COURT OF APPEALS DECISION DATED AND FILED

July 1, 2014

Diane M. Fremgen
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. 2013AP2048 **Cir. Ct. No. 2009CV2459**

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

DAVID J. LEWIS,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF HOBART,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. David Lewis appeals a judgment awarding him $46,200 in reasonable attorney fees in this condemnation action. Lewis asserts the

actual cost of his representation was much higher, and the circuit court erred by applying the rebuttable presumption contained in WIS. STAT. § 814.045(2)[1] that a reasonable fee is no greater than three times the amount of compensatory damages. He also asserts that § 814.045, which was enacted after this action was commenced, cannot be applied retroactively. We reject Lewis's arguments and affirm.

BACKGROUND

¶2 In 2009, Lewis refused the Village of Hobart's highest written offer of $98,000 to purchase two of Lewis's properties. Hobart then submitted a jurisdictional offer of $74,600. Lewis commenced the present action to appeal the award.

¶3 After a day of trial to the court, the parties stipulated to an award of $90,000, which required Hobart to make an additional $15,400 payment to Lewis. Pursuant to WIS. STAT. § 32.28, the stipulation allowed Lewis to recover reasonable litigation expenses, including reasonable attorney fees, in an amount to be determined by the court.

¶4 The parties disagreed about what constituted "reasonable" expenses. Lewis requested $75,055.75 in attorney fees. Hobart argued this demand was unreasonable under WIS. STAT. § 814.045, which sets forth factors to consider when determining the reasonableness of a fee, and establishes a rebuttable presumption in certain cases that a reasonable fee is three times the amount of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

compensatory damages. Because Lewis ultimately obtained an additional award of $15,400, Hobart argued the presumptively reasonable amount of attorney fees under § 814.045 was $46,200.

¶5 Lewis argued WIS. STAT. § 814.045 was inapplicable because it was enacted after this action was commenced and could not be applied retroactively. At a hearing on the attorney fee issue, Lewis also argued § 814.045 conflicted with the statute authorizing attorney fees in condemnation cases, WIS. STAT. § 32.28.

¶6 The circuit court resolved the attorney fee dispute in a twenty-four-page written order. The court first concluded WIS. STAT. § 814.045 was a procedural statute, not a substantive one, and should be applied retroactively. It observed the statute did not place any additional responsibility on Lewis, as the burden of demonstrating reasonableness already rested with the party claiming the fee. It also determined the rebuttable presumption did not act as a cap, stating, "If Lewis can demonstrate that the amount he claims is reasonable, he will be awarded that amount, presumption or no presumption."

¶7 The court then applied the factors set forth in WIS. STAT. § 814.045(1).[2] The court concluded the issues involved in the case were not particularly complex and Lewis had not met his burden of showing all the time

[2] These factors include the time and labor required; the novelty and difficulty of the questions involved; the skill required to perform the legal service properly; the likelihood that acceptance of the case precluded other employment by the attorney; the fee customarily charged in the locality for similar legal services; the amount of damages involved in the action; the results obtained in the action; the time limitations imposed by the client or by the circumstances; the nature and length of the attorney's professional relationship with the client; the experience, reputation and ability of the attorney; whether the fee is fixed or contingent; the complexity of the case; awards of costs and fees in similar cases; the legitimacy or strength of any defenses asserted in the action; and other factors the court deems important or necessary to consider. *See* WIS. STAT. § 814.045(1).

expended by his attorneys on the case was reasonable. The court observed that Lewis's Minnesota counsel charged $400 per hour, whereas local counsel charge approximately $200 per hour, and it found Lewis was not entitled to reimbursement for seeking more expensive counsel.[3] It also found a higher award was not justified by the amount of damages involved in the action, the outcome of the litigation, or the experience and reputation of Lewis's counsel. Lewis supplied a copy of the judgment in a 2012 case awarding over $200,000 in fees, but the court found this insufficient because nothing indicated how the fees were calculated. Lewis did not submit any other examples of awards in condemnation cases. Based on the structure of Lewis's fee agreement, the court determined Lewis "would likely not have to pay the hourly rate that his attorneys are seeking from [Hobart]."[4]

