

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 5, 2010

David R. Schanker
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. 2008AP3024

Cir. Ct. No. 2007SC3457

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ROBERT L. PERKINS,

PLAINTIFF-APPELLANT,

V.

RGIS, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ Robert Perkins appeals from a judgment dismissing his action against RGIS, LLC, for unpaid wages allegedly earned during his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

employment. Perkins challenges the jury verdict and order of dismissal on seven grounds. We affirm.

¶2 Perkins, a former employee of RGIS, filed a claim for wages he allegedly earned between October 21, 2003, and November 5, 2004. A default judgment was entered against RGIS on November 9, 2007, for its failure to appear. RGIS filed a motion to reopen the judgment, which a court commissioner granted. Perkins filed several motions objecting to RGIS' attempt to reopen the judgment and sought to have the commissioner's order vacated, but the commissioner did not issue a decision on Perkins' filings. Instead, the commissioner scheduled a trial for February 7, 2008.

¶3 On February 5, 2008, RGIS informed the court its principal witness would be unavailable on the date of trial, and requested an adjournment. RGIS failed to appear at trial, and the commissioner entered a default judgment in favor of Perkins. The commissioner granted RGIS' motion to reopen the judgment because RGIS was informed by court staff on February 6, 2008, that the trial would be postponed. On March 18, 2008, Perkins sought judicial review of the commissioner's orders. The circuit court reviewed the commissioner's orders and approved them. A trial was held on October 9, 2008, and a jury found Perkins was not entitled to additional wages and his action was dismissed with prejudice.

¶4 Perkins first argues the circuit court violated his due process and equal protection rights and erroneously exercised its discretion when it first reopened the default judgment. We disagree. Perkins fails to specify how the circuit court's exercise of discretion in this matter violated his constitutional rights. In any event, the court found the defendant's copy of the summons and complaint did not specify a personal appearance was required. In addition, the

court noted an out-of-state defendant must be allowed to answer by mail under WIS. STAT. § 799.22(4)(am). Perkins does not dispute that the Marathon County Circuit Court Rules do not prescribe a method by which a defendant may answer by mail. We therefore affirm the circuit court's decision to reopen the default judgment.

¶5 Perkins also claims the circuit court's order approving of the court commissioner's actions was an erroneous exercise of discretion and denied him due process and equal protection of the law. Again, Perkins has made only conclusory allegations concerning violations of his constitutional rights, and we will not consider those arguments. Moreover, we conclude the circuit court properly exercised its discretion in approving of the commissioner's actions. Perkins argues RGIS violated WIS. STAT. § 799.29(1)(a) by failing to provide notice of its motion, but that statute also permits a court to reopen a judgment without notice for "good cause." The circuit court agreed with the court commissioner that RGIS' ex parte communication concerning witness unavailability was appropriate under SCR 60.04(1)(g)1. because it related to both an emergency and a scheduling matter. Perkins challenges the credibility of RGIS' excuse for missing the trial date, but has not demonstrated any facts supporting his argument.

¶6 Perkins argues two jury instructions and a special verdict question were erroneously given because they limit RGIS' liability for unpaid wages to the minimum wage rate instead of allowing Perkins to recover the full amount of all wages earned.² See WIS. STAT. § 109.03. Perkins correctly points out the

² It appears Perkins' claim is for unpaid overtime wages. The briefs are not clear whether the parties use "minimum wage" to identify the lowest wage allowable under law or
(continued)

instructions, as given, permit him to recover only the minimum wage for the worked hours and not his full wage. Any error resulting from the defective instructions and verdict question was harmless, however. The jury found Perkins failed to prove RGIS owed him any minimum wages, and, therefore, the jury could not have found him to be owed any additional overtime. Perkins does not explain how a jury could have awarded him overtime pay when it concluded he was not even entitled to minimum wages. We therefore reject Perkins' argument.

¶7 Perkins' fourth claim is that the circuit court erroneously limited his testimony about the wages he should have received for each of 121 inventories spanning nine pay periods. The trial transcript shows Perkins recited details of each inventory, including arrival time, departure time, travel time, audit hours and actual hours paid, beginning on October 21, 2003. After reciting the details of his inventories through December 4, 2003, RGIS objected to the testimony and noted exhibit 6 summarized the testimony in a spreadsheet. The trial court concluded "we [do not] need to read every single item into the record here. The jury will have that exhibit to refer to." Perkins argues the circuit court erred by cutting off his testimony and relying on the exhibits to convey the pertinent wage information to the jury. We are not persuaded. The relevant evidence was submitted to the jury, and Perkins was permitted to testify generally about the content of each document in question. The circuit court was within its discretion in excluding his testimonial recitation of the information contained in the documents. *See* WIS. STAT. § 904.03 (circuit court may exclude evidence if waste of time and

Perkins' base rate of pay. In either case, the jury found Perkins was not entitled to any additional compensation.

cumulative presentation of the evidence considerations substantially outweigh the evidence's probative value).

¶8 Perkins next claims the trial court erred by failing to take judicial notice of WIS. ADMIN. CODE § 272.12 (February 2009), when delivering the jury instructions. While we note the circuit court should have taken judicial notice of the administrative provision, *see* WIS. STAT. § 902.03(1)(b), Perkins does not identify how the court's failure to do so resulted in an inadequate instruction. Furthermore, it is apparent the trial court considered the provisions of WIS. ADMIN. CODE § 272.12 when issuing the jury instructions even if it did not take explicit judicial notice of that regulation. The jury instruction adopted word-for-word the definition of hours worked from WIS. ADMIN. CODE § 272.12(1). In addition, the court's instruction accurately conveys the substance of WIS. ADMIN. CODE §§ 272.12(2)(g)2. and 272.12(2)(g)5. Though the trial court added some instructions based on federal regulations and case law under the Fair Labor Standards Act, Perkins does not object to these instructions on the ground that they are inconsistent with state law, and we do not view their inclusion as an erroneous exercise of discretion.

¶9 Perkins also contends the jury's verdict is contrary to the law and weight of the evidence. Our review of a jury verdict is "very limited, narrow, and circumscribed." *Hoffman v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. "This court views the evidence in the light most favorable to a jury's verdict and must sustain the verdict if there is any credible evidence in the record to support it, regardless of whether there is evidence to support a different verdict." *Id.* Perkins' wage claim was based on his contention that RGIS regularly required him to arrive at work early without compensation and instructed him to falsify time sheet records. Thomas Lowell and Kelly Garrow,

both RGIS employees, testified Perkins was never instructed to falsify time records. In addition, Garrow testified that RGIS employees were not generally required to report to work early, and were compensated when doing so was necessary. The jury's verdict is therefore supported by credible evidence.³

¶10 Lastly, Perkins contends he is entitled to a new trial in the interest of justice. Perkins merely restates his earlier arguments, which we have already rejected. There is no basis for a new trial under WIS. STAT. § 805.15.

By the Court.—Judgment affirmed.

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

³ Perkins submits three affidavits with his brief in support of his argument. The individuals did not testify at trial, nor were the affidavits offered as evidence to the circuit court. We will therefore not consider them.

