

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2011

A. John Voelker
Acting 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. 2010AP2030

Cir. Ct. No. 2009SC39991

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF ATTORNEYS FEES IN:
TAHNISHA LAMB,**

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

THE NEW HORIZONS CENTER, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded.*

¶1 FINE, J. The New Horizon Center, Inc., appeals the judgment entered in favor of Tahnisha Lamb by the circuit court following its *de novo* review of a court commissioner's determination. See WIS. STAT. § 799.207. Lamb cross-appeals, contending that the circuit court should have awarded her double costs under WIS. STAT. § 807.01 (offer of settlement). We reverse the

circuit court's grant of summary judgment and remand for further proceedings. This moots the other issues argued by New Horizon as well as Lamb's cross-appeal. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

I.

¶2 Lamb worked for New Horizon from August of 2007 until October of 2008. After leaving her employment with New Horizon, she sought monies she contended that New Horizon owed her as a result of her overtime work. A letter from her lawyer to New Horizon in May of 2009 asserted that Lamb had worked "281.5 unpaid hours of overtime," which meant, according to the letter, that New Horizon owed Lamb "\$8,867.25." The letter also requested that New Horizon pay Lamb's "attorney's fees, which are currently expected not to exceed \$4,500.00 should the matter be immediately resolved." (Footnote omitted.) One month later, the lawyer for New Horizon wrote back and set out what the letter represented was a table showing Lamb's overtime-work hours, which the letter calculated as, "79.5, not 281.5," resulting in Lamb's "entitle[ment] to an additional \$417.38."¹ The matter was not settled, and Lamb sued New Horizon in small-claims court.

¶3 Lamb's nine-page complaint alleged three claims: an alleged violation of the federal Fair Labor Standards Act, 29 U.S.C. § 201; and two

¹ A parenthetical showing the mathematics mistakenly gives "\$413.38" as the total.

alleged violations of what the complaint characterized as, “the Wisconsin Payment Laws.” Ultimately, the matter was submitted to the circuit court on cross-motions for summary judgment on the third claim, which asserted that New Horizon had not paid Lamb what they had agreed to pay her, and that this violated WIS. STAT. ch. 109. The circuit court denied New Horizon’s motion for summary judgment, and granted summary judgment to Lamb for overtime wages of \$417.38 under her employment contract, plus a one-half penalty of \$208.76. *See* WIS. STAT. § 109.11(2)(a). The circuit court also awarded Lamb attorney’s fees of \$15,896.

II.

¶4 In essence, WIS. STAT. ch. 109, permits employees who have not received timely payment of wages that are due under their employment contracts to recover those unpaid wages. WIS. STAT. §§ 109.01(3) & (4); 109.03(1), (5) & (6). Under WIS. STAT. § 109.03(6), “the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses.” “[E]xpenses” includes reasonable attorney’s fees. *See Jacobson v. American Tool Companies, Inc.*, 222 Wis. 2d 384, 398–402, 588 N.W.2d 67, 73–75 (Ct. App. 1998).

¶5 The pertinent part of Lamb’s employment agreement with New Horizon provides:

All hourly employees who work in excess of 40-hour workweek performed at the approval of the department head shall be recorded as overtime. The overtime rate shall be the employee’s hourly rate plus ½. Under federal wage guidelines, some categories of employment are not eligible for overtime pay. Department head will clarify those eligible for overtime. All salaried employees are required to work a minimum of 44 hours a week. All hours over 44 are considered compensatory time.

¶6 In support of its motion for summary judgment, New Horizon submitted an affidavit by Esther G. Crawford-Brown, New Horizon’s “Human Resources/Residential Director.” As pertinent to this appeal, Crawford-Brown averred that Lamb “underst[ood]” that New Horizon had “no funding to pay her overtime,” and that Lamb thus, “offered and agreed to work additional hours without overtime pay.” (Bolding and underlining omitted.) Further, Crawford-Brown averred that, as a department head, she “ma[de] certain categories of employment ineligible for overtime and [she] did so with Ms. Lamb’s explicit understanding that [New Horizon] could not fund her overtime hours.” Lamb submitted an affidavit saying that this was not true. As noted, the circuit court granted summary judgment to Lamb for her overtime-wage claim, plus the one-half penalty.

