**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 29, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 04-0279** **Cir. Ct. No. 02-CV-22**

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

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**LYMAN LUMBER OF WISCONSIN, INC., D/B/A J & F CONSTRUCTION,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**YOURCHUCK VIDEO, INC., A/K/A AND/OR D/B/A YOURCHUCK'S ACE HARDWARE,**

**DEFENDANT-APPELLANT-CROSS-RESPONDENT,**

**BREMER BANK NATIONAL ASSOCIATION,**

**DEFENDANT.**

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APPEAL and CROSS-APPEAL from judgments of the circuit court for Burnett County: MICHAEL J. GABLEMAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Yourchuck Video, Inc., appeals a summary judgment dismissing its counterclaim for negligent construction against Lyman Lumber of Wisconsin, Inc., and a judgment holding it in breach of contract and awarding damages to Lyman. Yourchuck claims there are genuine issues of material fact that preclude summary judgment, that there was insufficient evidence to support the judgment and damage award, and that the trial court took too long to issue its decision. Lyman cross-appeals the portions of the judgment that suspended accrual of interest during the pendency of the action and reduced the attorney fees to what the court deemed the reasonable local rate. Lyman argues that there is no basis for suspending the interest accrual and that because the contract called for actual attorney fees, the court erred by reducing them. We affirm the judgments on the appeal but reverse on the cross-appeal: the court had no basis for suspending interest and erroneously exercised its discretion when it adjusted Lyman's attorney's hourly rate. We remand to the trial court for computation and entry of the correct interest amount and attorney fees.

## Background

¶2 Yourchuck contracted with Lyman for the construction of a commercial building at a contract price of $822,074.48. The contract was dated April 18, 2000, and contained, as the trial court ultimately found, a "skeletal contract" consisting of terms of sale and specifications, along with sketches of the proposed building. The court determined that blueprints prepared over a month later were not a part of the contract.

¶3 During the course of construction there were, in addition to the contract specifications, items built or installed totaling $26,264.53. Yourchuck

disputed the extra costs, contending it did not approve them or they were already included in the initial contract price. Yourchuck also disapproved some of the workmanship, claiming some work was subpar and some was incomplete, but ultimately took physical occupancy of the building, opening its store to the public in January 2001. For contract purposes, the parties agreed on an occupancy date of June 12, 2001, the date Lyman submitted its final bill.

¶4 Because of what it terms "substantial problems," Yourchuck refused to pay the final bill until the building was "actually complete" and the defects remedied. Lyman brought the underlying action, seeking $180,812.01 as the unpaid amount remaining on the contract, imposition and enforcement of a construction lien, and interest and attorney fees. Yourchuck counterclaimed, alleging breach of contract, "strict responsibility and representation," intentional misrepresentation, negligent construction, and nuisance. On Lyman's motion for summary judgment, the court dismissed all but Yourchuck's breach of contract counterclaim. A trial to the court followed.

¶5 Yourchuck's essential defense was to establish what it believed to be deficiencies in construction that would entitle it to an $88,649.53 offset. It further disputed any liability for interest or attorney fees, claiming Lyman breached the contract and, therefore, could not enforce either contractual provision.

¶6 Lyman presented witnesses to establish the building was "substantially complete" and free of significant defects. At least one witness also testified that Lyman had been unable to remedy certain minor defects because Yourchuck would not specify what needed to be fixed and had barred Lyman from reentering the property.

¶7 Ultimately, the trial court rejected Yourchuck's breach of contract counterclaim and concluded the building was substantially complete, entitling Lyman to 98% of the contract price. The remaining 2% was granted as a setoff to Yourchuck for unfinished "punch list" items. The court determined those items were unfinished because Yourchuck had failed to cooperate with Lyman. The court awarded interest to Lyman as called for in the contract, but tolled its accrual during the pendency of the action. It also awarded attorney fees, but reduced the hourly rate to be commensurate with the prevailing Burnett County rate. Yourchuck appeals the judgment in favor of Lyman and the summary judgment dismissing its counterclaims; Lyman cross-appeals the adjustments to interest and attorney fees.

## Discussion

### Deadline for Entering Judgment

¶8 We begin with Yourchuck's assertion that the trial court took too long to enter its decision. Yourchuck argues that WIS. STAT. § 805.17(2) requires judgment be entered within sixty days of the cause being "submitted in final form" and because the court took eighty-eight days before entering judgment, the judgment should be vacated.[1] We disagree.

[1] WISCONSIN STAT. § 805.17(2) provides, in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. … The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

(continued)

¶9 Statutory interpretation presents a question of law. ***Hutson v. State of Wis. Personnel Comm'n***, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212. "[A] statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation." ***Karow v. Milwaukee County Civ. Serv. Comm'n***, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978) (citation omitted). WISCONSIN STAT. § 805.17 specifies no penalty for noncompliance and does not otherwise suggest sixty days is intended as a strict limitation. In addition, our supreme court has held that the sixty-day timeframe is directory. *See* ***Merkley v. Schramm***, 31 Wis. 2d 134, 138, 142 N.W.2d 173 (1966).[2]

¶10 Moreover, WIS. STAT. § 751.12(2) allows the supreme court to modify statutes relating to "pleading, practice, and procedure" by rules promulgated by the court. SUPREME COURT RULE 70.36(1)(a) establishes a ninety-day period for the court to enter judgment and allows for the possibility of a ninety-day extension. It is undisputed that the decision in this case was made within ninety days and, in any event, Yourchuck cites no authority for its proposition that dismissal is the appropriate remedy for the court's noncompliance

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All references to the Wisconsin Statutes and the Supreme Court Rules are to the 2003-04 version unless otherwise noted.

[2] To the extent Yourchuck challenges ***Merkley v. Schramm***, 31 Wis. 2d 134, 138, 142 N.W.2d 173 (1966), because it discussed WIS. STAT. § 270.33(1965), we note that § 270.33 is the predecessor statute of WIS. STAT. § 805.17, *see* SUP. CT. ORDER, 67 Wis. 2d 585, 713 (1976), and contains the same sixty-day requirement.

with filing deadlines.[3] This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980).

**Whether the Trial Court Erred on Summary Judgment**

¶11 Regarding the summary judgment dismissing its counterclaims, Yourchuck argues that there was a factual dispute over its breach of contract counterclaim and it was therefore inappropriate for the trial court to grant summary judgment to Lyman on that issue. We conclude that Yourchuck mischaracterizes the record: the trial court did not dismiss its breach of contract counterclaim on summary judgment.

¶12 Yourchuck bases its argument on the following portion of the transcript:

> The breach will be determined by a fact finder; I am not determining it today. Nor will I apparently determine it at all. That will be for the jury[4] to decide. And so therefore I cannot find that the contract has been breached and that I should disregard the terms excluding recovery for consequential, incidental or indirect damages. Therefore I find that summary judgment should be granted as to that and that is what I order.

[3] Yourchuck also complains "the court wrote a memorandum decision which blurs factual and legal conclusions to the point where each is not decipherable." To the extent we affirm the judgment, we disagree. Although the trial court did not label its findings, a trial court's failure to use "magic words" is not reversible error. ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993). In any event, and without dissecting the court's eleven-page decision, we conclude that while the legal conclusions are intertwined with the factual discussion, both are readily discernable.

[4] The parties subsequently agreed to a trial to the court, not a jury.

¶13 First, Lyman had not moved for summary judgment on the breach of contract claim so the question was not before the court. Second, the discussion of the contract did not begin because the court was ruling on the merits of the contract claims. Rather, the court asked Yourchuck why it thought it was entitled to consequential, indirect, or incidental damages when there was a contractual provision prohibiting recovery of those costs. Yourchuck responded that it was entitled because Lyman's alleged breach rendered the entire contract—and therefore the limiting clause—invalid. The court's response was meant to convey that because no breach had yet been determined, it could not summarily determine Yourchuck's entitlement to the costs it sought.

¶14 Third, given the context of the court's statement, it appears to have misspoken. The trial court had no intention of dismissing any contract-based claim, specifically because there were disputed facts. "When there is a conflict between an ambiguous oral pronouncement and the written judgment, the intent of the judge controls the determination." ***In re Estate of Jackson***, 212 Wis. 2d 436, 443, 569 N.W.2d 467 (Ct. App. 1997). When the oral ruling is ambiguous, it is proper to look to the written judgment to ascertain the court's intent. ***Id.*** Thus, to the extent that the court's oral statement was misleading, the written summary judgment decision is not. It dismissed Yourchuck's second through fifth counterclaims; the first counterclaim alleged breach of contract.

