COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1171

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

GERALD WITKOWSKI AND
RANDY SCOTT,

PLAINTIFFS-APPELLANTS,

V.

BARRY WEBER, CHIEF OF POLICE,
CITY OF WAUWATOSA AND
CITY OF WAUWATOSA,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Gerald Witkowski and Randy Scott, lieutenants with the Wauwatosa Police Department, appeal from the circuit court order denying their motion for attorney fees and from the order computing their damages. We affirm the orders but remand the order computing damages for clarification.

I. BACKGROUND

¶2 The relevant facts are undisputed. On December 15, 1993, Wauwatosa Police Chief Barry Weber initiated a new policy for promotions within the police department. The policy identified the qualifications required for promotion to lieutenant: (1) the candidate had to have completed five years of service within the department; (2) the candidate had to have shown knowledge and ability for the position as demonstrated by both written and oral examination; and (3) the candidate had to have completed an interview with the chief. The policy stated that at the conclusion of the process, Chief Weber would "select candidates in rank order from this list to fill vacancies. This list shall be valid for two (2) years from the date it is finalized."

¶3 On March 10, 1994, Chief Weber posted the promotions list for lieutenant. The list included both Witkowski and Scott. The list indicated that Witkowski and Scott were in line for promotion ranked as the fourth and fifth candidates, respectively. By May 19, 1995, Chief Weber had promoted the first three candidates on the March 10, 1994 list. On that date, however, Chief Weber rescinded the list and announced that the lieutenant hiring criteria were being amended to require supervisory experience. Between May 19, 1995 and March 10, 1996, the original date for the expiration of the promotion list, two lieutenant

positions opened in the department. Chief Weber promoted two persons who were not on the March 10, 1994 list.

¶4 Shortly thereafter, Witkowski and Scott sued Chief Weber and the City of Wauwatosa for declaratory and equitable relief regarding the chief's failure to promote them pursuant to the personnel policy he had developed and implemented. The circuit court granted summary judgment to Chief Weber and the City. Witkowski and Scott appealed, contending that Chief Weber violated a ministerial duty to follow his own promotional policy. We agreed with Witkowski and Scott and reversed the circuit court's order. *See* ***Witkowski v. Weber***, No. 96-2749, unpublished slip op. (Wis. Ct. App. May 13, 1997). In our mandate, we directed the circuit court to order the Wauwatosa Chief of Police to appoint Witkowski and Scott to lieutenant positions, and to "conduct proceedings necessary to determine the back-pay and other benefits to which the appellants [were] entitled." ***Id.*** at 6.

¶5 Following our remand, the circuit court conducted a hearing to compute Witkowski's and Scott's back pay. At the hearing on damages, testimony established that lieutenants generally work approximately 2.5 hours per week beyond 40 hours, for which they are not compensated because they are exempt from the requirements of the Fair Labor Standards Act.[1] Based on this testimony, the circuit court credited the city with 2.5 hours of overtime for each week Witkowski and Scott were denied the promotion.[2] The court also concluded

[1] Testimony indicated, however, that in exchange for overtime hours, lieutenants do receive compensatory time.

[2] To make Witkowski and Scott whole, the circuit court determined their damages by subtracting their respective straight time earnings as patrol officers and sergeants from their salary as lieutenants. To that sum, the court then added the overtime earnings that exceeded those overtime hours which they would have worked as lieutenants.

(continued)

that Witkowski and Scott were not entitled to attorney fees. Witkowski and Scott appeal from both orders.

II. ANALYSIS

¶6 Witkowski and Scott, relying on ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), first argue that circuit court erred when it denied them attorney fees. We disagree.