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[3] *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 743, 349 N.W.2d 661 (1984) (concluding that, under the facts of the case, WIS. STAT. § 32.28 did not limit an award of attorney fees to rates customarily charged by counsel in the area where the condemned property is located, but noting the statute "should not be read to require the state to pay for [a condemnee's] decision to seek more expensive representation"). The circuit court distinguished ***Standard Theatres*** on the ground that Lewis's decision to "seek" more expensive representation in this case was unreasonable, Lewis failed to describe how he selected his Minnesota counsel, and there was no evidence Lewis resided outside the locality or had a prior relationship with the firm. Further, although Lewis provided an affidavit from an eminent domain attorney practicing in Madison, the court observed Lewis had not presented any evidence of the prevailing rates for attorneys in the Minneapolis area. The court also found the Madison attorney's affidavit unpersuasive, as the affiant could use a favorable reasonableness determination in Lewis's case to persuade courts when awarding fees in other litigation. *See* WIS. STAT. § 814.045(1)(m) (requiring courts to consider awards of cost and fees in similar cases).

[4] The fee agreement set forth different fee structures depending on whether WIS. STAT. § 32.28 was triggered. If the amount recovered was insufficient to trigger § 32.28, Lewis was required to pay attorney fees totaling one-third of the amount recovered. If, however, the amount recovered exceeded the threshold set by § 32.28—thereby triggering the fee-shifting statute—fees were to be calculated at an hourly rate of $400 and $4,000 per day or partial day for an appearance at trial or an evidentiary hearing.

¶8 Given these factors, the court determined Lewis failed to rebut the presumption under WIS. STAT. § 814.045(2). It therefore found that "the presumption is appropriate and that reasonable attorney fees do not exceed three times the amount of compensatory damages awarded …." The court then entered a judgment awarding Lewis $46,200 in attorney fees—three times the additional amount recovered of $15,400. Lewis appeals.

DISCUSSION

¶9 The primary question presented by this appeal is whether the presumption under WIS. STAT. § 814.045(2) applies to Lewis's request for reasonable attorney fees under WIS. STAT. § 32.28. Answering this question requires us to interpret and apply statutes, and we do so de novo. ***N.E.M. by Kryshak v. Strigel***, 208 Wis. 2d 1, 6, 559 N.W.2d 256 (1997). In addition, we must determine whether § 814.045 can be applied retroactively, because it was enacted after this matter was commenced. We review the retroactivity of a statute de novo. *See* ***Snopek v. Lakeland Med. Ctr.***, 223 Wis. 2d 288, 293, 588 N.W.2d 19 (1999).

¶10 Generally in Wisconsin, a prevailing party is not entitled to collect attorney fees from the opposing party as a part of his or her damages or costs. ***Watkins v. LIRC***, 117 Wis. 2d 753, 758, 345 N.W.2d 482 (1984). This rule, known as the "American Rule," may be modified by statute. ***Id.*** In eminent domain cases, reasonable attorney fees and other litigation expenses may be recoverable under WIS. STAT. § 32.28.

¶11 WISCONSIN STAT. § 32.28 does not elucidate what constitutes "reasonable" attorney fees. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 740, 349 N.W.2d 661 (1984) ("There is absolutely no language in the statute

referring to the limits of what is a reasonable or necessary fee ….”). Historically, Wisconsin courts have looked to factors like the amount and character of the services rendered, the labor, time, and trouble involved, the character and importance of the litigation, the amount of money or value of the property affected, the professional skills and experience called for, and the standing of the attorney in the legal profession. *See* ***Trojan v. Trojan***, 79 Wis. 2d 3, 5, 255 N.W.2d 305 (1977) (per curiam); ***State v. Sidney***, 66 Wis. 2d 602, 607, 225 N.W.2d 438 (1975).

¶12 In 2011, the legislature passed 2011 Wis. Act 92, which created WIS. STAT. § 814.045. The statute identifies factors for courts to consider in a dispute over the reasonableness of attorney fees. It also creates a presumption, applicable "[i]n any action in which compensatory damages are awarded," that "reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded …." WIS. STAT. § 814.045(2)(a). The presumption may be overcome if the court determines, after considering the enumerated factors and any other factor the court deems important or necessary to consider, that a greater amount is reasonable. ***Id.***

¶13 Lewis's primary appellate argument is that the presumption under WIS. STAT. § 814.045(2) does not apply in eminent domain actions. He reasons that an action disputing an award of compensation concerns the constitutional guarantee of "just compensation," and is not an action involving compensatory damages. *See* WIS. CONST. art. I, § 13. As authority, Lewis relies on cases that he takes to stand for the proposition that damages typically classified as "compensatory damages" are not available in eminent domain cases. *See* ***City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth. of Milwaukee***, 2009 WI 84, ¶52, 319 Wis. 2d 553, 768 N.W.2d 749 (consequential or

incidental damages unavailable in eminent domain cases); ***DeBruin v. Green Cnty.***, 72 Wis. 2d 464, 470-72, 241 N.W.2d 167 (1976) (damages for "inconvenience" excluded from just compensation).

¶14 Lewis presents this argument for the first time on appeal. "It is a fundamental principle of appellate review that issues must be preserved in the circuit court. Issues that are not so preserved, even alleged constitutional errors, generally will not be considered on appeal." ***Dalka v. American Family Mut. Ins. Co.***, 2011 WI App 90, ¶5, 334 Wis. 2d 686, 799 N.W.2d 923. The forfeiture rule gives parties incentive to "apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party." ***Townsend v. Massey***, 2011 WI App 160, ¶26, 338 Wis. 2d 114, 808 N.W.2d 155. An appellant like Lewis, who fails to adequately raise an issue below, takes the chance that we will not elect to hear the issue. *See* ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 55-56, 264 N.W.2d 579 (1978).

¶15 Lewis responds that he did raise the issue of WIS. STAT. § 814.045(2)'s applicability in the circuit court. His attorney stated at the hearing, "I don't think [§ 814.045(2)] should apply in any condemnation case." However, Lewis's sole argument was that § 814.045(2) conflicted with WIS. STAT. § 32.28, and that the specific dictates of WIS. STAT. ch. 32 control over a "general procedural" rule like § 814.045. Lewis did not argue § 814.045(2) is inapplicable in an eminent domain case because such cases do not involve compensatory damages.

¶16 A party cannot avoid the forfeiture rule simply because he or she raised a general issue in the circuit court. *See* ***Townsend***, 338 Wis. 2d 114, ¶21. Raising a general issue does not preserve all arguments that might somehow relate

to that issue. ***Id.***, ¶¶21, 27. Instead, the forfeiture rule focuses on whether particular arguments have been preserved. ***Id.***, ¶25. Framing the rule in this way prevents circuit courts from being "blindsided" by appellate courts and gives circuit courts the ability to "correct any error with minimal disruption of the judicial process, eliminating the need for appeal." ***Id.***, ¶26 (citing ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612). In a nutshell, the forfeiture rule is a critical tool for promoting judicial efficiency, and we believe the circuit court should have been given the first opportunity to determine whether an eminent domain case involves "compensatory damages" under WIS. STAT. § 814.045(2).

¶17 With that, we turn to the argument Lewis did preserve: that WIS. STAT. § 814.045(2) conflicts with WIS. STAT. § 32.28. He argues § 814.045(2) "eviscerates" the constitutional protections underlying § 32.28, which is designed to discourage inequitably low jurisdictional offers and make the condemnee whole. *See* ***Redevelopment Auth. of Green Bay v. Bee Frank, Inc.***, 120 Wis. 2d 402, 411, 355 N.W.2d 240 (1984). When an owner is deprived of property against his or her will, the owner is not justly compensated for his or her property if the owner must be forced to litigate to obtain the full value of the land, and then must pay attorney fees from this full value. ***Standard Theatres***, 118 Wis. 2d at 744. Lewis argues § 814.045(2)'s presumption encourages unreasonably low jurisdictional offers by placing a litigating property owner on the hook for attorney fees exceeding three times the difference between the jurisdictional offer and the value of the property.

¶18 "It is a cardinal rule of statutory construction that where two conflicting statutes apply to the same subject, the more specific controls." ***Jones v. State***, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999). However, conflicts

between statutes, by implication or otherwise, are not favored. ***Id.*** If we can reasonably construe the statute in a way that reconciles them, we will do so. ***Id.*** "The statutes must [also] be construed in a manner that serves each statute's purpose." ***Id.***

¶19 Here, WIS. STAT. §§ 32.28 and 814.045(2) can be reasonably construed to avoid any conflict.[5] Under WIS. STAT. § 32.28(1) and (3), the condemnee may be entitled to litigation expenses, including reasonable attorney fees. Section 814.045 merely sets forth the factors the court must consider when determining the reasonableness of the fee, and creates a rebuttable presumption that a reasonable fee does not exceed three times the amount of compensatory damages. By creating a rebuttable presumption, § 814.045(2) does not in any way eliminate the availability of reasonable attorney fees under § 32.28.

