

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2004

Cornelia G. Clark
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. 04-0178
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000083

**IN COURT OF APPEALS
DISTRICT IV**

ALAN BERNDT AND DEBRA BERNDT,

PLAINTIFFS-APPELLANTS,

V.

**PEPPERTREE RESORT VILLAS, INC. AND PEPPERTREE
RESORTS LTD. D/B/A PEPPERTREE AT TAMARACK,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK TAGGART, Judge. *Reversed and cause remanded for further
proceedings consistent with this opinion.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 DYKMAN, J. Debra and Alan Berndt appeal from a judgment setting the amount of the Berndts' attorney fees covered under a fee-shifting statute, WIS. STAT. § 425.308(2) (2001-02).¹ The Berndts contend that the circuit court erroneously exercised its discretion when it rejected the requested rate of \$200 per hour and set the Berndts' attorney's hourly rate at \$125 per hour. We agree. Because the circuit court lacked sufficient evidence upon which to base its conclusion that \$125 per hour was a reasonable rate, we reverse.

BACKGROUND

¶2 In 1997, the Berndts purchased a time-share interest in a Sauk County recreational property from Peppertree Resort Villas, Inc. In 2003, the Berndts sued Peppertree to terminate their time-share interest and for damages for alleged violations of multiple consumer statutes and administrative rules. Their complaint stated claims under WIS. STAT. §§ 425.308 (Wisconsin Consumer Act), 707.57(1) (timeshare chapter), 100.171 (prize notification statute), and 100.20(5) (referral selling prohibition in WIS. ADMIN. CODE § ATCP 121). Other consumer actions have been brought against Peppertree, two of which resulted in published decisions of this court,² as well as the creation by the Department of Agriculture, Trade and Consumer Protection of a restitution fund to compensate persons harmed by Peppertree's business practices.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² See *Pliss v. Peppertree Resort Villas, Inc.*, 2003 WI App 102, 264 Wis. 2d 735, 663 N.W.2d 851; and *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, 257 Wis. 2d 421, 651 N.W.2d 345.

¶3 The Berndts accepted an offer of settlement that included damages of \$11,000 plus costs and reasonable attorney fees as decided by the court, among other terms. The Berndts then moved for an award of costs and attorney fees seeking compensation for their attorney at the rate of \$200 per hour for 50.8 hours of work, a total fee of \$10,160. Peppertree contested the amount sought by the Berndts, filing a brief in opposition and an affidavit sworn to by Peppertree’s attorney. The Berndts responded, filing affidavits attesting to the reasonableness of their attorney-fee request. The Berndts then requested compensation for an additional \$1,780 for 8.9 hours spent defending the fee request. This brought the total sought by the Berndts to \$11,940.

¶4 The circuit court entered a judgment that included the terms of the settlement, requested costs and an attorney-fee award of \$7,875. The court applied the factors set forth in WIS. STAT. § 425.308(2) to determine the reasonableness of attorney fees for claims brought under the Wisconsin Consumer Act.³ The court’s memorandum decision found the Berndts’ request of 59.7 hours

³ WISCONSIN STAT. § 425.308(2) of the Wisconsin Consumer Act provides that an “award of attorney fees shall be in an amount sufficient to compensate attorneys representing customers in actions arising from consumer transactions.” It identifies several factors a court may rely upon in determining the amount of the fee, including:

- (a) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;
- (b) The customary charges of the bar for similar services;
- (c) The amount involved in the controversy and the benefits resulting to the client or clients from the services;
- (d) The contingency or the certainty of the compensation;
- (e) The character of the employment, whether casual or for an established and constant client; and

(continued)

to be reasonable, but rejected their requested rate of \$200 per hour, finding a rate of \$125 per hour to be reasonable. The Berndts appeal the amount of the attorney-fee award.

STANDARD OF REVIEW

¶5 The amount of attorney fees awarded by a circuit court will be sustained on review unless the circuit court erroneously exercised its discretion. *Standard Theatres, Inc. v. Transp. Dep't*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). We give deference to a circuit court's determination of an attorney-fee award because the circuit court is in the best position to judge the quality of the services rendered by counsel and is familiar with local billing norms. *Id.* Therefore, "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 employed a logical rationale based on the appropriate legal principles and facts of record." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, __ Wis. 2d __, 683 N.W.2d 589 (citation omitted).

DISCUSSION

¶6 The Berndts contend that the circuit court erroneously exercised its discretion by failing to apply the lodestar approach to determine the reasonableness of the attorney fee. This approach, adopted by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983), requires that a court first determine the reasonableness of the number of hours

(f) The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

worked and the reasonableness of the hourly rate when calculating a reasonable attorney fee. The court then fixes these determinations as the “lodestar,” or guiding point, of its analysis. *Id.*

¶7 The supreme court in *Kolupar* directed circuit courts to use the lodestar approach when determining the reasonableness of fees under state fee-shifting statutes. *Kolupar*, 683 N.W.2d 58, ¶31. We also applied the lodestar approach to a fee determination in a state wage claim action in *Lynch v. Crossroads Counseling Center, Inc.*, 2004 WI App 114, ___ Wis. 2d ___, 684 N.W.2d 141. Previously, circuit courts had applied Supreme Court Rule 20:1.5(a) (2004),⁴ a multifactor test similar to the test applied by the court here, WIS. STAT.

⁴ Supreme Court Rule 20:1.5(a) lists the following factors “to be considered in determining the reasonableness of a fee”:

- (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.

§ 425.308(2),⁵ to determine the reasonableness of a fee under a fee-shifting statute. *Kolupar*, 683 N.W.2d 58, ¶33. Here, the circuit court ruled on the fee award prior to the adoption of the lodestar approach in *Kolupar* and *Lynch*. Therefore, as the supreme court did in *Kolupar*, we will review the circuit court's action for an erroneous exercise of discretion under the legal standard in force at the time. *Id.* We therefore reject the Berndts' contention that the court erroneously exercised its discretion by not following the lodestar method.

¶8 The Berndts also contend that the circuit court failed to point to any appropriate factors to support its determination of the hourly rate, and that this also constituted an erroneous exercise of discretion. Here, we agree.

¶9 The attorney submitting a fee request has the burden to prove the reasonableness of the request. *Standard Theaters*, 118 Wis. 2d at 748. The Berndts provided the court with evidence to support the fee request, including an affidavit of Mary Catherine Fons, their attorney, which included detailed billing records. The Berndts also submitted supporting affidavits of De Vonna Joy, Jeff Scott Olson, and A. Steven Porter, all attorneys practicing in southern Wisconsin who specialize in consumer protection law and other areas of law in which compensation is paid by fee-shifting statutes. Attorney Joy attested that her

⁵ The circuit court exercised its discretion to apply WIS. STAT. § 425.308(2), though it could have also applied SCR 20:1.5(a) (2004). The Berndts' complaint stated multiple claims arising from four different consumer protection statutes. The offer of judgment did not specify under which of these statutes the Berndts sought recovery. The court treated their recovery as being under the Wisconsin Consumer Act, and applied the reasonableness test of § 425.308(2) contained within that statute. The other three statutes under which the Berndts brought claims require that attorney fees be "reasonable," see WIS. STAT. §§ 707.57(1), 100.171 and 100.20(5), but do not include a test to determine reasonableness. When a statute does not include a test for reasonableness, courts have applied the multifactor test of SCR 20:1.5(a) to determine the fee. *See, e.g., Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ___ Wis. 2d ___, 683 N.W.2d 58.

standard hourly rate for services in consumer litigation is \$225 per hour. Attorney Olson averred that his standard hourly rate is \$340 per hour. Both Attorneys Joy and Olson attested to Attorney Fons' experience and reputation in the area of consumer litigation. Attorney Porter averred that the range of compensation for attorneys of Fons' "skill, reputation and experience" is between \$200 and \$400 per hour. Attorney Fons attested that she has worked in the area of consumer law since 1984, and that her standard billing rate was \$200 per hour at the time she accepted the Berndts' case. She also averred that in two previous fee decisions involving Peppertree in Milwaukee County and Dane County circuit courts, she had been awarded fees at a rate of \$200 per hour. Based on the foregoing, we conclude that the Berndts provided sufficient evidence to meet their evidentiary burden.

¶10 The circuit court's analysis did not address the evidence presented in the affidavits summarized above. Rather, the court determined that application of the second factor under WIS. STAT. § 425.308(2), "customary charges of the bar for similar services," supported a reasonable hourly rate below that requested by the Berndts. It based its conclusion upon the following evidence: (1) the affidavit of Peppertree attorney Jon Furlow, which included a 2001 Wisconsin State Bar survey that reported average hourly rates for attorneys by geographic area and specialty; (2) a Sauk County court's determination of the hourly rates of court-appointed counsel in criminal and juvenile proceedings; and (3) that court's conclusions about the hourly rates of area attorneys. We determine that these bases are not sufficient to support a proper exercise of the circuit court's discretion in this case.

¶11 The circuit court's decision stated that "[c]ounsel for the defendant argues that a 2001 state bar survey indicated sole practitioners such as the

plaintiffs' counsel generally earn significantly less than what is claimed here for one case if one uses the hours times rate approach." This forty-three page survey, entitled "Economics of Law Practice in Wisconsin: 2001 Survey Report," State Bar of Wisconsin, was based upon 890 self-reported responses to a questionnaire mailed to a geographically representative random sample of 3,741 bar members. State Bar Report, p.1. Neither Peppertree's affidavit nor the trial court's decision cite specific data from the survey that support an hourly rate below that requested by the Berndts. However, we observe that the study cites a reported average rate of \$146 per hour for the "Central/East" region of the state, which includes Sauk County, and a statewide average hourly rate for attorneys in private practice of \$146 per hour. State Bar Report, p.4. The study does not include separate data regarding the hourly rates of Wisconsin attorneys who specialize in consumer protection cases. In sum, the survey lacks specific evidence upon which the court could establish a reasonable hourly rate of \$125 per hour.

¶12 The court also considered the local and state appointment rates in criminal and juvenile cases, apparently citing the ruling of another Sauk County circuit court case:

Judge Evenson, found that Sauk County public defenders appoint counsel at the rate of about \$50 per hour, private counsel are paid \$65 per hour on court appointments in criminal, juvenile and related matters. The Supreme Court rate is \$70 per hour.

A court could not have reasonably relied upon rates paid in criminal and juvenile appointment cases as a basis to determine an hourly rate in a consumer law case such as this.

¶13 The circuit court further stated that the decision it cites concluded that "[m]ost fee requests in Sauk County cases cite an hourly rate in the \$100-\$125

range.” This apparently is the primary evidence upon which the circuit court based its hourly rate determination of \$125 per hour. The court added: “[Judge Evenson] found that these amounts do not establish that these rates should be applied, however, they do provide a perspective of the legal culture and what would be reasonable in certain circumstances.” Another judge’s conclusion, however, is not a substitute for evidence.

¶14 The circuit court also found that application of the first factor of WIS. STAT. § 425.308(2), “time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause,” supported an hourly fee below that requested by the Berndts. It found the case was “not unique from many other of the Peppertree cases” and the experience of the Berndt’s attorney litigating other Peppertree cases meant that she “was certainly familiar with the basic economics as the scale relative to case preparation.” However, Attorney Fons’ experience litigating similar cases tends to support a determination of a higher rate, not a lower one. The court’s application of the first factor of § 425.308(2) might support a reduction in the number of hours claimed; the “basic economics ... [of] scale” that result from having filed similar claims against the same defendant might reduce the number of hours reasonably required to litigate a case. The court, however, concluded that the number of hours billed by Attorney Fons was reasonable.

¶15 A final basis upon which a court may rely in determining reasonableness of an hourly rate is its own judgment and expertise. *See Standard Theatres*, 118 Wis.2d at 747. Though the circuit court did not explain its experience in calculating fees in other cases, it “observed the quality of the services rendered” here and therefore has some “expertise to evaluate the reasonableness of fees with regard to the services rendered.” *Tesch v. Tesch*, 63

Wis. 2d 320, 335, 217 N.W.2d 647 (1974). However, we have also held that “when the reasonableness of the fees is contested, the expertise of the trial judge is not a substitute for evidence.” *Crawford County v. Masel*, 2000 WI App 172, ¶16, 238 Wis. 2d 380, 617 N.W.2d 188 (citation omitted). Here, the circuit court lacked sufficient evidence to support its exercise of discretion.

¶16 In summary, we conclude that the circuit court erroneously exercised its discretion by establishing a rate of \$125 per hour as a reasonable rate for the services of the Berndts’ attorney. We therefore reverse and remand that portion of the circuit court’s judgment.

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.

