COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0995

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

JAY VERCAUTEREN,

PLAINTIFF-APPELLANT,

V.

RAINBOW INSULATORS, INC., A WISCONSIN CORPORATION,

DEFENDANT-RESPONDENT,

BRUCE BORDEN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

EICH, J. Jay Vercauteren appeals from that portion of a wage-claim judgment in his favor denying his request for attorney fees, penalties and

interest. He sought the fees under § 109.03(6), Stats., which states that the court, in wage-claim actions under ch. 109, "may allow the prevailing party … a reasonable sum for expenses," and he claims the trial court erroneously exercised its discretion (a) in denying his attorney-fee request, (b) in failing to award "enhanced wages" under § 109.11(2)(a),[1] and (c) in failing to award prejudgment interest on the amount he recovered. Under the standards governing our review of discretionary decisions, we are satisfied that the court's rulings were appropriate. We therefore affirm the judgment.

Vercauteren had worked for Rainbow Insulators, Inc., as a manager/salesman. He was paid a weekly salary for his managerial duties and earned commissions on his sales. He left Rainbow's employ in early January 1994 and, a few days later, after consulting with an attorney, wrote to Rainbow stating that he was owed $9,521 in commissions and an additional $2,856 from a profit-sharing agreement After some discussion, J. P. Waldo, Rainbow's Controller, wrote to Vercauteren's attorney indicating his understanding that Vercauteren was willing to settle "any and all claims against Rainbow … for the sum of $6,000," payable in twelve weekly installments of $500, and stating that Rainbow was "agreeable to this offer" and would have its attorney draft the necessary documents, as Vercauteren had requested. Vercauteren then retained a different attorney, who wrote to Waldo indicating that Vercauteren had now "estimate[d]" the commissions owed him "from orders … procured as of the date of his

[1] Section 109.11(2)(a) provides that, "[i]n a wage claim action … a circuit court may order the employer to pay…, in addition to the amount of wages due and unpaid and in addition to or in lieu of [specified] criminal penalties…, increased wages of not more than a 50% of the amount of wages due and unpaid."

termination" as "at least $8,000," and that he believed he was entitled to something more than $3,000 from the profit-sharing plan.

Vercauteren brought this action in April 1994 seeking payment of all commissions due and owing, profit-sharing payments, and "reimbursement of healthcare costs." The complaint did not include specific amounts. Rainbow's answer was a general denial and a "counterclaim" for health insurance premiums alleged to be owed by Vercauteren to Rainbow. A few months after the action was begun, Rainbow renewed its $6,000 settlement offer but it was never accepted. The case was tried to the court over a two-day period, resulting in a net recovery to Vercauteren of $5,253.75. This appeal followed the court's denial of Vercauteren's claims for discretionary fees, penalties and costs.

As indicated, while he worked for Rainbow, Vercauteren was paid both a weekly salary and commissions, which were calculated as a percentage of Rainbow's profits on business procured by him. When a job neared completion, Rainbow would invoice the customer and the commission would be calculated and credited to Vercauteren's commission account. When Vercauteren left Rainbow's employ, commissions were due him for completed work he had procured for the company. There were also orders he had "sold" that were still in progress and others that he had obtained while still on the job, but which had not been received by Rainbow until after his departure. Rainbow conceded that completed-work commissions were owing to Vercauteren, but disputed his calculations of the amounts due him. It also disputed his claim for some of the jobs that Vercauteren had sold, but which had not yet been completed.

Vercauteren also received an annual profit-sharing bonus calculated at 30 percent of Rainbow's annual profits, and he claimed Rainbow had refused to

pay his 1993 bonus. Finally, after Vercauteren left Rainbow, he was permitted to continue his existing health insurance at his own expense. As indicated, Rainbow, claiming that it had paid the premiums on Vercauteren's behalf for eleven months, sought reimbursement of these payments in its counterclaim.

With respect to Vercauteren's claim for commissions, the trial court ruled first that he was entitled to $3,084.67 for jobs completed prior to his departure—a figure a few hundred dollars less than Vercauteren had claimed. Vercauteren also sought $5,907.08 in commissions for jobs he had procured and were in progress when he left Rainbow's employ, and also for orders he had solicited, but were not received by Rainbow until after his departure. The trial court ruled that he was not entitled to commissions "on jobs that became orders after he left," and limited his recovery for jobs in progress at his departure to $1,185.18. As to Vercauteren's "bonus," the court adopted Rainbow's calculations showing the amount due as $2,856.00. Finally, the court held that Rainbow was entitled to recover of $1,872.00 on its insurance-premium counterclaim against Vercauteren, leaving him with a net recovery of $5,253.75.

Vercauteren, claiming that he had prevailed on his wage claim against Rainbow within the meaning of § 109.03(6), STATS., requested the court to award attorney fees of $27,287.37, an "increased wages" penalty of $3,562.88 under § 109.11(2)(a), *supra*, note 1, together with prejudgment interest of $1,234.80. The trial court declined to award the requested fees, penalties and interests, ordering that statutory costs be taxed based on Vercauteren's gross recovery of $7,125.75, and on Rainbow's recovery of $1,872.00 on its counterclaim.

We agree with Rainbow that § 109.03(6), STATS., which states that the trial court "may allow the prevailing party … a reasonable sum for expenses" gives the court discretion to order the requested attorney fees.[2] We will not reverse a trial court's discretionary determination if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Where the record shows that the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citations omitted). Indeed, we generally look for reasons to sustain discretionary decisions. ***Id***. at 591, 478 N.W.2d at 39. And while the reasons specified by the trial court for its decision are important to our review of a discretionary determination, we have consistently recognized that where the explanation is inadequate for any reason, "we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). In ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 573, 538 N.W.2d 849, 857 (Ct. App. 1995), an attorney-fee case, we said that even where the trial court did not specifically allude to any line of reasoning which we felt would justify its decision, we would still affirm based on our authority to "independently review the record to determine whether additional reasons exist to support the trial court's exercise of discretion."

[2] Rainbow does not dispute that Vercauteren was a prevailing party within the meaning of the statute.

The trial court began its discussion of Vercauteren's attorney-fee request with the following comments:

> The … issues in this case … demonstrate the dichotomy posed by two conflicting public policy principles: the laudable goal inherent in the Ch. 109 enforcement mechanism for employees who have been denied wages by their employers; and the public policy principle that favors and encourages settlement of claims short of trial….

The court went on to observe that Rainbow had been willing to settle Vercauteren's claims from the beginning for $6,000, and had renewed that offer after the suit had begun and before any significant expenses had been incurred by either party, and that, after a two-day trial, Vercauteren's total recovery was only $5,253.75. The court concluded:

> In my opinion, to award the amounts claimed by Vercauteren would be unconscionable. It would take the Department of Workforce development … out of the business of representing employees in wage claim cases as contemplated by Ch. 109, and would be contrary to the statutory directive to the Department to attempt to compromise and settle such claims.[3] It would remove any incentive for an employee to settle a wage claim with his or her employer. It would undercut the public policy principle … that parties to litigation should seek to resolve their disputes short of trial….

Citing ***State ex rel. Hodge v. Turtle Lake,*** 180 Wis.2d 62, 508 N.W.2d 603 (1993), a case arising under Wisconsin's Open Meetings Law, Vercauteren argues first that the trial court erred as a matter of law because it was required to award attorney fees "unless it determined that special circumstances existed to render such an award unjust." The statute under consideration in

[3] At this point, the trial court cited to § 109.09(1), STATS., which provides that "[t]he department [of Workforce Development] shall investigate and attempt equitably to adjust controversies between employers and employe[e]s as to alleged wage claims."

Hodge, § 19.97(4), STATS., like § 109.03(6), gives the trial court discretion to award fees to the prevailing party where a violation of the open meetings law occurs. But there the similarity ends, for, *un*like the situation here, the plaintiff in an open-meetings-law case "serves as a private attorney general" in order to vindicate not only his or her private rights, but also "the rights of the public to open government." ***Hodge***, 180 Wis.2d at 78, 508 N.W.2d at 609. In wage-claim actions under ch. 109, however, the individual employee is given only a private cause of action against his or her employer for the recovery of his or her own wages; and Rainbow has not referred us to any legislation, or any cases, adopting the "private attorney general" concept in such actions. As a result, the public policy concerns that led the supreme court in ***Hodge*** to hold that the "special circumstances" test should apply to open-meetings-law violations—as it has done, for similar reasons, in cases arising under laws such as the federal Civil Rights Act and the Wisconsin Fair Employment Act—are wholly absent here.[4] We conclude, therefore, that we review the trial court's decision in this case under traditional erroneous-exercise-of discretion standards.

The trial court reasoned that (a) because the settlement "apparently arrived at" by the parties prior to the commencement of any litigation was abandoned by Vercauteren when he changed attorneys and commenced this lawsuit, and (b) because even after the suit had been filed, Rainbow renewed its $6,000 offer—at a time "before any significant pretrial expenses had been incurred," and (c) because Vercauteren, having recovered less than the offered

[4] Whether such a policy should be judicially adopted in wage-claim cases is, of course, a matter for the supreme court, not this court. *See* ***State v. Schumacher***, 144 Wis.2d 388, 404-05, 424 N.W.2d 672, 678 (1988) (under the constitution, the supreme court, not the court of appeals, has the "law-declaring function").

amount, was seeking attorney fees in excess of $27,000, to allow his claim would not only be "unconscionable," but would run contrary to the accepted policy of encouraging settlement of claims short of trial. We think those are proper considerations, well-grounded in the record, and we cannot say that the trial court erroneously excercised its discretion in denying Vercauteren's claims for attorney fees, "excess wages" and pre-judgment interest on that basis.[5]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[5] Vercauteren also argues that the trial court erred "as a matter of law" when it denied him "statutory interest" under § 814.04(4), STATS. The statute states that interest at 12% per year "from the time of … decision … until judgment is entered shall be computed by the clerk and added to the costs." We do not see any such denial, however. In its decision, the court—after acknowledging that "interest under § 814.04, Stats.," was not discretionary, but mandatory—gave Rainbow ten days to file a bill of costs for its counterclaim, and stated that, when this was done, "[t]he clerk shall determine costs unless court review is sought." Since the statute directs the clerk to add the post-decision interest to the costs, we assume that both the statutory mandate and the court's order either have been complied with, or will be on remittitur.