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

**August 21, 2003**

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



**Appeal No. 03-0753-FT**

**Cir. Ct. Nos. 01FO001021**
**01FO001081**
**01FO001082**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**TOWN OF PERRY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DSG EVERGREEN F.L.P.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 LUNDSTEN, J.[1] DSG Evergreen F.L.P. appeals a judgment of the circuit court denying an award of statutory attorney's fees as a part of costs.

[1] This is an expedited appeal under WIS. STAT. Rule 809.17 (2001-02), decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

DSG's argument on appeal is twofold: first, that an award of statutory attorney's fees is mandatory under WIS. STAT. §§ 778.20 and 799.25(10)(a); and, second, that DSG is entitled to collect an attorney fee for each of the 472 citations issued to it by the Town of Perry.

***Background***

¶2 This case concerns a municipal forfeiture action tried in the Dane County Circuit Court. In September 2000, David J. Gehl, acting as the principal partner of DSG,[2] obtained an access permit for a field road and installed the field road in October 2000. In March 2001, DSG applied for a building permit to construct a farm residence and a driveway permit for the proposed farm residence with the express provision that the permit was to "Convert Field Road to Driveway." Both permit applications were denied. In April 2001, DSG had three-inch crushed rock spread on the field road. Also that month, an excavator employed by DSG scraped the topsoil from a potential site for the proposed farm residence and leveled the topsoil. It is DSG's contention that it did not direct the excavator to do this.

¶3 The Town interpreted these actions as the installation of a driveway without a permit and the commencement of the construction of a building without a permit. Therefore, in April 2001 the Town began to cite DSG for alleged violations of the Town's driveway and building ordinances. Rather than treat these as ongoing violations, the Town issued two new citations daily and continued doing so for approximately two months. Each citation had to be filed

[2] As Gehl is the principal partner of DSG and DSG is the named defendant-appellant in this case, we will refer to DSG and Gehl collectively as DSG.

with the clerk of court, who was then required to open a separate case file and assign a separate case number for each citation.

¶4 At a pretrial hearing on June 14, 2001, all of the citations were consolidated under one case number. As of that date, about 121 citations had been issued. At that hearing, the court allowed each day that the alleged violation continued to be considered a separate offense without necessitating the issuance and filing of additional citations. The parties stipulated that the exposure was a forfeiture of $100 per offense per day and, should violations of the driveway and building ordinances be found, the court would determine the total amount of exposure by tallying up the number of days that the violation continued. At this time, the parties also agreed that DSG could reserve the right to claim costs as if there were a separate offense each day.

¶5 On December 14, 2001, DSG was found not guilty and all citations were dismissed. On January 29, 2002, the Town's motion for reconsideration was denied. On February 25, 2002, DSG filed a proposed judgment and bill of costs. DSG sought a total of $48,547.71: $1,347.71 in out-of-pocket costs, and an attorney fee of $100 for each of the 472 citations.[3] The court allowed the $1,347.71of out-of-pocket costs, but did not allow DSG to collect any attorney's fees. In the handwritten notations on DSG's proposed bill of costs initialed by the court, the court had placed "0" next to DSG's request for $47,200 in attorney's fees.

[3] In their submitted bill of costs, DSG set the total number of alleged offenses at 472. We question this number, but need not calculate the exact number because of how we resolve the disputed issues.

¶6 The judgment appealed from states that it is based on the "reasons set forth on the record on December 14, 2001." This seems to suggest that the court set forth reasons for its decision orally. We can surmise that the circuit court believed that WIS. STAT. § 814.65 precludes statutory attorney fees because "814.65" is handwritten by the notation "0" on the part of the order denying attorney's fees. It would be nice to know the circuit court's thinking on the topic, if indeed it provided its thoughts, but neither party has seen fit to include the transcript of the court's oral decision in the appellate record.

## ***Discussion***

*Whether DSG is Entitled to Statutory Attorney's Fees*

¶7 DSG asserts that the circuit court was required to include statutory attorney's fees as part of the costs. DSG argues that WIS. STAT. § 778.10 governs the recovery of municipal forfeitures and WIS. STAT. § 778.20 authorizes attorney fees as an item of costs in actions brought under § 778.10. The Town responds that WIS. STAT. § 814.65(3) specifically prohibits statutory attorney fees in a municipal forfeiture action. We agree with DSG.

¶8 The statutes expressly authorize the assessment of costs against a municipality in a forfeiture action. WISCONSIN STAT. § 778.20 dictates who shall be liable for costs in municipal forfeiture actions:

> **Who liable for costs.** In all *actions brought under s. 778.10* the town, city, village or corporation in whose name such action is brought shall be liable for the costs of prosecution; and, if judgment be for defendant, *for all the costs of the action*, and judgment shall be entered accordingly.

(Emphasis added.) The Town does not dispute that the action here was brought under WIS. STAT. § 778.10. Section 778.10 provides: "All forfeitures imposed by any ordinance or regulation of any county, town, city or village … may be sued for and recovered, under this chapter …." And, there is no dispute that the "costs of the action" in § 778.20 brings in "Items of costs" under WIS. STAT. § 814.04, including attorney fees to the prevailing party in the amount of $15 to $100. Section 814.04(1)(b) provides:

> When no money judgment is demanded and no specific property is involved, or where it is not practical to ascertain the money value of the rights involved, attorney fees under par. (a) shall be fixed by the court, but shall not be less than $15 nor more than $100.

¶9 The Town does not dispute DSG's analysis of WIS. STAT. §§ 778.10 and 778.20. Rather, the Town argues that a more specific statute precludes a statutory attorney fee award in a municipal forfeiture action. The Town points to WIS. STAT. § 814.65(3), which provides: "A municipal court shall not *impose and collect* attorney fees." (Emphasis added.) The Town seems to argue that the plain language of this statute precludes awarding statutory attorney fees to a prevailing party in a municipal court action.

¶10 We first observe that neither party has adequately briefed whether we should apply this statute to the circuit court. Because the Town of Perry does not have a municipal judge, this matter was assigned to a circuit court judge. Both parties make factual claims as to the applicability of WIS. STAT. § 814.65, but neither provides legal analysis. In the absence of such analysis, we will assume, without deciding, that the circuit court sits in place of the municipal court and that § 814.65(3) applies.

¶11 We disagree with the Town. WISCONSIN STAT. § 814.65(3) does not address awarding attorney fees. Rather, it prohibits the imposition and collection of such fees. It provides: "A municipal court shall not impose *and* collect attorney fees." (Emphasis added.) "[I]mpose and collect" are in the conjunctive, so that the apparent purpose of § 814.65(3) is to prohibit a municipal court from collecting such fees. Whether there is a need to prohibit municipal courts from collecting such fees is a topic neither party sheds light on. But the point here is that the plain language of § 814.65(3) does not prohibit *awarding* such fees, it prohibits imposing and collecting such fees.

¶12 Further, the Town does not even attempt to reconcile its reading of WIS. STAT. § 814.65(3) with the clear authorization for such fees set forth in WIS. STAT. §§ 778.10 and 778.20. Rather, the Town makes a policy argument based on ***City of Janesville v. Wiskia***, 97 Wis. 2d 473, 293 N.W.2d 522 (1980). But this argument is poorly developed. A statutory argument of this type must begin with a discussion of whether the statute or statutes in question are ambiguous. Even assuming ambiguity here, there are several distinguishing factors between ***Wiskia*** and the situation here. In ***Wiskia***, the prevailing defendant sought reasonable attorney's fees under WIS. STAT. § 814.025 on the ground that the action was frivolous. ***Wiskia***, 97 Wis. 2d at 479. In the instant case, DSG is seeking a statutory attorney fee under WIS. STAT. § 778.20. Moreover, as pointed out by DSG, in this case there are statutes specifically authorizing an award of statutory attorney fees. These statutes were not addressed in ***Wiskia***. Since the Town has not explained why the reasoning of ***Wiskia*** should apply even when a statute explicitly authorizes costs, we are not persuaded that ***Wiskia*** has application here.

¶13 Accordingly, we conclude that a municipal court, or a circuit court acting in place of a municipal court, may impose statutory attorney fees under WIS. STAT. § 814.04.

*How Many "Actions"*

¶14 DSG asserts there were 472 separate "actions." The Town contends there was but a single "action." Although the statutory meaning of the term "action" is *the* question, neither party provides anything remotely resembling a statutory construction argument regarding the meaning of the term "action." Perhaps this is simply a reflection of the dearth of authority on the point. Our own research has not revealed a ready answer.

¶15 WISCONSIN STAT. § 778.20 says that in a municipal forfeiture action the prosecution is responsible for "all the costs of *the action*" if the defendant prevails. The statute does not say a party may recover costs for every citation. Nor does it say that a party may recover costs for all actions that could have been brought.

¶16 In this case, even assuming there were several "actions" at the onset, the circuit court consolidated the separate cases into a single case. We think this single consolidated case was a single action. Black's Law Dictionary defines "action" as "[a] civil or criminal judicial proceeding." BLACK'S LAW DICTIONARY 28 (7th ed. 1999). It defines "civil action" as "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." ***Id***. at 30. We find nothing in the statutes or case law to the contrary. Indeed, while use of the term "action" is not completely consistent, it is typically used to refer to the lawsuit, not the individual claims. *See*, *e.g.*, ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶134, No. 01-1193 ("This case originated in 1989.

After the circuit court in the original action dismissed Johnson Controls' claims regarding insurance coverage in 1995 ...."); ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶5, No. 02-1319 ("Teff and Soderholm-Wilder filed this action alleging various contract claims ...."); ***Raz v. Brown***, 2003 WI 29, ¶7, 260 Wis. 2d 614, 660 N.W.2d 647 ("According to the circuit court, the husband could have fully raised these claims in his 1996 action ...."); ***Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc.***, 2002 WI App 205, ¶1, 257 Wis. 2d 511, 651 N.W.2d 738 (the plaintiff "brought its action in tort, raising claims of strict products liability and negligence").

¶17 Because there was a single action, the court was required by WIS. STAT. § 814.04(1)(b) to award an attorney fee that was "not … less than $15 nor more than $100." Although the precise amount is a matter of circuit court discretion, we think the Town has effectively conceded that, if an attorney fee is awarded, the amount should be $100. The Town states: "Therefore, if any attorneys' fees are awarded, the maximum award should be $100."

¶18 Accordingly, we reverse that part of the circuit court's judgment awarding zero in statutory attorney's fees and direct that the award be amended to $100. No other action by the circuit court is anticipated or directed by this court.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

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