¶15 Finally, when we look at the final judgment, it is clear that the court considered Yourchuck's breach of contract claim because it "[took] up consideration of the several claims of specific breach alleged by Defendant Yourchuck against Plaintiff [Lyman]." Therefore, we need not determine if the trial court erred in dismissing the breach of contract counterclaim on summary

judgment because it is evident the court did not summarily dismiss that counterclaim.

¶16 The trial court did, however, dismiss Yourchuck's negligent construction counterclaim on summary judgment after concluding the economic loss doctrine preempted it. We review summary judgments de novo, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Whether the economic loss doctrine applies is a question of law that we review de novo. ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194, ¶10, 238 Wis. 2d 777, 618 N.W.2d 201.

¶17 To support its claim that summary judgment was inappropriate, Yourchuck argues there is a factual dispute over whether the contract in this case is for goods or services. For example, Yourchuck argues the contract required the building to have insulation and that the insulation itself is not defective but simply fails to perform at the correct level. This, it argues, is a problem with the installation service, not the product, thus revealing the contract was one for services. Then, relying on ***Barr v. Premier Prod. Co.*** (No. 02-0688) 2002 WL 31749954 (Ct. App. 2002), it contends that we have held a claim for negligent construction based on a contract for services is not preempted by the economic loss doctrine.

¶18 ***Barr*** was a certification to the supreme court, not a published case, and was *withdrawn* by this court after the parties voluntarily dismissed the appeal. Its citation is therefore inappropriate. *See* WIS. STAT. § 809.19(1)(e) and SCR 80.02. Moreover, in that case we simply agreed, without discussion, that the contract in question was one for services. The certified question was whether the economic loss doctrine applies to a service contract, not whether the contract was for services or goods.

¶19 In any event, we conclude that the economic loss doctrine bars the negligent construction claim. We look to the product purchased by the buyer, not the product sold by the vendor. ***Bay Breeze Condo. Ass'n v. Norco Windows, Inc.***, 2002 WI App 205, ¶25, 257 Wis. 2d 511, 651 N.W.2d 738. A contract for a completed structure—like a house or other building—is as a matter of law a contract for goods, not services:

> Generally, house buyers have little or no interest in how or where the individual components … are obtained. They are content to let the builder produce the finished product, i.e., a house. These homeowners bought finished products—dwellings—not the individual components of those dwellings. They bargained for the finished products, not their various components. The [allegedly defective component] became an integral part of the finished product….

***Id.***, ¶25 (citation omitted). Much like the condominium owners in ***Bay Breeze***, Yourchuck bargained for "the finished products, not their various components." ***Id.***

¶20 Thus, "the economic loss doctrine applies to building construction defects when, as here, the defective product is a component part of an integrated structure or finished product." ***Id.***, ¶26. The items about which Yourchuck complains, like the insulation, are integrated parts of the structure, "having no

function apart from the buildings for which they were manufactured." ***Id.***, ¶27. The trial court properly concluded the economic loss doctrine bars the negligent construction counterclaim.

**Sufficiency of the Evidence of Damages**

¶21 With Yourchuck's counterclaims dismissed, all that remained were the contract disputes—that is, Lyman's claim that Yourchuck breached through nonpayment for the substantially completed structure and Yourchuck's counterclaim that Lyman breached through poor and incomplete construction. Yourchuck argues there is insufficient evidence to support the court's finding that Lyman substantially performed, the basis underlying the court's damage award.

¶22 "When considering the sufficiency of the evidence, we apply a highly deferential standard of review." ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). "Furthermore, the fact finder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence." ***Id.*** The trial court's findings of fact will not be set aside unless we conclude that they are clearly erroneous. WIS. STAT. § 805.17(2).

