

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 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 No. 2008AP2348

Cir. Ct. No. 2003CV741

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOHN F. KOTTKE, D/B/A JFK TRUCKING, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

**COMMERCIAL TRUCK CLAIMS MANAGEMENT, OWNER-OPERATOR
SERVICES, INC. AND ALEA LONDON LIMITED,**

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Reversed in part; affirmed in part; cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. John Kottke, d/b/a JFK Trucking, Inc. (Kottke) appeals a judgment awarding attorney fees and costs. Commercial Truck Claims

Management, Owner-Operator Services, Inc., and Alea London Limited (Commercial) cross-appeal from the same judgment. Kottke argues the circuit court erred by not awarding the attorney fees and costs Kottke incurred presenting his punitive damages claim. Commercial, on the other hand, contends the court should also not have awarded attorney fees and costs on Kottke's bad faith claim. Kottke also argues the circuit court should have awarded him attorney fees and costs incurred in bringing an unsuccessful motion for reconsideration of the attorney fees award. Finally, Kottke challenges the court's rejection of the parties' stipulation to \$432 in costs for Kottke's wife's lost wages.

¶2 We previously decided an appeal by Commercial in this case, affirming on numerous issues, but reversing the judgment in part and remanding to permit Commercial to review Kottke's attorney fees bills in order to challenge the reasonableness of the fees. Commercial's new arguments after remand—that attorney fees are never recoverable for prosecuting either bad faith or punitive damages claims—went beyond the scope of our remand. We therefore reverse the judgment and remand with directions to award Kottke all reasonably incurred attorney fees and costs, including those relating to the motion for reconsideration.

¶3 Prior to the first appeal, the circuit court left open the determination of expenses for lost wages. Because Kottke's wife was not a party, we affirm the court's denial of the claim for wage reimbursement for her voluntary attendance at the proceedings.

BACKGROUND

¶4 The underlying facts of this case are set forth in greater detail in our prior decision. See *Kottke v. Commercial Truck Claims Mgmt.*, No. 2006AP340, unpublished slip op. (WI App Feb. 20, 2007). Briefly, Kottke struck a deer with

his semi truck. Commercial, Kottke's insurer, denied part of the repair claim because it included increased costs due to custom paint and components. When Kottke objected, Commercial reduced its reimbursement amount even further. Kottke then called for an explanation and the claims manager told him "I don't have to pay for all the ... fancy paint and chrome stuff that you have on your truck," and "[i]f you don't like it, that's tough shit." *Id.*, ¶5.

¶5 Kottke sued and a jury awarded him damages for breach of contract. In a subsequent bifurcated proceeding, a jury concluded Commercial acted in bad faith and also awarded punitive damages. Kottke filed a motion and affidavit in support of attorney fees and costs and submitted copies of the attorney fee bills for in camera review.¹ The circuit court denied Commercial's numerous motions after verdict and, with a few exceptions, awarded Kottke all of his requested attorney fees and costs. The order stated, in part:

2) Plaintiff's motion for award of actual attorney's fees, costs, disbursements, expenses, and consequential damages is granted subject to the following reservations:

a) Plaintiff's motions for lost wages/profits, as set forth in ... plaintiff's counsel's affidavit, ... are held in abeyance. The Court would require an evidentiary hearing with respect to said items before further consideration of same.

b) Plaintiff is to furnish to the defendant copies of all documentation of out-of-pocket expenses/disbursements incurred in prosecuting these bifurcated actions to verdict. Such documentation shall further include copies of any outstanding invoices from expert witnesses who testified on behalf of the plaintiff.

¹ The circuit court subsequently ordered Kottke to provide Commercial with redacted attorney bills, but following further legal argument, the court did not require release of the redacted records, which Kottke had again filed with the court.

