

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 26, 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. 02-1115
STATE OF WISCONSIN**

Cir. Ct. No. 02-SC-201

**IN COURT OF APPEALS
DISTRICT IV**

CHRIS MARCEAU,

PLAINTIFF-RESPONDENT,

V.

WILD LIFE UNLIMITED FOUNDATION, INC.

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Wild Life Unlimited Foundation, Inc. appeals a small claims judgment in the amount of \$496.94, plus costs, entered in favor of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Chris Marceau for wages owed him by the Foundation. The Foundation claims the trial court erred in awarding Marceau his wage claim because another entity was in fact Marceau's employer. He also claims that the Foundation was denied the right to present evidence in its defense, and that the proper defendant was wrongfully denied the opportunity to present a counter-claim. We are not persuaded that the trial court committed any of the errors the Foundation cites. Accordingly, we affirm the judgment entered against the Foundation.

BACKGROUND

¶2 Under WIS. STAT. § 109.09(1), the Department of Workforce Development may investigate wage claims filed by employees. The department is authorized to sue the employer on behalf of an employee "to collect any wage claim or wage deficiency," or it may refer the collection action to a local district attorney "for prosecution and collection." *Id.* In this case, the department investigated a wage claim filed by Marceau against his former employer, alleged to be the Foundation. The department, after its investigation, referred the matter to the Wood County district attorney for prosecution and collection.

¶3 The district attorney commenced this small claim action on behalf of Marceau against his former employer, named as "Wildlife Unlimited Foundation" in the small claims summons and complaint. The Foundation filed an answer denying that it owed Marceau any money. Only two witnesses were called at the small claims trial, Marceau and William Porter, who was the president of the Foundation, and apparently of a related entity, Wild Life Unlimited Distributors, Inc. We have reviewed the transcript of the trial court proceedings, and the picture

which emerges of the employment relationship between Marceau and one or more of Porter's entities is murky at best.²

¶4 Briefly, it appears that Mr. Porter was engaged in producing and presenting a local television program, entitled "Wild Life Unlimited." He hired Marceau to sell advertising for the production. The parties entered into at least two written employment contracts, both of which denominated Wild Life Unlimited Distributors, Inc. as the employer, but one of which was prepared on the letterhead of Wild Life Unlimited Foundation, Inc. The agreements called for a minimum salary of \$400 per week, for five eight-hour-days each week, but there were also provisions for certain incentives depending on revenues Marceau generated.

¶5 Marceau's payroll checks throughout his six months of employment were written on an account in the name of Wild Life Unlimited Distributors, Inc. Various advances that he received against his earnings, however, were paid by checks bearing the name of "Wildlife Unlimited Foundation, Inc." Both entities had the same address and telephone number, and William Porter and his wife were apparently principals of both entities. The "letters of agreement" that Marceau solicited from advertisers were likewise on the letterhead of Wild Life Unlimited Foundation, Inc., and they identified Marceau as the "SALES REP FOR W.L.U.F."

² A Wood County assistant district attorney represented Marceau at the trial, but Porter appeared pro se. The trial court found it necessary on several occasions to admonish Marceau and Porter to "stop talking over each other." At another point, the court observed that "this is turning into argument between the two of you."

¶6 Porter moved for dismissal of the action against the Foundation because he claimed that it was the “Distributors, Inc.” entity that had employed Marceau. In response, the district attorney, on Marceau’s behalf, moved to amend the complaint in the action to name the “Distributors, Inc.,” entity as defendant. The trial court never addressed the motion to amend, however, inasmuch as it took the dismissal motion under advisement until it heard testimony and ultimately ruled that the Foundation was a proper defendant.

¶7 Disputes in the testimony at trial dealt largely with whether the department’s wage computations, which were introduced as an exhibit, properly reflected certain deductions or offsets for items (e.g., a set of tires, a vehicle transmission) which Marceau apparently received as in-kind compensation. Porter also complained that the department’s computations did not adequately take into account payroll deductions for taxes and a child support assignment. Nonetheless, both Marceau and Porter agreed that the department’s three pages of calculations (which computed the amount of pay advanced and recovered as payroll deductions, as well as the gross wages earned by Marceau) were largely accurate.³

¶8 The exhibit from the department calculated an amount owing to Marceau of \$331.94, and ultimately that is what the court awarded in damages. The court also awarded a fifty percent penalty of \$165, for a total judgment of \$496.94, plus allowable costs. *See* WIS. STAT. § 109.11(2). The Foundation appeals.

³ Porter testified that he thought “the biggest weight in this whole case is Exhibit 6,” the department’s computations.

ANALYSIS

¶9 The Foundation renews on appeal its claim that another entity, Wild Life Unlimited Distributors, Inc., and not it, should be liable for any unpaid wages owed to Marceau. The Foundation also claims that because it was wrongfully named as the defendant, it was somehow denied the right to present evidence or a defense, and further, that the proper defendant, “Distributors, Inc.,” was deprived of its opportunity to file a counter-claim. The Foundation’s brief, submitted by Mr. Porter pro se, cites no legal authority, and we therefore interpret the claims of error as challenging the trial court’s factual findings.

¶10 A trial court’s factual findings will not be disturbed on appeal unless they are “clearly erroneous.” *See* WIS. STAT. § 805.17(2). “In addition, when the trial judge acts as the finder of fact, and ... there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (citation omitted).

¶11 The court explained its ruling on the identity of the proper defendant as follows:

[T]here is ample reason here to find that Wildlife Unlimited Foundation Inc. can be one of the defendants and may be designated as defendant in this case as has been done by the State ... on behalf of Chris Marceau.

And I say that because of all of the documentation in support of that ... that it begins with the fact of a letterhead or a letterhead stamp that says the Wildlife Unlimited Foundation, Inc.

... And then the checks upon which the advances are actually paid are variously issued by the Wildlife Unlimited Foundation, Inc. Maybe even mostly by Wildlife Unlimited Foundation, Inc. ... [s]o, the matter of choice of defendants is left to the plaintiff and left appropriately so.

And it's not an inappropriate designation when it looks at the documents or the employee looks at the documents and sees that they indicate that he may be employed ... by Wildlife Unlimited Foundation.

... And so I won't dismiss this case ... because there has been a substantial factual basis upon which to make the findings that Wildlife Unlimited Foundation is indeed a proper defendant in this case.

¶12 We conclude that the trial court's factual finding that Marceau was employed, at least in part, by the Foundation, is not clearly erroneous. Moreover, we agree with the trial court that if the Foundation believed some other entity was liable for Marceau's wages, the Foundation could have impleaded that entity as a third party defendant. The Foundation may also, of course, pursue a separate action for reimbursement.

¶13 We also conclude that the trial court provided the Foundation ample opportunity to present its evidence and its defense to Marceau's claim. We acknowledge that Wild Life Unlimited Distributors, Inc., is not a party to this litigation, but if it believes it has a claim against Marceau, nothing in the present judgment necessarily precludes it from pursuing a claim against Marceau in separate litigation.⁴

⁴ That is, Wild Life Unlimited Distributors, Inc., may not be subject to the defense of claim preclusion because it was not a party to this action. *See Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550-51, 525 N.W.2d 723 (1995). The doctrine of issue preclusion, however, might preclude the re-litigation of an issue that was actually litigated by the parties in this action. *See id.*

¶14 Finally, notwithstanding the often confusing testimony provided by Marceau and Porter, the exhibits introduced at trial provided a sufficient basis for the court to make the award that it did. As we have noted, both Porter, on behalf of the Foundation, and Marceau acknowledged that the exhibit detailing the department's computations was for the most part correct. The remaining exhibits tend to bear this out. It appears that the department took into account all pay advances Marceau received, and it further appears that certain in-kind payments he received were deducted from his gross pay as he testified. The department compared the gross wages to which it determined Marceau was entitled, to the amount of compensation, in whatever form, that he received during his employment, calculating a difference in the amount of \$331.94.

¶15 The court noted Porter's acknowledgment that portions of the department's accounting were accurate, and we cannot fault the court for likewise crediting the balance of the exhibit. In short, our review of the record does not convince us that the trial court's finding that Marceau was owed the difference of \$331.94 is clearly erroneous. The Foundation has not argued that the court erroneously exercised its discretion in imposing a 50% penalty under WIS. STAT. § 109.11, and thus we do not address the issue.

CONCLUSION

¶16 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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