¶7 In ***Elliott***, Elliott sued Donahue for damages resulting from injuries sustained in an automobile accident. *See* ***Elliott***, 169 Wis. 2d at 314. Donahue tendered the defense to Heritage Mutual Insurance Company, but Heritage, maintaining that Donahue did not have permission to drive the insured vehicle, denied coverage under the non-permissive use exclusion of the policy. *See* ***id.*** at 314-15. Thus, Donahue retained counsel. *See* ***id.*** at 315. Despite an order for a bifurcated trial, damages and coverage were tried together. *See* ***id.*** The jury found that Donahue had permission to drive the insured vehicle and, therefore, the trial court entered judgment finding that he was covered under the Heritage policy. *See*

Curiously, however, the order provides:

> 1. The City shall pay to the plaintiffs the difference between what they would have earned had they been timely promoted by the defendants to the position of Lieutenant and what they did earn either as a patrol officer or sergeant. This amount shall then be reduced by an overtime credit to the City of 2.5 hours per week.
> 2. ….
> 3. The amount of backpay [sic] to be paid *by* Scott *by* the defendant is $1,638.12, less applicable withholdings.
> 4. The amount of backpay [sic] to be paid *by* Witkowski *by* the defendant is $6,691.54, less applicable withholdings.

(Emphases added.) On remand, the order should be corrected to reflect who must pay whom.

id. Heritage then assumed Donahue's defense and settled the claims against him. *See* ***id.***

¶8 Donahue sought to recover his actual attorney fees and costs of litigation. *See* ***id.*** The trial court denied his request. *See* ***id.*** This court reversed, in part, concluding that Donahue was entitled to recover costs and actual attorney fees incurred in defending against the damages claim but, under the American Rule, was not permitted to recover attorney fees with respect to contesting Heritage's denial of coverage. *See* ***Elliott v. Donahue***, 163 Wis. 2d 1059, 1062, 473 N.W.2d 155 (Ct. App. 1991), *rev'd*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992). On further appeal, the supreme court thus considered whether an insured may recover attorney fees incurred in successfully establishing coverage[3] in the course of defending against an action for damages. *See* ***Elliott***, 169 Wis. 2d at 314-16.

¶9 The supreme court concluded that, under the policy provision obligating Heritage to reimburse an insured for any "reasonable expenses incurred at [the insurer's] request," Donahue was permitted to recover reasonable attorney fees incurred in establishing coverage. *See* ***id.*** at 319. The court explained: "Initiating an action which imposes an obligation on the part of the insured to successfully [establish] coverage is the equivalent of requesting the insured to incur reasonable expenses. Therefore, the attorney fees incurred by Donahue in successfully [establishing] coverage under the policy represent[] expenses incurred at Heritage's request." ***Id.***

[3] The supreme court alternated between characterizing Donahue's efforts as an insured's attempt either to *defend* coverage or to *establish* coverage. The former terminology is misleading; in this opinion, therefore, we will consistently refer to an insured's efforts to *establish* coverage.

¶10 The supreme court, however, then stated that it did not need to rely on the line of reasoning based on the policy provision because statutory law, recognizing equitable principles, permitted recovery of attorney fees. *See* ***id.*** The court reiterated that an insurance policy is "a unique type of legally enforceable contract" requiring an insurer, in return for the insured's premiums, to "assume[] the contractual duties of indemnification and defense for claims described in the policy." *See* ***id.*** at 320. Thus, the court declared:

> The insurer that denies coverage and forces the insured to retain counsel and expend additional money to establish coverage for a claim that falls within the ambit of the insurance policy deprives the insured [of] the benefit that was bargained for and paid for with the periodic premium payments. Therefore, the principles of equity call for the insurer to be liable to the insured for expenses, including reasonable attorney fees, incurred by the insured in successfully establishing coverage.

Id. at 322. On that basis, the court decided "that supplemental relief under [WIS. STAT.§ 806.04(8)[4] of the Uniform Declaratory Judgments Acts] may include recovery of attorney fees incurred by the insured in successfully establishing coverage under the insurance policy." ***Id.*** at 324.

¶11 Witkowski and Scott submit that their case is analogous to ***Elliott*** and, therefore, that the ***Elliott*** rationale dictates that they be reimbursed for their attorney fees. Specifically, they contend:

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[4] WISCONSIN STAT. § 806.04(8), provides:

> **Supplemental relief.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

> The fact is that Witkowski and Scott found themselves in virtually the same position as the insured in *Elliott*. Both *Elliott* and this case involve the court's declaratory judgment interpretation of a form of contract which imposed obligations and duties upon the defendant. In *Elliott*, the contract was an insurance policy obliging the insurer to defend. In this case, the contract was the promotion policy which obliged Chief Weber to promote Witkowski and Scott to the position of lieutenant. In both cases, the beneficiaries of those policies had to file lawsuits to compel the entities which issued the policies to fulfill their duties and obligations under the policies.

