

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2009

David R. Schanker
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 Nos. 2008AP2940-FT
2008AP2941-FT**

**Cir. Ct. Nos. 2007SC2729
2007SC2743**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2008AP2940-FT

BAYFIELD FINANCIAL, LLC,

PLAINTIFF-RESPONDENT,

V.

REBECCA R. HARVEY,

DEFENDANT-APPELLANT.

No. 2008AP2941-FT

RED ROCK LAKE FINANCIAL, LLC,

PLAINTIFF-RESPONDENT,

V.

JESSICA GRETZLOCK, A/K/A JESSICA L. ROEDER,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Reversed and causes remanded with
directions.*

¶1 HOOVER, P.J.¹ Rebecca Harvey and Jessica Gretzlock appeal orders granting them attorney fees pursuant to the Wisconsin Consumer Act, WIS. STAT. ch. 425.² Harvey and Gretzlock contend the circuit court erroneously exercised its discretion by failing to explain how it determined the amount of the awards. We agree and reverse and remand for the circuit court to determine and award reasonable costs and attorney fees, including an amount to compensate Harvey's and Gretzlock's attorney for this appeal.

BACKGROUND

¶2 Bayfield Financial, LLC, and Red Rock Lake Financial, LLC, filed independent small claims actions against Harvey and Gretzlock, respectively. Harvey and Gretzlock both retained the same attorney, and their cases were heard at the same time. Harvey and Gretzlock subsequently requested de novo trials in the circuit court, where they both prevailed on summary judgment based on the same Wisconsin Consumer Act argument. The parties had briefed the issue of whether attorney fees should be awarded, but there was no evidence yet of the amount of costs incurred or fees requested.

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). These appeals are also expedited under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Although unrelated, both cases proceeded in tandem in the small claims and trial courts. We ordered the appeals consolidated on January 6, 2009.

¶3 Nonetheless, the court concluded “reasonable attorney fees will be an amount not to exceed \$750. Costs will be determined by a calculation that [Harvey’s and Gretzlock’s counsel] can do and reasonable attorney fees whether they are more or less than \$750 are limited to \$750.” The court further directed counsel to “submit a billing to the court for approval ... subject to challenge as to reasonableness by the plaintiff.”

¶4 Harvey and Gretzlock then moved for larger fee awards and submitted affidavits of costs and attorney fees. Neither Bayfield nor Red Rock Lake argued the attorney’s hourly rate or number of hours incurred on the cases was unreasonable.³ After briefing, the circuit court awarded \$750 in each case, explaining only that “the award of attorney fees not to exceed \$750 is consistent with the court’s discretion, the statutes and relevant case law.”

DISCUSSION

¶5 WISCONSIN STAT. § 425.308(1) provides that a customer who prevails in an action arising out of a consumer transaction shall recover the amount of costs and expenses reasonably incurred, together with a reasonable amount for attorney fees. The “primary consideration” in setting attorney fees is that the award “shall be in an amount sufficient to compensate attorneys representing consumers.” *First Wis. Nat’l Bank v. Nicolaou*, 113 Wis. 2d 524, 537-38, 335 N.W.2d 390 (1983) (citing WIS. STAT. § 425.308(2)). This is because the Wisconsin Consumer Act “depends upon private lawsuits for enforcement and ... private enforcement of the Act will be unsuccessful unless prevailing

³ Bayfield and Red Rock Lake also shared counsel in these cases.

consumers can expect adequate attorney fee awards.” *Clark v. Aetna Fin. Corp.*, 115 Wis. 2d 581, 591, 340 N.W.2d 747 (Ct. App. 1983).

¶6 Although an attorney fee award is mandatory, WIS. STAT. § 425.308 leaves determination of the amount to the circuit court’s discretion. *Nicolaou*, 113 Wis. 2d at 537.

We give deference to the circuit court’s decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel. Thus, we do not substitute our judgment for the judgment of the circuit court, but instead probe the court’s explanation to determine if the court “employ[ed] a logical rationale based on the appropriate legal principles and facts of record.”

Kolupar v. Wilde Pontiac Cadillac, Inc., 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58 (citations omitted). Circuit courts are to apply the lodestar method to determine attorney fees. *Id.*, ¶30. This method requires a court to first determine a reasonable fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Id.*, ¶28. The court may then adjust this number, the lodestar, up or down by considering any other relevant factors. *Id.*, ¶29. Subsection 425.308(2) lists the factors a court may consider in determining what amount is sufficient to compensate consumers’ attorneys.

¶7 Having reviewed the record and the court’s explanation for the fee award, we are unable to conclude it employed a logical rationale based on the appropriate legal principles and facts of record. See *Kolupar*, 275 Wis. 2d 1, ¶22. Harvey’s and Gretzlock’s attorney submitted an affidavit that set forth his hourly rate, addressed whether that rate was customary, and itemized both the hours worked and costs incurred on each of the cases. Bayfield and Red Rock Lake conceded the attorney’s rate was “certainly customary for the bar.” Harvey’s and

Gretzlock's attorney calculated the lodestar as \$2,898 and \$2,793 in the two cases. He then argued various factors should lead to an upward departure, resulting in fee awards of \$3,150 and \$3,000, respectively.

¶8 Nonetheless, the court awarded significantly less than the lodestar amount in both cases. It offered no explanation for its award nor mentioned any of the factors set forth in WIS. STAT. § 425.308. Further, the court imposed an arbitrary cap on attorney fees before it had an opportunity to consider any of the relevant factors. For their part, Bayfield and Red Rock Lake offer no explanation as to how the court could arrive at \$750. We are left to wonder why that sum is reasonable.

¶9 Additionally, the court effectively did not provide an award for Harvey's and Gretzlock's costs in addition to attorney fees. As in *Kolupar*, the court here merely provided a single fees and costs award. See *Kolupar*, 275 Wis. 2d 1, ¶¶54-55. A court, however, must separately identify and explain the amounts awarded as costs and attorney fees. See *id.*

¶10 We remand for the circuit court to determine and award reasonable costs and attorney fees in an amount sufficient to promote private enforcement of the Wisconsin Consumer Act, consistent with *Kolupar* and WIS. STAT. § 425.308. The circuit court shall also award attorney fees for this appeal. See *Nicolaou*, 113 Wis. 2d at 541-42; *Clark*, 115 Wis. 2d at 591.

By the Court.—Orders reversed and causes remanded with directions. Costs awarded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