¶23 "To recover on an uncompleted construction contract on a claim of having substantially, but not fully, performed it, the contractor must make a good faith effort to perform and substantially perform his agreement." ***Kreyer v. Driscoll***, 39 Wis. 2d 540, 544, 159 N.W.2d 680 (1968). Most cases considering the substantial performance doctrine involve defective work or work contrary to the contract requiring substantial amounts of money to make the work conform. ***Id.*** at 545. "If a construction contract is substantially performed, the builder can recover the contract price less setoffs, if any." ***Klug & Smith Co. v. Sommer***, 83 Wis. 2d 378, 386, 265 N.W.2d 269 (1978).

¶24 The test for substantial performance is not strict compliance with the details of the contract, unless all details are of the essence, but whether the builder's performance meets the essential purposes of the contact. ***Id.*** Substantial performance presents a factual question, *see* ***Stevens Constr. Corp. v. Carolina Corp.***, 63 Wis. 2d 342, 359, 217 N.W.2d 291 (1974), and Yourchuck challenges several of the trial court's factual determinations.

¶25 The trial court held that the construction contract specifications dated April 18, 2000—the only documents existing at the time—constituted the contract. Yourchuck's main theory of error is that his expert stated without contradiction from Lyman's witnesses that blueprints generally are included in this type of contract. However, the trial court held the blueprints were not part of the contract, evidently rejecting Yourchuck's expert testimony. In rejecting this expert testimony, the court made a credibility determination. The trial court is the ultimate arbiter of weight and credibility. We will not overturn credibility assessments unless patently incredible. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Yourchuck provides no authority for its implicit contention that the trial court is bound by expert testimony simply because it is unrefuted, and we need not consider arguments unsupported by citation to legal authority. ***Shaffer***, 96 Wis. 2d at 545-46 n.3.

¶26 Next, the parties disputed whether certain items charged to Yourchuck were authorized additions. Yourchuck argues that because it signed no change orders, those orders are not "valid or enforceable" and Lyman cannot recover the associated costs of the work.

¶27 The court looked at two provisions in the contract, paragraphs 2 and 14. Paragraph 2 states in relevant part:

> Any alterations or changes from the specifications on the front of this contract involving extra costs will become an extra charge …. Additional work orders will become C.O.D. …. Owner will pay for any alterations or extras … upon substantial completion of the work.… If extra materials and/or labor are required because of … changes requested by Owner, Owner will bear cost of same.…

Paragraph 14 states in part "No change, addition, or modification of this Contract shall be valid or binding unless it is in writing and signed by the party to be charged." Yourchuck's sole argument is that it never signed any change orders.

¶28 The court determined that the disputed changes were alterations from the original contract specifications, not changes to the contract itself. Therefore, the court determined that paragraph 2, not paragraph 14, governed treatment of the work orders. Paragraph 2 contemplates "additional work orders," but does not require they be signed. Relying on this interpretation, the court determined the additional work had been performed at Yourchuck's request, the billing was not duplicative of items already in the contract, and no signature was required.

¶29 In any event, Yourchuck simply asserts that the additional work orders were not signed, as it believes the contract required. But Yourchuck fails to provide an analysis of or challenge to the court's interpretation of the contract. Indeed, Yourchuck merely states, without citation, "the lower court allowed these charges with the simple explanation that since the work was done … [Yourchuck] should pay for it."[5] The record reveals the court based its decision on other considerations, and we will not abandon our neutrality to develop Yourchuck's

[5] Yourchuck appears to acknowledge at least some work was done at its request. Thus, if what Yourchuck asserts is in fact the basis on which the trial court determined Lyman should be paid, it is evidently a quantum meruit justification, which Yourchuck also fails to discuss.

argument for it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶30 Finally, Yourchuck argues that Lyman's failure to complete the building was a breach of the contract. Therefore, at the very least, Yourchuck is entitled to a substantial offset for the cost of completing the building. Lyman argues it substantially completed the building and anything incomplete was due to Yourchuck's interference. Here, the trial court noted that some "punch list" items remained uncompleted, but accepted Lyman's proffered testimony that this was because Yourchuck refused to cooperate and eventually barred Lyman's entry onto the property. This is a factual determination supported by testimony, and it is not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶31 Ultimately, the court determined that Yourchuck was entitled to a 2% setoff for the incomplete items, but concluded that Lyman's 98% completion and Yourchuck's occupancy meant that Lyman had fulfilled the essential purpose of the contract. Thus, Lyman had substantially completed the building. This entitled Lyman to collect on the contract, minus the small offset. Yourchuck failed to introduce evidence substantiating larger setoffs. To the extent its witnesses disagreed with Lyman's witnesses, it is the trial court, not this court, that determines credibility and resolves conflicts in evidence. *See* ***Rucker v. DILHR***, 101 Wis. 2d 285, 290, 304 N.W.2d 169 (Ct. App. 1981).

**Whether the Trial Court Could Suspend Interest**

¶32 On cross-appeal, Lyman protests suspension of interest during the pendency of the action. The contract called for a "service charge," which neither party disputes is treated like interest, in the event there was a default on payment. There is no contractual provision for suspending interest, and the trial court

provided no rationale for choosing to suspend it. Yourchuck responds that it is improper for the trial court to have awarded interest at all because there was a dispute over the amount due.[6]

¶33 Whether preverdict interest may be awarded is a question of law. ***R.S. Deering Mech. Contractors v. Livesey Co.***, 161 Wis. 2d 727, 729, 468 N.W.2d 758 (Ct. App. 1991). Generally, prejudgment interest is awarded where the amount of damages is determinable, either because the damages are liquidated or there is a reasonably certain standard of measurement. ***City of Merrill v. Wenzel Bros.***, 88 Wis. 2d 676, 697, 277 N.W.2d 799 (1979). It is also true that if there is a real dispute over the damages owed, prejudgment interest may not be appropriate. *See* ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶¶49-50, 265 Wis. 2d 703, 666 N.W.2d 38; ***Loehrke v. Wanta Builders, Inc.***, 151 Wis. 2d 695, 707, 445 N.W.2d 717 (Ct. App. 1989). Indeed, Yourchuck relies on ***Teff*** to contend that because the final amount of damages due was not determinable until the court made a decision, no interest should have been awarded.

¶34 We are not, however, presented with the court's decision to add statutory interest. Instead, we have a contract stating, "Owner agrees to pay to Builder a service charge on any amount not paid when due at the rate of 1½% per

[6] Interestingly, Yourchuck did not, on direct appeal, brief the award of prejudgment interest. Therefore, we treat its argument in its cross-response brief as simply an answer to the merits of Lyman's cross-appeal, not a new claim for relief. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned). In addition, Yourchuck does not address the issue of tolling interest, but rather contends that because Lyman breached the contract, this contractual provision should not be enforced. This argument is premised on a holding that Lyman breached the contract. Since the trial court rejected that contention, and we affirm the trial court, Yourchuck's argument is unavailing.

month (18% per annum), with a minimum of $.50 per month." The contract also provided that final payment was due on the date of "substantial completion," contractually defined as the date upon which the owner is able to occupy the building.[7] Yourchuck moved into the building in January 2001, but Lyman agreed to June 12, 2001, as the substantial completion date within the meaning of the contract.

¶35 "As long ago as 1899 our supreme court recognized that interest should be paid on the amount required to satisfy a contractual obligation. … Interest is a measure of the time value of money." ***Deering***, 161 Wis. 2d at 731 (citations omitted). The rule is "the creditor is entitled to interest from the time payment was due by the terms of the contract…." *See* ***DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship***, 2004 WI 92, ¶50, 273 Wis. 2d 577, 682 N.W.2d 839 (citation omitted). "Contracts ... recognize the time value of money by explicitly providing for interest on amounts due and unpaid. We would be rewriting the contract between the parties if we denied preverdict interest on the amount the [court] determined was due [Lyman]." *See* ***Deering***, 161 Wis. 2d at 731.

¶36 The contract provides that interest accrues when amounts become due but are unpaid. The final bill was submitted on June 12, 2001—the date of substantial completion—in accord with the contract. The trial court therefore properly awarded interest starting June 12, 2001, but inexplicably suspended it

[7] The payment terms of the contract specified that 40% of the contract price was due "when the building and concrete are substantially completed…. The date of substantial completion shall be determined by Builder, based upon the date upon which the building is sufficiently complete so that the owner can occupy or utilize the building … for the use for which it was intended."

during the pendency of the action. The suspension was in error and is therefore reversed. The cause will be remanded for a computation of the correct amount of interest due.

