

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 13, 1999

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

**No. 97-3334**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOHN M. O'NEILL AND O'NEILL BUILDERS, INC.,**

**PLAINTIFFS-APPELLANTS-  
CROSS-RESPONDENTS,**

**V.**

**INDIAN HILLS FIRST ADDITION ASSOCIATION, INC.,**

**DEFENDANT-RESPONDENT-  
CROSS-APPELLANT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. John M. O'Neill and O'Neill Builders, Inc. (O'Neill) appeal and Indian Hills First Addition Association, Inc., cross-appeals from a judgment awarding attorney's fees under §§ 802.05 and 814.025, STATS., to Indian Hills. We affirm.

O'Neill owns landlocked property adjacent to Indian Hills subdivision and sued Indian Hills to gain an easement of necessity for access to his property. Indian Hills moved to dismiss O'Neill's complaint because it failed to state a claim upon which relief could be granted. The court granted the motion and also found O'Neill's action frivolous under §§ 802.05 and 814.025, STATS.<sup>1</sup> After O'Neill defaulted on the question of whether the action was frivolous, the court awarded Indian Hills \$10,553 in attorney's fees and costs.

O'Neill moved the court under § 806.07(1), STATS., to reconsider the amount of attorney's fees and costs, alleging an excuse for not having objected to the proposed order on attorney's fees and costs. The motion contended that the fees were excessive and unreasonable, and contained entries unrelated to the O'Neill litigation. O'Neill also claimed that the case was not sufficiently complex to warrant over \$10,000 in fees.

The court granted O'Neill's motion for relief from the order awarding attorney's fees due to mistake, inadvertence or excusable neglect. *See* § 806.07(1)(a), STATS. At the hearing on the motion, counsel argued regarding the amount of the fees. O'Neill argued that the invoices of Indian Hills' counsel did not indicate rates or time spent on matters. O'Neill further argued that the case was of short duration and not complex and included fees which predated the commencement of the action or were wholly unrelated to the litigation.

In response, counsel for Indian Hills stated that all of the services for which fees were claimed were necessary to respond to O'Neill's easement claim,

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<sup>1</sup> We previously determined that O'Neill could not appeal from the September 4, 1997 order dismissing his complaint and deeming his action frivolous because he did not timely appeal from that order.

regardless of whether the fees were incurred before O'Neill filed his complaint. Counsel stated that fees were incurred prior to the commencement of the suit in order to respond to Indian Hills' inquiries regarding O'Neill's expression of interest in an easement. These fees included researching the facts and law relating to the claim and correspondence with O'Neill regarding the claim. Counsel also stated that he was required to perform other services for Indian Hills unrelated to court preparation, including appearing at Indian Hills Association meetings held in response to O'Neill's easement claim and the subdivision's actions to obtain title to the roads in response to actions taken by O'Neill prior to commencing his suit.

The court found that some of Indian Hills' counsel's fees overlapped into other business matters of the association. The court reduced the fees by forty percent to \$6000 after considering the complexity and length of the case, the issues presented, the research and skill required to defend, the strategic decisions the association made regarding O'Neill's claim and the fact that some of the charges did not sufficiently relate to defending O'Neill's claim. The court found the \$6000 fee to be fair and reasonable. O'Neill and Indian Hills appeal and cross-appeal from this award.

The appeal and cross-appeal both challenge the amount of fees awarded: O'Neill seeks a reduction in the fees and Indian Hills seeks a restoration of all of its fees. An award of attorney fees under §§ 802.05 and 814.025, STATS., upon a determination of frivolousness, is committed to the circuit court's discretion. *See Hughes v. Chrysler Motors Corp.*, 197 Wis.2d 973, 987, 542 N.W.2d 148, 153 (1996). We will uphold the discretionary decision if it "employs a logical rationale based on the appropriate legal principles and facts of record." *Id.* (quoted source omitted). In determining the reasonableness of an attorney's fees, the court should consider "the time and labor required, the novelty and

difficulty of the questions involved and the skill requisite to perform the legal service properly.” *Siegel v. Leer*, 156 Wis.2d 621, 631, 457 N.W.2d 533, 537 (Ct. App. 1990).

O’Neill argues that the \$6000 fee is not reasonable. While O’Neill does not challenge the hourly rate, he argues that the time spent on the action was unreasonable and inappropriate because the issues were not complex and the case terminated at an early stage without discovery and after only two hearings. O’Neill challenges invoice entries relating to filing and service of documents which he contends required only minimal expertise to perform, if counsel’s expertise was required at all. O’Neill argues that the research incorporated in Indian Hills’ memoranda of authority was not complicated. O’Neill also challenges specific entries relating to preparation of a transfer tax return relating to the title to roads in the subdivision and conversations with the register of deeds.

As a preliminary matter, we note that it is difficult to address O’Neill’s challenges to and Indian Hills’ defense of specific invoice entries due to the informal manner in which the fees question was addressed in the circuit court. Counsel presented argument, not evidence. There was no testimony regarding the invoice entries or the nature and requirements of the case. Rather, O’Neill protested and Indian Hills’ counsel explained certain invoice entries. Neither party objected to the informality of the proceedings or sought an opportunity to put on evidence. Therefore, we are left with counsel’s argument and the affidavit of counsel for Indian Hills.

Indian Hills’ affidavit stated that all of the billing was related to the O’Neill easement claim and counsel reiterated that position at the hearing on O’Neill’s motion to reopen the fees order. Under the facts of this case, we

conclude that attorney's fees incurred prior to the commencement of O'Neill's suit are recoverable. Indian Hills' counsel argued in the circuit court that the pre-litigation services related to whether O'Neill had a legal basis for asserting an easement against Indian Hills. This question arose and required evaluation even though O'Neill had not yet filed a summons and complaint. Because the work related to the later-filed action, we affirm the award.

We also uphold the award for fees unrelated to court activities, such as preparation of the transfer tax return. Indian Hills' counsel's affidavit states that such work related to O'Neill's attempt to get access to his property. At the hearing, counsel stated that some of his services related to matters that evolved from O'Neill's various attempts to gain access to his landlocked property. The circuit court implicitly found that these charges resulted from O'Neill's lawsuit. O'Neill did not adequately counter Indian Hills' counsel's contention in his affidavit that all entries on the invoices represented services related to O'Neill's easement claim before and after he sued.

We conclude that the circuit court properly considered the factors governing the reasonableness of the fees based upon the record created by the parties. We defer to the court's ability to determine the reasonableness of the fees because it can evaluate the file and the services rendered. *See Siegel*, 156 Wis.2d at 630, 457 N.W.2d at 537. The court stated its reasons for reducing the fee to \$6000 and a balancing of the factors was within the court's discretion. For these reasons, we affirm the judgment.

*By the Court.*—Judgment affirmed.

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