3) Plaintiff expressly reserves his right to petition the Court for a further award of any and all actual costs, disbursements, and attorney's fees which have been or may be incurred in the future ... pending conclusion of this litigation in its entirety

¶6 Commercial then asserted nine circuit court errors on appeal, the last of which was “not allowing Commercial the opportunity to examine redacted copies of Kottke’s attorney fees to question the reasonableness of such bills.” *Kottke*, unpublished slip op. ¶1. Although rejecting Commercial’s other arguments, we “agree[d] with Commercial that it should have been allowed to examine redacted copies of Kottke’s attorney fees.” *Id.*

¶7 On remand, the circuit court released the redacted attorney fee bills to Commercial.² The parties then retained expert witnesses to opine as to the reasonableness of the fees.³ Prior to the hearing, the parties submitted their experts’ reports and legal briefs. In its brief, Commercial argued for the first time that, while attorney fees and costs were available relative to the breach of contract claim in the first trial, they were not recoverable for either the bad faith or punitive damages claims. In the alternative, Commercial argued attorney fees and costs were not available on the punitive damages claim. Because Commercial could not determine which services were provided for each claim at the second trial, it argued fifty-five percent of the attorney fees and costs should be apportioned to

² Judge Luebke presided over the action from its inception through the time of the first appeal. Following Judge Luebke’s retirement, Reserve Judge Bayorgeon presided over the action on remand. Eventually, Judge Krueger presided over the case, denying the motion for reconsideration of Judge Bayorgeon’s apportionment of the attorney fees and costs and granting judgment consistent with Judge Bayorgeon’s decision.

³ Commercial retained different counsel following our remand.

the bad faith claim, consistent with the proportion of arguments pertaining to that claim on appeal.

¶8 Kottke responded that if the fees and costs were to be apportioned, then the majority should be awarded as to the bad faith claim because the evidence required to prove both claims was essentially the same, except for evidence of Commercial's net worth. The circuit court concluded attorney fees and costs were available on the bad faith claim, but not the punitive damages claim, and awarded fees and costs at Commercial's proffered fifty-five percent rate. Kottke filed a motion for reconsideration, arguing Commercial's arguments concerning the availability of attorney fees and costs exceeded the scope of remand. The court summarily denied the motion and both parties ultimately appealed.

DISCUSSION

¶9 Commercial argues nothing in our mandate in the first appeal limited the issues on remand to the reasonableness of the attorney fees. This is a curious position given that Commercial's only prevailing argument in that appeal was that it was improperly precluded from examining the attorney bills to challenge their reasonableness. The entirety of our discussion of the issue in the first decision was as follows:

Finally, Commercial contends the court erred by not allowing it to examine redacted copies of Kottke's attorney fees bills to question the reasonableness of the bills. We agree. Several factors are considered when determining the reasonableness and necessity of attorney fees. *See Jensen v. McPherson*, 2004 WI App 145, ¶39, 275 Wis. 2d 604, 685 N.W.2d 603. Kottke offers no reasonable explanation of how fees can be adequately challenged by the opposing party without the opportunity to review the type of work performed by the attorney, how much time was spent on each item of work and who performed the work. Kottke's

attorneys may redact from their time records any evidence that would invade the attorney-client privilege.

Kottke, unpublished slip op. ¶34. If, however, Commercial is referring explicitly to our mandate line, then Commercial is technically correct. The mandate line states: “Judgment and order affirmed in part; reversed in part and cause remanded. Costs denied to both parties.” However, the decision itself, rather than the mandate line, provides direction upon remand. The mandate line is merely a statement showing the broad result. While perhaps we might have provided more explicit directions, the intent and scope of our mandate is clear when reviewing our discussion in light of the parties’ arguments.

¶10 We have reviewed Commercial’s briefs in the prior appeal. Commercial titled its argument: “The trial court committed prejudicial error by not allowing the insurers the opportunity to examine redacted copies of the insured’s attorney bills to question the reasonableness of such bills.”⁴ Further, Commercial represented in its statement of the case that “[t]he insurers requested the opportunity to examine the insured’s legal bill to determine the reasonableness of such bill.”

¶11 Within its reasonableness argument in the first appeal, Commercial did insert an additional, very brief argument concerning the scope of attorney fees, referring to the insurance contract’s optional appraisal process. Commercial contended “the vast majority of the legal fees and expert costs would not have

⁴ The brief is available at: <http://libcd.law.wisc.edu/~wb/will0118/48779404.pdf>. The other briefs and appendices are also available online. See University of Wisconsin Law Library, Wisconsin Briefs, <http://library.law.wisc.edu/eresources/wibriefs/> (search “300wis2d580”).

been incurred” had Kottke pursued the appraisal process to completion.⁵ With that one exception, Commercial did not dispute the costs portion of the award and disputed the attorney fees only as to their reasonableness, citing to unstated factors from *Fireman’s Fund Insurance Company v. Bradley Corporation*, 2003 WI 33, 261 Wis. 2d 4, 660 N.W.2d 666, and *Jensen*, 275 Wis. 2d 604. As noted above, in our decision remanding for Commercial to review the billing statements, we cited *Jensen*, 275 Wis. 2d 604, ¶39, for the three relevant reasonableness factors. Commercial could have challenged the remaining reasonableness factors prior to the first appeal, because those factors are not dependent upon information provided in the attorney billing statements. *See id.*, ¶37.

¶12 Thus, on remand Commercial was limited to reviewing Kottke’s attorney fees bills and objecting to the reasonableness of billing for the specific work performed, the amount of time spent on that work, and the rate charged relative to who performed the work (i.e., a paralegal, experienced attorney, etc.). Neither the parties nor this court discussed any issue concerning the legal availability of attorney fees in the first appeal. While one might say it is unreasonable to award attorney fees if they are not legally recoverable, that is conceptually different than conducting the reasonableness inquiry envisioned by *Fireman’s Fund* and *Jensen*.⁶

⁵ We did not directly address this argument in our reasonableness discussion in our first decision. However, our rejection of the appraisal issue in other arguments rendered discussion unnecessary.

⁶ If Commercial wanted to challenge the legal availability of some portion of the attorney fees and costs, it should have responded in kind to Kottke’s motion and affidavit for attorney fees and costs. Both of those documents set forth citation to the caselaw that Kottke relied upon for the availability of the awards.

¶13 In addition to rejecting Commercial’s argument that the availability of attorney fees issue is somehow subsumed within the reasonableness of the fees inquiry, we observe Commercial already received the records supporting Kottke’s claimed *costs* prior to the first appeal. The costs either were or were not available for recovery on the same legal basis as the attorney fees. Commercial does not explain why it could not have reviewed those records to determine which costs were incurred relevant to the breach of contract, bad faith, and punitive damages claims. Yet, Commercial did not object to the availability of the costs in the circuit court or the first appeal.

¶14 Further, it was obvious from Kottke’s submissions that he sought an award for all attorney fees and costs, encompassing all claims. For instance, Kottke’s motion stated he moved “for an award of actual attorney’s fees, costs, disbursements, expenses, and all consequential damages naturally flowing from the determination of bad faith against the defendants herein.” The motion does not indicate the request was limited only to the attorney fees and costs incurred at the first trial.

¶15 In addition, Kottke’s attorney’s affidavit in support stated, “[Y]our affiant has submitted nine separate invoices to the plaintiff for legal services rendered, *to date*. ... *[T]o date*, the *total* itemized billings and disbursements advanced on behalf of the plaintiff total \$74,962.77.” (Emphasis added). The affidavit further stated Kottke incurred additional expert witness costs and that both he and his wife claimed lost wages for attending *both* trials. The total amount claimed to the date of the affidavit was \$83,060.77. Thus, Commercial cannot reasonably argue it was unaware Kottke was claiming attorney fees and costs exceeding those incurred pertaining to the breach of contract issue at the first trial.