We cannot agree. First, Witkowski and Scott's attempt to equate their circumstances to those in ***Elliott*** fails. As the circuit court aptly noted in rejecting their argument:

> [T]here was nothing in [the parties'] relationship from which it can be implied any similar obligation on the part of Wauwatosa to pay attorney fees for Scott and Witkowski . . . as [there was] in the *Elliott* case. There is not a corollary there with regard to them.
>
> Wauwatosa didn't have a duty to provide a defense or provide attorneys to Mr. Scott and Mr. Witkowski if they chose to sue Wauwatosa over the violation of the policy by the chief the way [the insurer] had a duty to provide a defense to [the insured] if he was sued for his operation a car under the terms of the policy with [the insurer]. So the very thing that was to be provided in the [insurance] policy, to wit legal services by an attorney, was denied him.

¶12 Although ***Elliott*** permits the reimbursement of attorney fees and costs, and the case references WIS. STAT. §§ 806.04(8) and 806.04(10)[5] as statutory authority allowing reimbursement, it does so under limited circumstances not present here. In defining the dispute in ***Elliott***, the supreme court stated: "The sole issue on review concerns whether an insured may recover attorney fees incurred in successfully defending coverage under an insurance policy." ***Elliott***,

[5] WISCONSIN STAT. § 806.04(10), provides:

> **Costs.** In any proceeding under this section the court may make such award of costs as may seem equitable and just.

169 Wis. 2d at 316. Here, neither Witkowski nor Scott is an insured and, thus, neither falls within the supreme court's holding.

¶13 Subsequent decisions have also declined to extend ***Elliott***'s exception to the American Rule beyond the insurance contract context. In ***DeChant v. Monarch Life Insurance Co.***, 200 Wis. 2d 559, 547 N.W.2d 592 (1996), the supreme court held that an insured was entitled to attorney fees and bond premiums in a first party bad-faith action as compensatory damages flowing from the insurance company's bad faith. *See* ***id.*** at 577. The supreme court remarked however:

> We agree with DeChant that our decision in ***Elliott*** stands for the proposition that courts have the equitable power to award attorney's fees to insureds in limited circumstances.... ***Elliott*** involved a declaratory judgment action in which the insurer breached its duty to defend. Therefore, although some of the rationale expressed in ***Elliott*** is supportive, we decline to extend ***Elliott*** beyond its particular facts and circumstances.

Id. at 569. More recently, this court, relying on ***DeChant***, reversed a trial court order granting fees under ***Elliott***, noting that the court erred in granting fees because "*[a]ttorney's fees should only be awarded in limited circumstances: when an insurer breaches its duty to defend an insured*." ***Ledman v. State Farm Mutual Auto. Ins. Co.***, 230 Wis. 2d 56, 70, 601 N.W.2d 312 (Ct. App. 1999) (emphasis added); *see also* ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, ¶20-24, 234 Wis. 2d 374, 610 N.W.2d 501. These limited circumstances do not exist here.

¶14 Witkowksi and Scott nevertheless argue that the equities of their case merit the award of attorney fees. Again, we disagree. Under the well-established American Rule, parties to litigation are generally responsible for their

own attorney fees unless recovery is expressly allowed either by contract or statute, or when recovery results from third-party litigation. *See* ***Kremers-Urban Co. v. American Employers Ins.***, 119 Wis. 2d 722, 744-45, 351 N.W.2d 156 (1984). Here, attorney fees are neither authorized by statute nor authorized by contract. Further, while they are the natural and proximate result of the wrongful act by the defendant, that wrongful act did not subject Witkowski or Scott to litigation with any party other than the police chief and the City of Wauwatosa. Consequently, ***Elliott*** does not extend to the facts of this case.

