Errio agreed that this was the correct legal standard for the court to apply. Errio does not provide any legal authority to support her assumption that ***Lynch*** applies to attorney fees awarded pursuant to § 814.045(1).

Second, even if the approach we endorsed in ***Lynch*** does apply to a determination of reasonable attorney fees under WIS. STAT. § 814.045(1), Errio is making this argument for the first time on appeal. We will not blindside the circuit court by reversing based on a theory that

was never presented to the court. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155.

Errio also argues that the circuit court did not adequately consider other relevant facts when making its attorney fee award. Errio points to the fact that the jury awarded the Beans less than one-half of the $42,000 that the Beans were seeking, and that one of the Beans' claims for damages was rejected entirely. The circuit court addressed these facts when evaluating two of the fifteen statutory factors in WIS. STAT. § 814.045(1), specifically, the damages sought and the results obtained. *See* § 814.045(1)(f)-(g). The court explained that even though the amount awarded by the jury was less than the amount the Beans had sought, the Beans were nonetheless the prevailing party and the total attorney fees were within the presumptive cap in § 814.045(2).

We see no error in the circuit court's conclusion that the disparity between requested damages and verdict should not be a basis for reducing the attorney fee award. The attorney fee statute requires the court to consider "all" of the listed factors before making a determination. *See* WIS. STAT. § 814.045(1). Errio has not identified any legal authority that would require the court to reduce the fee based solely on its analysis of these two factors.

Errio also contends that the circuit court did not adequately consider a purported settlement offer of $20,000 that she made to the Beans shortly before trial. In its analysis, the court declined to consider "what the parties may have negotiated on [or what] the case could have settled at," deeming this information to be irrelevant to the jury verdict obtained by the Beans.

Errio again directs our attention to ***Lynch***, where we noted that "[a] rejected settlement offer that turns out to be the same as the amount recovered might also bear on the reasonableness of the hours expended." ***Lynch***, 275 Wis. 2d 171, ¶46. We have already explained that ***Lynch***

involves a different approach to calculating attorney fees. Errio does not develop any argument regarding how a rejected settlement offer relates to any of the statutory factors in WIS. STAT. § 814.045(1). Moreover, Errio did not cite ***Lynch*** in the circuit court, nor did she make any other legal argument regarding the significance of this purported settlement offer. As we explained above, we will not blindside the circuit court by reversing based on new arguments made for the first time on appeal. *See* ***Townsend***, 338 Wis. 2d 114, ¶25.[3]

Errio also relies in our decision in ***Beaudette v. Eau Claire Cnty. Sheriff's Dept.***, 2003 WI App 153, 265 Wis. 2d 744, 668 N.W.2d 133. In ***Beaudette***, we concluded that the circuit court properly exercised its discretion to reduce attorney fees because "the amount of time … spent on research was unreasonable, given the absence of case law in the area. Further, the court noted the case did not require extensive discovery, was not especially difficult, and compared the amount recovered with the amount of fees requested." ***Id.***, ¶33.

Errio argues that the same analysis should apply here because "the case was not so overly litigious as to warrant $57,000 in attorney fees." Errio observes that there were no discovery disputes, no extensive arguments regarding motions in limine, and no motions to dismiss. The circuit court rejected a similar argument during the fee hearing, pointing to instances of "delays or lack of cooperation" by Errio that had necessitated additional work for the Beans. The court also credited the Beans' attorney with meeting its expectations that litigants comply with court orders requiring information to be submitted before motion hearing and trial. The court

[3] The Beans also argue that this line of argument is not supported by any record evidence. We agree with the Beans. Errio raised this issue for the first time during the motion hearing on attorney fees, but "statements made by counsel during argument are not to be considered or given weight as evidence." ***Merco Distrib. Corp. v. O & R Engines, Inc.***, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976).

explained that "any time that the court is provided better information, it's a better outcome for all parties."

Errio further argues that "this case was not nearly as difficult as [the Beans'] attorney made it out to be." As a barometer of the complexity of the case, Errio directs our attention to the Index, which shows twelve filings by plaintiff, totaling fifty pages. Errio argues that the Beans' "enormous exhibit list" was unnecessary given the relative simplicity of the legal issues involved in the case. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2003 WI App 175, ¶18, 266 Wis. 2d 659, 668 N.W.2d 798 (concluding that "[t]he finding that there was excessive litigation justifies the [circuit] court's reduction of the … requested attorney fees").

During the hearing on attorney fees, the circuit court addressed the complexity of the case and the novelty and difficulties of the questions involved. The court determined that the issues in the case were not "overly-novel," nor was the case as complex as, for example, a medical malpractice case. Nonetheless, the court determined that the Beans had "a difficult burden to overcome" in order to prove that Errio knowingly misrepresented the condition and age of the property. The court explained that, to satisfy this burden, the Beans brought in several witnesses and went through extensive records in order "to present a case that dated back decades." The court further explained that the length of time involved in the case "certainly did add a level of complexity to the case as far as the burden that the [p]laintiffs carry in being able to show that to the jury." The court's evaluation of these factors adequately addresses Errio's arguments about the difficulty and complexity of the case.

Accordingly, Errio has not identified any relevant facts that the circuit court failed to consider in the attorney fee award. "A court properly exercises its discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion."

Beaudette, 265 Wis. 2d 744, ¶31. We see no reason to question the court's conclusion that the Beans' attorney fees were reasonable. Instead, "we defer to the [circuit] court's attorney fee determination because it has the 'advantageous position to observe the amount and quality of the work performed and has the expertise to evaluate the reasonableness of fees.'" ***Id.*** (quoted source omitted).

In sum, because Errio has forfeited her arguments about the special verdict form and has not demonstrated that the circuit court erroneously exercised its discretion in calculating reasonable attorney fees under WIS. STAT. § 814.045, we affirm the circuit court's judgment.

The Beans argue that, as the prevailing party under WIS. STAT. § 100.18, they are entitled to reasonable appellate attorney fees. *See* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991) ("a party who prevails on appeal in an intentional misrepresentation case brought under sec. 100.18 is … entitled to reasonable appellate attorney fees"). Errio did not file a reply brief, so we deem her to have conceded this issue. *See* ***Apple Hill Farms Dev., LLP v. Price***, 2012 WI App 69, ¶14, 342 Wis. 2d 162, 816 N.W.2d 914 (failure to file a reply brief is deemed a concession). We therefore remand this matter to the circuit court for a determination of the amount of appellate attorney fees that should be awarded. *See* ***Radford***, 163 Wis. 2d at 551.

Based on the foregoing,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this case is remanded to the circuit court for a determination of reasonable appellate fees.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals