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DISTRICT II

July 9, 2025

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You are hereby notified that the Court has entered the following opinion and order:

2024AP1916

April Brenner v. Michelle Serpe (L.C. #2020CV503)

Before Gundrum, P.J., Neubauer, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

April Brenner appeals from an order of the trial court awarding her \$8,000.00 in attorney fees. Brenner argues that the court failed to perform the required analysis for fee award calculation and requests that the order awarding attorney fees be reversed and remanded for a calculation consistent with the statutory requirements. Based upon our review of the briefs and

Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).¹ We affirm.

Brenner filed suit against Michelle Serpe, asserting causes of action for breach of a contract for home-improvement work to be performed by Serpe, fraudulent representation, breach of implied warranty, prohibited trade practices, theft by fraud, and violations of the Home Improvement Practices Act. The trial court ultimately granted judgment in favor of Brenner on every count she pursued through trial to the court. Brenner then petitioned the court for an award of costs and reasonable attorney fees pursuant to WIS. STAT. § 100.20(5) and WIS. STAT. § 100.18(11)(b). In a written order, the court awarded Brenner \$2,518.50 in costs and \$8,000.00 in attorney fees and found that Brenner’s request for an award of \$79,605.00 for attorney fees was “completely unreasonable.” Brenner timely appealed.

We will not disturb a trial court’s award of attorney fees or costs unless the court erroneously exercised its discretion. *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 988, 542 N.W.2d 148 (1996). Discretion is properly exercised if the court “employs a logical rationale based on the appropriate legal principles and facts of record.” *Id.* (citation omitted).

Brenner asserts that the trial court erred by failing to employ the lodestar methodology in determining its award of attorney fees. Specifically, Brenner argues that the court failed to undertake the initial step of determining a reasonable number of hours and then multiplying that figure by a reasonable hourly rate. Brenner is correct that our supreme court has adopted the lodestar approach in determining reasonable attorney fees and that the first step under this

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

methodology is multiplying the reasonable number of hours by a reasonable hourly rate. *See Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, ¶39, 281 Wis. 2d 66, 697 N.W.2d 73; *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶29, 275 Wis. 2d 1, 683 N.W.2d 58. However, Serpe argues that “[t]he fact that [the trial] court did not explicitly declare a lodestar figure should be taken as an implicit finding that the lodestar figure was above the presumptive cap [prescribed in WIS. STAT. § 814.045(2)(a)] and therefore reduced prior to applying the sub. (1) factors.” We agree.

As a threshold matter, we dismiss Serpe’s argument that Brenner waived appeal of this issue by failing to file a motion for reconsideration in the trial court. Citing to *Schinner v. Schinner*, 143 Wis. 2d 81, 420 N.W.2d 381 (1988), Serpe asserts that “[a] party waives the right to have an issue reviewed on appeal by failing to bring a motion to correct a manifest error.” However, the *Schinner* court’s holding was far narrower than Serpe’s recitation suggests, and there is no statutory or precedential authority which requires a motion for reconsideration to be filed prior to an appeal.

While the *Schinner* court held that “[f]ailure to bring a motion to correct ... manifest errors properly constitutes a waiver of the right to have such an issue considered on appeal,” the court declined to “employ this waiver rule” against the appellant, concluding that doing so would be “inappropriate and unfair.” *Id.* at 93-94. The court noted that waiver is a “rule of judicial administration which an appellate court may, in its discretion, choose not to apply.” *Id.* at 94. The *Schinner* court also provided that a “manifest error” is a “self-evident kind of error ... which [does not] lend [itself] to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy.” *Id.* at 92-93. In *Schinner*, for example, the appellant alleged that the trial court had “committed certain mathematical or accounting errors” in its

division of property between the parties. *Id.* at 93. But the error alleged in this appeal is an error of law, and the alleged error is not so self-evident as to escape “legitimate legal debate.”

The question posed by this appeal is whether a trial court can implicitly perform the first step of the lodestar method in determining an award of attorney fees or if, instead, the court must make an explicit finding as to the number of reasonable hours worked and a reasonable hourly rate applicable to those hours. Brenner maintains that, in not making these findings explicit, the court, “[w]ithout question ... failed to perform [a] foundational step” in the lodestar method and thus erroneously exercised its discretion.

The trial court awarded Brenner \$5,685.00 in compensatory damages.² Therefore, pursuant to WIS. STAT. § 814.045(2)(a)—which requires a court to “presume that reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded”—an award of attorney fees was presumptively capped at \$17,055.00. Serpe contends that the court’s failure to explicitly make findings regarding reasonable hours and a reasonable hourly rate was not due to the court skipping that required step, but rather was a consequence of the court recognizing that the calculation would produce a figure easily exceeding that of the presumptive cap; explicitly stating this figure prior to imposing the statutory cap would be superfluous. Serpe submits that the court appropriately exercised its discretion by implicitly determining that the

² In its oral ruling, the trial court identified the “contract” damages as \$5,685.00 while also noting that this figure would be further subject to statutory doubling. While neither party has cited any authority regarding whether compensatory damages under WIS. STAT. § 814.045(2)(a) are to be calculated prior to or after statutory doubling, we find that Serpe conceded that Brenner’s base compensatory damages figure of \$5,685.00 is correct by not contesting it in her reply brief. See *United Co-op. v. Frontier FS Co-op.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to respond in reply brief to an argument made in response brief may be taken as a concession).

initial lodestar figure would exceed the presumptive statutory cap, applying the presumptive cap, and then adjusting that figure further after consideration of the § 814.045(1) factors. We agree.

WISCONSIN STAT. § 814.045(1) provides a list of factors to be considered in determining reasonable attorney fees (and in potentially exceeding the presumptive cap in § 814.045(2)(a)). Here, after determining the presumptive cap, the trial court made extensive findings regarding many of the § 814.045(1) factors. The court found that the “time and labor required” in the case “did not necessitate having two attorneys.” *See* § 814.045(1)(a). The court found that the case did not involve “novel or tricky” facts and that it did not require “extraordinary legal or technical skill.” *See* § 814.045(1)(b)-(c). The court noted that the case proceeded to a bench trial, rather than a jury trial, and consequently required less preparation. *See* § 814.045(1)(a). The court found that the “straightforward nature of the facts and issues” made it unlikely that an attorney would be unable to take on other work. *See* § 814.045(1)(d). Finally, the court found that Brenner’s attorneys “have expertise in consumer litigation ... which would render them likely to be more efficient in [their] work.” *See* § 814.045(1)(j). After consideration of these factors, the court found that the presumption that “reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded” had not been overcome “based upon all the findings made.”

We cannot conclude that the trial court erroneously exercised its discretion where, prior to a detailed consideration of the relevant factors, it implicitly reduced the lodestar figure to the presumptive cap and where it expressly found the presumption had not been rebutted. Reviewing courts will assume trial courts “implicitly made those findings necessary to support [their] decision[s], and ... accept those implicit findings if they are supported by the record.”

Town of Avon v. Oliver, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260. For these reasons, we affirm.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals