COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1469 **Cir. Ct. No. 2011CV3589**

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

PARAGON TANK TRUCK EQUIPMENT, LLC,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

CHRISTOPHER J. KUCHLER,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. The trial court determined that Christopher Kuchler was the prevailing party in his wage claim against Paragon Tank Truck Equipment, LLC. Paragon appeals the judgment determining that Kuchler

therefore was entitled to expenses and attorney's fees under WIS. STAT. § 109.03(6) (2011-12).[1] Kuchler cross-appeals the dismissal of his invasion-of-privacy claim and the reduction in the expenses and fees award. We affirm in all regards.

¶2 In October 2011, Paragon terminated Kuchler from his sales position. Kuchler refused to immediately relinquish his company-issued iPhone and laptop computer, but turned them over two days later. A computer forensics analyst determined that in the meantime Kuchler had downloaded over 800 company files. Paragon reported the matter to police. The magistrate found probable cause and police executed a search warrant at Kuchler's residence in an effort to locate the downloaded files or devices or hard drives to which they might have been transferred.

¶3 Paragon filed a lawsuit alleging conversion and breach of the company's confidentiality and non-compete agreement and moved for an emergency temporary injunction. Kuchler counterclaimed, alleging violations of WIS. STAT. § 134.01 and 42 U.S.C. § 1983 (2012); a claim for unpaid wages and unreimbursed expenses under WIS. STAT. § 109.03; that the search warrant was based on false statements and led to an unreasonable search and seizure; and an invasion-of-privacy claim under WIS. STAT. § 995.50.

¶4 Both parties moved for summary judgment. The trial court granted Kuchler's motion and dismissed Paragon's claims, granted partial summary

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

judgment to Paragon, and dismissed all of Kuchler's counterclaims but the WIS. STAT. § 109.03 claim. It also denied Kuchler's motion for reconsideration.

¶5 In December of 2012, Paragon tendered to Kuchler two checks totaling $1566.65. One was for commissions, the other for reimbursement of expenses. The trial court dismissed Kuchler's claim for additional commissions and a jury trial went forward on the wage claim. Paragon successfully moved for a directed verdict at the close of Kuchler's case.

¶6 Kuchler moved for a civil penalty under WIS. STAT. § 109.11(2) and for attorney's fees and expenses under WIS. STAT. § 109.03(6). The trial court found that Kuchler was the prevailing party on his wage claim because of the two checks, which the court found were "a substantial amount." The court therefore awarded him a fifty-percent enhancement of the $1566.65 wages he had received, for an additional $783.33. *See* § 109.11(2)(a).

¶7 On the fee request, the trial court found that Kuchler's attorneys' hours and rates were reasonable but discounted them by fifty percent. It also halved his expenses. This appeal and cross-appeal followed.

Appeal

¶8 For claims brought under WIS. STAT. ch. 109, the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses. WIS. STAT. § 109.03(6). "Expenses" include attorney's fees. ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 401, 588 N.W.2d 67 (Ct. App. 1998). For attorney's fees purposes, a prevailing party is one who succeeds on any significant issue in litigation that achieves some of the benefit the party sought in bringing suit. ***Sands v. Menard, Inc.***, 2013 WI App 47, ¶53, 347 Wis. 2d 446, 831 N.W.2d

805. Whether a party qualifies as a prevailing party is a question of law that we review de novo. *See* ***Credit Acceptance Corp. v. Woodard***, 2012 WI App 43, ¶6, 340 Wis. 2d 548, 812 N.W.2d 525.

¶9 Paragon repeatedly contends that Kuchler could not be the prevailing party because the court directed the verdict in its favor. As the trial court noted, however, this case in some ways was "two separate lawsuits." As for Kuchler's wage claim, "[h]e clearly prevailed on that[.] [H]e didn't get everything he wanted but he got a substantial amount." Further, besides paying Kuchler $1,566.65 before the penalty for the unpaid commissions and expenses,[2] Paragon's claims in "Kuchler's lawsuit" all were dismissed. We agree that Kuchler prevailed on his wage claim.

¶10 Both parties challenge the award of attorney's fees. Paragon argues that attorney's fees are unavailable to Kuchler based on its belief that he is not the prevailing party. It also asserts the award is excessive. In his cross-appeal, Kuchler calls the fifty-percent reduction "arbitrary" and insufficiently explained. Both contend the court failed to consider the factors set out in SCR 20:1.5(a). We already have put to rest Paragon's objection that Kuchler is not the prevailing party. We reject both parties' remaining contentions.

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[2] Curiously, Paragon does not mention those payments. Whether deliberate or by oversight, the failure to do so troubles this court.

We also note that Paragon's briefs do not comply with WIS. STAT. RULE 809.19(1)(d), (1)(e), (1)(i), (2)(a), and (8)(b)3., or with SCR 80.02(3). The text contains an off-putting mix of monospaced and proportional fonts in various styles and sizes; the statement of the case and the argument contain no record cites; the argument is devoid of proper citation to authority; its two sizable appendices are unpaginated, making the tables of contents virtually useless and thus violating at least the spirit of RULE 809.19(2)(a); and it consistently uses party designations instead of party names. Lastly, its briefs beg for a good proofreading.

¶11 To determine the reasonableness of fees under a fee-shifting statute, the trial court calculates a "lodestar" figure by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. ***Anderson v. MSI Preferred Ins. Co.***, 2005 WI 62, ¶39, 281 Wis. 2d 66, 697 N.W.2d 73. The court then may adjust the lodestar figure up or down by considering the factors recited in SCR 20:1.5(a).[3] ***Anderson***, 281 Wis. 2d 66, ¶39. Appellate review of the award is limited to whether the trial court properly exercised its discretion. ***Id.***, ¶19. The decision will be upheld if we can find facts of record that support it. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995).

¶12 Kuchler argues that to be made whole he should realize the entire lodestar figure, as the issues were intertwined and Paragon brought claims it could

[3] The SCR 20:1.5(a) factors 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;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

not prove and dragged its feet in discovery. Thus, he asserts, he had to defeat all claims in order to recover the unpaid commissions and expenses and it took longer than it should have to do so.

¶13 We see no erroneous exercise of discretion. The court explained that since Paragon did not prevail on its claims, it was "not entitled to taxes, costs, or fees, or offset, or otherwise." As for Kuchler, the court considered the hours and rates his attorney documented in light of accompanying affidavits, its own experience with lawyers' fees and rates, and its familiarity with the particulars of this case, such as the "substantial amount" of pretrial motion practice and the jury trial. The court also observed that, in its view, the fees and expenses issue had three layers of time and expenditures: (1) for Kuchler to recover his compensation; (2) for Kuchler to overcome Paragon's defenses and offsets; and (3) for Paragon's claims. The court further reasoned that defending against Paragon's claims was "largely separable analytically … from [Kuchler's] pursuit of his commission."

¶14 While the trial court did not expressly invoke SCR 20:1.5(a), we are satisfied that it covered those factors in its decision. As for "results obtained," the court noted that Kuchler prevailed in recovering his unpaid commissions, but not at the jury trial on additional wages, and Paragon prevailed on none of its claims. As Kuchler's attorney did not "parse out" which claims the hours were devoted to, the court made a "commonsense" allocation and halved Kuchler's requested fees and expenses. Regardless of whether we might have decided differently were we ruling on the matter in the first instance, where, as here, the record reveals an appropriate exercise of discretion, we will affirm the decision. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

Cross-Appeal

¶15 One issue remains on Kuchler's cross-appeal: the dismissal at summary judgment of his invasion-of-privacy claim. Kuchler complains that, although Paragon alleged only conversion and breach of a covenant not to compete, it told police that Kuchler had committed theft of "trade secrets" when it knew the materials did not constitute "trade secrets." Police subsequently searched Kuchler's house and vehicles, and seized his personal computer and cellphone, his hard drive, the computers of his wife and children, and other items.

¶16 When called upon to review a trial court's grant of summary judgment, we follow the same methodology as the trial court. ***Keller v. Patterson***, 2012 WI App 78, ¶8, 343 Wis. 2d 569, 819 N.W.2d 841. That methodology is set forth in WIS. STAT. § 802.08(2).

¶17 As applies here, "invasion of privacy" means an intrusion of a nature highly offensive to a reasonable person upon the privacy of another, in a place that a reasonable person would consider private. WIS. STAT. § 995.50(2)(a). Kuchler contended that Paragon invaded his privacy by obtaining the search warrant on false allegations and approving the search of his home and seizure of his property.

¶18 Paragon's president testified at deposition that when the computer forensics expert detected that Kuchler had copied company materials post-termination and Kuchler denied it, Paragon had no choice but to go to the police, and that he approved obtaining search warrant. Another Paragon official testified at deposition that he believed Paragon had "trade secrets," which he defined as unique designs generated by Paragon that enabled Paragon's business to grow. Kuchler, by contrast, averred in an affidavit that when he worked at Paragon he "did not understand any information to be a trade secret," and admitted at

deposition that he "d[id]n't have any idea" what a trade secret was and so did not know whether any of the files he transferred were trade secrets or not.

¶19 The court ruled that on these facts Paragon was justified in going to the authorities and could not be held liable for the follow-up action the police took. We must affirm that decision. When terminated, Kuchler refused to turn over his Paragon-issued computer and phone. Paragon discovered that he copied hundreds of company files before returning the property. Paragon owns information it does not want disseminated to its competitors and thus informed police what occurred. No one associated with Paragon either was present during the search or confiscated any of Kuchler's personal property, and he makes no claim that the police conducted the search improperly. Whether the information Kuchler downloaded technically constituted "trade secrets" is mincing words. He may have been upset when police searched his home, but the warrant was supported by probable cause. A reasonable person would not consider Paragon's conduct "highly offensive."

¶20 No costs to either party.

By the Court.—Judgment affirmed.

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