¶20 For this reason, we also conclude WIS. STAT. § 814.045 has retroactive effect. It is true that statutes are usually applied prospectively. *See* ***Snopek***, 223 Wis. 2d at 293. "However, if a statute is remedial or procedural, rather than substantive in nature, it will be given retroactive application unless there is a clearly expressed legislative intent to the contrary or unless retroactive application will disturb contracts or vested rights." ***City of Madison v. Town of Madison***, 127 Wis. 2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985). The question of whether a statute can be applied retroactively is a question of law that this court reviews de novo. ***State v. Meinhardt***, 2012 WI App 82, ¶3, 343 Wis. 2d 588, 819 N.W.2d 347.

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[5] To reiterate, we express no opinion on whether WIS. STAT. § 814.045(2) does or should apply to eminent domain cases for "just compensation." Lewis has forfeited that argument. *See supra*, ¶¶6-9.

¶21 The distinction between substantive and procedural laws is relatively clear. If a statute simply prescribes the method, or legal machinery, by which a right or remedy is enforced, it is procedural. ***City of Madison***, 127 Wis. 2d at 102. If the law creates, defines, or regulates rights and obligations, it is substantive. ***Id.*** A remedial statute fills the gap between substantive and procedural laws. Remedial statutes are related to remedies or modes of procedure and do not create new rights or take away vested rights, but operate only in furtherance of a remedy or right already existing. ***Id.***

¶22 We conclude WIS. STAT. § 814.045 is both procedural and remedial. It is procedural because it simply provides circuit courts with guidance as to what constitutes reasonable attorney fees under a wide swath of fee-shifting provisions in state law. Section 814.045 does not add any new rights, or take any away. A court had authority to award reasonable attorney fees in eminent domain cases before § 814.045's enactment, and retained that authority afterward. Further, the statute is remedial because it facilitates the pre-existing right to collect reasonable attorney fees. *See* ***Bruner v. Kops***, 105 Wis. 2d 614, 619, 314 N.W.2d 892 (Ct. App. 1981). The legislature previously neglected to provide courts and litigants with any roadmap to determining a reasonable fee, and of course retained authority to fill that lacuna.

¶23 Relying on foreign law, Lewis argues the right to collect attorney fees is substantive. This argument misses the mark.[6] WISCONSIN STAT. § 814.045 does not confer upon anyone the right to collect reasonable attorney fees; it simply provides guidance as to what a "reasonable" fee is. WISCONSIN STAT. § 32.28, which allows condemnees to collect reasonable attorney fees, is the substantive statute.

¶24 Lewis appears to argue WIS. STAT. § 814.045(2) is a substantive change in the law because it regulates the right to collect attorney fees under WIS. STAT. § 32.28. *See* ***City of Madison***, 127 Wis. 2d at 102 (law is substantive if it regulates rights and obligations). If § 814.045(2) capped or otherwise limited the amount of attorney fees available, we might agree. However, the statute merely creates a rebuttable presumption in certain cases. Again, attorney fees in any

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[6] We also observe that none of the foreign cases Lewis cites address whether a statute like WIS. STAT. § 814.045 can be applied retroactively. In ***Missouri State Life Insurance Co. v. Jones***, 290 U.S. 199, 202 (1933), the Supreme Court concluded the demand for attorney fees "became part of the matter put in controversy by the complaint" for purposes of federal jurisdiction. ***Kucel v. Walter E. Heller & Co.***, 813 F.2d 67, 73 (5th Cir. 1987), simply stands for the uncontroversial proposition that an "award of attorney's fees is part of the substantive right of a suit."

The closest Lewis comes to an analogous case is ***L. Ross, Inc. v. R. W. Roberts Construction Co.***, 481 So. 2d 484 (Fla. 1986). However, rather than creating a rebuttable presumption regarding the reasonableness of a fee, the statute at issue in that case repealed a limit on the amount of available attorney fees. ***Id.*** The Florida Supreme Court recognized the statute greatly increased the defendant's exposure in the suit, and held the statute could not be applied retroactively because the statute changed the applicable measure of damages. Here, by contrast, WIS. STAT. § 814.045 does not limit the amount of available attorney fees in any way.