¶15 Witkowski and Scott next claim that the circuit court erred in determining their back pay. Specifically, they argue that "the circuit court erred as a matter of law when it reduced their damages by 2.5 hours per week on the theory that they would [not] have worked that much overtime as lieutenants." They claim that the court erred in accepting the testimony of Captain John Bozicevich, who testified to the average number of hours per week that a lieutenant works overtime. In response, the City claims that the circuit court properly considered Captain Bozicevich's testimony, and requests that this court affirm the back pay order.[6]

¶16 At the evidentiary hearing, the City called Captain Bozicevich who stated that "it wouldn't be uncommon [for a lieutenant] to have[worked] two to three hours a week beyond the 40 hour weekly schedule." Witkowski and Scott objected, claiming that Captain Bozicevich, a twenty-six year veteran of the

[6] Curiously, the City of Wauwatosa offers an alternative argument, requesting that we reverse the circuit court order calculating damages, and remand with an order directing the circuit court to calculate the back pay issue by subtracting Witkowski's and Scott's total earnings as patrol officers/sergeants from their salaries as lieutenants. While we agree that this calculation comports with the case law the City cites, we cannot grant the City's request because it failed to cross-appeal from the order. *See* WIS. STAT. RULE 809.10 (2)(b) (mandating that a cross appeal be filed).

Wauwatosa Police Department, lacked foundation to offer this testimony. They also contended that the evidence was not relevant, and that the testimony was based on conjecture. We reject their arguments.

¶17 Whether an individual is qualified to testify as an expert rests in the sound discretion of the court. *See* ***State v. Robinson***, 146 Wis. 2d 315, 332, 431 N.W.2d 165 (1988). This court will not reverse a trial court's discretionary ruling absent an erroneous exercise of discretion. *See* ***id.***

¶18 WISCONSIN STAT. § 907.02[7] permits qualification of an expert witness by "knowledge, skill, experience, training, or education." The qualification of an expert has historically been a matter not of licensure, but of experience. *See* ***Robinson***, 146 Wis. 2d at 332; *see also* ***State v. Donner***, 192 Wis. 2d 305, 317-18, 531 N.W.2d 369 (Ct. App. 1995) (expert qualified by experience to testify about the effects of blood alcohol concentration); ***State v. Hollingsworth***, 160 Wis. 2d 883, 896, 467 N.W.2d 555 (Ct. App. 1991) (experience and technical training are proper bases for expert opinion). WISCONSIN STAT. § 907.02 is broadly phrased to encompass experts who are qualified to testify on a subject matter based not only on their degree or certification, but also on their experience, knowledge or specialized training.

¶19 Captain Bozicevich testified that he had been with the Wauwatosa Police Department for twenty-six years. He had held many positions and, at the

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[7] WISCONSIN STAT. § 907.02, provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

time of his testimony, was an administrative captain. His responsibilities included planning and administering the Department's budget. He testified that he was well-acquainted with the overtime practices of the staff. Based on this testimony, the circuit court concluded that Captain Bozicevich could offer credible testimony concerning lieutenants' weekly work hours. We agree with the circuit court. Clearly, ample foundation was laid for Captain Bozicevich's opinion and he was qualified to testify as to the number of hours the people on his staff worked. Moreover, we note that Witkowski and Scott failed to cross-examine Captain Bozicevich as to the basis of his testimony. Consequently, his testimony remained uncontroverted. For these reasons, we affirm the circuit court's factual findings on this issue.

¶20 Witkowski and Scott also argue that the circuit court erred in deducting any pay from their overtime earnings. We disagree. The determination of damages is within the discretion of the circuit court. *See* ***Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.***, 164 Wis. 2d 689, 703, 476 N.W.2d 305 (Ct. App. 1991). Whether the circuit court applied the proper legal standard in determining damages is a question of law, which we review de novo. *See* ***id.*** Factual findings made by the circuit court shall be upheld, however, unless they are clearly erroneous. *See* ***id***

¶21 As it currently stands, the plaintiffs received more than they would have earned had they been promptly promoted. Because the City failed to cross-appeal from the order entering damages, we will not reverse the circuit court's order. We note, however, that compensatory damages, such as back pay, are awarded to make a person whole, not to afford a windfall. *See* ***White v. Benkowski***, 37 Wis. 2d 285, 290, 155 N.W.2d 74 (1967); see also ***Brockmeyer v. Dun & Bradstreet***, 113 Wis. 2d 561, 574-76, 335 N.W.2d 834 (1983).

Consequently, we conclude that calculated damages entered by the circuit court sufficiently compensated Witkowksi and Scott, making them whole. Accordingly, we affirm and remand solely for the correction of the order pursuant to our discussion in footnote 2.

By the Court.—Orders affirmed and cause remanded with directions.

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