COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP416 **Cir. Ct. No. 2009SC39991**

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

IN THE MATTER OF ATTORNEY FEES IN:
TAHNISHA LAMB,

PLAINTIFF-RESPONDENT,

V.

THE NEW HORIZON CENTER, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Appeal dismissed in part; order of January 12, 2012, affirmed in part and cause remanded with directions.*

¶1 FINE, J. The New Horizon Center, Inc., appeals, as designated by its filled-in notice-of-appeal printed form, "the whole … final judgment or order entered on (date) November 11, 2011 (money) and January 10, 2012 (attorney fees)." (The first parenthetical is on the printed form, the second two

parentheticals were added by New Horizon.) New Horizon filed its notice of appeal on February 21, 2012.

¶2 This matter was here once before, on New Horizon's appeal from the trial court's grant of summary judgment to Tahnisha Lamb. As we recounted then:

> Lamb worked for New Horizon from August of 2007 until October of 2008. After leaving her employment with New Horizon, she sought monies she contended that New Horizon owed her as a result of her overtime work. A letter from her lawyer to New Horizon in May of 2009 asserted that Lamb had worked "281.5 unpaid hours of overtime," which meant, according to the letter, that New Horizon owed Lamb "$8,867.25." The letter also requested that New Horizon pay Lamb's "attorney's fees, which are currently expected not to exceed $4,500.00 should the matter be immediately resolved." (Footnote omitted.) One month later, the lawyer for New Horizon wrote back and set out what the letter represented was a table showing Lamb's overtime-work hours, which the letter calculated as, "79.5, not 281.5," resulting in Lamb's "entitle[ment] to an additional $417.38."[1] The matter was not settled, and Lamb sued New Horizon in small-claims court.
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> Lamb's nine-page complaint alleged three claims: an alleged violation of the federal Fair Labor Standards Act, 29 U.S.C. § 201; and two alleged violations of what the complaint characterized as, "the Wisconsin Payment Laws." Ultimately, the matter was submitted to the circuit court on cross-motions for summary judgment on the third claim, which asserted that New Horizon had not paid Lamb what they had agreed to pay her, and that this violated WIS. STAT. ch. 109. The circuit court denied New Horizon's motion for summary judgment, and granted summary judgment to Lamb for overtime wages of $417.38 under her employment contract, plus a one-half penalty of $208.76. *See* WIS. STAT. § 109.11(2)(a). The circuit court also awarded Lamb attorney's fees of $15,896.

[1] A parenthetical showing the mathematics mistakenly gives "$413.38" as the total.

In re Attorney's Fees in Lamb v. New Horizons Center, Inc., No. 2010AP2030, unpublished slip op. ¶¶2–3 (WI App March 8, 2011) (Footnote in original.) We reversed because there were genuine issues of material fact that required a trial. ***Id.***, ¶1.

¶3 The parties tried the case, and on November 11, 2011, the trial court awarded Lamb "damages in the amount of $417.38." The trial court also awarded, as permitted by WIS. STAT. § 109.11(2) "a civil penalty of $200." The trial court then added another $417.38 in "liquidated damages" under the Fair Labor Standards Act, 29 U.S.C. § 216(b). The trial court thus gave Lamb $834.76 in damages.

¶4 The trial court then set the matter down to determine a reasonable attorney's-fee award. *See* ***ibid.*** ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."); WIS. STAT. § 109.03(6) ("In any such proceeding the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses."); ***Jacobson v. American Tool Companies, Inc.***, 222 Wis. 2d 384, 398–402, 588 N.W.2d 67, 73–75 (Ct. App. 1998) ("expenses" in § 109.03(6) includes attorney's fees). Lamb's lawyer submitted his time records, and asserted that his hourly rate was $275. He sought attorney's fees of $44,534.50, and asked the trial court to double that amount because, according to the submission, New Horizon rejected an offer of settlement that was lower than the amount awarded plus Lamb's fees and costs. The trial court awarded the amount requested and doubled it under WIS. STAT. RULE 807.01(3) ("If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the

taxable costs."), concluding that attorney's fees were "taxable costs" under that rule.

¶5 New Horizon's appeal argues that: (1) the trial court should have recused itself; (2) the trial court erred in awarding Lamb any damages; (3) the trial court erred in awarding the attorney's fees; and (4) the trial court erred in doubling the attorney's-fee award. We affirm the trial court's refusal to recuse itself. We dismiss that aspect of New Horizon's appeal that argues the merits of Lamb's wage-claim award. We remand the attorney's fee issue for further proceedings consistent with this opinion.

A. *Recusal*.

¶6 New Horizon claims that the trial court was biased. It contends essentially that the trial court initially misapprehended this court's earlier decision reversing a predecessor court's grant of summary judgment to Lamb. It also objects to the following trial court comments to its trial (and appellate) lawyer at the status hearing following our remand:

> THE COURT: So you want to continue to litigate this case, Mr. Coe? I'm -- The only reason I'm asking is that if you can -- if you lose again, you know, the attorney fees clock keeps ticking.
>
> ….
>
> I just -- And what I'm suggesting is that it might be reasonable to settle this claim; and, given that if there is a legitimate claim, the attorney's fees are gonna [*sic*] continue to mount and -- it's a consideration.

As phrased by its main brief on this appeal, New Horizon contends that this shows that the trial court "had set a bad tone of pro Plaintiff bias." New Horizon says that: "This is in violation of the impartiality a judge must show, Wis. Stats.

757.9[*sic*](2)(g)." The trial court denied the recusal request, determining that it was not biased.

¶7 Section 757.19(2)(g) requires disqualification "When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This is a subjective test. ***State v. American TV and Appliance of Madison, Inc.***, 151 Wis. 2d 175, 182–183, 443 N.W.2d 662, 665 (1989). We thus "'must objectively decide if the judge went through the required exercise of making a subjective determination.'" ***State v. Henley***, 2011 WI 67, ¶14, 338 Wis. 2d 610, 618, 802 N.W.2d 175, 179 (quoted source omitted). We have; the trial court did. Indeed, New Horizon does not present a cogent argument to the contrary, and its contention that the trial court should have recused itself borders on the frivolous. We affirm the trial court's determination that its recusal was not warranted.

B. *Appeal of the merits.*

¶8 Although New Horizon's appeal from the trial court's award of attorney's fees is timely, its notice of appeal was filed more than ninety days after the trial court's November 11, 2011, order awarding Lamb $834.76 in damages. *See* WIS. STAT. § 808.04(1). Thus, the appeal from that order is not timely because a dispute over attorney's fees in a fee-shifting case such as this does not toll or extend the time within which to appeal. *See* ***Admiral Ins. Co. v. Paper Converting Machine Co.***, 2012 WI 30, ¶33, 339 Wis. 2d 291, 305–306, 811 N.W.2d 351, 358. We dismiss the aspect of New Horizon's appeal that seeks review of the November 11, 2011, order.

C. *Attorney's fees*.

¶9 As we have seen, the fee-shifting statutes require that any attorney's-fee award be "reasonable." A trial court has discretion in fashioning a reasonable attorney's-fee award. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶15, 303 Wis. 2d 258, 272–273, 735 N.W.2d 93, 100. In evaluating a request for attorney's fees under a fee-shifting statute, a trial court must start with what has been called a "lodestar" analysis: "the product of reasonable hours multiplied by a reasonable rate." ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶29, 275 Wis. 2d 1, 18–19, 683 N.W.2d 58, 67. ***Kolupar*** adopted the lodestar-methodology set out in ***Hensley v. Eckerhart***, 461 U.S. 424 (1983). ***Kolupar***, 2004 WI 112, ¶30, 275 Wis. 2d at 19, 683 N.W.2d at 67. Some two years after ***Hensley***, the United States Supreme Court explained the significance of the result of the litigation for which fees are sought:

> In ***Hensley v. Eckerhart***, *supra*, we held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." We specifically noted that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff -- although technically the prevailing party -- has not received any monetary benefits from the postoffer services of his attorney.

Marek v. Chesny, 473 U.S. 1, 11 (1985) (citations omitted). Once a trial court makes that lodestar assessment it "may adjust this lodestar figure up or down to account" for matters beyond those already encompassed by the lodestar analysis. ***Kolupar***, 2004 WI 112, ¶29, 275 Wis. 2d at 19, 683 N.W.2d at 67. "We look to the eight factors set out in SCR 20:1.5 in relation to the award." ***Kolupar***, 2004 WI 112, ¶35, 275 Wis. 2d at 22, 683 N.W.2d at 69. They are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

SCR 20:1.5. Further, "'the losing party is not entitled to a reduction in attorney's fees for time spent on unsuccessful claims, if the winning party achieved substantial success and the unsuccessful claims were brought and pursued in good faith.'" ***Cook v. Public Storage, Inc.***, 2008 WI App 155, ¶97, 314 Wis. 2d 426, 481, 761 N.W.2d 645, 671–672 (quoted source omitted).

¶10 Although the trial court indicated that it had considered SCR 20:1.5 factors, it did not specifically address the factors in connection with what on the surface appears to be an extraordinarily large attorney's-fee award in light of the comparative minimal award on the merits of Lamb's wage claim. *See* SCR 20:1.5(4) ("[T]he amount involved and the results obtained" is a factor that should be considered). *See also* ***Hensley***, 461 U.S. at 436 (If "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive

amount."). New Horizon sent to Lamb's lawyer a letter dated June 24, 2009, agreeing to pay Lamb the $417.38 the trial court ultimately found New Horizon owed her.[2] A settlement offer, although excluded from evidence addressing liability on the merits of a claim, is admissible in connection with an attorney's-fee award. *See* WIS. STAT. RULE 904.08.[3] *See also* ***Lohman v. Duryea Borough***, 574 F.3d 163, 167–168 (3d Cir. 2009). The trial court may also, of course, consider whether New Horizon's "litigation tactics in fact drove *particular* costs" in assessing a "reasonable" fee. *See* ***Kolupar***, 2007 WI 98, ¶54, 303 Wis. 2d at 288, 735 N.W.2d at 108 (emphasis added). Thus, the trial court must make findings of fact addressing specifically each item of claimed lawyer or paralegal work against what that work accomplished, and is free to require the lawyers to address that matter line-by-line. The trial court may exercise its discretion and award a reasonable fee in connection with the fee litigation if that is warranted. *See* ***Chmill v. Friendly Ford-Mercury of Janesville, Inc.***, 154 Wis. 2d 407, 415–416, 453 N.W.2d 197, 200 (Ct. App. 1990) (Party may recover "reasonable fees and

[2] As we see from our earlier decision and footnote one above, the letter mistakenly gives $413.38 as the total. The context and the adjacent calculations, as we noted in the earlier opinion, add up $417.38.

[3] WISCONSIN STAT. RULE 904.08 provides:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

disbursements incurred to litigate fees under a fee-shifting statute, unless precluded by the language of the statute. … However, no fee should be awarded for litigating a fee issue on which the claiming party is not successful.") Simply put, an appropriate award of fees cannot be supported in a case like this with an overall blanket conclusion, even though here, unlike the situation in the first ***Kolupar*** appeal, the trial court had the lawyer's time records. *See* ***Kolupar***, 2004 WI 112, ¶32, 275 Wis. 2d at 20, 683 N.W.2d at 68. Accordingly, we remand for further proceedings consistent with this opinion.

D. *Doubling the fee award.*

¶11 As noted, the trial court used WIS. STAT. RULE 807.01(3) to double the attorney's-fees award. Fees and costs under a fee-shifting statute are not included in the "amount recovered" aspect of RULE 807.01, however. *See* ***Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.***, 2002 WI App 138, ¶¶29–31, 256 Wis. 2d 205, 223–225, 647 N.W.2d 315, 323–324. Although the word "costs" in an accepted offer-of-settlement under RULE 807.01 includes "taxable costs" so attorney's fees under a fee-shifting statute made the acceptor liable for those fees, *see* ***Alberte v. Anew Health Care Services, Inc.***, 2004 WI App 146, ¶¶2–8, 275 Wis. 2d 571, 574–583, 685 N.W.2d 614, 616–620, this does not mean, as Lamb contends, that attorney's fees awarded under a fee-shifting statute may be doubled when the offer is not accepted. On remand, the trial court shall not use RULE 807.01(3) to double whatever attorney's fees it deems, in the reasoned exercise of its discretion, are warranted.

By the Court.—Appeal dismissed in part; order of January 12, 2012, affirmed in part and cause remanded with directions.

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