

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 5, 2002**

Cornelia G. Clark  
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. 01-2479  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-SC-7658**

**IN COURT OF APPEALS  
DISTRICT IV**

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**JOHN E. TAYLOR,**

**PLAINTIFF-APPELLANT,**

**V.**

**CRESS FUNERAL SERVICE, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County:  
JOHN C. ALBERT, Judge. *Reversed and cause remanded with directions.*

¶1 DEININGER, J.<sup>1</sup> John Taylor appeals a small claims judgment entered in his favor against Cress Funeral Service, Inc. The judgment awarded Taylor \$1,184 for unpaid wages, together with costs and statutory attorney fees.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a).

Taylor claims the trial court erred in concluding that Cress did not violate Wisconsin's wage payment statute, WIS. STAT. § 109.03 (1999-2000).<sup>2</sup> Taylor further claims the trial court erred in determining in the alternative that, even if Cress had violated the statute, a penalty should not be imposed on Cress under WIS. STAT. § 109.11(2)(b), and Cress should be ordered to pay only a portion of Taylor's actual attorney fees.

¶2 We conclude the trial court erred in ruling that Cress did not violate WIS. STAT. § 109.03, but it did not erroneously exercise its discretion in denying a penalty payment and in awarding attorney fees in the amount of \$935. Accordingly, we reverse the appealed judgment and remand with directions to enter an amended judgment which includes the attorney's fees the trial court deemed reasonable.

## **BACKGROUND**

¶3 Taylor worked as a funeral director for Cress. Cress's Staff Handbook provides in part: "We give all new full-time staff two weeks (ten business days) of vacation time per calendar year. If employment begins mid-year, staff members will be granted vacation days on a prorata basis for the first year." Cress terminated Taylor in August of his second year of employment for alleged misconduct. Taylor retained counsel to challenge various alleged inequities concerning his termination. Taylor's counsel wrote Cress alleging that it had breached its employment agreement, committed age discrimination, and failed to include the full amount of Taylor's vacation pay in his final paycheck.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Cress's counsel responded by denying the breach of employment agreement and age discrimination claims, but conceding that Cress did not pay the full amount of vacation pay in Taylor's final paycheck. Cress's counsel offered to pay \$317.14 in payment of all vacation pay due.<sup>3</sup> Taylor's counsel rejected this amount as insufficient and claimed \$1,184 as the amount owed for his vacation pay.<sup>4</sup> Taylor's counsel also reasserted allegations of age discrimination and breach of the employment agreement. Cress's counsel subsequently forwarded a check to Taylor's counsel for \$426.23 to cover the claimed vacation pay entitlement.<sup>5</sup> Taylor's counsel rejected this offer and returned the check.

¶5 Taylor then filed a wage complaint with the Department of Workforce Development for \$1,184 in unpaid vacation pay. The department attempted to facilitate settlement. Cress's counsel wrote the department with an offer to pay Taylor \$1,184 in exchange for a release of all claims against Cress

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<sup>3</sup> Cress arrived at this amount by calculating the pro-rata share of Taylor's vacation pay earned through his August termination date (10 vacation days per year x 2/3 year worked = 7 days), subtracting 2 vacation days that Taylor used earlier in the year, and subtracting another 2 days for which Cress claims it mistakenly overpaid Taylor in his final paycheck, for a total of 3 unpaid vacation days. Cress calculated the value of each vacation day by dividing Taylor's biweekly payroll amount (\$1,480) by the number of calendar days in the payroll period (14), for a per diem of approximately \$105.71. Multiplying the 3 unpaid vacation days by the per diem results in the amount offered, \$317.14.

<sup>4</sup> Taylor's counsel asserted that Taylor was entitled to a full year's vacation pay (10 vacation days), less Taylor's used vacation days (2 days), for a total of 8 days. Taylor's counsel calculated the value of each vacation day by dividing the total biweekly payroll amount (\$1,480) by the number of business days in the payroll period (10), for a per diem of \$148. Multiplying the 8 unpaid vacation days by Taylor's asserted per diem equals \$1,184.

<sup>5</sup> Cress's counsel arrived at this revised amount by disregarding the 2 days for which Cress originally claimed it had overpaid Taylor in his final paycheck. Taking the pro-rata share of Taylor's vacation pay (7 days), subtracting Taylor's used vacation days (2 days), and multiplying the difference by Cress's asserted per diem (\$105.71; *see* footnote 3) equals approximately \$529, which after payroll deductions resulted in the \$426.23 tender amount.

(i.e., the wage claim, the alleged breach of employment agreement and an age discrimination claim). Taylor's counsel rejected this offer and demanded \$8,000 for a release of all claims (\$5,000 in damages and \$3,000 for attorney fees). Cress's counsel rejected this offer.

¶6 When settlement efforts stalled, the department requested both parties to submit written positions so that the department could make a determination as to the amount of vacation pay owed. After reviewing the parties' submissions, the department issued a written determination which included the following:

Mr. Taylor has indicated he is not aware of other employees who have received their full year's vacation pay upon termination from the company. Based on the information presented by both parties it is my determination that Cress Funeral Services is indebted to Mr. Taylor for \$317.14 for the three unpaid days of vacation pay he has.

¶7 Cress's counsel then wrote the department requesting that the payment of \$317.14 operate as the consideration for a mutual release of all claims. Taylor, writing on his own behalf, responded that he would sign a mutual release for a payment of \$1,200 in order to "put this matter behind us." Cress's counsel agreed and sent the department a signed mutual release and settlement agreement to be forwarded to Taylor for his signature. After consulting with his lawyer, however, Taylor elected not to sign the agreement and instead to pursue the matter in court.

¶8 Taylor's counsel subsequently filed a small claims complaint on Taylor's behalf, seeking \$1,184 in vacation pay, an additional \$1,184 statutory penalty, and actual attorney fees. Cress disputed the claim and the matter was heard by a court commissioner, *see* WIS. STAT. § 799.207(1), who awarded Taylor

\$255.49 plus statutory fees and costs, for a total of \$343.49. Taylor requested a trial before the circuit court pursuant to § 799.207(3). Following the testimony, the court reserved a ruling on whether Cress had violated WIS. STAT. § 109.03, but found that Taylor was “entitled to \$1,184” from Cress.<sup>6</sup>

¶9 The court requested the parties to brief whether Cress should be liable for the statutory penalty and actual attorney fees under WIS. STAT. ch. 109. Taylor argued for a penalty of \$1,184 and \$8,400 in actual attorney fees. Cress responded that no penalty or attorney fees were warranted and that, in any event, the requested fees were excessive. After reviewing the parties’ submissions, the court held that a penalty and actual attorney fees were unwarranted because “there is no violation by the defendant of § 109.03.” The court also ruled in the alternative that if its conclusion regarding a violation of WIS. STAT. § 109.03 were reversed, a penalty would still be inappropriate because Cress “simply took the position that it was correct in its determination,” and Cress’s determination was presumptively reasonable given that the Department of Workforce Development and the small claims commissioner had agreed with it. The court also determined that any recovery by Taylor of attorney fees should be limited to \$935.<sup>7</sup> The court concluded that any larger fee award would be disproportionate to the result

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<sup>6</sup> The court concluded that Taylor was entitled to a full “ten days vacation as of the date he was terminated,” rather than a pro-rated amount, because “that’s the only way that the [employment] agreement can be read.” The court further deemed Cress’s calculation of the per diem for each vacation day (see footnote 3) as fundamentally incorrect. Thus, the court agreed with Taylor that he was entitled to 10 days of vacation, less the 2 days he had used, at a per diem of \$148 (see footnote 4), for a total of \$1,184. Cress does not challenge the court’s ruling on damages in this appeal.

<sup>7</sup> This figure represents a total of 5.5 hours at the hourly rate of Taylor’s counsel (\$170), which the trial court deemed appropriate given the monetary value of the case and the issues involved.

achieved and would impermissibly allow Taylor to “hitch” the attorney fees relating to his claims of a breach of employment agreement and age discrimination “to the small claims horse.”

¶10 The court entered a judgment for Taylor for \$1,347, which includes statutory costs and fees. Taylor appeals, arguing that Cress violated WIS. STAT. § 109.03 and should pay an additional \$1,184 penalty and \$8,400 in actual attorney fees. Cress does *not* cross-appeal the amount of damages the court awarded to Taylor, arguing only that the trial court correctly determined that a penalty and attorney fees were unwarranted and that, if any attorney fees must be awarded, the recovery should be limited to \$935, which the court deemed reasonable.

### ANALYSIS

¶11 We first address whether Cress violated WIS. STAT. § 109.03, a question of law which we will review independently of the trial court’s decision. *See Kenosha Fire Fighters v. City of Kenosha*, 168 Wis.2d 658, 663, 484 N.W.2d 152 (Ct. App. 1992) (application of statute to a particular set of facts presents a question of law). WISCONSIN STAT. § 109.03(2) requires an employer to pay a discharged employee all wages due (including vacation pay) by the date of the employee’s next regularly scheduled paycheck or within thirty-one days of termination, whichever is earlier. *See* § 109.03(1), (2); *see also* WIS. STAT. § 109.01(3) (defining “wages” as including vacation pay). This requirement is consistent with the overall purpose of the Wage Payments, Claims and Collections Act (WIS. STAT. ch. 109) to protect “the right of employees to receive their wages when due.” *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 400, 588 N.W.2d 67 (Ct. App. 1998).

¶12 The trial court held, with little elaboration, that Cress did not violate WIS. STAT. § 109.03(2). We disagree. Because the date of Taylor’s next scheduled paycheck following his termination fell within thirty-one days of his termination, § 109.03(2) required Cress to pay all of his wages (including vacation pay) in his final paycheck. It is undisputed that Cress did not do so. While the parties vigorously contested the amount of the discrepancy in the proceedings below, Cress’s failure to pay all of Taylor’s wages by the date of his next paycheck was a per se violation of § 109.03(2). See § 109.03(2) (requiring employers to timely pay wages “in full”). Thus, the trial court erred in concluding that Cress did not violate § 109.03(2).<sup>8</sup>

¶13 We next consider whether Cress is liable for the penalty and attorney fees Taylor seeks. WISCONSIN STAT. § 109.11(2)(b) provides that the court “may” order an employer to pay a successful wage claimant “100% of the amount of those wages due and unpaid” as a penalty, and WIS. STAT. § 109.03(6) provides that the court may as well allow a prevailing party in an action under WIS. STAT. § 109.03 to recover reasonable actual attorney fees.<sup>9</sup> We generally construe the word “may” in a statute as allowing for the exercise of discretion. *Rotfeld v. DNR*, 147 Wis. 2d 720, 726, 434 N.W.2d 617 (Ct. App. 1988). To sustain a trial court’s discretionary determination, we must confirm that the court employed “a

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<sup>8</sup> Cress essentially concedes that the trial court erred on this point. Cress asserts in its brief that “[w]hile the Court did state that it found no violation of WIS. STAT. § 109.03, what it clearly meant was that it found no violation of the sort that would justify an award of a penalty and attorney fees under Chapter 109.”

<sup>9</sup> WISCONSIN STAT. § 109.03(6) authorizes payment to a successful wage claimant of “a reasonable sum for expenses,” which we have construed as including reasonable actual attorney fees. See *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 401-02, 588 N.W.2d 67 (Ct. App. 1998).

logical rationale based on the appropriate legal principles and facts of record.” *Meyer v. Michigan Mut. Ins. Co.*, 2000 WI App 53, ¶11, 233 Wis. 2d 493, 609 N.W.2d 167 (citations omitted).

¶14 We conclude that the trial court did not erroneously exercise its discretion in holding that Cress’s conduct did not justify a penalty under WIS. STAT. § 109.11(2). We held in *Employees Local 1901 v. Brown County*, 140 Wis. 2d 850, 412 N.W.2d 167 (Ct. App. 1987), *aff’d*, 146 Wis. 2d 728, 432 N.W.2d 571 (1988), that an employer’s compliance with its internal procedures constituted good cause for delay in paying a retroactive wage increase awarded to employees in arbitration, and therefore was “not the type of conduct meant to be penalized under ch. 109.” *Id.* at 854. We likewise conclude here that the trial court did not err in determining that Cress’s conduct in this case was not of the type that merited the assessment of a penalty under § 109.11(2)(b).

¶15 The 100% wage penalty at issue is recoverable only after the Department of Workforce Development has investigated and unsuccessfully attempted to settle the wage claim. *See* WIS. STAT. § 109.11(2)(b). Thus, the apparent purpose of this provision is to penalize employers who thwart the department’s settlement efforts and/or refuse to promptly pay amounts the department has determined are due the employee. Here, the record reflects that the failure of the department’s settlement efforts cannot be attributed to any obstinacy or bad faith on the part of Cress.

¶16 For example, in settlement talks facilitated by the department, Cress offered to pay Taylor the full amount he was claiming as unpaid vacation pay (\$1,184) in return for a release of all claims, but Taylor’s counsel countered with a demand for \$8,000 (\$5,000 for Taylor and \$3,000 in attorney fees). Subsequently,



the department obtained an agreement between Taylor and Cress to resolve their dispute for \$1,200, but Taylor's counsel apparently advised him to withdraw from this agreement in order to file suit. Although Taylor ostensibly rejected these settlement proposals in order to preserve his potential age discrimination or breach of employment agreement claims, the record contains no indication that Taylor ever formally pursued these claims, electing instead to file the instant action claiming only the entitlement to vacation pay.

¶17 Thus, we conclude that the trial court did not err in determining that Taylor and his attorney were at least as culpable, if not more so, for the failure to resolve Taylor's wage claim prior to suit, and accordingly, in declining to penalize Cress under WIS. STAT. § 109.11(2)(b).<sup>10</sup>

¶18 We turn next to Taylor's demand that Cress be ordered to pay the full amount he requested for attorney fees. A court may award reasonable attorney fees to a prevailing wage claimant so as to make the claimant whole. *See* WIS. STAT. § 109.03(6); *see also Jacobson*, 222 Wis. 2d at 401-02. Here, the trial court determined that if Cress were deemed to have violated WIS. STAT. § 109.03, Taylor should receive only \$935 in attorney fees, rather than the \$8,400 he requested. The trial court's determination was based on the amount in controversy and the result achieved, and on its finding that the fees were largely driven by the efforts of Taylor and his counsel to recover on the unrelated breach of contract and age discrimination claims.

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<sup>10</sup> The trial court summarized its impression of the facts before it as follows: "Taylor's counsel persisted in his attempts to expand the issues (and the award) during the DWD proceedings. The efforts were unsuccessful and now Taylor and his counsel seek to use the vacation pay claim as a springboard to statutory penalties and all actual attorney's fees."

¶19 As with the trial court's determination regarding the statutory penalty, we are to sustain its determination of reasonable attorney fees unless the court erroneously exercised its discretion. *Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.*, 2001 WI App 129, ¶46, 246 Wis. 2d 579, 629 N.W.2d 329, review denied, 247 Wis. 2d 1034, 635 N.W.2d 782 (Wis. Sep. 19, 2001) (No. 00-1490). This deferential standard of review is particularly appropriate in the attorney fee context, as "the trial court is in an advantageous position to observe the amount and quality of work performed and has the expertise to evaluate the reasonableness of the fees." *Id.* As stated previously, we must sustain a trial court's discretionary determination if the court used a logical rationale based on appropriate law and the facts of record. *See Meyer*, 2000 WI App 53 at ¶11.

¶20 Cress first argues that we may affirm the trial court's refusal to award Taylor any attorney fees by viewing the court's decision as resting on a determination that any violation of WIS. STAT. § 109.03 by Cress was not sufficiently flagrant to merit any recovery of attorney fees. In the alternative, Cress asks us to uphold the court's determination that \$935 constitutes a reasonable attorney fee award for the successful prosecution of the wage claim. We cannot accept Cress's first argument inasmuch as the court's declination to order any attorney fee award was plainly based on its conclusion that "there is no violation by the defendant of § 109.03." The court also made clear that if it were determined on appeal that a violation of the statute had indeed occurred, Taylor should recover \$935 as a reasonable attorney fee award. ("That is the amount that this Court feels should be awarded to make the plaintiff whole under the wage claim statute and per *Jacobson* ... if an Appellate Court reverses this Court on the issue of a violation of the statute.")

