

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 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. 2013AP2153

Cir. Ct. No. 2011SC9133

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARY S. OZERS,

PLAINTIFF-RESPONDENT,

v.

VISTAMOTIF LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ VistaMotif, LLC appeals a small claims judgment awarding Dr. Mary Ozers damages in the amount of \$6,751.05. Ozers, a former employee of VistaMotif, brought suit against VistaMotif to seek reimbursement

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

for personal funds she expended on behalf of VistaMotif during her employment with VistaMotif. The circuit court found that Ozers was entitled to reimbursement for the funds she sought reimbursement for, but offset that amount by a portion of a payment Ozers received from VistaMotif during her employment, the authorization of which was in dispute. VistaMotif challenges the circuit court's calculation of the offset amount. For the reasons discussed below, I affirm.

BACKGROUND

¶2 VistaMotif is a single member LLC wholly owned by Dr. Aseem Ansari. Ozers worked for VistaMotif on a part-time basis from approximately April 2009 until September 2010. During the period of Ozers' employment with VistaMotif, VistaMotif conducted research, the focus of which was DNA, and its operations were almost exclusively funded by two federal research grants, one which lasted from April 1, 2009 until March 31, 2010, and the second, which will be referred to as the Department of Defense grant, which lasted from September 1, 2009 until September 30, 2010. Both grants identified Dr. Christopher Warren as the principal investigator in charge of all aspects of the grant-funded research project, and they identified Ozers as the co-principal investigator whose duties included providing scientific support to Warren. It is undisputed that Ansari had little or nothing to do with VistaMotif or its research during the period of Ozers' employment with VistaMotif.

¶3 In October 2011, Ozers brought suit against VistaMotif in small claims court seeking to recover \$8,228.17. Ozers alleged that she spent that amount on behalf of VistaMotif during the period of her employment using her personal funds but was not reimbursed for her expenditure.

¶4 At trial, Ozers testified that the Department of Defense grant operated on a reimbursement basis, meaning that all grant expenses, including supplies, salary and equipment, were purchased by VistaMotif and then reimbursed by the Department of Defense upon approval of those expenditures. Both Ozers and Warren testified that during Ozers' employment with VistaMotif, Ozers made purchases for VistaMotif using a credit card for which she was the guarantor and that charges on the credit card for VistaMotif were paid directly to the credit card company by check from VistaMotif's checking account. The checking account had been opened by Ansari and it identified Ansari, Warren and Ozers as authorized signers. During Ozers' employment, all checks issued by VistaMotif were signed by either Warren or Ozers.

¶5 Ozers testified that during the final quarter of the Department of Defense grant, she made purchases in the amount of \$8,228.17 on behalf of VistaMotif using the credit card at issue and that the Department of Defense authorized reimbursement for those purchases. Ozers testified that in September 2010, prior to the Department of Defense's reimbursement authorization for those purchases, her employment with VistaMotif was terminated by Ansari. Ozers testified that she paid for the credit card charges using her personal funds and that she requested reimbursement from VistaMotif; however, Ansari denied her request.

¶6 At trial, testimony was also given regarding payments Ozers received during her employment, in particular regarding a payment Ozers received in December 2009 in the amount of \$4,437. Ozers testified that the December 2009 check included payment for overtime work she had performed, which was necessitated because Ansari and his wife refused to provide a certain item which was necessary for the grant work. Ozers was not able to explain how the overtime

payment was calculated, but testified that it was for several months of work. Ansari testified that Ozers was not authorized to take or receive the \$4,437 payment and appears to have taken the position that the payment was an unauthorized bonus.

¶7 The circuit court ultimately found that Ozers paid for items on behalf of VistaMotif in the amount of \$8,228.17 and that she was entitled to reimbursement for those expenditures. The court further found that this reimbursement amount should be offset by \$1,620.50, which is a portion of the payment Ozers received in December 2009. A judgment in favor of Ozers was subsequently entered. VistaMotif appeals.

DISCUSSION

¶8 This appeal presents the discrete issue of whether the circuit court properly offset the amount to which Ozers was entitled to be reimbursed by VistaMotif. Determining damages lies within the circuit court's discretion. *J.K. v. Peters*, 2011 WI App 149, ¶32, 337 Wis. 2d 504, 808 N.W.2d 141. An appellate court will not overturn the circuit court's factual findings on damages unless those findings are clearly erroneous. *Id.* A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). To the extent an appellate court's review entails a consideration of whether the circuit court applied a proper legal standard in determining damages, that issue presents a legal question, which is reviewed de novo. *J.K.*, 337 Wis. 2d 504, ¶32.

¶9 In determining whether Ozers was entitled to be fully reimbursed for the \$8,228.17 she expended on behalf of VistaMotif, or whether that amount

should be offset, the circuit court found that the only possible valid offset was the \$4,437.00 check received by Ozers from VistaMotif in December 2009. The court then went on to determine what portion of that amount should be offset. In doing so, the court commented that Ozers did not receive the entirety of the \$4,437. The court stated: “It appears … there were amounts withheld, that [the payment] was treated like it was salary. So, [Ozers] didn’t actually walk out with \$4,500² in her pocket.” The court further stated that given the timing of the departure of VistaMotif’s accountant, who resigned in January 2010, the court “assume[d] the withheld amounts are still with VistaMotif” because the court “doubt[ed] that withheld amounts would have been paid to the government in the month of December. And we know that [the accountant] left and that withholdings weren’t paid after she left.”

¶10 After discussing the issue of withholdings, the circuit court compared the \$4,500 December 2009 payment with the average of the five previous monthly checks Ozers had received for her work at VistaMotif. The court found that the average of Ozers’ five previous monthly checks was \$1,196, which was approximately \$3,241 less than Ozers’ December 2009 check.

¶11 The court went on to find that Warren testified that as principal investigator, he had control over the grant’s resources and authority to grant overtime to Ozers. The court found that the record supported Ozers’ claim that a necessary component for the research project was expected to be provided by Ansari’s wife, but that Ansari’s wife failed to do so, which required “the

² The circuit court rounded up the \$4,437 December 2009 payment to \$4,500 in calculating the offset amount. Neither party challenges the fact that the circuit court rounded up the payment and henceforth, I too refer to the December payment as \$4,500.

expenditure of unplanned for effort on the part of Ozers.” The court found that the amount of extra effort expended by Ozers as a result of Ansari’s wife’s failure to provide the necessary component was “not quantified.” The court further found, however, that it was “an odd coincidence” that the amount of Ozers’ December 2009 payment combined with the December 2009 payment received by Warren totaled \$10,000, which is the amount the Department of Defense grant allowed for unapproved expenditures. The court then stated:

When I look at the \$3,241 that’s more than the average check that [Ozers] received and try to figure out which one of you is more persuasive about, “It was extra time that we had to work” versus he grabbed the fee that you weren’t entitled to, my conclusion is the only thing I can do is split it down the middle.

The court did just that, offsetting \$1,620.55 (one-half of \$3,241) against the \$8,228.17 the court found Ozers was entitled to be reimbursed.

¶12 VistaMotif argues that the circuit court was clearly erroneous in reducing Ozers’ \$4,500 December 2009 payment by the amount of tax withholdings. VistaMotif asserts that the evidence does not support a finding “that the withholdings taken from [] Ozers’ December [] 2009 gross pay were not paid to the taxing authorities.” It is clear, however, from a review of the court’s discussion on the offset amount that although the court found that the December 2009 payment had likely been subject to withholdings which were retained by VistaMotif, the court did not actually reduce the \$4,500 December 2009 payment by any withholding amount. Rather, the court reduced \$4,500 by the average of Ozers’ five prior paychecks, which did not include any payments for purported overtime, and then halved that amount.

¶13 I read VistaMotif's brief as arguing that the circuit court's calculation of the offset amount was also clearly erroneous because the evidence failed to support a finding that any portion of the \$4,500 was for permissible overtime. VistaMotif asserts that Ozers did not provide any specification as to what her overtime work was, when it was performed, or the amount of extra time involved. VistaMotif also asserts that even if Ozers had worked overtime, there was no evidence that she was entitled to payment for that overtime work.

¶14 First and foremost, VistaMotif's argument presupposes, without any legal support, that it was Ozers' burden to prove that the December 2009 payment, or any portion of that payment, should not be offset against Ozers' reimbursement amount, rather than VistaMotif's burden to prove that the payment was wholly or partially invalid and should be offset against the reimbursement amount. That issue aside, there is credible evidence to support the court's finding that at least part of the December 2009 payment was for overtime work and was permissible, and thus I cannot say the court's finding was clearly erroneous.

¶15 The circuit court found that Warren had authority to authorize overtime work and that unplanned overtime work was necessitated by the failure of Ansari's wife to provide a necessary component for the grant research. These findings are supported by testimony by Warren that the grants funding VistaMotif's research permitted the payment of wages for overtime work spent on the grant funded research, and testimony by both Ozers and Warren that the failure of Ansari's wife to provide the component required additional, unanticipated work on their part, testimony that the court found credible. In addition, both Ozers and Warren testified that the calculation of their regular wages and any payment they received for overtime work, including their December 2009 checks, was performed by VistaMotif's accountant, who was in charge of VistaMotif's payroll,

but who was not called to testify at the trial. VistaMotif did not present any evidence that the accountant was not in charge of calculating Ozers' wages, including overtime wages, nor did VistaMotif present any evidence that part-time employees such as Ozers are not entitled to receive overtime pay, other than Ansari's self-serving testimony that a salaried university professor such as himself does not receive overtime pay.

¶16 Finally, VistaMotif argues that the circuit court's offset calculation was an erroneous exercise of the court's discretion because the court's decision was "internally inconsistent." VistaMotif argues that the circuit court "[c]learly" viewed the extra December 2009 payment as a bonus, rather than overtime pay because if it had not, the court would not have offset any of that payment. This argument is without merit. The circuit court's decision to split the amount of the December 2009 payment that exceeded the average of Ozers' five prior paychecks reflects the reality that in light of the evidence presented in this case, an exact calculation of Ozers' overtime pay was impossible. However, the court found that at least a portion of the December 2009 payment was a permissible payment for overtime work and the court came up with what the court found to be the most reasonable remedy under the circumstances. *See id.* (damage determinations lie within the circuit court's discretion). VistaMotif seems to argue that splitting the difference as the court did in this case is, as a matter of law, an erroneous exercise of the court's discretion. However, VistaMotif has not presented this court with any legal authority supporting that assertion. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court need not consider arguments unsupported by citation to authority). Accordingly, I reject this argument.

¶17 VistaMotif has not presented this court with any persuasive arguments that the circuit court's calculation of the offset amount was clearly erroneous. Accordingly, I affirm.

CONCLUSION

¶18 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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