¶7 A court may only grant summary judgment if: “there is no genuine issue as to any material fact” and a party “is entitled to a judgment as a matter of law.” WIS. STAT. RULE 802.08(2). We review *de novo* a circuit court’s rulings on summary judgment, and apply the governing standards “just as the trial court applied those standards.” *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Further, we look at the parties’ submissions in a light most favorable to the party against whom summary judgment is sought, *Johnson v. Rogers Mem’l Hosp., Inc.*, 2005 WI 114, ¶30, 283 Wis. 2d 384, 401, 700 N.W.2d 27, 35, and all reasonable inferences are to be assessed against the party seeking summary judgment, *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 189–190, 260 N.W.2d 241, 244 (1977). There may, however, be disputed issues of fact that preclude a grant of summary judgment even though the parties filed cross-motions for summary judgment.

Stone v. Seeber, 155 Wis. 2d 275, 278, 455 N.W.2d 627, 629 (Ct. App. 1990). That is the case here.

¶8 As we have seen, New Horizon claimed that Lamb agreed to be paid what they paid her, and Lamb said that that was not true. This a paradigm conflict of material fact because if Lamb agreed to modify her employment agreement to eschew entitlement to overtime pay, then New Horizon did not violate its employment agreement with Lamb. All this, of course, requires a trial.²

¶9 New Horizon also objects to the circuit court’s acceptance, without specific articulated analysis, of a billing statement submitted by Lamb’s lawyer in support of the attorney’s fee request. As a result of our reversal of the circuit court’s grant of summary judgment, the attorney’s fee matter is moot. Nevertheless, we remind the circuit court that fees awarded in contravention of the American Rule must be “reasonable” in both the hourly rate charged and the time “reasonably necessary to perform the work,” in conjunction with all the other circumstances. *Lynch v. Crossroads Counseling Center, Inc.*, 2004 WI App 114, ¶42, 275 Wis. 2d 171, 197, 684 N.W.2d 141, 153. This and an analysis of all the material factors generally require an evidentiary hearing. See *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶34 n.6, 275 Wis. 2d 1, 22 n.6, 683 N.W.2d 58, 69 n.6. See also *id.*, 2004 WI 112, ¶¶31–52, 275 Wis. 2d at 19–28,

² WISCONSIN STAT. § 109.03(5) provides, with an exception not material here, that: “no employer may by special contract with employees or by any other means secure exemption from this section.” The circuit court did not assess whether this provision affects the right of New Horizon to ask, and Lamb to agree (if she did agree), that Lamb give up overtime that might be due under the contract. This and the conflict in the summary-judgment affidavits that we have already discussed should be explored at trial.

683 N.W.2d at 67–72. We also do not address Lamb’s cross-appeal because the offer of settlement is moot at this point.

¶10 We reverse the judgment and remand for further proceedings consistent with this opinion.³ We are also disturbed by the tendentious tone of both parties’ briefs and remind counsel that respect for the courts and counsel requires civility. *See* WIS. SCR 62.02; *Aspen Services, Inc. v. IT Corp.*, 220 Wis. 2d 491, 508–509, 583 N.W.2d 849, 856 (Ct. App. 1998).

By the Court.—Judgment reversed and cause remanded.

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

³ New Horizon seeks to have us specify that this matter on remand be assigned to a different judge. Although we have supervisory jurisdiction over the circuit court, WIS. STAT. § 752.02, we deny the request because New Horizon has a remedy under WIS. STAT. § 799.205(4) (substitution of judge). We also deny New Horizon’s undeveloped contention that it is entitled to appeal costs under WIS. STAT. RULE 809.25(3) (frivolous appeals).