Lewis also cites ***In re Silk***, 937 A.2d 900 (N.H. 2007). The legislature there changed the definition of a "prevailing party" eligible to recovery attorney fees in an appeal for workers' compensation benefits, a change that the New Hampshire Supreme Court determined could not be applied retroactively. ***Id.*** at 902. As Lewis concedes, ***In re Silk*** dealt with the retroactivity of a statute that altered who was entitled to recover attorney fees in the first instance. WIS. STAT. § 814.045 does not accomplish any such change.

reasonable amount have been and are still available to litigants in eminent domain cases. The law imposes no additional burdens on condemnees, because the party seeking attorney fees has always borne the burden of demonstrating that the amount of fees requested is reasonable. *See* ***Southeast Wis. Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.***, 2007 WI App 185, ¶52, 304 Wis. 2d 637, 738 N.W.2d 87.[7]

¶25 Lewis relies heavily on the effective date of the statute, reasoning that "[b]ecause this matter was initiated before the effective date of the statute, [WIS. STAT. § 814.045] does not apply to this action." However, the effective date of a statute does not determine whether it will apply retroactively. ***Salzman v. DNR***, 168 Wis. 2d 523, 529, 484 N.W.2d 337 (Ct. App. 1992). All statutes have effective dates. ***Id.***

¶26 To the extent Lewis suggests he was entitled to rely on recovery of a particular amount of attorney fees when commencing this litigation, we cannot agree. A variety of factors determine whether a particular fee is reasonable. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶26, 275 Wis. 2d 1, 683 N.W.2d 58. "[T]he results are open to significant variation," and variation is to be expected. ***Id.***, ¶¶26-27. The factors do not lead to a single unitary value as the only reasonable fee, but can justify a range of reasonable fees and different methods of calculating them. ***Id.*** We therefore reject the notion that Lewis could have had any reasonable expectation of recovering a particular amount of fees at the inception of this litigation.

[7] Lewis argues WIS. STAT. § 814.045 allows a condemnor to "rely on the presumption without submitting any evidence to the contrary." It is not, however, the condemnor's burden to prove up the amount of the condemnee's reasonable attorney fees.

¶27 Lewis also argues the circuit court erred by refusing to apply the test established in ***Kolupar*** to determine whether a particular fee is reasonable. Under ***Kolupar***, a court should begin determining a reasonable fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. ***Id.***, ¶28. This approach generates a "lodestar" figure, which the court may then adjust up or down using the factors embodied in SCR 20:1.5 (many of which are now part of WIS. STAT. § 814.045(1)).

¶28 Hobart responds that the circuit court did look at the hours expended by Lewis's attorney and the hourly rate, and determined the requested fee was not reasonable. Indeed, the circuit court's analysis was thorough and well-reasoned, spanning fourteen pages of its written decision. The court engaged in an exhaustive review of the factors contained in WIS. STAT. § 814.045(1), beginning with the time and labor required by the attorney, the novelty and difficulty of the issue and the requisite skill involved, and the fee charged in the locality for similar legal services. The court observed that Lewis's attorneys, who are from Minneapolis, charged $400 per hour and $4,000 per day or partial day for an appearance at trial or an evidentiary hearing. Hobart, by contrast, paid attorneys from Green Bay and Oshkosh $210 per hour, and submitted a 2008 survey report showing that average billing rates are $172 per hour in Green Bay, $180 per hour in Oshkosh, and $192 per hour in Minneapolis-St. Paul.[8]

¶29 We agree with Hobart that the circuit court considered the proper factors. In addition, we note Lewis has failed to respond to Hobart's argument,

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[8] Lewis objects that the survey itself is not in the record on appeal. However, the circuit court restated the results of the survey in its written decision. Accordingly, Hobart's failure to include the survey in the appellate record is of no consequence.

and has therefore conceded the argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). Further, Lewis explicitly concedes in his reply brief that the "trial court's application of [WIS. STAT. §] 814.045(1) to the facts is not an issue" in this appeal.

¶30 In sum, we conclude WIS. STAT. § 814.045 is applicable in this action. We reject the only arguments Lewis adequately preserved for appeal: that the statute conflicts with WIS. STAT. § 32.28, and that it cannot apply retroactively. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.