

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1235

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GEORGE A. MUDROVICH,

PLAINTIFF-APPELLANT,

V.

TRANS-AMERICA, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ George Mudrovich appeals a judgment dismissing his wage claim against Trans-America, LLC. He argues that the circuit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

court erred in finding that he had withdrawn his settlement offer and in failing to award damages under the doctrine of unjust enrichment. Because the circuit court's finding that Mudrovich withdrew his settlement offer is not clearly erroneous and because Mudrovich did not raise the issue of unjust enrichment at trial, we affirm the judgment of the circuit court. Additionally, we conclude that Mudrovich is not entitled to attorney's fees because he is not a prevailing party.

BACKGROUND

¶2 Donald Johnson owns Trans-America, LLC, a trucking company. Johnson advertised for a truck driver stating, "Wages are negotiable, but will be offered a flat rate and 31 or more cents per mile over 2,000 mile (sic)." Mudrovich met with Johnson in response to the ad. Johnson hired Mudrovich without a written contract.

¶3 Johnson sent Mudrovich to collect a load of potatoes in Illinois and deliver them to North Carolina. Mudrovich had mechanical problems with the truck, and the relationship between him and Johnson deteriorated. Mudrovich delivered the load of potatoes, then, at Johnson's direction, collected a load of cottonseed to deliver to Seymour, Wisconsin. Instead, he parked the loaded trailer in a Wausau truck stop and took the tractor unit to his house. Subsequently, Johnson came to Mudrovich's house accompanied by a Wausau police officer. Mudrovich gave him the keys to the tractor and told him where the trailer was, but he kept a black binder containing the truck's registration, insurance and permits (without which the truck could not be legally operated), as well as an envelope

containing receipts from the trip that Johnson needed for his business records. This litigation centers on what Mudrovich was to be paid.²

¶4 Mudrovich retained an attorney, Ryan Lister, who began negotiating a settlement with Johnson's attorney and returned the black binder Mudrovich had retained when he turned over the tractor to Johnson. Eventually, the parties agreed to settle the matter for \$1,692.15, on the condition that Mudrovich turn over the trip receipts to Johnson's attorney. Mudrovich did so on January 29, 1999, but he did not receive the settlement check. On February 26, Lister wrote the following letter to Johnson's attorney:

My client is very upset about the delay in receiving the settlement proceeds. Mr. Mudrovich has advised me that if the funds are not received in my office by Tuesday, March 2, 1999, to withdraw the settlement offer and proceed with all legal remedies.

¶5 Mudrovich did not receive a settlement check by March 2, so he sued Johnson in small claims court seeking wages and reimbursement for expenses. Johnson counterclaimed seeking damages for lost profits caused by his inability to operate the tractor-trailer without the documents Mudrovich initially retained. After a trial, the circuit court dismissed Mudrovich's suit and Johnson's counterclaim. It found that Johnson and Mudrovich had not come to a meeting of the minds on the terms of employment; that Mudrovich's initial retention of the tractor-trailer's black binder was a direct cause of Johnson's loss of business; that an award of attorney's fees was inappropriate because Mudrovich had been paid

² Johnson testified that he agreed to pay Mudrovich \$300 for the North Carolina trip, plus \$50/month that he could use to purchase benefits. Mudrovich, on the other hand, testified that Johnson agreed to pay him \$750/week, plus \$0.31/mile for each mile over 2,000 in a single trip and \$50/week to purchase benefits.

wages before the trip began; and that the damages of one party offset the damages of the other. Mudrovich appeals. Johnson does not.

DISCUSSION

Standard of Review.

¶6 We will not set aside a circuit court’s findings of fact unless they are clearly erroneous. WISCONSIN STAT. § 805.17(2). Whether an implied contract exists turns on questions of fact. *Garvey v. Buhler*, 146 Wis. 2d 281, 287, 430 N.W.2d 616, 619 (Ct. App. 1988). However, we are not bound by a circuit court’s conclusions of law, which we review *de novo*. *First Nat’l Leasing Corp. v. City of Madison*, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977).

Settlement Offer.

¶7 Mudrovich argues the circuit court erred in finding that he had withdrawn his settlement offer.³ Mudrovich testified that Johnson agreed to settle his wage claim for \$1,692.15 in exchange for the receipts from the trip, and he testified that he returned the receipts but never received the settlement check. However, Mudrovich also testified to the contents of the February 26 letter from Attorney Lister to Johnson’s attorney stating that the settlement offer would be withdrawn unless he received payment by March 2, 1999. Given this testimony, the circuit court’s finding that Mudrovich had withdrawn the settlement offer was not clearly erroneous.

³ The circuit court did not make a specific finding that Mudrovich had withdrawn the settlement offer. However, in dismissing the claim and counterclaim, it stated, “And there is no way to come to any mathematical precision of what damages should be here because that just can’t be done” From this, we infer that the circuit court did not consider the settlement offer to provide a basis for calculating damages because Mudrovich had withdrawn it.

Unjust Enrichment.

¶8 Mudrovich also argues that the circuit court erred because it did not award him damages under a theory of unjust enrichment. Because of the services he performed and the expenses he incurred, he contends he is entitled to an award of \$1,731.65.⁴

¶9 Unjust enrichment can provide the basis for recovery under an implied contract of employment. *Garvey*, 146 Wis. 2d at 287, 430 N.W.2d at 619. Damages for a contract implied in law are measured by the value of the benefit conferred. *W.H. Fuller Co. v. Seater*, 226 Wis. 2d 381, 385, 595 N.W.2d 96, 99 (Ct. App. 1999). However, Mudrovich raises this issue for the first time on appeal. Because the circuit court was not asked to make the findings necessary to such a recovery, we do not consider it on appeal. *Ramsden v. Farm Credit Svcs.*, 223 Wis. 2d 704, 719 n.11, 590 N.W.2d 1, 7 n.11 (Ct. App. 1998).

Attorney's Fees.

¶10 Finally, Mudrovich argues that he should be awarded costs and attorney's fees, including those incurred pursuing this appeal. He bases his claim on WIS. STAT. § 109.03(6), which states, in part:

In an action by an employee ... against the employer on a wage claim ... the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses.

⁴ Mudrovich as a settlement argues that he should be paid \$620 in wages (based on a rate of \$0.31/mile for the first 2,000 miles of the trip), \$300.39 for mileage in excess of 2,000 miles, \$50.00 for benefits, and \$761.26 for reimbursable expenses. This is less than he believes he had an agreement to be paid.

The statutory phrase “a reasonable sum for expenses” supports an award to the employee for actual attorney’s fees. *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 401, 588 N.W.2d 67, 74 (Ct. App. 1998). However, Mudrovich did not prevail on his wage claim, so the circuit court could not have awarded him attorney’s fees under the statute. Similarly, he is not entitled to an award of attorney’s fees on appeal because he has not prevailed here.

CONCLUSION

¶11 Because the circuit court’s finding that Mudrovich withdrew his settlement offer is not clearly erroneous and because Mudrovich did not raise the issue of unjust enrichment at trial, we affirm the judgment of the circuit court. Additionally, we conclude that he is not entitled to attorney’s fees because he is not a prevailing party.

By the Court.—Judgment affirmed.

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