¶21 Accordingly, given our conclusion that Cress violated WIS. STAT. § 109.03(2) (which Cress does not dispute, see footnote 8), we must determine if the trial court erred in allowing Taylor only a partial attorney fee recovery. We conclude that the trial court did not erroneously exercise its discretion in limiting Taylor’s fees to \$935.

¶22 We may look to the factors set forth in SCR 20:1.5(a) (2000)<sup>11</sup> in reviewing a trial court’s determination of reasonable attorney fees to be awarded a prevailing party. See *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 749, 349 N.W.2d 661 (1984). We first note, as did the trial court, the discrepancy between “the time and labor *required*,” SCR 20:1.5(a)(1) (emphasis added), to resolve the wage claim dispute and the amount of fees sought by Taylor. Taylor’s counsel billed some \$8,400 for prosecuting a wage claim worth a small fraction of that amount. We agree with the trial court’s assessment that the bulk of the claimed fees “could have been avoided by a reasonable and prudent effort”<sup>12</sup> to resolve the vacation pay dispute, especially given Cress’s demonstrated willingness to settle the wage claim and the comparatively straightforward issues involved. See SCR 20:1.5(a)(1) (the “novelty and difficulty of the questions involved” is a proper consideration in determining a reasonable attorney fee).

¶23 Second, we note, as did the trial court, the discrepancy between the result obtained by the efforts of Taylor’s counsel and the substantial fees Taylor is

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<sup>11</sup> All references to the Supreme Court Rules are to the 2000 version unless otherwise noted.

<sup>12</sup> *Aspen Servs., Inc. v. IT Corp.*, 220 Wis. 2d 491, 499, 583 N.W.2d 849 (Ct. App. 1998) (“This premise has been interpreted to mean that ‘[a] plaintiff may not unnecessarily run up its legal bill in the expectation that the breaching party will ultimately pick up the entire tab.’” (citation omitted)).

seeking to recover. *See* SCR 20:1.5(a)(4) (“the amount involved and the results obtained” is a factor in assessing reasonable attorney fees). From the time that Taylor’s counsel became involved in this matter, Cress was willing to pay Taylor at least \$317.14 in unpaid vacation pay. The amount Taylor recovered for unpaid vacation pay is \$1,184. We conclude the trial court did not err in determining that the \$866.86 difference between these two figures cannot justify an attorney fee award of nearly ten times that amount.

¶24 Accordingly, we conclude that the trial court did not erroneously exercise its discretion in limiting Taylor’s attorney’s fees to \$935, which the court arrived at by allowing a reasonable amount of time (5.5 hours) for “pretrial preparation” and for “trial and briefing,” multiplied by a reasonable hourly rate of \$170.

### CONCLUSION

¶25 For the reasons discussed above, we reverse the appealed judgment and direct that, on remand, a revised judgment be entered awarding Taylor \$935 in attorney fees under WIS. STAT. § 109.03(6), in addition to the \$1,184 previously awarded as damages, plus allowable costs.

¶26 We direct that neither party be allowed costs in this appeal. *See* WIS. STAT. RULE 809.25(1)(a).<sup>13</sup>

*By the Court.*—Judgment reversed and cause remanded with directions.

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

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<sup>13</sup> Because we are reversing the appealed judgment, costs are allowed against the respondent (Cress) under WIS. STAT. RULE 809.25(1)(a) “unless otherwise ordered by the court.” We direct that no costs be allowed in this appeal because, notwithstanding our disposition, Taylor has not substantially prevailed in his claims. The relief he seeks from this court is the inclusion in the judgment of a penalty in the amount of \$1,184 and attorney fees of \$8,400, both of which we have rejected. We are essentially affirming the trial court’s alternative ruling that Taylor was entitled to no penalty and only limited fees, positions argued by Cress in this appeal. We thus deem the result before us mixed, entitling neither party to an award of costs in the appeal. For similar reasons, we decline to order an additional award to Taylor for attorney fees in the appeal.