## Attorney Fees

¶37 Finally, Lyman complains that the trial court erred in reducing the hourly rate its attorney charged to a rate commensurate with the prevailing hourly rates in Burnett County. The rate reduction lowered Lyman's total attorney fee award by almost $17,000.[8]

¶38 When a trial court awards attorney fees, the amount of the award is left to the discretion of the court. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. We uphold the court's determination unless it erroneously exercised its discretion. ***Id.*** Although there is a contract in this case for "actual" fees, it is always appropriate for the court to review a bill submitted for reasonableness: "[t]he burden of proof is upon the attorney submitting the fees to prove the reasonableness of a fee when it is questioned." *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 748, 349 N.W.2d 661 (1984). This is because attorneys practicing in this state have an ethical obligation to charge reasonable fees. *See* ***Kolupar***, 275 Wis. 2d 1, ¶24; SCR 20:1.5.

[8] Like the argument on interest, Yourchuck did not, on direct appeal, brief the issue of attorney fees. Again, its cross-response is premised on its belief that Lyman breached the contract, arguing that Lyman is not entitled to enforce the attorney fees provision. The brief does not address the issue of the trial court's adjustment.

¶39 The supreme court has endorsed the factors set forth in SCR 20:1.5(a) and encourages courts to use these factors when evaluating fees. These factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

¶40 Lyman asserts its attorney's hourly rate averaged $175. The court made no finding of Lyman's attorney's rate, but noted:

> [T]he Court is satisfied that the amount and character of the services rendered were comprehensive and skillful. The labor and time involved were both significant. The litigation was time-consuming, important, and presented numerous legal issues. The value of the amount in controversy was significant and the attorney has significant experience.
>
> An additional factor, however, considered by the Touchett Court was the area in which the legal services were performed. … In Burnett County, it is generally considered that legal fees in the amount of $125.00 per hour for out of court work attorney's fees and $150.00 per hour for in-court work are reasonable.

As a result, the court reduced Lyman's $60,267.80 bill to $43,301.25.[9]

¶41 Despite findings that Lyman's attorney was significantly experienced, the amount in controversy was significant, the litigation was time-consuming, and the services were skillfully provided—all factors that would seem to suggest a finding of reasonableness would follow—the court nonetheless reduced the hourly rate. The court did not adjust the quantity of hours billed, but merely noted the local rates without stating the rate Lyman's attorney charged, why the rate was unreasonable when compared to the local rates, or how the court determined the local rate.[10] Indeed, while parties are not generally permitted to seek the most expensive attorney solely for cost's sake, nothing requires litigants to hire an attorney from a given locality, particularly if local counsel may not be knowledgeable about the subject in controversy. *See* ***Standard Theatres***, 118 Wis. 2d at 743-44.

¶42 The supreme court rule provides a list of factors to be considered when evaluating the reasonableness. Thus, we think that a comparison of local rates is generally not, standing alone, prima facie justification for finding a fee unreasonable particularly when the court finds factors that appear to otherwise support a determination of reasonableness.[11] Otherwise, courts would not be

[9] Although the trial court in this case relied on ***Touchett v. E Z Paintr Corp.***, 14 Wis. 2d 479, 111 N.W.2d 419 (1961), the enumerated factors in the court's decision are sufficiently similar to the rule to allow comparison.

[10] We do not necessarily mean to prevent our courts from taking judicial notice of local rates, but the exercise of discretion contemplates some articulation of the factual basis, be it the court's own previous practice, affidavits or other evidence provided by the parties, local bar association publications, or some other source. *See* WIS. STAT. § 902.01.

[11] Of course, we do not mean to say that one factor can never outweigh the others.

asked to consider multiple factors, but only a fee comparison. In this case, Lyman contends that its average rate in this case was approximately $175 per hour. The court determined the local rate to be $125-150. But it appears the court adjusted the fee based solely on the comparison of rates, ignoring its other findings. This is an erroneous exercise of discretion, and we therefore reverse the portion of the order adjusting Lyman's attorney fees and remand the case to the trial court for reconsideration of the fees. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980) (an appellate court must not exercise the trial court's discretion).

*By the Court.*—Judgments affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

Not recommended for publication in the official reports.