¶16 Indeed, the record on appeal indicates Commercial was well aware prior to the first appeal that Kottke sought attorney fees and costs relative to punitive damages. Commercial wrote in a letter brief to the circuit court dated November 3, 2005:

[A]ny work done in preparation for trial or in depositions related to punitive damages should not be included in the order for attorney's fees. Presumably, the plaintiff had some agreement with plaintiff's counsel to accept a percentage of any judgment on a punitive finding to cover those fees. If that is the case, the party should not be allowed to double-dip in regard to those legal fees and related expenses.⁷

¶17 Commercial, however, argues the circuit court “was entitled to consider on remand any question not presented or settled by the first appeal.” If this were in fact the law, there would be no finality in our courts because litigants could intentionally sandbag issues as insurance should they not prevail on appeal. Nonetheless, Commercial asserts its proposition is supported by our supreme court's language in *Fullerton Lumber Co. v. Torborg*, 274 Wis. 478, 483-84, 80 N.W.2d 461 (1957).

¶18 Without restating Commercial's lengthy quote from *Fullerton*, we observe that language does not support Commercial's position. Rather, because we only reversed the judgment in part and remanded for a limited purpose, the court had no authority to undertake new matters or take any action inconsistent with our mandate. *See id.* Commercial is attempting to stretch our fairly precise,

⁷ Kottke responded in a letter dated November 16, 2005, that Commercial's attorney's “presumption is inaccurate. The undersigned did not have any type of contingent fee agreement with respect to recovery of punitive damages. Thus, it would be inappropriate to reduce the award of costs and fees for this reason.”

limited mandate into an entire new case that should have been before this court on the first appeal. This we cannot allow.

¶19 We also reject Commercial’s position that, by failing to raise the issue until his motion for reconsideration, Kottke forfeited his argument that the circuit court exceeded the scope of our remand. We question whether forfeiture properly applies where the court has undertaken matters beyond its authority. Regardless, forfeiture is merely a rule of “administration and does not involve the court’s power to address the issues raised.” *Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). We observe no inequity in rejecting Commercial’s forfeiture argument given its deliberate attempt to sidestep our mandate in the first appeal.

¶20 Kottke also appeals that part of the judgment rejecting the parties’ stipulation to \$432 in costs for Kottke’s wife’s lost wages. To the extent the stipulation was to an issue of fact, the circuit court stated it accepted the numbers. However, to the extent the stipulation was to an issue of law, the circuit court was not bound to accept the parties’ position. The court was well justified in declining to award damages to a nonparty. Kottke cites no law suggesting such an award would be appropriate. Further, a “trial court may totally accept or reject a stipulation presented by the parties for its approval.” *Phone Partners Ltd. P’ship v. C.F. Commc’ns Corp.*, 196 Wis. 2d 702, 709, 542 N.W.2d 159 (Ct. App. 1995).

¶21 Finally, Kottke appeals the circuit court’s denial of his request for attorney fees and costs incurred presenting his motion for reconsideration. The court denied the request because Kottke did not prevail on the motion. We reverse that portion of the judgment because Kottke has prevailed on the merits presented in the motion for reconsideration. Further, Commercial failed to respond to

Kottke's argument on appeal. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶22 While Kottke asks us to reverse the court's denial of his specific attorney fees and costs request on the motion for reconsideration, he requests we "remand with instructions to award all costs and fees incurred in this matter until final conclusion." We decline to remand with such broad instruction. Rather, the court shall award the reasonable attorney fees and costs incurred preparing the motion for reconsideration. Any requests for attorney fees and costs incurred after those included in the July 17, 2008 judgment should be evaluated for reasonableness in the usual manner.

¶23 Regarding all attorney fees and costs that the court awarded on a percentage basis, we reverse that part of the judgment and direct the court to award those fees and costs in their entirety. Further, the clerk of court of appeals shall allow Kottke his statutory costs in this court.

By the Court.—Judgment reversed in part; affirmed in part; cause remanded with directions. Costs awarded.

Not recommended for publication in the official reports.

